IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	**CRIMINAL NO. 06-447**
	:	
v.	:	
	:	
BRIAN J. NEWMARK	:	
JOHN N. WIGHT	:	
Defendants.	:	

Gene E.K. Pratter, J. — Memorandum and Order — March 14, 2007

The grand jury has issued an Indictment in this case that describes a money and property scheme allegedly designed and orchestrated by defendant Brian J. Newmark, and implemented by Mr. Newmark and defendant John N. Wight, among others, to defraud Arthur N. Walker and Thomas J. Walker. According to the charges, Messrs. Newmark and Wight swindled approximately $3.5 million from the Walkers. Thus, the Indictment charges the Defendants with two counts of mail fraud and two counts of wire fraud, and also charges Mr. Newmark with one count of making a false declaration under oath in a court proceeding. The Government charges that both Defendants allegedly misrepresented themselves as attorneys for the Walkers in the course of attempting to sell, and eventually succeeding in selling, an annuity product to the Walkers. Neither Mr. Newmark nor Mr. Wight is actually an attorney.

FACTUAL AND PROCEDURAL HISTORY

Barry Bohmueller is an attorney licensed to practice in Pennsylvania. Together with Mr. Bohmueller, Mr. Newmark advertised an annuity product – referred to as a "charitable gift annuity" or a "tax-deferred annuity"– which ostensibly was to serve several purposes, including providing a consistent income stream to its beneficiaries, and avoiding probate or estate taxes. Representatives from Mr. Newmark's firm would visit potential customers, like the Walkers,

who expressed interest in this type of financial product. Mr. Wight worked as a "sub-contractor" for Mr. Newmark, soliciting customers interested in these financial products.

The Government contends that Ms. Victoria Lawson, a representative of Mr. Newmark's firm, initially placed a "sales call" to the Walkers on June 27, 2001. Shortly thereafter, in July 2001, Mr. Wight began to endeavor to persuade the Walkers to invest in Mr. Newmark's living trusts and "pour-over" wills, in place of their existing wills and other estate-planning devices, and to invest in a charitable gift annuity offered through New Life Corporation of America ("New Life"). Mr. Wight visited the Walkers' home on July 20, 2001 and again on or around August 8, 2001. The Walkers eventually agreed to purchase an annuity through New Life. During one of these visits, Mr. Wight also persuaded the Walkers to execute "pour-over wills." To serve as a witness to the execution of these documents, the Walkers called upon a neighbor. According to the Government, the Walkers (or one of them) introduced Mr. Wight to the neighbor as their attorney. Hearing this, Mr. Wight apparently did not correct the misstatement that he was an attorney.

Investing in Mr. Newmark's annuity required the Walkers to release certain of their assets that were being held by Morgan Stanley. When Morgan Stanley was informed that the Walkers intended to release these assets, Perry Rose, a Morgan Stanley representative, visited the Walkers' home, reviewed documents relating to the New Life annuity, and informed the Walkers that, in his view, they did not have to invest in the annuity in order accomplish their estate-planning goals. According to the Government, the Walkers rescinded their direction to Morgan

Stanley to release their assets.[1]

The next day, after becoming aware of Morgan Stanley's involvement, Mr. Wight visited the Walkers and re-convinced them to proceed with the purchase of the annuity. Mr. Wight drafted letters, with Mr. Newmark's assistance, which were faxed to Morgan Stanley with directions to release the Walkers' assets to enable them to purchase the annuity. Several days later, on August 31, 2001, Mr. Newmark called Morgan Stanley's office in New York City and spoke with Chris Zeyer. According to notes taken by Mr. Zeyer during this telephone conversation, Mr. Newmark represented to Mr. Zeyer that he was an attorney for the Walkers, apparently complained about Mr. Rose's earlier visit with the Walkers, and stated that the Walkers did not want to be contacted again by Morgan Stanley.

Later on the same day, Mr. Newmark sent a "facsimile transmittal sheet" to Mr. Zeyer under the letterhead of the "Bohmueller Law Offices." In this fax, Mr. Newmark referred to the Walkers as "my clients" and requested Morgan Stanley's immediate attention in order to "resolve" the matter at hand, namely, Morgan Stanley's release of the Walkers' funds. Mr. Newmark attached several letters to this communication, which purported to be from either Arthur or Thomas Walker, and which requested the execution of the transfer of assets.

Morgan Stanley eventually released the Walkers' assets, enabling them to purchase the New Life annuity from Mr. Newmark. Apparently, the annuity cost approximately $2 million, and New Life received approximately $1.5 million as a "charitable donation." As commissions, Mr. Newmark earned approximately $230,000, and Mr. Wight earned approximately $69,000.

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[1] It is not clear whether the Walkers' rescission was verbal or whether it was informally or formally documented in some manner.

Eventually, the Walkers suspected that something about the New Life annuity was out of the ordinary. The Defendants contend that the annuity product performed as advertised, including providing the Walkers with a continuous, monthly income stream. It seems, however, that the Walkers may have realized that Mr. Newmark's annuity may not have been the most beneficial or cost-effective way to accomplish their estate-planning objectives. The Walkers hired an attorney, Gary Lightman, and sued Mr. Newmark and Mr. Wight, among others, seeking to recover the funds that the Walkers had invested in the annuity.[2]

As stated above, the alleged misrepresentation at issue here is that both Defendants held themselves out as attorneys for the Walkers. As part of discovery in the civil suit, both Messrs. Newmark and Wight stated in their respective responses to interrogatories that they had never represented themselves as attorneys for the Walkers. In addition, during his deposition in the civil lawsuit, Mr. Newmark testified under oath that he had never represented himself as an attorney. The civil lawsuit eventually settled. Mr. Newmark paid the Walkers approximately $900,000, and Mr. Wight settled for a nominal sum.

Here, the Indictment charges Mr. Newmark with two counts of wire fraud in violation of 18 U.S.C. § 1343.[3] Count One consists of the August 31, 2001 facsimile from Mr. Newmark to

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[2] Thomas J. Walker and Arthur R. Walker, Jr. v. Barry O. Bohmueller, Esquire, et al., Civil Action No. 03-3750 (E.D. Pa.).

[3] 18 U.S.C. § 1343 provides:

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

Morgan Stanley, and Count Two consists of the August 31, 2001 telephone call from Mr. Newmark to Morgan Stanley. The Indictment further charges two counts of mail fraud in violation of 18 U.S.C. § 1341.[4] Count Three is premised upon Mr. Newmark's December 16, 2003 interrogatory response, and Count Four on Mr. Wight's December 17, 2003 interrogatory response. Finally, the Indictment charges one count of making a false material declaration under oath in violation of 18 U.S.C. § 1623(a),[5] which pertains to Mr. Newmark's statement in his

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years, or both. If the violation affects a financial institution, such person shall be fined not more than $ 1,000,000 or imprisoned not more than 30 years, or both.

[4] 18 U.S.C. § 1341 provides:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation affects a financial institution, such person shall be fined not more than $ 1,000,000 or imprisoned not more than 30 years, or both.

[5] 18 U.S.C. § 1623(a) provides:

Whoever under oath (or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code) in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall

January 21, 2004 deposition in the civil action that he had never held himself out as an attorney. Mr. Wight is not charged in Count Five. The Indictment also charges both Mr. Newmark and Mr. Wight with aiding and abetting the acts of wire and mail fraud described in Counts One through Four in violation of 18 U.S.C. § 2.[6]

Mr. Newmark filed the following pretrial motions: (1) a Motion to Dismiss the Indictment for Defect in Instituting Prosecution (Docket No. 25); (2) a Motion to Dismiss the Indictment for Pre-Indictment Delay (Docket No. 26); (3) a Motion to Dismiss the Indictment for Failure to State an Offense (Docket No. 27); and (4) a Motion to Sever (Docket No. 29).[7] At oral argument on these motions, Mr. Wight's counsel stated that Mr. Wight joined in all of Mr. Newmark's pending motions. In addition, Mr. Wight filed a Supplemental Memorandum in Support of Mr. Newmark's Motion to Dismiss the Indictment for Pre-Indictment Delay (Docket

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be fined under this title or imprisoned not more than five years, or both.

[6] 18 U.S.C. § 2 provides:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

[7] Mr. Newmark also brought a Motion to Strike Surplusage (Docket No. 28), in which he sought to strike the words "purported" and "purporting" from the Indictment. These words are used with respect to the "tax deferred annuities" sold by Mr. Newmark, which the Indictment characterizes as "financial products which *purported* to involve a gift to a charitable organization," Indictment ¶ 4 (emphasis added), and with respect to the New Life Corporation, which the Indictment describes as "*purporting* to be a charitable organization," Indictment ¶ 8.A (emphasis added). Pursuant to correspondence received on February 22, 2007, Mr. Newmark's counsel indicated that the parties had reached an agreement on this language issue so that the Court need not decide this Motion. Therefore, Court will consider Mr. Newmark's Motion to Strike Surplusage to be moot.

