

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

-----X
United States of America, :
 :
 - against - : Case No. 3:05CR268 (JBA)
 :
 John M. Lucarelli, :
 : April 16, 2007
 :
 Defendant. :
 :
-----X

**DEFENDANT JOHN M. LUCARELLI'S MEMORANDUM IN
OPPOSITION TO GOVERNMENT'S MOTION FOR RECONSIDERATION**

Defendant John M. Lucarelli respectfully submits this memorandum in opposition to the government's motion for reconsideration of judgment of acquittal. As the government acknowledges, "the standard for granting a motion for reconsideration . . . is 'strict,'" and such a motion should be granted only when there is "an intervening change in the law," "new evidence not previously available," or "the need to correct a clear error of law or prevent manifest injustice." (Gov't Mot. at 3-4.) The government does not and cannot argue that there is new evidence to support its motion. Likewise, there has been no error of law to correct and no intervening change in the law. As the Court properly recognized, the special interrogatory answers determined conclusively that the jury found no specific intent to defraud, and there can be no conviction for securities fraud or conspiracy without that essential element. The Court's entry of judgment of acquittal was entirely proper.

1. Acquittal Is the Proper Outcome When the Jury Affirmatively Finds the Absence of an Essential Element of the Crimes Charged

The Court held that "the jury was required to find that Lucarelli had the specific intent to defraud the NHSB and/or its depositors" and that, "considering the Government's burden to prove each legal element of Counts 1 and 12, the jury's special interrogatory answers are

tantamount to an acquittal on both counts.” (Op. at 5-6.) The government’s motion for reconsideration does not take issue with the Court’s conclusion that specific intent to defraud is a necessary element both of aiding and abetting securities fraud and of conspiracy to commit mail or securities fraud.¹ The government instead challenges the Court’s conclusion that acquittal is the appropriate outcome in this case, but none of its arguments offer any basis to alter that conclusion.

The essential point is that the Court did not “substitute[] its own judgment for that of the jury.” (Gov’t Mot. at 4.) What it did was give effect to the jury’s clear judgment as reflected in the interrogatory answers. This was an acquittal by the jury, not a judgment by the Court setting aside a conviction. The government’s reiteration of its prior argument that courts should avoid speculating about a jury’s deliberations (*id.* at 4-8) serves only to reinforce the notion that a court should give effect to a clear manifestation of the jury’s findings. The Court properly recognized that “through the interrogatory answers the jury memorialized its finding with respect to the element of specific intent to defraud,” and that those answers “make clear that the jury found no specific intent to defraud either the NHSB or its depositors.” (Op. at 12, 15.)

None of the cases cited by the government to support its view that the Court has somehow “usurp[ed]” the role of the jury (Gov’t Mot. at 6) suggests that a new trial is appropriate when the jury affirmatively finds that the government failed to prove an essential element of the crimes charged. First, the recent Eight Circuit decision in *United States v. Mitchell*, 476 F.3d 539 (8th Cir. 2007), reinforces the outcome in this case. In *Mitchell*, the jury returned a general verdict of guilty on a count of bankruptcy fraud under 18 U.S.C. § 152(3),

¹ Indeed, the government has effectively conceded that specific intent to defraud is an essential element of both crimes. (*See* Op. at 8, 13-14 & n.7.)

based on false statements made by the defendant in a bankruptcy proceeding. *Id.* at 541-42. In connection with this count, the jury was asked to respond to three interrogatories, one of which asked whether the jury “unanimously [found] beyond a reasonable doubt that one or more of the false declarations . . . were ‘material’ matters.” *Id.* at 542. The jury “checked the ‘no’ box, annotating that it could not make a unanimous finding beyond a reasonable doubt that one or more of the false statements was material.” *Id.* As a result, the district court granted the defendant’s motion for a new trial. *Id.* at 543.

In *Mitchell*, the jury indicated that it could not reach a unanimous decision on an essential element. Here, the jury affirmatively found the absence of an essential element. While the former warrants a new trial and the latter an acquittal, in both cases the courts recognized that the jury’s answers to the special interrogatories must be given effect. The jury’s answers in this case require a judgment of acquittal.²

The government’s return to *Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385 (1972), and its progeny is similarly unavailing. As we advised the Court in Mr. Lucarelli’s opening memorandum (Mem. at 14-16), a footnote to the Supreme Court’s 1972 decision in *Pipefitters* stated that where “the jury’s special finding may well have been inconsistent with its general verdict,” that “could require only reversal, not acquittal.” 407 U.S. at 401 n.11. The government acknowledges that this statement was “dicta.” (Gov’t Mot. at 9.) The meaning of

