

ERIC JASO - LEGAL RESEARCH  
- REDIRECT/404(b) -  
CODEPENDENTS

ATTORNEY WORK PRODUCT

Redirect - 404(b) - codefendants

**FILED**

U.S. DISTRICT COURT  
EASTERN DISTRICT ARKANSAS

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF ARKANSAS  
WESTERN DIVISION

APR 11 1996

JAMES W McCORMACK, CLERK

By: \_\_\_\_\_ DEP. CLERK

UNITED STATES OF AMERICA )

v. )

JAMES B. MCDUGAL, )  
JIM GUY TUCKER, and )  
SUSAN H. MCDUGAL )

No. LR-CR-95-173

MEMORANDUM OF THE UNITED STATES IN SUPPORT OF  
ADMISSIBILITY OF TESTIMONY REGARDING PRIOR CONSPIRACY

The United States of America, by Kenneth W. Starr, Independent Counsel, respectfully submits this Memorandum in support of the admissibility of testimony regarding a previous conspiracy between Defendant Jim Guy Tucker and David L. Hale. Counsel for Tucker did not object to co-defendant Susan H. McDougal's ("McDougal") counsel's line of questioning on cross examination which elicited Hale's testimony regarding this conspiracy. Further, the questions McDougal's counsel asked Hale and the answers elicited to those questions implied that Hale's testimony regarding the charged conspiracy defied common sense and was therefore incredible. The United States has the right to clarify the facts for the jury and attempt to dispel the doubts McDougal's counsel attempted to cast on Hale's testimony. Having stood by silently and benefited from a co-defendant's cross examination, Tucker may not now object to the government's effort to set the record straight on the basis of unfair "prejudice."

Hale should be permitted to describe the prior conspiracy to the jury.

ARGUMENT

A. Counsel for Susan H. McDougal attempted to impeach Hale by implying it was unreasonable for Hale to Jim Guy Tucker knew they were agreeing to commit crimes

On cross examination, counsel for Defendant Susan H. McDougal asked Hale the following series of questions:

Q: So then there at this meeting -- you weren't social friends with Jim McDougal, were you?

A: No.

\* \* \*

Q: And you knew that Jim Guy Tucker was a former prosecuting attorney, didn't you?

A: And congressman and Attorney General.

Q: I was going to get to that.

A: Yes, sir.

Q: Thank you. And you knew that you had been a chief prosecuting attorney?

A: Yes, sir, that's correct.

Q: Wouldn't you agree it's kind of risky for someone to just out of the clear blue throw up a criminal scheme to somebody that's a chief prosecuting attorney? That's a kind of risky proposition for somebody, isn't it, that had never dealt with them on a criminal scheme before, just out of the clear blue?

A: Well, we had --

Q: Yes or no? Wouldn't that be a risky proposition?

A: It wasn't the first time.

Q: Oh, okay. Prior criminal schemes between you and Jim McDougal?

A: Not Jim McDougal, no, sir.

(Tr. 4180-81) (emphasis added).

Plainly, this line of questioning presupposed that Hale and Tucker had "never dealt with [each other] on a criminal scheme before," and sought to give the jury the impression that a reasonable person would not propose a criminal scheme to persons he had never conspired with before, particularly where two of the conspirators had law enforcement backgrounds. Needless to say, counsel did not pursue Hale's truthful reply, that "[i]t wasn't the first time." Having been led to believe that the charged conspiracy was proposed "out of the blue," the jury is entitled to hear Hale's testimony to the contrary.

Hale would testify that in 1983, Tucker asked Hale to lend money from Capital Management Services ("CMS") to Tucker's former congressional aide, John Niven, who was in financial straits, but who owned a vacation lake home. The lake home had been financed by Savers Federal Savings & Loan, which was demanding payment on the mortgage from Niven. Tucker told Hale he would arrange for James B. McDougal to have Madison Guaranty Savings & Loan ("MGSL") assume the mortgage on the lake home and pay off Savers, which was accomplished. Tucker then formed two shell corporations, Greenfield Properties, Inc., which Tucker put in

his own name, and Niven Real Estate, which was in Niven's name. CMS then loaned Niven Real Estate \$80,000 for the stated purpose of "working capital;" however, the proceeds were misapplied to pay off Niven's personal debts, among other things. Niven conveyed the lake home to Greenfield Properties, and Tucker conveyed the stock of Greenfield Properties to Hale, who used the lake home to his own benefit. Hale's testimony to this effect would demonstrate that Tucker had conspired with Hale on at least one previous occasion to obtain fraudulent loans from CMS to their own benefit and to the benefit of their associates.