No. 43). The United States filed a Response to all of Mr. Newmark's pending motions (Docket No. 36), and filed a Reply to Mr. Wight's Supplemental Memorandum (Docket No. 46). The Court presided over oral arguments on these motions on February 22, 2007.[8]

For the reasons stated below, all of the Defendants' motions will be denied. The Court will address each motion in turn.

DISCUSSION

I. Motion to Dismiss the Indictment for Defect in Instituting Prosecution

Rule 12(b)(3)(A) of the Federal Rules of Criminal Procedure requires a defendant alleging a defect in the institution of the prosecution to do so in the form of a pre-trial motion. The Supreme Court has stated that dismissal of an indictment may be appropriate when "the structural protections of the grand jury have been so compromised as to render the proceedings fundamentally unfair, allowing the presumption of prejudice." Bank of Nova Scotia v. United States, 487 U.S. 250, 257 (1988).[9] Where a court is asked to dismiss the indictment before trial

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[8] Running throughout the defense motions is the difficult and unfortunate theme of deliberate prosecutorial misconduct and/or incompetence. The Court does not question the avowed reluctance with which counsel makes such arguments and certainly does not doubt the earnest umbrage expressed by counsel for the Government in response. The Court does expect, however, that the rawness that necessarily accompanies such arguments will be sufficiently dissipated by the time of trial so as not to impede the well-known and mutually acknowledged professionalism of all counsel.

[9] In Bank of Nova Scotia, the district court had dismissed the indictment because, among other reasons, the court found that IRS agents gave "misleading and inaccurate summaries" to the grand jury just prior to the indictment, which prejudiced the defendants. Bank of Nova Scotia, 487 U.S. at 260. However, the Supreme Court found that the record did not reveal any prosecutorial misconduct with respect to these summaries and, therefore, the "misleading and inaccurate summaries" by the prosecutors did not provide grounds for dismissing the indictment. Id. at 260-61. Of particular importance to this case, the Supreme Court rejected the district court's finding that the summaries offered by IRS agents contained evidence that had not been presented to the grand jury in prior testimony as grounds for dismissing the indictment and held,

for nonconstitutional error, the Supreme Court adopted the standard that dismissal is appropriate only "'if it is established that the violation substantially influenced the grand jury's decision to indict,' or if there is 'grave doubt' that the decision to indict was free from the substantial influence of such violations." Id. at 256. A district court is not to dismiss an indictment for errors in grand jury proceedings unless such errors prejudiced the defendant. Id. at 254.

The August 30, 2006, grand jury proceeding consisted entirely of testimony presented by Special Agent Alissa Tyler of the Criminal Investigation Division of the Internal Revenue Service. The grand jury proceeding lasted 31 minutes, including two off-the-record breaks. No evidence, documentary or otherwise, other than Agent Tyler's testimony, was offered.

During the grand jury proceeding, Mr. Richard Lloret, counsel for the Government, used leading questions[10] to elicit summary testimony from Agent Tyler. Mr. Lloret's questions recited and summarized the language later used in the Indictment and summarized the key events, documents and civil deposition testimony of the Defendants and various fact witnesses. Mr. Lloret's questions were successfully designed to elicit simple "yes" or "no" answers from Agent Tyler. The transcript from the grand jury proceedings reveals that all of Mr. Lloret's questions

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rather, that the issue "boils down to a challenge to the reliability or competence of the evidence presented to the grand jury." Id. at 261. The Supreme Court reiterated that "an indictment valid on its face is not subject to such a challenge." Id. (citing United States v. Calandra, 414 U.S. 338, 344-345 (1974)). Further, the Supreme Court held that to the extent that a challenge is made to the "accuracy of the summaries," as Mr. Newmark challenges here, "the mere fact that evidence itself is unreliable is not sufficient to require a dismissal of the indictment." Id. (citing Costello v. United States, 350 U.S. 359, 363 (1956) (holding that a court may not look behind the indictment to determine if the evidence upon which it was based is sufficient)).

[10] There is no doubt that the Government's counsel during the grand jury proceeding asked leading questions, which he is permitted to do. Indeed, almost none of Agent Tyler's answers to Mr. Lloret's questions were substantive. Her answers were in the nature of "yes" or "correct"; she rarely supplemented her affirmative answers or elaborated in any detail.

and Agent Tyler's mostly "yes" answers, were submitted to the grand jury without any supporting evidence.

Mr. Newmark points to two specific instances where the Government allegedly erred during the grand jury proceedings. First, Mr. Newmark argues that counsel for the Government misled the grand jury as to Mr. Newmark's allegedly misrepresenting himself as an attorney. Mr. Newmark states that the "grand jury was told about one express representation, actually an omission, which involved Mr. Wight, not Mr. Newmark." Def. Mot. Dismiss (Defect) 4.[11]

Next, Mr. Newmark objects to Mr. Lloret's question that asked, "[Defendants Newmark and Wight] did acknowledge that they made these representations that after careful review of a variety of financial products, these [tax deferred annuities] were in the best interests of [Arthur and Thomas Walker], correct?" Def. Mot. Dismiss (Defect) Ex. A at 24:23–25:2. To which Agent Tyler responded, "[y]es they did." Id. 25:3. Mr. Newmark argues that Mr. Lloret's

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[11] Mr. Newmark objects to counsel for the Government's question to the IRS agent, where counsel stated that "*the Walkers* introduced Mr. Wight to this neighbor as their attorney; is that right?" Def. Mot. Dismiss (Defect) Ex. A at 17:5–15 (emphasis added). Mr. Newmark claims that it was only Thomas Walker, and not Arthur Walker, who introduced Mr. Wight to the neighbors as his attorney. Mr. Newmark claims that this "seemingly slight inaccuracy is actually of crucial significance" because Arthur Walker, not Thomas Walker, made the decision to purchase the annuity. Def. Mot. Dismiss (Defect) 5. Essentially, Mr. Newmark argues that because Arthur Walker made the decision to purchase the annuity, and because only Thomas Walker thought Mr. Wight was an attorney, and not Arthur Walker, any decision that Arthur Walker made to purchase the annuity could not have been based on the mistaken belief that either he or Mr. Wight was an attorney. Mr. Newmark does not acknowledge the possibility that one brother may have shared the misinformation with the other brother.

In any event, it would be more appropriate for Mr. Newmark to present this argument at trial. Although it may have been unfortunately imprecise of counsel for the Government to refer to "the Walkers" generally, when a specific reference to Thomas Walker in the context cited above would have been more accurate, the Government's casualness on this point is certainly not fatal.

question and Agent Tyler's affirmative response as to the Defendants' "acknowledgment" is inaccurate and essentially amounted to an admission "put in the mouth" of Mr. Newmark, whereas no such admission actually had occurred. Mr. Newmark's specific contentions are first, that there is no documentary evidence to prove that either he or Mr. Wight actually made such a "best interests" representation to the Walkers, and second, that neither of them made such a representation to Agent Tyler.

Mr. Newmark's assertion is not correct that the grand jury was told about only a single instance where he or Mr. Wight allegedly made the misrepresentation. Before the grand jury, counsel for the Government established that neither Mr. Newmark nor Mr. Wight was an attorney. Def. Mot. Dismiss (Defect) Ex. A at 13:18–23. Counsel then questioned Agent Tyler as to each of the alleged misrepresentations at issue, including the following incidents:

- During one of his meetings with the Walkers, Mr. Wight handwrote his name and telephone number on a business card from attorney Barry Bohmueller's office, and gave the card to the Walkers. Id. 16:6–14.

- On July 20, 2001, Thomas and Arthur Walker executed wills in the presence of Mr. Wight and one of the Walkers' neighbors.[12] Counsel asked Agent Tyler whether "the Walkers" introduced Mr. Wight to the neighbor as their attorney, and Agent Tyler answered in the affirmative. Id. 17:5–15. Counsel noted that, at that time, Mr. Wight did not seek to correct the misimpression that he was not the Walkers' attorney because Mr. Wight did not want to "gum up the sale." Id. 17:20–22.[13] Further, counsel asked whether the neighbor had confirmed that she

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[12] Presumably, the neighbor was present specifically to witness the signatures in order to give legal effect to the wills.

[13] Mr. Newmark specifically objects to Mr. Lloret's use of the words "gum up the sale." Mr. Newmark argues that, during this particular meeting, Mr. Wight was present to witness the Walkers execute documents pertaining to legal wills. He claims that this meeting did not involve any "sale" because the only sale involved was the subsequent sale of the New Life annuity. Therefore, Mr. Newmark argues that Mr. Lloret's use of the phrase "gum up the sale" was inaccurate and unfairly prejudicial. This argument lacks merit. Mr. Lloret adequately laid the

had been introduced to Mr. Wight as the Walkers' attorney, and again confirmed that Mr. Wight had done nothing to correct that misimpression. Id. 17:24–18:6.