² In *Mitchell*, the interrogatory left unclear whether the jury had unanimously found that none of the statements were material or had failed to find unanimously that they were material. Here there was no such ambiguity—the interrogatory answers contained a single positive statement that the jury had not found an intent to defraud either the Bank or depositors. There was nothing in the interrogatory to suggest that the jury was anything less than unanimous. Indeed, the jury must be presumed to follow the Court’s instructions that it reach a unanimous judgment. (See Jury Instr. at 8 (the jurors must be “unanimously convinced beyond a reasonable doubt of his guilt”); *id.* at 62 (explaining unanimity requirement for conspiracy); *id.* at 73-74 (“Your verdict, whether guilty or not guilty, must be unanimous. If you take a vote and it is not unanimous, you have not reached a final decision one way or the other.”).) Ultimately, after more than four days of deliberation, the Court gave an *Allen* charge emphasizing that the jury needed to reach “a unanimous verdict” and would be sent back “one last time to see if, in light of my instructions, you can reach a unanimous verdict.” (7/26/06 Trial Tr. at 1692-95.)

the interrogatories was not before the Supreme Court in *Pipefitters*, as the defendants “failed to move for acquittal on the ground now offered once the special finding was returned” in the district court, and the Supreme Court vacated and reversed the convictions on other grounds. 407 U.S. at 401 n.11, 442. While the Court “assume[d], arguendo, the correctness of petitioners’ premise” that the interrogatories addressed an element of the underlying crime, *id.* at 401 n.11, it did not hold that this was so.³ The dictum in the *Pipefitters* footnote also did not address the important constitutional implications of a jury’s finding that an essential element is lacking. (*See* Mem. at 15.)

Further, the one case that has looked to *Pipefitters* for guidance on the question of remedy is inapplicable here. In *Crawford v. Fenton*, 646 F.2d 810 (3d Cir. 1981), a state court jury initially found the defendant guilty of conspiring to distribute a controlled substance, but answered in the negative on both parts of an interrogatory that asked whether the substance was cocaine or heroin. *Id.* at 813. The trial judge returned the verdict to the jury for clarification several times, and an increasingly frustrated jury returned increasingly confusing findings.⁴ *Id.* at 813-15. This confusion, rather than the jury’s answers to the interrogatories, led the judge to declare a mistrial. *Id.* In rejecting a habeas petition brought by the defendant on double jeopardy grounds, the Third Circuit observed in dictum that “if the jury verdict had been

³ The *Pipefitters* defendants were charged under 18 U.S.C. § 371 with conspiring to violate 18 U.S.C. § 610, which prohibited labor unions from making contributions or expenditures in connection with federal elections. 407 U.S. at 387. A violation under § 610 could be either a misdemeanor or a felony, depending on whether the violation was “willful.” *Id.* at 401 n.11. If the jury found the defendants guilty of conspiracy, a special interrogatory asked the jury to find whether they conspired to violate § 610 “willfully.” *Id.* The jury returned a general verdict of guilty but answered the interrogatory in the negative, and the defendants then argued on appeal that an acquittal should be entered because “willfulness” was an element of conspiracy. *Id.* While an inconsistency between the jury’s answer and the general verdict is intelligible, the answer did not preclude the conclusion that the defendants willfully conspired to commit a misdemeanor violation of § 610. No such reconciliation of the jury’s verdict is possible here.

⁴ One of several notes that the *Crawford* jury returned to the court during its successive deliberations read, “We have been here 12 hours. A lot of us are very tired and cannot concentrate. We ask you to please let us go home.” 646 F.2d at 815.

accepted, Crawford would have been entitled, at most, to a new trial.” *Id.* at 817 n.8 (citing *Pipefitters*, 407 U.S. at 401 n.11). Neither this statement in dictum nor the distinct factual circumstances of *Crawford* support the government’s argument for a new trial in this case.

Finally, the government quotes from another case, *United States v. Hoffer*, 626 F. Supp. 786 (N.D. Ill. 1985), without regard to its inapposite facts. In *Hoffer*, the defendant had been tried and convicted of murder, voluntary manslaughter, and involuntary manslaughter, and when faced with a new trial on all counts argued that his earlier conviction on the lesser count precluded retrial on the greater counts. *Id.* at 787. The statement quoted by the government, that “[u]nder no rational perspective can a jury’s express finding of guilty be considered a factual resolution in the defendant’s favor, and therefore an acquittal” (Gov’t Mot. at 6), is inapplicable here, because *Hoffer* involved only a general guilty verdict, not an express finding by the jury on an element of the crimes. Unlike *Hoffer* and the other cases cited by the government, the jury’s interrogatory answers here require a judgment of acquittal.⁵

2. The Court Properly Recognized that the Jury’s Affirmative Finding on Specific Intent to Defraud Overrides Any Potential Deficiency in the Jury Instructions on the Importance of This Element

The government attempts to portray the Court’s ruling as one based solely on deficient jury instructions, in order to rely upon cases where courts have held that the remedy for deficient instructions is a new trial. The government misconstrues the Court’s ruling in this regard, and the cases it invokes as a result are inapposite.