The United States is entitled "to correct false inferences left by defense counsel after cross-examination" of a witness. United States v. Womochil, 778 F.2d 1311, 1316 (8th Cir. 1985). This ability is all the more important where the "false inference" is that a defendant did no previous wrong. Id. Tucker objects to permitting the United States to rebut the false impression caused by his co-defendant's questioning. However, the time to object was when counsel for McDougal elicited the purportedly unfairly prejudicial information. The Seventh Circuit has addressed this issue squarely:

Although it was Sullivan's co-defendant Cain who elicited the response from Montgomery which 'opened the door' for the government, Sullivan acquiesced in Cain's cross-examination and thus waived his right to prohibit the government's exploration of the matter on redirect examination. Sullivan could not sit back, let the "door opening" evidence come in unchallenged during cross-examination, and then assert that the government's redirect examination on that issue provided testimony which was unfairly prejudicial under Rule 404(b).

United States v. Sullivan, 911 F.2d 2, 7-8 (7th Cir. 1990).

Having benefited from his co-defendant's cross-examination and the false impression it left with the jury that the charged conspiracy came "out of the blue," Tucker may not object to the government's effort to set the record straight. And in any event, Tucker may not object under Rule 404(b). Defendants received notice of the government's intention to introduce evidence regarding the Niven deal at paragraph 12 of its 404(b) letter dated February 28, 1996.

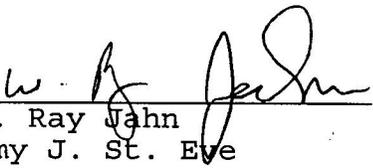
#### CONCLUSION

For the foregoing reasons, the United States should be permitted to conduct redirect examination of David L. Hale regarding a previous conspiracy involving Defendant Jim Guy Tucker.

April 11, 1996  
Little Rock, Arkansas

Respectfully submitted,

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By: 

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CERTIFICATE OF SERVICE

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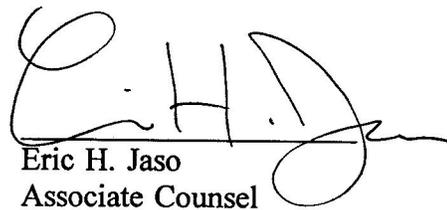
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Associate Counsel

Hale - Cross (By Mr. McDaniel)

1 social friends with Jim McDougal either, had you?

2 A. No, sir.

3 Q. You just were a casual acquaintance, weren't you?

4 A. More than a casual acquaintance, but I hadn't --

5 Q. And you knew that Jim Guy Tucker was a former prosecuting  
6 attorney, didn't you?

7 A. And congressman and Attorney General.

8 Q. I was going to get to that.

9 A. Yes, sir.

10 Q. Thank you. And you knew that you had been a chief  
11 prosecuting attorney?

12 A. Yes, sir, that's correct.

13 Q. Wouldn't you agree it's kind of risky for someone to just  
14 out of the clear blue throw up a criminal scheme to somebody  
15 that's a chief prosecuting attorney? That's kind of a risky  
16 proposition for somebody, isn't it, that had never dealt with  
17 them on a criminal scheme before, just out of the clear blue?

18 A. Well, we had --

19 Q. Yes or no? Wouldn't that be a risky proposition?

20 A. It wasn't the first time.

21 Q. Oh, okay. Prior criminal schemes between you and Jim  
22 McDougal?

23 A. Not Jim McDougal, no, sir.

24 Q. All right. Now, this criminal scheme then involving two  
25 prosecuting attorneys and somebody that was very politically

Christa R. Newburg, CSR, RPR, CCR  
United States Court Reporter

## Hale - Cross (By Mr. McDaniel)

1 active was hatched; correct?