- Counsel questioned Agent Tyler about the interaction between Mr. Newmark and a representative from Morgan Stanley. Counsel noted that once Morgan Stanley became aware that the Walkers had chosen to release certain assets that were invested with Morgan Stanley, to enable them to purchase the annuity product sold by Mr. Newmark and Mr. Wight, Morgan Stanley sought to dissuade the Walkers from entering into this transaction. Counsel questioned Agent Tyler as to certain correspondence between Messrs. Newmark and Wight and Morgan Stanley that occurred between August 22, 2001 and August 30, 2001. Id. 19:18–20:3. Counsel asked Agent Tyler whether Mr. Newmark had faxed a letter to Morgan Stanley on the letterhead of attorney Mr. Bohmueller on or about August 31, 2001, and whether Mr. Newmark had referred to the Walkers as his "clients" in the fax cover memo. Id. at 20:13–18, 21:9–14. Counsel further noted that an internal memo from Chris Zeyer, a Morgan Stanley employee, reveals that Mr. Zeyer received a telephone call from Mr. Newmark in which Mr. Newmark represented that he was the attorney for the Walkers. Id. at 20:19–7.

Therefore, Mr. Newmark's argument that the United States only informed the grand jury of one instance of an alleged misrepresentation by Mr. Newmark and Mr. Wight, and that the grand jury would not have indicted them absent this one alleged misrepresentation, is unavailing.

The Defendants levy additional attacks on the Indictment. Indeed, Mr. Newmark's argument that Mr. Lloret impermissibly stated that Mr. Newmark "acknowledged" that the

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foundation for these questions during the grand jury proceeding to explain to the grand jury that the purpose of this meeting was for the Walkers to execute wills. He explained that there was a July 20 episode where the Walkers "had to sign some wills." Def. Mot. Dismiss (Defect) Ex. A 17:9-11. He further asked whether, at this meeting, the Walkers introduced Mr. Wight to the neighbor as their attorney. Id. 17:11-14. Agent Tyler responded, "yes they did." Id. 17:15. Further, the Government argues that the signing of the "wills" was part of the alleged annuity "scheme" that is the subject of the Indictment. The Defendants cannot argue that the wills were part of a transaction that was wholly independent from the New Life annuity transaction. Therefore, the Government argues, if Mr. Wight would have admitted, during the signing of the wills, that he was not an attorney, then that admission could have "gummed up the sale" of the New Life annuity, which was the $3.5 million objective of the alleged scheme, because such a disclosure (according to the Government) would have given the Walkers reason to pause at a substantive point in the process.

financial products were in the best interests of the Walkers, in effect states an objection to the Indictment itself, and not the grand jury proceeding. The Indictment here reads as follows:

> Between in and about July of 2001 and October of 2001, defendants BRIAN J. NEWMARK and JOHN N. WIGHT represented to [Arthur Walker and Thomas Walker] that after "careful review" of a "variety" of financial products, they concluded that the purchase of tax deferred annuities from NLC would be in the best interests of [Arthur Walker and Thomas Walker]. In fact, defendants sold [Arthur Walker and Thomas Walker] tax deferred annuities because of the substantial fees defendants would earn as a result of selling [Arthur Walker and Thomas Walker] the annuities.

Indictment ¶ 8.J. The grand jury had a copy of the proposed Indictment during the proceedings before it and the grand jury could see that the terms "careful review" and "variety" were in quotation marks, which arguably implies that the use of such terms could be imputed to either Mr. Newmark or Mr. Wight. The Indictment itself did not include any citation to inform the grand jury as to who, if anyone, wrote or spoke the terms "careful review" or "variety."

Mr. Newmark's first contention is that the Indictment falsely states that Mr. Newmark and Mr. Wight represented, *to the Walkers*, "that after 'careful review' of a 'variety' of financial products, they concluded that the purchase of tax deferred annuities from NLC" would be in Walkers' "best interests." Indictment ¶ 8.J. The Government notes in its response brief that the words "careful review" and "variety" were taken from Mr. Wight's answer to one of the plaintiffs' interrogatories in the civil litigation. Mr. Wight's interrogatory answer states that "[John Wight], together with representatives of Estate Planning Advisors evaluated a *variety* of financial products that might meet [Arthur and Thomas Walker's] goals. After *careful review* Estate Planning Advisors through [John Wight] advised [Arthur and Thomas Walker] of the availability of charitable annuities through New Life." United States' Opp'n 33 (quoting J.

Wight Response to Interrogatory 3) (emphasis added).[14] The Government argues that Mr. Wight's admission, among other statements in Mr. Wight's and Mr. Newmark's responses to interrogatories, provided the foundation for the specific words used in the Indictment, and for Mr. Lloret's related question to Agent Tyler during the grand jury proceedings. Mr. Newmark objects to this language being used in the Indictment because he claims Mr. Wight never actually uttered the specific words "careful review" and "variety" to the Walkers when recommending the annuities to the Walkers, and that he only used those words when responding to an interrogatory in the subsequent civil lawsuit. Mr. Newmark wants the Court to believe that although Mr. Wight admitted that after "careful review" of a "variety" of financial products, he merely advised the Walkers of the availability of the annuities they eventually purchased and did not endorse the annuities as being in the Walkers' "best interests." Essentially, this formulation of advocacy leaves the defense to argue that the Defendants sold the Walker brothers a complex $3.5 million annuity product without actually recommending or endorsing the product itself.

In other words, Mr. Newmark argues that he and Mr. Wight only admitted to having deliberations with each other and their colleagues about which products were in the "best interests" of the Walkers, and that because there is no evidence that they directly conveyed these exact terms to the Walkers, it was improper for the Government to use this language in the

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[14] The Government also points to Mr. Newmark's responses to interrogatories in the civil action, where Mr. Newmark stated that "Defendants considered a number of factors when determining an appropriate plan for [Arthur and Thomas Walker]"; "Defendants concluded that New Life Corporation of America was a stable, reliable company that would best satisfy [Arthur and Thomas Walker's] objectives."; "In order to accomplish these goals, Brian Newmark and his employees and independent contractor used their available research, skills and judgment to match the Walkers' objective with an appropriate estate plan." United States' Opp'n 35 (quoting N. Newmark Resp. to Interrogs. 8, 9, 13).

Indictment and during the grand jury proceedings to describe the Defendants' alleged misrepresentations.

Secondly, Mr. Newmark contends that "Contra this grand jury presentation, Mr. Newmark made no such admission *to the case agent*." Def. Mot. Dismiss (Defect) 8 (emphasis added). Mr. Newmark contends that not only did neither he nor Mr. Wight make the alleged misrepresentation to the Walkers, but that they did not make this misrepresentation to Agent Tyler either. To be sure, Agent Tyler did not testify that Mr. Newmark or Mr. Wight acknowledged *to her*, that "after careful review of a variety of financial products" such products were in the best interests of the Walkers. Agent Tyler merely testified that Messrs. Newmark and Wight did acknowledge reviewing such products and making a recommendation to the Walkers.

Mr. Newmark's arguments here are off the mark. First, the Indictment does not charge the Defendants with the crime of falsely representing the validity, character or quality of the annuity to the Walkers. The Indictment charges Mr. Newmark and Mr. Wight with five counts that are centered around alleged misstatements of one fact at issue, namely, the allegation that both Defendants, at various times, held themselves out as attorneys for the Walkers. Further, the Government has shown that both Defendants admitted arriving at the conclusion that the annuity products were well-suited for the Walkers, and that they advised the Walkers to purchase the annuities.[15]

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[15] As the United States points out, Mr. Newmark also presents a Motion to Dismiss for Failure to State an Offense. In that Motion, Mr. Newmark addresses paragraph 8.J. of the Indictment and states that "[t]he quoted representation about careful representation of a variety of financial products and the best interests of the [Walker] Brothers are in fact true – they were not false representations." Def. Mot. Dismiss (Offense) 9. Mr. Newmark proceeds to present an elaborate argument that such representations consist of mere "puffery." Id. Mr. Newmark argues that statements "which express confidence in a company or a product – even if called into doubt

Upon close analysis, Mr. Newmark has not shown that the grand jury proceedings involved any gratuitous misstatements of fact that "'substantially influenced the grand jury's decision to indict'" or shown that there is "'grave doubt' that the decision to indict was free from the substantial influence of such violations." Bank of Nova Scotia, 487 U.S. at 256 (citation omitted). As such, the Court cannot conclude that the Defendants were prejudiced[16] by the use of the quoted language in paragraph eight of the Indictment or by the prosecutor's quoting the same language during the grand jury proceedings. See id. at 254 ("We hold that, as a general matter, a district court may not dismiss an indictment for errors in grand jury proceedings unless such errors prejudiced the defendants.").[17] Therefore, Mr. Newmark's Motion must be denied.

