United States of America v. Matthew Connolly, Gavin Black
In the Second Circuit Court of Appeals
On April 14, 2021
4:06pm - 5:13pm EST

This memorandum summarizes the oral argument proceeding held on April 14, 2021 in *U.S. v. Connolly,* and is not, nor is it intended to be, a verbatim transcript. It reflects thoughts and impressions of counsel, and is accordingly subject to the protections of the attorney work product doctrine and attorney-client privilege.

1. Argument for Black

Opening Statement:

Seth Levine: The two issues here are falsity and due process. There is a failure of proof on the issue of falsity. There is no evidence that LIBOR rate submissions were outside the reasonable range at which Deutsche Bank could borrow. Nor is there any evidence that they believed such a rate was submitted, thus none of the submissions were false. In key part, the definition requires only a submission of a numerical estimate, as a rate at which the bank could borrow, and the BBA did not require the use of any particular methodology to arrive to an estimate.

As the evidence shows, and as seen in *Allen*, a LIBOR submitter must select a single rate from a range of reasonable rates. There is no one right answer, but a range of right answers to choose from. The structure of the definition of the rule provides two reasons. First is the concept of a reasonable market size. The BBA did not define the loan and how large of a loan the estimate was supposed to consider. The loan can be changed on a regular basis and the submitter must consider this. Second, as recognized in *Allen*, estimates are imprecise. They have to be made before eleven o'clock and must be submitted on fifteen different loan sizes. There are a variety of methods. Combined with the loan size latitude, there is wide range of reasonable borrower rates to submit.

The BBA provides no methodology or instruction on how to select between reasonable estimates. They just said submit one rate. The Government's cooperator, Mr. King, testified that he always submitted a reasonable rate. There is no evidence suggesting that Deutsche Bank submitted any rate outside a reasonable range. Therefore, there is no evidence that anyone submitted a rate that contained a false statement or opinion.

The Chicago Mercantile Exchange ("CME") made a submission (JA.4711) to the BBA confirming their understanding of falsity as part of a process to reconsider the LIBOR process. The submission stated that "a contributor panel who can borrow in reasonable market size, at any one of a wide range of offered rates, commits no falsehood if she bases her response on daily LIBOR survey upon the lowest of these or the highest or any other arbitrary selection from among them. The CME makes clear, any submission within the range is truthful, it does not matter what the motivation is." The Government tried to sidestep and replace "arbitrary" with "random." This shows that the Government's case cannot be sustained.

[Initial 3 minutes expire]

Let's assume on any given day that there is a reasonable range between 6 and 7 and the submitter selected 6.6 and the selection is totally random. To the Government, that number is truthful. But a submitter arbitrarily chose 6.6, the same 6.6, based on a trading position, the same 6.6 is now false according to the Government. Respectfully, this is nonsense. 6.6 is either truthful or it is not. It is either believed to be in the range or it is not. The motivation for the selection does not impact truthfulness. This is the very point that another Government cooperator, Mr. Curtler, agreed with on cross and it makes the point clear. Mr. Curtler agreed that "the fact that somebody has a trading position does not mean what they are saying about the trade is not true. (JA.3457, p. 19)."

Intent and falsity are different elements. The Government asks to conflate them, which is not the law. Moreover, it is clear that the Government invented the rule that a reasonable rate submission transformed from truthful to false if informed by trading position. This is wrong. The BBA never says this. BBA is a trade association in England. Evidence shows that this is inconsistent with how people behave. Mr. Curtler and Mr. King were derivatives traders while they were submitters. The market knows this. Goldman Sachs, an alleged victim, noted that derivatives traders make LIBOR submissions. The BBA did not change its rules on derivative traders until years after the events of this case. The rule itself reflects the need for a range because you cannot run it any other way, and you need to pick within a reasonable range. This is not just confirmed by the language but also the largest market in LIBOR, the CME. When the CME submitted a letter, BBA thanked parties for their comments and suggested they would keep definitions unchanged, accepting that this is a correct interpretation. There is no rule. All you have is the ability of someone to choose a rate that the bank can borrow at, and nothing else can happen.