⁵ Other cases cited by the government are not on point. For example, in *United States v. Console*, 13 F.3d 641 (3d Cir. 1993), a RICO case, the issue was not what effect should be given to interrogatory answers, but rather whether a district court had erred in declining to use a more extensive verdict form with interrogatories addressing forty predicate acts rather than just eleven that were within the statute of limitations. *Id.* at 662. The jury in that case did not even answer the interrogatories on the verdict form, and no particular predicate was essential to the overall RICO offense. *See id.* at 663-665. Here, specific intent to defraud was an essential element both for securities fraud and for conspiracy, and the jury affirmatively found that this essential element was lacking.

This Court held that the jury’s verdict was “tantamount to an acquittal on both counts” because “the special interrogatory answers make clear that the jury found no specific intent to defraud either the NHSB or its depositors.” (Op. at 6, 15.) The Court held that the jury’s answers “memorialized its finding with respect to the element of specific intent to defraud,” even if the jury instructions, “while technically correct,” may not have been explicit enough that this element was required both for aiding and abetting securities fraud and for conspiracy. (*Id.* at 11-12.) The interrogatories thus “became the vehicle to reflect the jury’s finding that the Government’s proof on the element of intent fell short,” effectively overriding any deficiency in the Court’s instructions.⁶ (*Id.* at 12.)

On this point, as on others, the cases cited by the government are inapposite because they lack the essential characteristic of this case: an affirmative finding by the jury of the absence of an essential element of the crimes charged. For example, in *Neder v. United States*, 527 U.S. 1 (1999), the Supreme Court affirmed a conviction for tax fraud where a court failed to instruct the jury properly on the element of materiality and the jury returned a general verdict of guilty, but there was no finding or interrogatory answer by the jury indicating that it had resolved the materiality element in the defendant’s favor. *Id.* at 19. Similarly, in *United States v. Malpeso*, 115 F.3d 155 (2d Cir. 1997), the Second Circuit affirmed a conviction for possession of a firearm where a court failed to include a limiting instruction and the jury returned a general verdict of guilty, but there was no finding or interrogatory answer by the jury indicating that it had applied the limiting principle in the defendant’s favor. *Id.* at 166. Finally, in *United States v. Hastings*,

⁶ In Mr. Lucarelli’s motion, we described the Court’s instructions on intent for aiding and abetting securities fraud (Mem. at 7, 9 n.5) and conspiracy (*id.* at 10-11 & n.7) and noted Mr. Lucarelli’s objection to those instructions to the extent that they could be read to require anything less than specific intent to defraud. While such deficiency in the instructions would support a new trial on their own, the Court properly recognized that acquittal is the proper judgment based on the jury’s findings.

918 F.2d 369 (2d Cir. 1990), the Second Circuit granted a new trial where a court omitted the knowledge element from its instruction on unlawful possession of a firearm and the jury returned a general verdict of guilty, but there was no finding or interrogatory answer by the jury indicating that it had resolved the knowledge element in the defendant's favor. *Id.* at 373-74.

Here, by contrast, the jury affirmatively found that Mr. Lucarelli did not act with specific intent to defraud either the Bank or depositors. Had the jury been more clearly instructed that such intent was an essential element both of aiding and abetting securities fraud and of conspiracy to commit mail or securities fraud, it would have had no choice but to enter a general verdict of acquittal on these counts consistent with its specific findings. The possible shortcoming in the Court's instructions on intent may explain why the jury entered a general verdict that was contrary to its specific findings, but it is those specific findings that justify and require the entry of a judgment of acquittal.