– are the stuff of puffery and cannot ground a mail fraud scheme." Id. 10.

[16] Mr. Newmark does not explain, with respect to this particular Motion, how any of the alleged "defects" in the Indictment would prejudice him. He merely states, in the "conclusion" paragraph of his Motion that the "prejudice to Mr. Newmark is self-evident." Def. Mot. Dismiss (Defect) 13. Mr. Newmark's implication is that, but for the prosecutor's purported misstatements, the grand jury would not have indicted him on any of the counts included in the Indictment. For all of the reasons stated above, the Court does not embrace Mr. Newmark's characterizations or conclusions on this issue.

[17] In United States v. Williams, 504 U.S. 36, 46 (1992), the Supreme Court made clear that its holding in Bank of Nova Scotia clarified that a district court may "dismiss an indictment because of misconduct before the grand jury, at least where that misconduct amounts to a violation of one of those 'few, clear rules which were carefully drafted and approved by this Court and by Congress to ensure the integrity of the grand jury's functions.'" Id. (quoting United States v. Mechanik, 475 U.S. 66, 74 (1986) (O'Connor, J., concurring in judgment). In Williams, the Supreme Court cited several statutes that, if violated, would permit a court to dismiss an indictment. Id. at 46 n.6. Mr. Newmark does not refer the Court to any specific rule that the Government allegedly disavowed during these proceedings. Mr. Newmark just cites examples of general, attenuated misconduct, or cites examples of alleged misconduct that the Supreme Court has already concluded do not warrant dismissing an indictment. At most, Mr. Newmark has argued that the grand jury proceedings included an erroneous summary of the events, documentary evidence and/or testimony surrounding this case, which alone cannot support dismissal of an indictment. See Bank of Nova Scotia, 487 U.S. at 261 ("To the extent that a challenge is made to the accuracy of the summaries, the mere fact that evidence itself is

II. Motion to Dismiss the Indictment for Pre-Indictment Delay

Rule 48 of the Federal Rules of Criminal Procedure[18] permits the Court to dismiss an indictment for, among other reasons, unnecessary delay in presenting a charge to a grand jury or delay in bringing a defendant to trial. Mr. Newmark moves to dismiss the Indictment for pre-indictment delay. Mr. Wight joined in this Motion and also filed a separate supporting memorandum.

The statute of limitations, which in this case is five years, typically guards against delay in criminal prosecutions.[19] However, the Due Process Clause of the Fifth Amendment[20] "has a limited role to play in protecting against oppressive delay." United States v. Lovasco, 431 U.S. 783, 789 (U.S. 1977). In order to invoke the Fifth Amendment to warrant dismissal for pre-indictment delay, a defendant must demonstrate "that he was actually prejudiced by the delay and

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unreliable is not sufficient to require a dismissal of the indictment."); Costello v. United States, 350 U.S. 359, 363 (1956) (holding that a court may not look behind the indictment to determine if the evidence upon which it was based is sufficient).

[18] Rule 48(b) provides that "[t]he court may dismiss an indictment, information, or complaint if unnecessary delay occurs in: (1) presenting a charge to a grand jury; (2) filing an information against a defendant; or (3) bringing a defendant to trial." Fed. R. Crim. P. 48(b).

[19] The Government avers that the statute of limitations began to run on August 31, 2001, which is the date that Mr. Newmark sent the fax and made the telephone call to Morgan Stanley, allegedly misrepresenting himself as an attorney for the Walkers. United States' Resp. 3. Thus, the five-year statute of limitations would have expired on August 31, 2006, one day after the grand jury returned the Indictment in this case.

[20] The protection afforded by the Sixth Amendment right to a speedy trial does not vest until formal charges have been filed or the accused has been arrested; it does not extend to pre-accusation delays. United States v. Robles, 129 F. App'x 736, 738 (3d Cir. 2005) (citing United States v. Marion, 404 U.S. 307, 320 (1971)); accord United States v. Lovasco, 431 U.S. 783, 789 (1977) (noting that for purposes of the Speedy Trial Clause of the Sixth Amendment, pre-indictment delay is "wholly irrelevant").

that the Government intentionally delayed the indictment to gain tactical advantage." United States v. Robles, 129 F. App'x 736, 738 (3d Cir. 2005) (citing United States v. Gouveia, 467 U.S. 180, 192 (1984)). Mr. Newmark argues, and the Government agrees, that in addition to "intentional delay," Due Process rights are violated when the Government's delay is "reckless."[21] See Feb. 22, 2007 Tr. 49:1-6 (noting that the Department of Justice has conceded that a "reckless" delay can violate a defendant's Due Process rights, but arguing that the Defendants in this case have not proven recklessness).

Mr. Newmark's only argument here that the Government's delay was "intentional, reckless and unjustified" is that the Government failed to indict Mr. Newmark until after the death of Arthur Walker, whom Mr. Newmark describes as "'the' preeminent and exculpatory witness in this case." Def. Mot. Dismiss (Pre-Indictment Delay) 3. Arthur Walker died in August 2005. Mr. Newmark argues that the Government's delay was unjustifiable because it had obtained all of the essential information to support an indictment as of August 27, 2003,[22] yet it

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[21] In United States v. Marion, the Supreme Court noted that the Government conceded that "the Due Process Clause of the Fifth Amendment would require dismissal of the indictment if it were shown at trial that the pre-indictment delay in this case caused substantial prejudice to appellees' rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused." 404 U.S. 307, 324 (1971). In Lovasco, the Supreme Court noted that the Government expanded its concession, acknowledging that a "tactical" delay would violate the Due Process Clause "'upon a showing of prosecutorial delay incurred in reckless disregard of circumstances, known to the prosecution, suggesting that there existed an appreciable risk that delay would impair the ability to mount an effective defense.'" Lovasco, 431 U.S. at 796 n.17 (citation omitted). In Lovasco, there was no evidence of recklessness on the part of the Government. Id.

[22] Mr. Newmark claims that the Government was in possession of the relevant documents, had interviewed both Walker brothers (Arthur Walker was 81 years old and Thomas Walker was 83 years old at the time of the interviews), and was aware both that Arthur Walker was exhibiting early signs of Alzheimer's disease and that his testimony was at risk for being lost due to death or disease.

"delayed" approximately three years – until August 2006 – before indicting the Defendants.

A. *Delay*

Mr. Newmark alleges that the Government made a "tactical" decision to delay the indictment until after Arthur Walker died because Arthur Walker was an exculpatory witness. Mr. Newmark does not submit any evidence that the Government's delay was "intentional." Rather, he argues that "[i]ntent is to be inferred from [the Government's] conduct." Def. Mot. Dismiss (Pre-Indictment Delay) 16.[23]

To explain – at least in part – the timing here, the Government contends that the FBI became aware of the civil suit between the Walkers and Messrs. Newmark and Wight in the summer of 2003. United States' Mem. Opp'n 6. The parties all seem to agree that the FBI eventually turned the matter over to the IRS to investigate whether a potential tax fraud case against the Defendants existed.[24] By late 2004, the original Assistant United States Attorney

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[23] Mr. Newmark cites United States v. Harmon, 379 F. Supp. 1349, 1351 (D.N.J. 1974), to support the proposition that because intent is difficult to prove, intent may be inferred from the Government's conduct. However, the reference to Harmon in support of that proposition is incomplete because in Harmon the Government did not advance any reason for its delay. Only absent any proffered reason for the delay was the court able to infer "that there was an intent by the government to secure a tactical advantage over the defendant." Id. In the present case, as discussed infra, the Government has proffered various reasons.

[24] The Defendants claim that "in approximately 2003 or 2004 the Federal Bureau of Investigation had determined that there was insufficient basis for mail fraud charges" against them. Def. Supplemental Mem. (Pre-Indictment Delay) 1. According to the Defendants' interpretation of what can only be described at this juncture as hearsay, the FBI declined to pursue an investigation against the Defendants and, at some later date, turned to matter over to the IRS to investigate potential tax fraud. Id. at 2. On the basis of the transfer of this case from one federal agency to another, the Defendants conclude that, "[t]he clear inference, and only inference, from the transfer of the investigation from the Federal Bureau of Investigation to the Internal Revenue Service is that the Federal Bureau of Investigation's agents assigned to the matter decided that there was insufficient evidence of any mail fraud in this matter." Id. The Court need not address any such "clear inference," however, because any inference to be drawn

handling this matter left the U.S. Attorney's office. Id. The matter was assigned to Mr. Lloret, the Assistant United States Attorney who is currently handling this case for the Government. At that time, Mr. Lloret was working primarily on two other significant investigations and other matters. Id. A new IRS agent was assigned to the case in October of 2005. Id. The Government claims that it was not until July 14, 2006, during a meeting with Gary Lightman, the Walkers' attorney in the civil matter, that Mr. Lloret became aware that Arthur Walker had passed away. Id. Of particular importance, however, the Government also claims that it was at this meeting with Mr. Lightman that Mr. Lloret became aware of certain details of Mr. Newmark's involvement in this matter, specifically, that Mr. Newmark had sent the fax and made phone calls to Morgan Stanley representatives allegedly misrepresenting himself as the Walkers' attorney. Id. The Government claims that in the month following the July 14, 2006 meeting, Mr. Lloret "requested and reviewed a variety of documents from the civil case, took other investigative steps, and eventually concluded that a provable wire and mail-fraud scheme had been perpetrated by Newmark and Wight." Id. The indictment was then returned on August 30, 2006. Id.