One final point on due process. In addition to not establishing falsity, and creating a thought crime because you just need to have bad thoughts when you are submitting the reasonable rate, the CME letter shows that our interpretation at the very minimum is very reasonable, if not correct. Therefore, under the clear notice provision, the Government's interpretation is not unambiguously in its favor. Due process bars the Government from criminalizing conduct on standards and rules invented after the fact to prosecute a UK citizen like Mr. Black. The Government cannot retroactively change truth to falsity. Thank you very much.

Questions:

J. Cabranes: Judge Kearse, any questions for Mr. Levine?

J. Kearse: No questions, thank you.

J. Cabranes: Judge Pooler, any questions for Mr. Levine?

J. Pooler: Isn't it true, counsel, that no matter what, that the numbers given for fixing is in reasonable range? Isn't it true that if it went towards the trader's interest, that the counterparties lost money, including the FHLB?

Seth Levine: The answer isn't clear. No one traded on these positions alone. They were all

hedged in a million ways, so whether one lost or gained doesn't tell us anything about their position. There's a complicated question as to whether there was any loss here. The Court is correct that money could be gained or lost, but everyone was aware of the LIBOR processes. It is inappropriate to change the rules and say conduct that was not prohibited now is.

J. Pooler: Isn't it true that you are arguing that because no one said it was illegal that we could do it?

Seth Levine: No, what the rules required was that a good faith estimate be submitted. Once you satisfy the requirement of a reasonable rate, you've satisfied the rule. One can have a debate about whether LIBOR has conflicts. But what you cannot do now is invent a new rule after the fact.

J. Pooler: Isn't the new rule not to cheat?

Seth Levine: It is not cheating, your honor. According to the CME and the rule, it is truthful as long as it's within a reasonable range. Now if you submit a rate which you do not believe is in the reasonable range for a bad purpose, then yes, that would be a problem. That would be a potential violation. But in this case we don't have that. The evidence is undisputed that they never put in a rate outside the reasonable range. Sixteen rates were put in for every loan size, and the BBA throws in the garbage the top four and bottom four and averages the remaining eight. These are the rules as they were set up. I recognize, your honor, that there's an instinct that says this isn't very good, but this system was set up a long time ago. You can't prosecute a couple of LIBOR traders because the system is weak. To the extent to which there is concern that this is not a good system or this isn't ethical, those are all good conversations to have, but not in a criminal courthouse for something that doesn't violate the rule when the parties that wrote the rule knew everything about this and specifically rejected a change when the CME pointed out what falsity meant under this rule. They could have rejected this definition (i.e. here's how you select between rates). That all happened, but only several years after the facts of this case concluded. We do not defend criticized parts of LIBOR. The Government does not like the rules as written. But, there is not a shred of evidence that my client ever expressed a view that did not reflect his good faith view of the market. The testimony suggests he had thoughtful views. They all had trading positions but the Government never produced evidence that submissions were not within reasonable range.

J. Cabranes: We're talking about the definition of fraud under the Federal Statutes, and my question is whether we ought not to consider community expectations and norms of fair play when we consider what counts as fraud. That was part of what Judge Pooler was aiming at. I'm asking the same question. Why shouldn't we consider community expectations and norms of fair play?

Seth Levine: Your Honor, I think that's a question of intent. If someone knew they were doing something that's wrong, that should certainly be taken into consideration. It was considered here but there was no evidence of it. This is the heart of the problem. The Government wants to substitute the moral intuition that this is "wrong," and it wants to use that to remove the bedrock principle that there has to be a false statement. Here, the only statement is a numerical number, without qualification or comment. You certainly can take into account what the standards are to

lead someone to know but you can't say the same number is both true and false about the market. If the Government can prove that numbers were submitted outside the reasonable range, that's different, but here we have no false statements. You have in their view bad intent, we also dispute that – there's no evidence that my client did something outside of a good faith belief. You can't take the fraud, your honor, out of fraud. If you take away the need to prove actual or believed falsity, then it's just a thought crime. Hey, I expected a good faith view of the market, I was right about the market, but yes, I have a tradeoff. Yes, you can consider it, but you can't replace actual falsity, because then there's not a false statement.

J. Cabranes: In the beginning of your argument you made a glancing statement to Judge McMahon's views regarding the character of these prosecutions. Could you elaborate on what you were referring to?

Seth Levine: I was referring to the fact that at sentencing, the District Court talked about the fact that these men were scapegoats. Looking at what's happened, that my client has had to come to this country to defend himself for something for which there's no rule, and he has violated no rule, there are profound questions here. There are other issues here about profound decisions, the outsourcing of information, and wrongful conduct by the prosecution in this case that isn't being raised.

