

occurred in contravention of Rule 48(b) of the Federal Rules of Criminal Procedure.

The court set the trial for April 11, 2018.

Subsequently on motion of the defendant, the court postponed the trial to begin on April 16, 2018. On April 3, 2018, less than two weeks before the trial is to begin, defendant filed a motion for reconsideration of his motion to dismiss the indictment.

The gravamen of the pending motion is that several potential defense witnesses are now either dead, incapacitated, or otherwise unavailable and that the delay in the trial caused by the Government's dilatory production of discovery now makes any trial unfairly prejudicial to defendant. See Barker v. Wingo, 407 U.S. 514, 532 (1972).

In the original motion to dismiss, defendant argued, among other things, that he could not receive a fair trial because memories of witnesses have or will have faded and witnesses have or will become unavailable due to of the passage of time. He cited no specifics at that time. As a result, the court stated in its November 14, 2017 Memorandum accompanying its denial of the motion to dismiss:

It is well-established that general allegations about the dimming of memory or the unavailability of witnesses, absent excessive post-arrest or post-indictment delay, do not suffice to establish prejudice. Velazquez, 749 F.3d at 191; see also Loud Hawk, 474 U.S. at 656.

Consequently, the defendant has not established through presumptive prejudice or specific evidence of prejudice that his defense will be impaired by a trial starting on April 11, 2018.

Shulick, 2017 WL 5476380 at *10.

Defendant now attempts to rectify this deficiency by specifically identifying Benjamin Wright, Susan Kistler, Denise Medina, Jeffrey Jones, and John Brennan as witnesses whose absences will result in prejudice to him.

Benjamin Wright was the Associate Superintendent of the Philadelphia School District and Superintendent of Alternative Education at the time when Shulick is accused of embezzling from the School District. According to defendant, he was responsible for awarding the contract to defendant's company, DVHS, in July 2010, as well as an amendment to the contract, and recommended renewal of the contract in 2012. He purportedly participated in numerous walk-throughs at Southwest School operated by DVHS and made the decision to terminate the contract.

The defendant's investigator states in an affidavit that she "has learned that he [Wright] is seriously ill, unable to travel and he now has seriously diminished memory relating to the facts of this case." Significantly, while defendant lists several subjects about which Wright has knowledge and could testify, defendant never states how Wright would testify or that

his testimony would be favorable to defendant. While defendant's investigator apparently interviewed him before he had health issues, there is no statement from her about exactly what Wright told her and would say on the witness stand. Moreover, to the extent that defendant would have attempted to elicit testimony from Wright that the School District was satisfied with Shulick's performance under the relevant contract, it would be irrelevant. It is the defendant's intent and not the perception or opinion of the victim that is the proper focus of inquiry. See United States v. Coyle, 63 F.3d 1239, 1244 (3d. Cir. 1995). There is no evidence that his absence from the trial will prejudice the defendant.

We next turn to Susan Kistler, Esquire, whose testimony would purportedly be relevant to the charges against Shulick for bank fraud on PNC Bank and making a false statement to that bank. In essence, the indictment charges that Shulick as Fattah's lawyer and employer committed fraud and made a false statement to the bank in an effort to resolve Fattah's outstanding bank loan.

Kistler was a lawyer with an outside law firm in Houston, Texas, who was retained by the U.S. Treasury to collect debts on behalf of the Small Business Administration ("SBA"), which had guaranteed the Fattah loan. The indictment alleges in Count Seven that as part of the scheme, Shulick sent a letter to

PNC Bank offering to settle the loan PNC had made to Fattah. Attached to Shulick's letter was an SBA form that contained Fattah's financial statement, which stated that Fattah's monthly income was \$2,500, when Shulick was paying him an annual salary of \$75,000 – a significant difference. Count Eight alleges that Shulick knowingly made a false statement to PNC Bank for the purpose of influencing the bank to settle Fattah's loan, that is, he submitted the form to the bank that misrepresented Fattah's monthly income as being significantly lower than it was.

According to Defendant, the SBA forms were the basis for the settlement of the loan. Defendant complains that Kistler's testimony would prove that the SBA never received the SBA forms from Shulick referenced in these counts and that these forms were the basis for the ultimate settlement of the loan. He further contends that Fattah, not Shulick, settled the loan with PNC Bank seven months after the acts of Shulick. Defendant states he has been unable to locate Kistler and according to him, the lack of her testimony is a fatal blow to his defense to Counts Seven and Eight.

The relevant charges involve fraud on PNC Bank, not on the SBA. Whether the loan was ultimately settled on the basis of the SBA forms, or who settled the loan, is immaterial since the indictment does not allege that the loan was in fact

settled. Further, 18 U.S.C. § 1344 does not require that the defendant actually cause harm to the financial institution. Shaw v. United States, 137 S. Ct. 462, 467 (2016); United States v. Khorozian, 333 F.3d 498, 505 n.6 (3d Cir. 2003). Thus, a lack of testimony suggesting that SBA never received forms with Fattah's income or that Fattah, not Shulick, settled the loan, does not prejudice the defense. Consequently, defendant has not shown that her unavailability will be prejudicial to defendant.

Denise Medina is a person who is said to have worked at defendant's law firm in a secretarial and paralegal capacity and is now deceased. She allegedly faxed a March 26, 2010 letter signed by Shulick on his law office letterhead together with enclosures to PNC concerning the loan in issue made to Chaka Fattah, Jr. Shulick, as noted, was Fattah's employer as well as his lawyer. Defendant surmises that the letter and enclosures were all the fabrication of Fattah because the fax cover sheet contained a handwritten phone number on it. There is nothing in the letter or on the fax cover sheet to support any fabrication solely by Fattah. Defendant merely speculates that Medina could have supplied him with exculpatory evidence. In any event, Medina died on January 6, 2015, some eighteen months before the indictment was returned. There is no basis to support the notion that the Government's post-indictment delay

in producing discovery denied defendant the ability to call Medina as a witness.

John Brennan, the agent of the Office of the Inspector General of the School District of Philadelphia, is now deceased, having died on February 3, 2017, approximately four months after the indictment was handed down and seven and a half months before defendant filed his original motion to dismiss for delay. Defendant contends that he would have been able to prove through him "Fattah's secret plans to take over Shulick's contracts with PSD." Fattah purportedly had contact with Brennan by telephone and by email concerning Shulick's wrongdoing and Fattah's efforts to obtain a whistleblower award. Defendant hopes to establish that Shulick and Fattah had not conspired with respect to any embezzlement from the School District. Defendant has pointed to nothing that would show that Brennan's testimony, had he lived, would have benefited Shulick and would not have been inculpatory of Shulick as well as Fattah.

Finally, defendant argues that the absence of Jeffrey Jones is unfairly prejudicial. Defendant's investigator records in her affidavit that Jones "stated that due to the passage of time, he no longer has a recollection of the events." Defendant hoped to prove through Jones that Fattah and Andre Bean planned to start an educational company called "Dreamchasers" to compete with Shulick and take over the School District contracts in

2011. Jones, a relatively young man, testified at the Fattah Jr. trial in the fall of 2015. Bean is listed as a witness at defendant's upcoming trial. Defendant does not contend that the testimony of Jones is the only way to establish these facts. Thus, defendant has not shown any prejudice from the absence of Jones.

The Supreme Court stated in United States v. Loud Hawk, 474 U.S. 302, 315, that "the possibility of prejudice is not sufficient to support [defendant's] position that [his] speedy trial rights were violated." At most, this is all that defendant has shown. Accordingly, the defendant's motion for reconsideration of his motion to dismiss will be denied.