2 A. Who are you talking about?

3 Q. I'm talking about you and your contention that Jim  
4 McDougal and Jim Guy Tucker hatched a criminal conspiracy.

5 A. That's correct.

6 Q. Okay. And it was hatched to make fraudulent transactions  
7 involving Madison Guaranty; correct?

8 A. That's correct.

9 Q. Knowing that auditors were on the way; correct?

10 A. No, I didn't know auditors were on the way.

11 Q. You didn't know auditors were on the way?

12 A. No, sir.

13 Q. So at the time this conspiracy was hatched, you didn't  
14 know the auditors were coming?

15 A. No, sir.

16 Q. Certainly didn't know they were coming in January, did  
17 you?

18 A. No, sir.

19 Q. Okay. But you did know that Madison Guaranty was an  
20 institution that had auditors? You knew that, didn't you?

21 A. Yes, sir.

22 Q. And you knew that your SBA had auditors?  
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23 A. Yes, sir.

24 Q. And so it's your contention then you were setting up a

25 fraudulent scheme so that it could be looked at not by one set

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United States Court Reporter

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<key1> UNITED STATES OF AMERICA, PLAINTIFF VS. JAMES B. MCDOUGAL, GOV. JIM GU  
TUCKER, SUSAN MCDOUGAL, DEFENDANTS, CASE NUMBER LR-CR-95-173 </key1>

<key2> </key2>

<key3> </key3>

1 establish foundation for admission, Your Honor.

2 THE COURT: Mr. Sutton?

3 MR. SUTTON: I don't have any trouble with the  
4 document. I would like for it to be left for  
5 identification.

6 THE COURT: Okay. What is the government's  
7 position.

8 MR. BENNETT: We have no objection to it  
9 remaining identified as Tucker 218.

10 THE COURT: All right.

11 CROSS EXAMINATION

12 BY MR. SUTTON:

13 Q. Now, you were saying, however, that you were aware of  
14 that, that a hundred percent of the stock was acquired?

15 A. Yes, sir.

16 Q. And were you aware or were you knowledgeable as to  
17 who the directors of the company were at the time that was  
18 done?

19 A. No, sir.

20 Q. Was Ken Koone one of them?

21                   MR. BENNETT:  Objection.  The witness has just  
22 testified he doesn't know who the directors were and  
23 reading through a laundry list off of this document that  
24 is not in evidence is not going to permit the truthful  
25 testimony of this witness who has already said he doesn't

1 know.

2 MR. SUTTON: I can cross examine the witness by  
3 leading questions.

4 THE COURT: Yes. Overruled, go ahead.

5 BY MR. SUTTON:

6 Q. Did you know whether Ken Koone was one of them?

7 A. I knew Mr. Koone, I knew he was associated with  
8 Mr. Hale and with the insurance company. I did not know  
9 his position with the insurance company.

10 Q. Is he a political figure?

11 A. He has been at times, yes, sir.

12 Q. In the Republican party?

13 A. Yes, sir.

14 Q. Running for office now?

15 MR. BENNETT: Your Honor, I don't quite see the  
16 relevance of this. I know Mr. Sutton thinks it's  
17 important to mention the name of every Republican who has  
18 come into play in any way in this case, but I don't see  
19 how it's relevant that Mr. Koone is now running for  
20 political office as a Republican. This is a document that

21 purports to be dated back in 1989, and I simply fail to  
22 see the relevance.

23 MR. SUTTON: It's not important to me, I'll  
24 withdraw it.

25 THE COURT: Beg your pardon?

1 MR. SUTTON: It's not important to me, I'll  
2 withdraw.

3 MR. BENNETT: Would you instruct the jury to  
4 disregard?

5 THE COURT: Yes. Disregard the question and any  
6 comments pertaining to Mr. Koone's running for a  
7 position.

8 CROSS EXAMINATION

9 BY MR. SUTTON:

10 Q. Judge Watt, I want to call your attention to the time  
11 that you testified before the grand jury 24 days after  
12 expressing the opinion to Mr. Denton or making a statement  
13 to Mr. Denton that these people wanted you to lie on  
14 Tucker.

