

## Ex-State Street Exec Promises Precedent-Setting Appeal

Share us on: By [Chris Villani](#)

Law360, Boston (October 17, 2018, 2:19 PM EDT) -- After being sentenced to 18 months in prison, a former [State Street Corp.](#) executive who was convicted of stealing millions from international clients asked a Massachusetts federal judge Wednesday for his freedom pending an appeal that he promises will include multiple issues that have not yet been addressed by the First Circuit.

A jury [convicted](#) Ross McLellan in June on five counts of wire fraud, securities fraud and conspiracy to commit those offenses, and on Tuesday, U.S. District Judge Leo T. Sorokin handed down the relatively [lenient sentence](#). But McLellan said he should stay out of jail until the appellate court can address whether the wire fraud statute on which he was convicted applies outside the U.S. and whether Judge Sorokin was correct in failing to trigger a foreign treaty to help McLellan obtain documents and depositions he claims could have aided his defense.

“This issue will present the First Circuit with an important question of first impression in this circuit: whether the wire fraud statute applies extraterritorially and, if it does, whether this court erred in declining to submit the issue to the jury,” McLellan’s brief states, adding that the question of whether the law applies outside the U.S. has already split the circuits.

“Under the circumstances of this case, in which the alleged scheme to defraud predominantly involved actions taken by, and statements made by, a London-based salesman to obtain the transition management business of European and Middle Eastern clients for a European bank (State Street Bank Europe Ltd.) through proposals submitted and negotiations conducted entirely extraterritorially,” McLellan wrote in his brief. “The failure to instruct the jury about the substantive domestic limitations of the wire fraud statute is likely to be found to have been reversible error if the First Circuit agrees that the wire fraud statute does not apply extraterritorially.”

Also at issue is Judge Sorokin’s pretrial order, in which he decided not to compel the [U.S. Department of Justice](#) to invoke mutual legal assistance treaties, or MLATs, with Ireland, the Netherlands and the U.K. to help McLellan obtain evidence.

“The issue at hand, whether the government may be constitutionally required to exercise its MLAT rights to obtain material defense evidence, is a novel one in this circuit,” the motion states.

Even if Judge Sorokin was right to say he did not have the authority to force the government to use the MLATs, he could have suppressed the government’s evidence relating to the foreign clients in question, McLellan argued.

“The appeal will raise important issues regarding the scope of the security law statutes,” McLellan’s attorney, Martin G. Weinberg, told Law360 on Wednesday, “and the extent to which an alleged scheme to defraud that is centered in London can properly be prosecuted under the wire fraud statutes in the U.S.”

Judge Sorokin on Tuesday ordered McLellan to report to federal prison on Jan. 2. The 18-month sentence is less than the [five years prosecutors requested](#) and well below the federal sentencing guidelines of 14 to 17 years because the direct victims were institutional investors, rather than individuals. During the spring trial, the government alleged McLellan orchestrated a scheme to tack on basis points, pennies per share, to massive transactions without telling clients.

McLellan allegedly worked with two lower-level directors, Edward Pennings and Richard

Boomgaardt, to swindle the Kuwait Investment Authority, [Royal Mail Pension Plan](#), National Treasury Management Agency's pension, Sainsbury's, Eir Group PLC and SPH, the Dutch pension fund for doctors.

In addition to the territorial issues, McLellan plans to argue to the First Circuit that Judge Sorokin's instructions were overly broad and that the securities fraud conviction cannot stand because the alleged fraud only impacted whether the client might have chosen State Street to handle the transaction, not which securities were bought or sold. In a footnote in Wednesday's brief, McLellan suggested those types of actions should be treated as "breaches of contract," rather than fraud.

"Other courts have also stressed the critical distinction between fraud pertaining to the securities themselves, which may constitute securities laws violations, and fraud aimed at obtaining the clients' business, which does not," McLellan wrote in his brief.

State Street admitted to the overcharges last year and took responsibility for the actions prosecutors attribute to McLellan, Pennings and Boomgaardt. The bank agreed to [pay \\$64.6 million](#) in criminal and civil fines to end federal investigations. The [U.S. Securities and Exchange Commission](#) later added a [\\$3 million penalty](#) for omitting information about how State Street operated a government securities trading platform.

Boomgaardt was sentenced to one year of probation and prosecutors say they will seek prison time for Pennings when he is sentenced next month.

A spokeswoman for the [U.S. Attorney's Office](#) for the District of Massachusetts declined to comment Wednesday afternoon. Prosecutors have indicated they plan to oppose McLellan's bid to remain free pending appeal, and Judge Sorokin set a two-week deadline for filing that opposition.

The government is represented by Stephen E. Frank of the U.S. Attorney's Office for the District of Massachusetts and William Johnston of the DOJ's Fraud Section.

McLellan is represented by Martin G. Weinberg.

The case is U.S. v. McLellan et al., case number 1:16-cr-10094, in the U.S. District Court for the District of Massachusetts.