B. *Prejudice*

Mr. Newmark characterizes Arthur Walker as an "exculpatory" witness, despite the Government's contention that Mr. Newmark perpetrated a scheme to swindle Arthur and Thomas

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based on the Government having "insufficient evidence of any mail fraud in this matter," is irrelevant to the issue of whether any "intentional" or "reckless" acts on behalf of the Government amounted to a "tactical delay" designed to prejudice the Defendants. If the Court were to consider this hearsay to ponder whether the FBI initially decided not to pursue a criminal case against the Defendants, but then the Assistant United States Attorney later discovered evidence that he deemed provided a sufficient basis to prosecute the defendants, this "after-acquired evidence" helps to explain the Government's "delay." It does not, however, suggest that any "delay" on the Government's part was "tactical," or was in any way motivated by or related to Arthur Walker's passing.

Walker out of millions of dollars. Mr. Newmark's main contention here is that Arthur Walker made the investment decisions on behalf of himself and his brother Thomas, and that Mr. Newmark never represented to Arthur Walker that he was an attorney. Mr. Newmark argues that Arthur Walker thought that he (Mr. Newmark) was a "salesman." Further, Mr. Newmark argues that, even if Mr. Wight allegedly misrepresented himself as an attorney to Thomas Walker, that alleged misrepresentation is irrelevant or immaterial because Arthur, and not Thomas, made the brothers' decision to purchase the annuities. Essentially, the defense argument is that, because Arthur Walker never believed that Mr. Newmark was an attorney (a claim the Government disputes), the Government cannot claim that Arthur Walker "relied" on this alleged misrepresentation in purchasing the annuity. Because Arthur Walker died, Mr. Newmark claims that his defense is prejudiced because he cannot offer this "utterly exculpatory testimony which would exonerate him from these charges." Def. Mot. Dismiss (Pre-Indictment Delay) 14.

Mr. Newmark contends that Arthur Walker would have testified that he was the financially savvy one of the Walker brothers. Again according to Mr. Newmark, Arthur Walker was concerned that if he predeceased his brother, Thomas would be unable to manage the Walkers' remaining assets responsibly. Mr. Newmark contends that he advised the Walkers to purchase this particular annuity because it would guarantee a steady, predictable income stream and included certain favorable tax consequences. The predictable income stream meant that, if Arthur died first, Thomas would be provided for and would not be faced with making difficult financial decisions that he was ill-suited to make. Mr. Newmark asserts that Arthur Walker also had concerns about his sister, Ms. Joyce Kriso, whom the Walker brothers supported. Ms. Kriso was 78 years old, had no heirs, and lived with a much younger man, Mr. William Giles. Mr.

Newmark maintains that the annuity was suggested to remedy Arthur's concern that, once he and Thomas both died, all of their assets would pass to Ms. Kriso, and then eventually pass to Mr. Giles. Mr. Newmark contends that the annuity was structured, in part, to ensure that the Walkers' assets would not pass to Mr. Giles once Ms. Krisco passed away. In sum, Mr. Newmark contends, Arthur Walker would have testified that the Walkers purchased the annuity to (1) remove them from the volatility of the stock market, (2) provide a substantial monthly income, (3) provide for Ms. Kriso to live comfortably, and (4) ensure, after both Walker brothers and Mr. Kriso had passed away, that the brothers' assets would pass to charity instead of to Mr. Giles.

The Government disputes both the attack on its decision-making process and the factual underpinnings of Mr. Newmark's argument. The Government avers that the transcript from Arthur Walker's deposition in the civil case reveals that Arthur Walker believed that Mr. Newmark was his attorney.[25] The Government contends that the two days of Arthur Walker's testimony provides ample evidence against Mr. Newmark (not to mention against Mr. Newmark's motion), and that it is the Government's case, not Mr. Newmark's, that has been prejudiced by Arthur Walker's passing. The Government also contends that the video-tape and transcript from Arthur Walker's September 16, 2003 deposition are available and could be

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[25] At various times during the deposition, Arthur Walker says both that Mr. Newmark *was* his attorney and that he was *not* his attorney, but, rather, was a "salesman." The Government admits that at the time of Arthur Walker's video-taped deposition on October 16, 2003, Mr. Walker "was already exhibiting the ravages of Alzheimer's Disease that eventually killed him." At the deposition, Arthur Walker did not know who his own attorney was. See United States Opp'n 22. Mr. Walker's unfortunate condition as of October 2005 indicates that his competence as a witness would have been greatly open to question well before his death, suggesting that the supposed Machiavellian tactical decision attributed to the Government to hold up an indictment until after Mr. Walker died may not be valid in any event.

introduced to the jury if Mr. Newmark so desires.

Mr. Newmark characterizes the Government's delay as permitting the case to "'slip[] through the cracks,' for no good reason." Def. Mot. Dismiss (Pre-Indictment Delay) 18. While this characterization may not seem unwarranted, Mr. Newmark has not established that the Government's delay was intentional or reckless.

The delay was certainly unfortunate and not to be emulated. Perhaps it even could be described as negligent. Indeed, it is unclear why it took so long for this action to make its rounds through the IRS, the FBI and the United States Attorneys' Office, aside from the Government's assertion that these things just take time. See United States' Opp'n 6 (noting that "IRS tax investigations often took years"); Feb. 22, 2007 Tr. 49:21 (noting that this case was first assigned to Mr. Lloret as an IRS tax case, which often take years). However, if the Government became aware of the full extent of Mr. Newmark's involvement in this alleged scheme in July 2006, during Mr. Lloret's meeting with Mr. Lightman, then it cannot be inferred that the Government "delayed" indicting the Defendants in order to "gain tactical advantage over" them. United States v. Marion, 404 U.S. 307, 324 (1971). Instead, a possible inference is that the Government waited until it had what it believed was substantial evidence before bringing charges against the Defendants, and that it was mere happenstance that Mr. Lloret and Mr. Lightman met in July 2006, when new evidence was revealed to Mr. Lloret, and that Mr. Lloret believed he had appropriately built a case in the two months prior to the expiration of the applicable statute of limitations in this case. Moreover, the Court perceives no good public policy that would be served by encouraging criminal cases to be brought on insubstantial grounds.

Further, Mr. Newmark cannot prove that he has been prejudiced by the delay to the extent

necessary to implicate the Due Process Clause. As the Supreme Court has observed, "[a]ctual prejudice to the defense of a criminal case may result from the shortest and most necessary delay," but that "every delay-caused detriment to a defendant's case" does not abort a criminal prosecution. Marion, 404 U.S. at 324-25.

In this case, to accept Mr. Newmark's argument, the Court would have to accept Mr. Newmark's account of what Arthur Walker *would have said* had he not died, which at certain points is at odds with what Mr. Walker actually *did say* at his deposition.[26] Under certain extreme circumstances, the death of one witness could conceivably prejudice a defendant enough to warrant dismissing an indictment, but the Court of Appeals for the Third Circuit has generally been cautious about according too much weight to one witness's "lost" testimony.[27]

In this case, the record is far from clear as to whether Arthur Walker would have offered any exculpatory evidence at all. Even if Mr. Newmark conceivably would suffer some prejudice as a result of pre-indictment delay, any such prejudice does not warrant dismissal of the

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[26] In other words, Mr. Newmark cannot offer any "proof" of prejudice, but can only speculate as to what purportedly "exculpatory" evidence may have existed. According to the Supreme Court, however, "proof of prejudice is generally a necessary but not sufficient element of a due process claim, and that the due process inquiry must consider the reasons for the delay as well as the prejudice to the accused." Lovasco, 431 U.S. at 790.

[27] Neither party cites any case within the Third Circuit in which a court has dismissed an indictment on Fifth Amendment Due Process grounds for pre-indictment delay because one key witness has died. The Court of Appeals rejected a claim where the defendant argued that his alibi witness's memory faded as a result of the delay. See United States v. Robles, 129 F. App'x 736, 738 (3d Cir. 2005). In Robles, the court rejected the defendant's Due Process claim that the government's pre-indictment delay impaired his ability to put on a defense because he could not furnish an alibi for the nights of the offenses. Id. The court held that the defendant's general argument that witnesses' memories have faded falls short of showing actual prejudice. Id.