15 MR. SUTTON: And may I approach the witness?

16 THE COURT: Yes.

17 BY MR. SUTTON:

18 Q. I want to show you a transcript from those  
19 proceedings.

20 MR. BENNETT: Which proceeding, Counsel?

21                   MR. SUTTON: Grand jury. And the copy that you  
22 gave me was not numbered, but I have numbered it, and the  
23 way I have numbered them, I'm looking at page 2, to begin  
24 with.

25 BY MR. SUTTON:

DeMuzio - Cross (By Collins)

1 be the corporate attorney?

2 A. Yes, which would place him in an agent relationship, which  
3 was the other part of that definition that you did not --

4 Q. That would pertain to Bob Leslie.

5 A. An agent. Anyone who served, I would think, providing  
6 legal work to the licensee.

7 Q. Would you say any lawyer would be an agent if he took one  
8 case for CMS?

9 A. At that particular time. At that particular time.

10 Q. The word "agent" -- even though they specifically describe  
11 a lawyer as being a person on retainer in the capacity of  
12 attorney at law, that wouldn't control it? It would be  
13 something else?

14 A. You just asked for my understanding of it and that's my --

15 Q. You notice that a lawyer, Bob Leslie, did the regulatory  
16 writing?

17 A. Yes.

18 Q. And you know, do you not, that Bob Leslie was the  
19 principal of Liberty Mortgage that had a phony loan from CMS.  
20 Do you know that?

21 A. No.

22 Q. Do you know that Mr. Leslie was the head of the Republica  
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23 party in our state?

24 MS. ST. EVE: Objection, Your Honor. There is  
25 absolutely no foundation for this in the record.

Carolyn S. Fant  
United States Court Reporter

DeMuzio - Cross (By Collins)

1 MR. COLLINS: I believe it's the fact, Judge.

2 THE COURT: What is the Government's --

3 MR. JAHN: Your Honor, if he makes an assertion it's  
4 fact doesn't make it a fact. I can sit here and assert the  
5 moon is made out of blue cheese and that doesn't make it a  
6 fact.

7 THE COURT: I will sustain the objection.

8 BY MR. COLLINS:

9 Q. Ma'am, do you have any familiarity with any loans relat  
10 to Bob Leslie?

11 A. No.

12 Q. Do you have any familiarity with any gifts made to Bob  
13 Leslie of \$20,000 or so?

14 A. No, I don't.

15 Q. And do you know whether or not Bob Leslie was a person  
16 regularly serving this SBIC on retainer or in the capacity of  
17 attorney at law?

18 A. I don't know if he was on retainer. I know he wrote lega  
19 opinions for the licensee, yes.

20 Q. In fact he wrote at least, you can think of, six of them,  
21 didn't he?

22 A. Several. Several. Quite a few.

23 Q. And each one was written to get money for the licensee?

24 A. Yes.

25 Q. And when we say "the licensee" what we mean is Capital

Carolyn S. Fant  
United States Court Reporter

## DeMuzio - Cross (By Collins)

1 Management Systems?

2 A. Capital Management Services, Inc., yes.

3 Q. I'm going to drop this on the floor. Not out of disrespect  
4 but I have no place to put it.

5 Now, you have told us, have you not, that you were pretty  
6 well fooled by David Hale?

7 A. Yes.

8 Q. Now, he was actually in your office at times talking to  
9 you, wasn't he?

10 A. Yes.

11 Q. And he came to see with you a Mr. Matthews once, did he  
12 not?

13 A. Yes.

14 Q. And they really snowed you pretty good, didn't they?

15 A. Well, they just discussed plans for future changes at  
16 CMS. Their ideas for plans.

17 Q. Did they get \$900,000 out of you?

18 A. Not as a result of that meeting, no.

19 Q. But they did get \$900,000 from you, didn't they?

20 MS. ST. EVE: Objection, Your Honor. We're talking  
21 about 1989 time period.

22 MR. COLLINS: That's all right. I'm talking about  
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23 her relationship with David Hale. She's testified to that.