J. Cabranes: What's the theory of scapegoating here? Perhaps you could take one minute to describe the course of these LIBOR prosecutions. They're being handled by main justice, is that right?

Seth Levine: Yes, your honor, there were only three cases in the U.S. that were prosecuted (*Allen*, *SocGen* – resolved, and this), but you have numerous banks prosecuted for this conduct, none of them are senior folks. The evidence shows that everything done here was open and notorious. Not only open, but it was the policy of the Bank. The Bank required derivative traders to sit together so they could talk. There was a worldwide phone call for traders to talk about this. Judge McMahon referenced this in sentencing. So the idea that these guys defrauded BBA, who was in the middle of this, I think Judge McMahon properly noted was very troubling to her. The record in *Allen* shows that these prosecutions were selecting a few people for retroactively created crimes.

2. Argument for Connolly

<u>Opening Statement</u>:

Ken Breen: Thank you, your honors, I represent Matt Connolly. Just to be clear, Matt Connolly was not a LIBOR derivatives trader at Deutsche Bank, nor a LIBOR submitter. He only nominally supervised a trading desk in New York for Deutsche Bank. Picking up on the comments by District Court at sentencing, the Court found that Matt Connolly was not a manager nor a supervisor of the alleged LIBOR scheme, that the LIBOR was run out of London, not New York, that Matt Connolly had very little to do with LIBOR as part of his job. That he was the person who "had the least to do with LIBOR or manipulation of LIBOR" at all of Deutsche Bank. And she found that Matt Connolly and Gavin Black were both low on the totem pole. The Government cooperated down, using cooperators including submitters, the managing

directors, to go after Matt Connolly – a mid-level manager of a desk in New York, and Gavin Black, a midlevel employee, in London, while a lot of other people were not charged.
The Government did not prove fraudulent intent. All the evidence showed that Matt Connolly acted in good faith, like he thought he should, and was supposed to. He followed the Deutsche Bank policies and procedures, believing there was permissible leeway within a reasonable range, as Mr. Levine described.
He on three occasions made conditional requests, in a manner that BBA rules permitted, and never asked for anything outside the reasonable range. At its core, the case against Matt Connolly rests on merely three email exchanges and a lying cooperating witness. Three times, Matt Connolly made requests, all within the BBA rules, all explicitly conditioned to stay within the rules: The first, "if, you see the market higher." Second, "we would prefer it higher," third, "if possible, lower." These emails sat openly on the Deutsche Bank email system. Three emails that exonerate him, they don't implicate him, because they show that he acted in good faith.
Now a lying cooperating witness, Tim Parietti. The only cooperating witness in the New York Office, was the key witness against Matt Connolly, who, as the District Court found, only nominally supervised him. He got paid more, he was a derivatives trader, but nominally, he was supervised. That's why Matt Connolly got charged, but Parietti was deemed not credible by the judge and jury.
[Three minutes up, Ken Breen received permission to continue from Judge Cabranes]
The Jury acquitted on the counts on which they needed to believe Tim Parietti exclusively, Counts 8 and 10. The District Court found that he was guilty of at least quibbling and possibly outright lying. She noted on her reading of the verdict that the jury did not believe Parietti. Even looking at what Parietti said, he only talked about his own thoughts, that he thought the conduct was "wrong / not fair." He never shared that view with Matt Connolly or Gavin Black or anyone else. Fraudulent intent should not be imputed for personal views of right and wrong that were not shared. And the same goes for the views of Curtler and King, whom Matt Connolly had no relationship with.
The Government did not prove fraudulent intent and did not prove that Matt Connolly did not act in good faith.
Questions:

J. Cabranes: Judge Kearse, any questions for Mr. Breen?

J. Kearse: No questions, thank you.

J. Cabranes: Judge Pooler, any questions for Mr. Breen?

J. Pooler: I just have one. Isn't it true that the jury is the judge of whether the witnesses were lying or not and isn't it further true that many of these cooperating witnesses said that they knew that what they were doing was wrong?
Ken Breen: Well, your honor, the first thing, the jury decided not to convict. They acquitted on the counts where Parietti was the witness as to Matt Connolly. So the jury did speak, that's why you can trust and rely on the fact that he was not credible, because they isolated the counts that we could look at and that the District Court was focused on when she made that comment, and on there the jury decided.