Indictment in this case.[28]

[28] Mr. Newmark cites two cases where he claims courts have dismissed an indictment due to the government's "recklessness." Neither case assists Mr. Newmark here because, in each of them, the court dismissed the case on Fifth Amendment grounds after taking into account a multitude of reasons that demonstrated a greater degree of actual prejudice than Mr. Newmark can show here.

For example, in United States v. Sabath, 990 F. Supp. 1007, 1008 (N.D. Ill. 1998), the district court dealt with a "highly unusual criminal case" where the defendant was charged with burning down his own former place of business in July 1991, but was not charged until February of 1997, "even though by the government's own admission the investigation was completed over four years earlier." Id. In that case, material witnesses were lost due to death and memory loss. However, the court cited numerous examples of errors and general ineptitude on the part of government representatives, exacerbated by the prosecutor, that established "severe, substantial and actual prejudice" to the defendant. Id. at 1009. For example, the court noted that immediately after the fire in July 1991, federal and state agents interviewed the only known witnesses – the defendant, his 78-year-old father, and an employee named David Hen. Id. According to the court, by August 1991,

> [T]he government's investigation had progressed rapidly. The government had obtained a signed statement and sworn grand jury testimony from its primary fact witness, David Hen; executed at Defendant's residence a search warrant that uncovered documentary evidence the government planned to use at trial; put together a physical and scientific cause and origin evaluation concluding that the fire was intentionally set using an accelerant; and secured statements of other potential witnesses. By March 1992, the government also had obtained Defendant's extensive sworn statement given to an insurance company attorney.

Id. However, by the time the government indicted the defendant in 1997, David Hen had moved from the United States to the Netherlands, and the transcript from his deposition revealed "his diminished memory on many key circumstantial facts." Id. at 1010. In addition, the government lost crucial evidence, including a gallon can found at the scene which was believed to be the point of the fire's origin, prints and negatives of the photographs of the fire, and a videotape of the fire's progress. Id. (The court noted that in most criminal cases the loss of the photographs would not be severely prejudicial, but in a close circumstantial arson case these items were key pieces of evidence.) Finally, the court noted that *three* important witnesses – all of which the court determined could have offered material testimony that could have been outcome determative – died during the period of delay. Id. at 1010-11.

Of particular importance in comparison to this case, the Sabath court noted that "witness deaths alone may meet the required showing of prejudice," but emphasized that its "finding of prejudice is based on the combination of the factors" discussed above and "not premised on the

III. Defendant's Motion to Dismiss the Indictment for Failure to State an Offense

This Indictment charges the Defendants with two counts of wire fraud in violation of 18 U.S.C. § 1343 (Counts One and Two), two counts of mail fraud in violation of 18 U.S.C. § 1341 (Counts Three and Four), and charges Mr. Newmark with one count of making a false material declaration under oath in violation of 18 U.S.C. § 1623(a) (Count Five). The Indictment charges both Mr. Newmark and Mr. Wight with aiding and abetting the actions contemplated in Counts One through Four in violation of 18 U.S.C. § 2.

Mr. Newmark argues that each count must be dismissed pursuant to Rule 12(b)(3)(B) of the Federal Rules of Criminal Procedure for failure to state an offense. Mr. Newmark first argues

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death of any one witness." Id. at 1014. The court concluded that "the lost evidence, impaired memories of fact witnesses, flawed governmental reports, and deceased key witnesses have combined to plague Defendant with just the kind of concrete and substantial prejudice that the Due Process Clause was designed to remedy." Id.

In United States v. Glist, 594 F.2d 1374, 1378 (10th Cir. 1979), the court of appeals affirmed the dismissal of the indictment for pre-indictment delay. The court acknowledged the district court judge's characterization of the proceedings as a "shambles of a trial," and noted that the district court found, among other things, that the government investigative files were scattered among many people and offices, the lead IRS agent was no longer with the government, and there was not "the kind of disciplined development of the facts that is required." Id. at 1377. At various points in the trial, the court found Jencks Act and Brady violations, that government agents had not listened to tapes which arguably contained exculpatory statements by defendants, and that these tapes had been represented to defense counsel and to the court as duplicates of tapes which contained no such material. Id. at 1378. In addition, the straw that broke the camel's back in prompting the district court to dismiss the case due to pre-indictment delay "involved the government providing tape recordings of the company meeting where the tax fraud scheme was discussed together with a written transcript which purportedly contained all pertinent remarks made at the meeting about the conspiracy." Id. However, the appellate court noted that "[a]fter five days of trial it was revealed that a government agent had cut off the transcription 82 seconds before a clearly exculpatory statement by one of the defendants." Id. In light of the government's numerous ethical and evidentiary violations, the court of appeals held that "while there may have been no deliberate intention on the part of government agents to deceive, there was substantial fault by government representatives, enough to support dismissal for pre-indictment delay under the standards of Lovasco and Marion." Id.

that the mail fraud counts must be dismissed because the mailings at issue were mailed two years after the alleged scheme came to fruition, and were, therefore, not made "in furtherance" of the alleged scheme. Next, Mr. Newmark contends that the two wire fraud counts and the two mail fraud counts must be dismissed because the alleged misrepresentations at issue are immaterial. Finally, Mr. Newmark argues that the fifth count must be dismissed because his allegedly false statement made under oath at a deposition was immaterial to the civil litigation in which it occurred.

The Supreme Court has held that "an indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." Hamling v. United States, 418 U.S. 87, 117 (1974). Further, "[i]t is generally sufficient that an indictment set forth the offense in the words of the statute itself provided that 'those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished.'" Id. (quoting United States v. Carll, 105 U.S. 611, 612 (1882)). "'Undoubtedly the language of the statute may be used in the general description of an offence, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offence, coming under the general description, with which he is charged.'" Id. at 117-18 (quoting United States v. Hess, 124 U.S. 483, 487 (1888)).

An indictment returned by a legally constituted and unbiased grand jury, if valid on its face, is sufficient to warrant a trial on the merits of the charge. Costello v. United States, 350 U.S. 359, 363 (1956). In Costello, the Supreme Court cautioned that "[i]f indictments were to be

held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great indeed." Id. "The result of such a rule," according to the Supreme Court, "would be that before trial on the merits a defendant could always insist on a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury."[29] Id.

As an initial matter, the Court notes that, for each Count, the Indictment specifies the statute the Defendants are charged with violating, and then describes the Defendants' allegedly offending conduct, using the terms of the statute itself and essentially spelling out all of the elements of each offense. For example, Count One alleges that the August 31, 2001 facsimile that Mr. Newmark sent to Morgan Stanley, in which Mr. Newmark allegedly held himself out as

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[29] In Costello, the Supreme Court addressed the question of whether an indictment should be quashed on Fifth Amendment grounds where the only evidence presented to the grand jury to indict the defendant was hearsay evidence. Costello, 350 U.S. at 359. In finding that the Fifth Amendment did not require dismissal of an indictment on those grounds, the Supreme Court declined to announce a rule that would permit a defendant to challenge an indictment on the ground that it is "not supported by adequate or competent evidence." Id. at 364. The Supreme Court noted that such a rule "would run counter to the whole history of the grand jury institution, in which laymen conduct their inquiries unfettered by technical rules. . . . In a trial on the merits, defendants are entitled to a strict observance of all the rules designed to bring about a fair verdict. Defendants are not entitled, however, to a rule which would result in interminable delay but add nothing to the assurance of a fair trial." Id.

In addition, in United States v. D'Alessio, 822 F. Supp. 1134, 1140 (D.N.J. 1993), the court held that defendants' claims that an examination of certain evidence indicated that it was not misleading and that the there was no intent on the part of the defendants were arguments "improperly addressed to the weight of the Government's evidence." Id. The court noted that "an indictment 'may not properly be challenged by a pretrial motion on the ground that it is not supported by adequate evidence.'" Id. (quoting United States v. Gallagher, 602 F.2d 1139, 1142 (3d Cir. 1979)). The court noted that defendants' arguments would require making factual findings regarding the sufficiency of the government's evidence, which the court is not permitted to do prior to the close of the government's case in chief. Id. (citing Costello, 350 U.S. at 363; United States v. Donsky, 825 F.2d 746, 752 & n.8 (3d Cir. 1987)).

an attorney for the Walkers, violated the federal wire fraud statute, 18 U.S.C. § 1343. The federal wire fraud statute criminalizes the act of "having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice." 18 U.S.C. § 1343. Count One tracks this language. It describes the alleged scheme, which involves an effort to obtain money from the Walkers under false pretenses, Indictment ¶ 8, and states that "for the purpose of executing the scheme described above, and aiding and abetting its execution, [Mr. Newmark and Mr. Wight] caused to be transmitted by means of wire communication in interstate commerce the signals and sounds described below for each count," Indictment ¶ 9. This Count tracks the language of the pertinent statute, states each element of the offense, and uses the "magic words" in each statute when describing the allegedly offending conduct. Each of the other Counts of the Indictment are similarly constructed. See Indictment 5-8.