3. Judgment of Acquittal is Appropriate in Light of Principles of Double Jeopardy and Collateral Estoppel

As the Court correctly observed, the jury's finding that Mr. Lucarelli acted without specific intent to defraud is "tantamount to an acquittal on both counts" because the interrogatory answers resolved the element of specific intent to defraud in the defendant's favor. (Op. at 6.) An acquittal is a "resolution in the defendant's favor, correct or not, of some or all of the factual elements of the offense charged." *Maula v. Freckleton*, 972 F.2d 27, 28 (2d Cir. 1992) (quoting *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1976)); see also *United States v. Watts*, 519 U.S. 148, 155 (1997) (observing that an acquittal is "an acknowledgment that the government failed to prove an essential element of the offense beyond a reasonable doubt"). "[A] defendant once acquitted may not be again subjected to trial without violating the Double Jeopardy Clause." *United States v. Scott*, 437 U.S. 82, 94 (1978) (observing that a second trial

“would present an unacceptably high risk that the Government, with its vastly superior resources, might wear down the defendant so that ‘even though innocent he may be found guilty’”) (citation omitted). This principle comports with the requirements of due process and the right to a trial by jury.⁷

Because specific intent to defraud is an essential element both of aiding and abetting securities fraud and of conspiracy (Op. at 8, 13-14 & n.7), the interrogatory answers preclude retrial or conviction for these crimes. Under the doctrine of collateral estoppel, “when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot be litigated between the same parties in any future lawsuit.” *Dowling v. United States*, 493 U.S. 342, 347 (1990) (quoting *Ashe v. Swenson*, 397 U.S. 436, 443 (1970)). In *Ashe*, the defendant was accused of being one of several masked men who robbed six men playing poker in the basement of a home. 397 U.S. at 437. After the defendant was acquitted of robbing one of the men, the Supreme Court reversed his subsequent conviction for robbing another of the men on double jeopardy grounds, because the first jury had already determined that there was insufficient evidence to prove that the defendant was one of the masked men. *Id.* at 445-46. As the Court later observed of *Ashe* in *Dowling*, “[a] second prosecution was impermissible because, to have convicted the defendant in the second trial, the second jury had to have reached a directly contrary conclusion.” 493 U.S. at 348.

⁷ “The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged,” and “[t]he Sixth Amendment guarantees the accused a trial by jury Taken together, these rights indisputably entitle a criminal defendant to a jury determination that he is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.” *United States v. Brunshstein*, 344 F.3d 91, 99 (2d Cir. 2003) (internal citations omitted); *see also Dretke v. Haley*, 541 U.S. 386, 395 (2004) (“[D]ue process requires proof of each element of a criminal offense beyond a reasonable doubt.”); *United States v. Gaudin*, 515 U.S. 506, 510 (1995) (observing that these rights “require criminal convictions to rest upon a jury determination that a defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt”).

Here, analogously, the jury has determined that Mr. Lucarelli acted without specific intent to defraud either the Bank or depositors. A second jury could not convict him of the securities fraud and conspiracy counts without reaching a contrary conclusion on this central element of the crimes. As the Court recognized, the special interrogatories “became the vehicle to reflect the jury’s finding that the Government’s proof on the element of intent fell short.” (Op. at 12.) The interrogatory answers therefore preclude a retrial on this issue. *See Dowling*, 493 U.S. at 347; *Ashe*, 397 U.S. at 443. The Court properly determined that this unique circumstance requires a judgment of acquittal.

CONCLUSION

For the foregoing reasons, defendant John M. Lucarelli respectfully submits that the government's motion for reconsideration should be denied.

Dated: New York, New York
April 16, 2007

DAVIS POLK & WARDWELL

By: /s/ Robert B. Fiske, Jr.
Robert B. Fiske, Jr. (ct10797)
Douglas K. Yatter (phv01318)

450 Lexington Avenue
New York, New York 10017
Telephone: (212) 450-4000
Facsimile: (212) 450-3800
Email: robert.fiske@dpw.com
douglas.yatter@dpw.com

DOMINIC F. AMOROSA (ct17873)
95 Worth Street
New York, New York 10013
Telephone: (212) 406-7000
Facsimile: (212) 233-7805
Email: lawoffices@dfamorosa.com

JACOBS, GRUDBERG, BELT,
DOW & KATZ, P.C.
David T. Grudberg (ct01186)
350 Orange Street
New Haven, Connecticut 06511
Telephone: (203) 772-3100
Facsimile: (203) 772-1691
Email: dgrudberg@jacobslaw.com

Attorneys for Defendant John M. Lucarelli

CERTIFICATE OF SERVICE

I hereby certify that on April 16, 2007, a copy of the foregoing Memorandum of Defendant John M. Lucarelli in Opposition to Government's Motion for Reconsideration was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

/s/ Robert B. Fiske, Jr.

Robert B. Fiske, Jr. (ct10797)
Davis Polk & Wardwell
450 Lexington Avenue
New York, New York 10017
Telephone: (212) 450-4000
Facsimile: (212) 450-3800
Email: robert.fiske@dpw.com