Second, the views of the cooperating witnesses all testified about feeling, about not being fair, or

views that they didn't talk to anybody about. They didn't share that view. Of the people who did share that view, first was Curtler, who he hardly knew. Parietti, he was the only person in New York who knew Matt Connolly, and he was the one who testified about his own views of right or wrong, but he acknowledged he'd never spoken about those views with Matt Connolly, and Matt Connolly never spoke about his views on it to Parietti. So, I agree with the premise your honor, but I think that that falls in favor of there not being a case that was sufficient as to Matt Connolly. I hope that answers your question.

J. Pooler: Yes it does, thank you, I have no further questions.

J. Cabranes: Thank you, all right, Mr. Breen, you've reserved a couple of minutes after we hear from Ms. Rao. Let's hear from Ms. Rao, for the Government.

Ken Breen: Your Honor, there was one other issue I really wanted to address, if I could just have two minutes?

J. Cabranes: Sure.

Ken Breen: The case against Connolly was time barred. There was no financial institution that was directly affected under FIRREA. A ten year statute of limitations does not apply. Five years apply. All these charges are time barred against Matt Connolly, they didn't prove there was newer or increased risk of loss as to Deutsche Bank's counterparties. They were all hedged, they didn't prove how much, they didn't prove any loss that was experienced, or realistic prosecutable loss, or how the risk of loss increased. The Counterparties couldn't answer that, they didn't have the questions, all they said was they weren't perfectly hedged. That's not proof that there was any loss. And if there was loss, it wouldn't have been a significant loss, or a risk of loss that was more than de minimis because that's how hedged trades work. And with Deutsche Bank, it didn't affect Deutsche Bank because there were no fees or expenses connected to the conduct. Only three witnesses testified about being interviewed by lawyers, but there was no bank employee to talk to about an origin of any investigation, or the scope, or how much it cost, or even whether the attorneys who conducted the interviews were employed by Deutsche Bank at all.

J. Cabranes: Correct, correct.

Ken Breen: Thank you, your honor. Appreciate it.

3. Argument for the United States

Opening Statement:

Sangita Rao: May it please the court, Sangita Rao on behalf of the United States, if I am permitted rebuttal on the cross appeal I respectfully ask to reserve one minute. Counsel made several colorful comments and accusations of the trial team, and while those accusations are not accurate and do not provide the full picture, the record below speaks for itself. The District Court systematically and thoroughly rejected their claims based on those accusations and given that they are not in issues today, the Government is not going to respond further.

On sufficiency, the LIBOR manipulation scheme was the classic scheme to defraud. And arguing to the contrary, defendants turn a deferential standard of review on its head by looking at the evidence in isolation and without drawing all reasonable inferences in favor of the jury's verdict, as it must.

As did the District Court. The District Court relied on Parietti's testimony in denying the acquittal motion that relied on all the evidence in that thorough opinion, and that is what this Court must do as well. Under the proper standard, this is what the jury could find. LIBOR submitters, King and Curtler, had the expertise to come up with an honest estimate of the Bank's borrowing cost per the LIBOR instructions. This process mostly relied on a pricer, but they also used their expertise and other data to sometimes adjust the number from the pricer to come up with their honest estimate. But rather than submitting that honest estimate of Deutsche Bank's borrowing cost, submitters sometimes submitted biased rates in response to requests from defendants and a small group of traders within Deutsche Bank to move the submissions up or down to benefit their trading positions. The small amount to avoid detection.

Now to Black, King testifies, "Gavin Black occasionally asked me to manipulate the rates, or to put in a submission that was higher or lower than I would have done to benefit his trading positions" (JA.1825). As to Matt Connolly, he said, "Matthew Connolly on occasion made requests for me to change our LIBOR rates and to benefit the trader's positions" (JA.1829).

Now in the Government's brief (pp. 16-20) we describe the specific requests from both defendants. And there is one from Mr. Connolly on November 28, 2005 that is particularly illustrative. Connolly asked for a higher one month LIBOR because New York was on the receiving end of a fifteen billion dollar notional amount. In response, Curler emails Connolly, "looking like 29 in 1mth libor – we went in 295 for u" (JA.4729). And the submission that day was in fact 4.295 percent, rather than 4.29. That transaction is a direct example of materiality. Resulting in a higher submission for that day moved the final LIBOR submission upwards, costing their counterparties thousands of dollars based on that notional amount. And we describe this in full in Government's brief (pp. 55-56). This was fraudulent.