All of Mr. Newmark's arguments that the Indictment should be dismissed for failure to state an offense would require the Court to make pre-trial factual findings regarding the sufficiency of the Government's evidence. For example, Mr. Newmark argues that Counts Three and Four must be dismissed because to sustain a conviction for mail fraud the Government must prove that the offending mailings made "for the purpose of executing" the alleged fraudulent scheme. Mr. Newmark argues that, according to the Indictment, the alleged scheme occurred from June 2001 through August 2001. Indictment ¶ 8. However, Mr. Newmark argues, the mailings in question were mailed in December 2003, over two years after the alleged scheme

came to fruition.[30] Mr. Newmark argues that, therefore, these mailings cannot be said to have been "in furtherance of" the alleged scheme.[31]

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[30] The only argument that challenges the facial validity of the Indictment is Mr. Newmark's claim that Counts Three and Four, which occurred in December 2003, fall outside of the date range of the alleged scheme, which is described in the Indictment as taking place from June to August of 2001. Indictment ¶ 8. However, before the "scheme" is described in paragraph eight, paragraph seven of the Indictment states that from on or about "June 27, 2001 through on or about January 21, 2004, defendants knowingly devised and intended to devise a scheme to defraud" the Walkers. Indictment ¶ 7. Therefore, the Indictment clearly captures the relevant dates, and Mr. Newmark's "facial" challenge is misplaced.

[31] In United States v. Lebovitz, 669 F.2d 894, 895-96 (3d Cir. 1982), the Third Circuit Court of Appeals analyzed the meaning of the phrase "for the purposes of executing the scheme," under the mail fraud statute,18 U.S.C. § 1341, stating:

> Whether a mailing is "for the purpose of executing a scheme" within the meaning of § 1341 depends upon whether it is "sufficiently closely related to respondent's scheme to bring his conduct within the statute." The completion of the scheme must depend in some way on the mailings charged. However, "[i]t is not necessary that the scheme contemplate the use of the mails as an essential element." Rather, it is sufficient if the mailing is "incident to an essential part of the scheme."

Lebovitz, 669 F.2d at 896 (citations omitted). Mr. Newmark argues that the December 16, 2003 "Responses to Plaintiff's First Set of Interrogatories" in the civil case, in which Mr. Newmark stated that he had never held himself out as an attorney for the Walkers (Count Three), and the December 17, 2003 "Answer of John Wight to Plaintiff's Interrogatories," in which Mr. Wight stated that he had never held himself out as an attorney to the Walkers (Count Four), were not made "for the purpose of executing a scheme to defraud," so that, as a matter of law, the Indictment must be dismissed. Mr. Newmark argues that "as a matter of statutory interpretation, the specific facts alleged in the charging document fall outside the reach of the relevant criminal statute," United States v. Panarella, 277 F.3d 678, 684 (3d Cir. 2002), and, therefore, the Indictment must be dismissed. See id. at 685 ("[W]e hold that, for purposes of Rule 12(b)(2), a charging document fails to state an offense if the specific facts alleged in the charging document fall beyond the scope of the relevant criminal statute, as a matter of statutory interpretation."). In Panarella, the defendant pleaded guilty to a superceding information and was convicted of being an accessory after the fact to a wire fraud scheme perpetrated by a Pennsylvania state senator. Id. 679. The defendant in Panarella raised the issue that the superceding information failed to state an offense, for purposes of Rule 12(b)(2), for the first time on appeal. Id.; see also United States v. Syme, 276 F.3d 131, 145 (3d Cir. 2002) (noting that an indictment may be dismissed if the criminal charges are "based on an erroneous interpretation of law or contain a mistaken

The United States argues that Mr. Newmark is essentially asking the Court to make a "summary judgment" decision because determining whether the Defendants' answers to interrogatories were in "furtherance of" the alleged scheme, and, therefore, violate the mail fraud statute, would require presenting evidence, making factual findings, and the like. In United States v. Gallagher, 602 F.2d 1139, 1142 (3d Cir. 1979),[32] the court of appeals noted that Rule 12(b)(1) of the Federal Rules of Criminal Procedure "cautions the trial judge to consider on a motion to dismiss the indictment only those objections that are 'capable of determination without the trial of the general issue,' and that evidentiary questions should not be determined at that stage." Id. (quoting United States v. Knox, 396 U.S. 77 (1969)). The appellate court observed that "the sufficiency of an indictment 'may not be properly challenged by a pretrial motion on the ground that it is not supported by adequate evidence.'" Id. (quoting United States v. King, 581

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description of the law"). However, Mr. Newmark's claims do not actually challenge the interpretations of law that appear in the Indictment. He challenges the application of the facts to the applicable law. Such a challenge cannot be made until after a trial on the merits.

[32] In Gallagher, the co-defendants raised their motion to dismiss the indictment in their second appeal. 602 F.2d at 1140-41. A jury had found co-defendants Gallagher and Fredenburgh guilty of numerous counts of misapplication of bank funds in violation of 18 U.S.C. § 656, making false statements in connection with bank loans in violation of 18 U.S.C. § 1014, and one charge of conspiracy in violation of 18 U.S.C. § 371. The defendants appealed their conviction and on appeal, the court of appeals found that there was insufficient evidence to support the conviction of Gallagher on the Section 1014 counts but enough to sustain the guilty verdicts against Fredenburgh. United States v. Gallagher, 576 F.2d 1028 (3d Cir. 1978). However, the court of appeals determined that because of an error in the jury instructions, all of the convictions on the § 656 counts and the conspiracy charge had to be vacated. Id. The case was remanded to the district court, where, rather than proceed with a new trial, the district court granted defendants' motion to dismiss the indictment except as to the two § 1014 counts against Fredenburgh, which the court of appeals had affirmed. In the second appeal, the government appealed from the dismissal of the indictment. The court of appeals found that "the district court went beyond the text of the charges and analyzed the evidence received at the first trial to determine if it was consistent with the terms of the indictment," and held that it found "no authority for such a procedure." Gallagher, 602 F.2d at 1142.

F.2d 800, 802 (10th Cir. 1978) ("Certainly an information or indictment may be dismissed if it is insufficient to charge an offense. But it may not be properly challenged by a pretrial motion on the ground that it is not supported by adequate evidence.").

While Mr. Newmark invokes Rule 12(b)(3)(B) of the Federal Rules of Criminal Procedure, which does permit a defendant to bring a motion alleging a defect in the indictment for failure to state an offense at any time while the action in pending, all of Mr. Newmark's claims challenge the sufficiency of the evidence underlying the various counts in the Indictment and do not challenge the facial validity of the Indictment itself.[33] To address Mr. Newmark's claims as to these issues would require extensive fact-finding and witness testimony (including cross-examination of such witnesses and an opportunity for the fact-finder to assess the credibility of the fact witnesses and the weight to be accorded to the testimony). It would require, in short, a trial. Mr. Newmark is attempting to dismiss the Indictment by way of "summary judgment," which is not the purpose that Rule 12(b)(3)(B) serves. See, e.g., United States v. Thomas, 150 F.3d 743, 747 (7th Cir. 1998) ("Summary judgment does not exist in

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[33] The cases Mr. Newmark cites in support of his motion that the Indictment should be dismissed at the present procedural point (rather than following submission of the evidence when a Rule 29 motion may be warranted) do not help, however, because these cases are from appellate courts, following trials on the merits or a guilty plea where the defendants were convicted, and appealed their convictions. See, e.g., Kann v. United States, 323 U.S. 88, 95 (1944) (reversing the appellate court's affirmance of a conviction after a trial on the merits; holding that the clearing through the mails of checks representing the proceeds of a fraudulent scheme, after they have been cashed and are in the hands of a holder in due course, is not a part of the execution of the scheme to defraud and does not constitute a violation of the federal mail fraud statute); United States v. Tarnopol, 561 F.2d 466, 472 (3d Cir. 1977) (reversing defendants' conviction for mail fraud; holding that mailings that took place after the object of the scheme had been accomplished were not sufficiently closely related to the scheme to support a mail fraud prosecution); Lebovitz, 669 F.2d at 899 (affirming a jury verdict finding defendants guilty of mail fraud; holding that mailing at issue was sufficiently related to the alleged scheme to support a conviction for mail fraud).

criminal cases."); United States v. Xiong, 2006 U.S. Dist. LEXIS 48905, at *5 (W.D. Wis. July 7, 2006) (declining to dismiss the defendant's conspiracy charge pursuant to defendant's pretrial Rule 12(b)(3)(B) motion, and noting that challenging the government's ability to prove its case is not a ground for pretrial dismissal of a charge because summary judgment does not exist in criminal cases).[34]

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[34] Mr. Newmark also argues that all of the Counts should be dismissed because the alleged misrepresentation at issue in each Count is immaterial to the alleged scheme. In the first of these arguments, Mr. Newmark argues that Counts One through Four must be dismissed because two alleged misrepresentations – that the defendants (1) represented to the Walkers that after "careful review" of a "variety" of products, they concluded that the New Life annuity was in the Walkers' "best interests" and (2) misrepresented to the Walkers that they were attorneys – are immaterial and "deficient as a matter of law." Mr. Newmark's next and final argument in this motion is that Count Five – the false declaration under oath charge against Mr. Newmark – should be dismissed because it fails to state an offense, and because the alleged misstatement at issue was immaterial when it was made.