24 MS. ST. EVE: Can we have a side bar, Your Honor?

25 THE COURT: Yes.

Carolyn S. Fant  
United States Court Reporter

## Opening/Tucker

1 and over to the fact that Jim Guy Tucker was a lawyer and that  
2 he was a lawyer for David Hale, he was a lawyer for Jim  
3 McDougal and these companies from time to time. Do you  
4 remember that? Jim Guy Tucker is a lawyer, but he was not  
5 functioning as a lawyer for these companies in these  
6 transactions that we're talking about in this case.

7 I want to call to your attention that in the Dean Paul  
8 deal that they put up on the board and said was a fraudulent  
9 deal and they got \$500,000.00 of money into Capital Management  
10 as a result of that deal, there was a lawyer who had to do an  
11 opinion to send in to the SBA to say that that was legal and  
12 all of that was okay and that they ought to get new funds from  
13 the SBA to do that. That was this lawyer right here, Bob  
14 Leslie (indicating). Sat in the next office to David Hale. H  
15 did the opinion that said all of that was legal. In this case  
16 with this kind of thing going on, he's going to do it again.  
17 He's going to say that this is okay, and that they are entitle  
18 to get money based on \$275,000.00 of new money that's coming i  
19 to Capital Management from that woman's account. He is going  
20 to endorse that 275,000-dollar check as president of Liberty  
21 Mortgage. He's going to get it, instead of using it for  
22 Liberty Mortgage, he's going to endorse it and give it right  
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23 back to David Hale. Now, if you don't know that there's  
24 something wrong with that, you know, you don't know very much  
25 as a lawyer. And then he's going to do an opinion to say that

Eugenie M. Power  
United States Court Reporter

## Opening/Tucker

1 that's all okay.

2 Now, my client, Jim Guy Tucker, has been charged,  
3 criminally, on some of the things that you've heard about. An  
4 to my knowledge, this man has not been charged with anything.  
5 He was former Chairman of the Republican Party in Arkansas.

6 I'm going to now go back with you and talk to these  
7 specific things that have been brought against my client and  
8 the Governor of the State of Arkansas, Jim Guy Tucker, and to  
9 tell you that this started, as I said, in the summer of 1993,  
10 because when David Hale was caught in the things that I have  
11 just shown you, there was no way out except for someone who wa  
12 very, very clever. The broker in the matter was a lawyer and  
13 broker, but he was not that clever, and he pled guilty for his  
14 part and went to jail. The lawyer in the part pled guilty and  
15 he's kind of rethinking his now and thinking about withdrawing  
16 his plea of guilty. But David Hale, after he had consulted  
17 three lawyers, caught in this mess, began to leak to the press  
18 and leak to the U.S. Attorney's Office that he might give  
19 evidence against some big people in order to save his skin. "  
20 might deliver to you the President of the United States, and I  
21 might deliver to you the Governor of the State of Arkansas."  
22 And as Mr. Heuer has stated, the U.S. Attorney, who is no  
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23 dummy, in effect, said, "Buzz off". But that story was kept  
24 going, kept pushing until an independent prosecutor, Office of  
25 Independent Counsel, was created, and they heard something the

Eugenie M. Power  
United States Court Reporter

## Opening/Tucker

1 liked. It had a ring of things that they liked. And the gist  
2 of this is going to go back and take you back where I want to  
3 take you now, into the period of the '80s.

4 In the period of the '80s there had been certain laws  
5 passed. Almost everybody agrees now, those laws were a  
6 mistake. But the purpose of them at the time was good, if the  
7 had worked well, been all right, but the purpose was to loosen  
8 up the savings and loans and put some money in circulation, an  
9 that was the era of the '80s. And you know something about  
10 that. Those were the biggest financial disasters that this  
11 country has seen in many a time. Ladies and gentlemen, Madiso  
12 Savings & Loan, Madison Guaranty Savings & Loan was little  
13 bitty, I mean it was really infinitesimally small. Right here  
14 in Arkansas we had FirstSouth, which was big; we had First  
15 Federal, which was big, old; we had Savers, which was big and  
16 old, and on and on and on, one savings and loan institution  
17 after another went under as a result of these policies. Even  
18 in the case of Madison Guaranty Savings & Loan, which as Mr.  
19 Heuer has pointed out, went under three years after Jim  
20 McDougal, I think most experts would tell you that it had to d  
21 with vicious sways back and forth on rather complex things  
22 involved in the cost of money, interest rates, and that sort o  
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23 thing. But, anyway, that was the '80s. I want to talk about  
24 Jim Guy Tucker in the '80s.  
25 In 1982, after he had been defeated by Bill Clinton in hi