Although the defendants make a lot of arguments that the BBA's instructions were vague or allowed this, or that they didn't understand whether it was allowed, the jury rejected all those arguments. And defendants, in fact, received a very defense-friendly jury instruction. The jury was instructed that the Government has the burden to negate any reasonable interpretation of the instructions that would make Deutsche Bank's submission responsive. That is what the jury had to find before returning the guilty verdict. This Court should trust the jury.

I would like to address the reasonable range argument unless the Court would like to ask questions instead.

Questions:

J. Cabranes: Judge Kearse, any questions at this time?

J. Kearse: We said in *Allen* that LIBOR submissions are necessarily imprecise, even when there

was decent market information, such that at any given time there existed a range of reasonable LIBOR submissions. Is it the Government's view that this is not so?

Sangita Rao: Um, your honor, it's true in this sense. There is flexibility inherent in an estimate and therefore different people can arrive at different estimates. That does not mean that the jury believes that the BBA, the defendants, or the market place believed it admissible for the conspirators to arrive at an honest estimate and then skew it to benefit trading positions. Just as long as they keep it small to avoid being detected. And there is good evidence to support this. The jury was entitled to rely on and draw inferences from the expert testimony. Dr. Youle, the Government expert, testified at 1672, I'm going to leave out some words, but everything I say is a quote. "In the course of my research and in every financial concept, I've never heard of that idea before that there was a range of true borrowing costs that banks could choose from" (JA.1762). Conspirators, likewise rejected the idea that they could arrive at their honest estimates and then move their submissions within a reasonable range. At (JA.3672-73), Curtler denies that in setting LIBOR that it can move within a wide range of reasonable rates, rather he says that the submitters had to come up with the range and that he had never even heard of the concept that it was permissible to move the LIBOR submissions within a reasonable range to accommodate trading positions until after the investigations began (JA.3671). And Mr. Levine, I believe, refers to testimony that we all submitted rates based on a reasonable range, well yeah, he said that kept his LIBOR rates within this reasonable range to avoid BBA scrutiny. It was part of the fraud. To keep the adjustments small so that they could not be detected. And keep the fraud going and keep the money out of the counterparties' pockets.

The defendants rely on the CME letter, but that is misplaced. They argued their interpretation of that letter to the jury and the jury rejected it. The letter doesn't say that a panel bank can move its LIBOR submissions to benefit its trading positions. The jury was left to believe that if this was permissible, then market participants would say that explicitly. The jury reasonably believed that the CME is acknowledging, that the point of the letter relied on by the defendants, was that there is flexibility inherent in an estimate. It is possible for people to honestly arrive at different numbers. But the really important part of that statement about that letter, is that it actually notes the problem about biased submissions to the daily LIBOR. It makes clear that when there is a "legitimate difference of opinion," (JA.4711) that a jury could reasonably interpret that CME letter as inculpatory and certainly was not able to find it exculpatory. And I can explain a bit more about why the evidence is so clear that the market participants knew that the BBA did not advise biased LIBOR submissions to benefit trading positions.

J. Cabranes: Ms. Rao, maybe it would be helpful if you could turn your attention to the Government's cross-appeal.

Sangita Rao: Of course, your honor. The District Court plainly erred in imposing on defendant Black a home confinement sentence without determining that it was both feasible and appropriate. After expressing doubt on both. The District Court, here, imposed that sentence without determining three things. One the feasibility of administering home confinement in a foreign country. Two the appropriateness of allowing Black to use his wealth to hire a private contractor, an option that might exacerbate inequities based on socioeconomic data. Third, the foreign policy implications of a U.S. court order confining a British citizen to a home location on British soil and forced to do surveillance.

The District Court expressed doubt that its sentence could be implemented. It recognized, both, that implementing such a sentence through contractors might be inappropriate and that monitoring from a Probation Office might not be feasible to enforce, thus leaving it to the Probation Office to figure out.

J. Cabranes: Could you give us a quick description of the sentences imposed on each of these defendants?

Sangita Rao: Yes, your honor. Defendant, Black, was sentenced to nine months home confinement and a $300,000 fine.