Count Five alleges that Mr. Newmark knowingly made a false statement of fact when he stated in a deposition in the civil action, under oath, that he had never held himself out as an attorney for the Walkers or for anybody. It is a violation of 18 U.S.C. § 1623 to "knowingly make[] any false material declaration" "under oath . . . in any proceeding before or ancillary to any court or grand jury of the United States." 18 U.S.C. § 1623. Count Five alleges that Mr. Newmark stated under oath at a deposition on or about January 21, 2004 that he had never represented himself as an attorney, Indictment ¶ 3, that this statement was "material," Indictment ¶ 2, and that Mr. Newmark made this statement knowing that it was false, Indictment ¶ 4, in violation of 18 U.S.C. § 1623. Because Count Five, by reciting all of the elements of a violation of 18 U.S.C. § 1623, and describing the events that comprise Mr. Newmark's alleged violation in terms of the elements of 18 U.S.C. § 1623, the Indictment is valid on its face. Therefore, Count Five will not be dismissed.

Mr. Newmark's two "materiality" arguments are also unavailing. Defendants concede that "materiality generally is a matter for the jury." Def. Mot. Dismiss (Offense) 8 n.1. The Court need not proceed any further on this point. As discussed above, an inquiry into the "materiality" of an alleged misrepresentation must be made after a trial on the merits, either by the Court if the motion is raised at the close of evidence, or by the jury. A Rule 12(b)(3)(B) motion presented prior to the close of evidence does not permit the Court to look behind the Indictment to evaluate the evidence presented. Because Counts One through Four are facially valid, these Counts will not be dismissed.

Precedent makes it clear that the Court is not permitted to make such findings until the close of the Government's case in chief. Costello, 350 U.S. at 363; see also United States v. D'Alessio, 822 F. Supp. 1134, 1140 (D.N.J. 1993). The Court finds the Indictment is facially valid, and therefore, that a trial on the merits is appropriate. Costello, 350 U.S. at 363 (holding that a valid indictment, if returned by a legally constituted and unbiased grand jury, is sufficient to warrant a trial of the charge on the merits).

IV. Motion to Sever

Mr. Newmark and Mr. Wight are jointly charged under Rule 8(b) of the Federal Rules of Criminal Procedure[35] and are scheduled to be tried together. Rule 14 provides for relief from prejudicial joinder. It states, in pertinent part, that:

> If the joinder of offenses or defendants in an indictment, an information, or a consolidation for trial appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires.

Fed. R. Crim. P. 14(a). Mr. Newmark argues that his trial should be severed from Mr. Wight's

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[35] Rule 8(b) provides:

> The indictment or information may charge 2 or more defendants if they are alleged to have participated in the same act or transaction, or in the same series of acts or transactions, constituting an offense or offenses. The defendants may be charged in one or more counts together or separately. All defendants need not be charged in each count.

Fed. R. Crim. P. 8(b). "The Supreme Court has stated that "'there is a preference in the federal system for joint trials of defendants who are indicted together.'" United States v. Davis, 397 F.3d 173, 182 (3d Cir. 2005) (quoting Zafiro v. United States, 506 U.S. 534, 537 (1993)).

because Mr. Wight's testimony, if offered, would exculpate Mr. Newmark.[36]

In determining whether severance is appropriate, the Court of Appeals for the Third Circuit has stated that a defendant's claim of improper joinder must "demonstrate clear and substantial prejudice." United States v. Davis, 397 F.3d 173, 182 (3d Cir. 2005) (quoting United States v. Gorecki, 813 F.2d 40, 43 (3d Cir. 1987) (citation omitted)). The Supreme Court has held that severance should be granted "only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." United States v. Davis, 397 F.3d at 182 (quoting Zafiro v. United States, 506 U.S. 534, 539 (1993)).

Our court of appeals has addressed the situation where one defendant in a joint trial argues that severance is appropriate because testimony from a co-defendant would exculpate him. Davis, 397 F.3d at 182-83. The court held that "bare assertions that codefendants will testify are insufficient" to warrant separate trials. Id. at 182 (quoting United States v. Boscia, 573 F.2d 827, 832 (3d Cir. 1978)). The court of appeals advises that a district court should consider four factors – the "Boscia factors" – in determining whether severance is appropriate under these circumstances: "'(1) the likelihood of co-defendant's testifying; (2) the degree to which such testimony would be exculpatory; (3) the degree to which the testifying co-defendants could be

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[36] Mr. Newmark states that, if Mr. Wight were to testify, he would testify that: (1) Arthur Walker was the financial decision maker and that Thomas Walker's misimpression that Mr. Wight was his attorney is not material; (2) Thomas Walker's misimpression of Wight as his lawyer occurred in the context of Mr. Wight witnessing the Walkers' signatures on wills and not on annuity documents; (3) Mr. Wight's failure to correct Thomas Walker's misimpression that Mr. Wight was a lawyer was the result of Mr. Wight's decision to "table" correcting that misimpression at that time; and (4) Mr. Wight hand wrote his name and telephone number on attorney Bohmueller's card that was together with estate-planning documents that he had delivered to the Walkers.

impeached; [and] (4) judicial economy.'" Id. (quoting Boscia, 573 F.2d at 832). In addition, a defendant's claim that a co-defendant would testify on his behalf "must be supported by the record, and the record must show more than simply the defendant's 'request for declaration of [his co-defendants'] intent to testify.'" Id. (quoting United States v. Gonzalez, 918 F.2d 1129, 1137 (3d Cir. 1990)).

In this case, there is no evidence in the record that Mr. Wight would testify during Mr. Newmark's trial if his trial was severed from Mr. Newmark's. Mr. Wight has not submitted an affidavit stating that he would testify or indicating the substance of any potential testimony. Furthermore, at oral argument on these motions, counsel for Mr. Wight stated that it is likely that Mr. Wight would testify *regardless* of whether the case was severed or whether the defendants were tried jointly. Feb. 22, 2007 Tr. 71:20-22 (stating that "there is a large likelihood that Mr. Wight would testify at trial, either in which he is the sole defendant, or a trial in which he is one of two defendants"); see generally id. 71:19–72:18. Mr. Wight's counsel indicated that the decision whether Mr. Wight would testify would probably not be made until after the Government rests its case. Id. 71:23-24.

Because it is equally likely that Mr. Wight will or will not testify if the trial is or is not severed, and because the Defendants have not offered any evidence of the substance of Mr. Wight's possible testimony, the Court is compelled to dismiss this Motion as well.

CONCLUSION

For the reasons stated above, Mr. Newmark's three Motions to Dismiss and his Motion to Sever, all of which are joined by Mr. Wight, will be denied. An appropriate Order follows.

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Gene E.K. Pratter
United States District Judge

March 14, 2007

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	**CRIMINAL NO. 06-447**
	:	
v.	:	
	:	
BRIAN J. NEWMARK	:	
JOHN N. WIGHT	:	
Defendants.	:	

O R D E R

AND NOW, this 14th day of March, 2007, upon consideration of the Defendants' Motion to Dismiss the Indictment for Defect in Instituting Prosecution (Docket No. 25), Defendants' Motion to Dismiss the Indictment for Pre-Indictment Delay (Docket No. 26), the Supplemental Memorandum in Support of the Motion to Dismiss the Indictment for Pre-Indictment Delay filed by Defendant John N. Wight (Docket No. 43), Defendants' Motion to Dismiss the Indictment for Failure to State an Offense (Docket No. 27), Defendants' Motion to Strike Surplusage (Docket No. 28), Defendants' Motion to Sever (Docket No. 29), the United States' cumulative Response to the Defendants' motions (Docket No. 36), Defendants' Reply (Docket No. 37), and the United States' Response to Defendant Wight's Supplemental Memorandum (Docket No. 46), it is **ORDERED** that:

1. Defendants' Motion to Dismiss the Indictment for Defect in Instituting Prosecution (Docket No. 25) is **DENIED**;
2. Defendants' Motion to Dismiss the Indictment for Pre-Indictment Delay (Docket No.26) is **DENIED**;
3. Defendants' Motion to Dismiss the Indictment for Failure to State an Offense (Docket No. 27) is **DENIED**;
4. Defendants' Motion to Strike Surplusage (Docket No. 28) is **MOOT**; and

5. Defendants' Motion to Sever (Docket No. 29) is **DENIED**.

FOR THE COURT:

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Gene E.K. Pratter
United States District Judge