J. Cabranes: And that would be home confinement in Britain?

Sangita Rao: Yes, that was home confinement in Britain. While defendant Connolly was sentenced to six months home confinement in his home in New Jersey, along with a $100,000 fine. They both had supervised release terms. And, I'm sorry. It's been two or three years, and I can't find it in my notes. I believe it's in our brief.

J. Cabranes: What your real problem is, with the sentence imposed on Black, with respect to supervised release abroad, right?

Sangita Rao: Yes, your honor. The District Court said that this was a serious and not a victimless crime. And it believed that foreign home confinement was a substantial punishment. This was before the pandemic, and maybe some of us have different views about how bad that sentence is, but the District Court viewed it as substantial. It is possible that a significant part of defendant Black's sentence might not be able to be effectuated. And for that reason, there needs to be a remand.

If there isn't a remand, then it could very well be that defendant Black's sentence becomes less onerous than defendant Connolly's sentence. Even though the District Court thought that Black deserved a more onerous sentence. She specifically linked the two sentences, she tethered them together. That is why both sentences should be remanded to the District Court to just decide, based on a full record, what it believed the appropriate sentence is.

J. Cabranes: Thank you, any questions for Ms. Rao?

J. Kearse: Which of the three parts of Black's sentence did the Government object to in the District Court?

Sangita Rao: We did not object at the District Court level, and that is why we are here on plain-error review for the foreign home confinement facet. We did not agree with the sentence; we asked for a prison sentence and a larger fine. But we did not object after it was imposed.

J. Kearse: What about the use of wealth to fund the home confinement? Did the Government ask whether the defendant was going to fund that?

Sangita Rao: Yes, your honor, we did.

J. Kearse: You didn't object to the fact that he may be funding it.

Sangita Rao: We did not. So, I think that our feeling at that point was that if there was going to be a requirement of the 24 hour, 7 days a week-type monitoring then certainly the defendant should pay for it. We did not mean to be saying affirmatively that it is necessarily appropriate. Given the inequities of it. But we didn't make that objection. That is why we are here now on plain error review. What we want is to make that the sentence from the District Court wants to impose is effectuated.

J. Kearse: Well, it sounds as if it is something that the Government considered and simply decided not to object to. Rather than something that the Government overlooked and neglected to object to.

Sangita Rao: Your honor, we had every notice and opportunity to object to the foreign home confinement sentence. We agree. What happened is that the Probation Office did not recommend foreign home confinement sentence initially. The District Court did ask the parties to address any sort of sentence that defendant Black could serve abroad, and the trial team just did not think about foreign home confinement. But defendant Black, in his sentencing submission, did talk about foreign home confinement. But it really was just not in the Government's belief of the realm of possibilities that it was going to happen. The Government just did not think about it.

J. Cabranes: Let me ask you Ms. Rao, to follow up on Judge Kearse's question. Foreign home confinement, what was the history, what would the record show about the emergence of this idea of foreign home confinement?

Sangita Rao: The first time it was mentioned in the record was with defendant Black's sentencing submission, and he did thoroughly discuss it. The submissions were filed simultaneously. So the Government did not have another opportunity to answer the submission in writing at that time. But we were on notice and had the opportunity to respond. We could have asked to respond in writing or said something at the sentencing hearing, but we did not.

J. Cabranes: And the Probation Office?

Sangita Rao: The Probation Office, your honor, Officer Kim, who was highly respected by the District Court judge, was unfortunately not asked at the sentencing hearing. So, the sentence lacked in the record said something to the effect of we discussed with the Probation Office and we will be guided by the District Court's decision. We did not want to put anything to the court in the brief that was not part of the record. We would not be taking this appeal if we did not have a good faith basis to believe that there is a strong possibility that this sentence cannot be effectuated under current mechanisms. We have no grounds to believe that Probation believes that the sentence can be effectuated.

J. Cabranes: And we don't know of anyone, or does anyone on this call have experience with foreign home confinement in other cases?

Sangita Rao: I looked into it as much as I could, your honor, and I checked with other portions of the Department of Justice. And we are unaware. I am unaware of any defendants serving foreign home confinement in a foreign country. It is true that supervised release is sometimes served in a foreign country, and in this case, Judge Rakoff had allowed that, but that is not the same as foreign home confinement. It is qualitatively different because restricting someone physically to a certain space. And under the Guidelines, it must be enforced through appropriate monitoring. And there is not a record that there is a way to effectuate that.

J. Cabranes: And what about supervised release? Do you think that supervised release can be effectuated?

Sangita Rao: I can say that courts have ordered it. And the Government has not objected to it. We submit that foreign home confinement is a different "beast."

J. Cabranes: So foreign home confinement is the only part of the opinion that you have issue with?

Sangita Rao: Correct.

J. Cabranes: Great. Thank you very much.

J. Pooler: I have a question. Counsel, do you accept the argument that the jury just didn't believe Mr. Parietti and that is why they acquitted the defendants of several charges.

Sangita Rao: Absolutely not, your honor.

J. Pooler: Tell me, why not?

Sangita Rao: It is really the standard of review, your honor. That's not what we do. When we look at what the evidence showed, we look at all inferences in favor of the verdict, it could very well be that the jury simply was being kind at that point. They acquitted on three counts. Two of them were Parietti's emails alone. So they might have just felt that Connolly was not as responsible for that. The third count was a continuation of a conversation that they convicted on. It could be that, that was enough. It certainly helped that they rely on Parietti's testimony to make requests to the New York desk. So, we have no reason to think that the jury didn't believe Parietti's testimony. The District Court, no matter what it said at sentencing, the denial of the motion for acquittal relied on Parietti's testimony. And credited it. As it should. As any court must, because all inferences must be taken in the jury's favor.

4. Rebuttal for Black

J. Cabranes: Mr. Levine, if you could just give us the benefit of your rebuttal.

Seth Levine: I'd like to make a few points and I'll get to sentencing. First, the Government offered you no answer on falsity. They have not provided you any explanation at all about how you judge falsity under the rule. It is very clear that they have no experience other than you look to intent and they cannot explain the fact that the rule doesn't say that. There is no rule they've

cited. They have no source of interpretation other than the fact that they don't like the conduct. Frankly, your honor, it's even shocking to hear the Government continue to rely on Dr. Youle. Judge McMahon precluded Youle from testifying about what anybody thought about LIBOR or the LIBOR rules because he knows nothing about them. Youle did not understand reasonable market size. He had done some academic research that he can calculate numbers. The judge found that she didn't care what he thought about LIBOR. He has no knowledge of it. In fact, he said he couldn't even find the rules online so he had to look at them. He provides no support for the Government.

On the sentencing, your honors, first of all, not only did we raise the issue of foreign home confinement in our sentencing submission, the District Court repeatedly asks the Government to address any possible sentencing in the United Kingdom. The Government sent a letter and an email, in addition to their sentencing submission, where they took the strategic choice to not address foreign home confinement and they just repeatedly asked for incarceration. It is a pure strategic choice. Further, Judge McMahon did not express any confusion whatsoever. She was immersed in the record. What she said was, as is true with supervision in the United States, that the Probation Department would have to sort out precisely how they do that. Under the rules, home confinement is supervised in numerous ways and it doesn't only have to be electronic monitoring. But we took it upon ourselves, because we don't think electronic monitoring is even necessary, to provide all of the possibilities of doing that. And Judge McMahon said, "Yeah, we'll sort it out if there's an issue." She is supervising Mr. Black. Judge McMahon will make sure that that sentence is supervised. Of course, the court should reverse and vacate the sentence, so we should not even be talking about this, but assuming that's not the case. Further, pretrial services, excuse me, the Probation Department recommended Mr. Black's release in the United Kingdom. It is also, your honors, really a little much. The cooperators in this case, like Mr. Curtler, is on supervised release in the United Kingdom right now. They regularly sentence people. Mr. Black has been out on bail since this case began. He has had no issues. He's lived at home in the United Kingdom. There is no basis in this record whatsoever to have a concern and after the pandemic that we've all lived through where we are now arguing cases remotely by phone in this court, something that was unheard of, the notion that a man who is totally compliant and law abiding, and frankly innocent in my view, cannot be supervised is merely a question that the Probation Department will sort out as it does with every single one of its supervisees and there is nothing in this record besides idle speculation and the Government's sour grapes that suggest that we should revisit this. They had not one but multiple opportunities, they chose not to address it. There is no plain error here. I part ways with the District Court on the merits here but on the sentencing Judge McMahon immersed herself in the rules and gave an extremely detailed reason why she issued the sentence. And the guidelines provide no prohibition against this whatsoever and, in fact, the only unfairness is the unfairness that if Mr. Black who is a citizen of the U.K., who should have never been in the United States, cannot get the same kind of sentence he could if he was living in the U.S. And I think it's very important that they have not met any of the standards of plain error. There's no substantial rights and I think –

J. Cabranes: Mr. Levine, did you say that, did I hear you say that the U.S. Probation Office had expressly suggested home confinement in Britain?

Seth Levine: I said that I believed they expressed that they could supervise release in Britain and

that it would be fine. There was no objection from the Probation Office. This was in our papers and, frankly, given the technology as we pointed out I don't think this is really even a big deal. But and I am sure Judge McMahon, if this case is not reversed, who has full supervision over Mr. Black and he is totally compliant, will be able to evaluate if probation has any issues. But what the Government doesn't get to do, respectfully your honor, is they didn't just not respond or have a chance, they repeatedly submitted letters asking to impose sentences of incarceration. They didn't get what they want and as Justice Kearse pointed out, after the sentence was issued, if they have any concerns when they raised their issue about cost, they could have raised them then. This is a pure waiver. But even on plain error, there is no possibility that they can satisfy that this seriously affected the fairness and integrity of public perception of the judicial proceeding.

J. Cabranes: Thank you, Mr. Levine.

5. Rebuttal for Connolly

Ken Breen: Thank you, your honor, just quickly, the quote that we cited from the communication with Matt Connolly was, again, a conditional request. There was no evidence that that request led to anything that was outside the range of what was reasonable, outside the BBA. And the simple consideration of that request going into the falsity issue, consideration of financial position in the Second Circuit does not make a true statement false. *US v. Skelly*, cited in our brief – what Skelly says is that, it's in a case involving a broker who did expose a financial incentive, the court held, "otherwise truthful statements…about the merits of a particular investment are not transformed into misleading 'half-truths' simply by the [speaker's] failure to reveal that he is receiving added compensation for promoting a particular investment"). Also *Altayyar v. Etsy*, which talks about the fact that in statement cases like this, they're only actionable if it's proven that there's both objective falsity and that it was disbelieved by the defendant at the time. Here, there was a range, so there was no objective falsity. *Countrywide Home Loans*, also cited in our brief, says bad intent, even false intent, fraudulent intent, does not prove a knowing statement. You could go on, southern district cases, but I won't go on because I'm limited in time here. So Judge Pooler's question about acquitted conduct, the answer we got, I think, tells it all. The jury was being kind? No. Acquitted charges, acquitted conduct, can be used. The jury's decision on the merits of a case, can be used and considered in appellate review. This precedent is *US v. Facen*, 812 F.3d 28 (2d Cir. 2016). There, it was a slightly different situation, it was the defense that wanted this ruled not credible, but it was considered in judicial review. The same logic appears here. The government doesn't dispute that authority.

Last, dealing with sentencing. I heard that Judge McMahon, the District Court, specifically tethered the sentences. That's completely inconsistent with the record. The judge, the District Court, made a very specific list of findings about the minimal responsibility of Matt Connolly, relative to others who've been charged, relative to the cooperators who testified against him, and relative to people within the institution of Deutsche Bank, who were people who likely orchestrated the entire scheme for the benefit of the bank. So that was what it was tied to, it wasn't tethered to Gavin Black's sentence or procedural error. Certainly it wasn't, it wasn't an error. So it should be left the same and it should not be disturbed.

J. Cabranes: Thank you very much Mr. Breen.

J. Pooler: I have one more question Judge Cabranes, for Mr. Levine but maybe Mr. Breen – could you, one of you, give me citation to record where Judge McMahon said that these defendants were being scapegoated? Is that in the record that we have in front of us?
Ken Breen: It is in the record your honor, GSA 698, Lines 10-11.
J. Pooler: Was that involved in sentencing or was it just an offhand remark.
Ken Breen: Oh no, it was involved in sentencing. What the Judge said was that Connolly and Black were scapegoats for the sins of the entire industry. And she also noted that the Government cooperated down.
J. Pooler: Thank you, and thank you Judge Cabranes.
J. Cabranes: Thank you all. We will reserve decision and I'll ask the clerk to close.