Eugenie M. Power  
United States Court Reporter

Citation	Rank(R)	Page(P)	Database	Mode
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40 Fed. R. Evid. Serv. 499				
<b>(Cite as: 16 F.3d 767)</b>				

UNITED STATES Of America, Plaintiff-Appellee,

v.

Russell PREVATTE and Robert A. Soy, Defendants-Appellants.

Nos. 92-3370, 92-3535.

United States Court of Appeals,  
Seventh Circuit.

Argued June 10, 1993.

Decided Feb. 15, 1994.

Defendants were convicted in the United States District Court for the Northern District of Indiana, Rudy Lozano, J., of maliciously destroying property by means of explosive, resulting in death, and conspiracy, and were sentenced to life imprisonment. Defendants appealed. The Court of Appeals, Ripple, Circuit Judge, held that: (1) other acts evidence respecting burglaries was admissible, and (2) district court committed plain error in sentencing defendants to life imprisonment without jury direction.

Remanded for resentencing.

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<b>(Cite as: 16 F.3d 767, *776)</b>				

c. motive

At trial, the district court determined that

the uncharged crimes in issue are probative in proving defendants' motive as well as their preparation and plan in committing a series of burglaries and/or robberies. The defendants' motive behind the uncharged crimes of burglary and robbery is financial gain which is the same motive for the conspiracy charged in the indictment.

Tr. IV at 503-04. The defendants treat this justification as ruse; they argue that "the stated motive, that of 'financial gain' is next to useless in determining whether it was more likely that these Defendants committed the burglaries and the bombings." Appellant Soy's Br. at 15.

[5] In the context of Rule 404(b), we believe that district courts should approach a general claim of "financial gain" as a motive with great circumspection. In this case, however, we cannot say that the district court's determination can be characterized fairly as an abuse of discretion. In light of the early successes of this group, the district court was entitled to conclude that knowledge of the motive of financial gain would aid the jury in understanding the reasons for the formation and continuance of the bombing-burglary scheme at issue. In the summer of 1990, Prevatte, Williams, and Bergner burglarized M & G Metals in Chicago. Each gained approximately \$300 for one night's work. The following summer, Williams and Prevatte stole \$1000

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(Cite as: 16 F.3d 767, \*776)

from the Wolf Lake Park. After unsuccessfully trying to raid the safe at the Whiting License Branch, Prevatte, Soy, and Bergner successfully absconded with \$20,000 from Nick's Liquors in Hammond. On the record, the jury would be entitled to reason that the group, encouraged by the result of these earlier endeavors, became more audacious and attempted other burglaries. As the group expanded its horizons, it did not limit itself to the methods with which it began. The defendants tested the concept of cutting telephone wires at the Currency Exchange in Hammond and eventually branched out into bombings as diversionary tactics. We cannot say, therefore, that the motive of financial gain, as evidenced by these earlier acts, was without significance to the jury's assessment. In any event, these incidents were also admissible as evidence of modus operandi, scheme, and background. [FN8]

FN8. Three acts listed by defendants do not fit easily into the above categories. First, Jerry Williams testified to Prevatte's theft of a jet ski and their commission of two instances of insurance fraud. Although somewhat more attenuated than the burglaries listed above, these acts do establish the affiliation of the parties in the conspiracy and the reasons why the alleged conspiracy may have formed. In addition, we agree with the government that these acts are admissible because defendant Prevatte opened the door. Counsel for defendant Prevatte conceded that the specific

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(Cite as: 16 F.3d 767, \*776)

instances mentioned could be validly admitted outside the scope of 404(b) so long as one of the defendants opened the door. This occurred during defendant Prevatte's cross-examination of Williams. On cross, Williams was questioned regarding why he cooperated with the activities of Prevatte and Soy; specifically counsel inquired if they had something on Williams. The counsel for the government on redirect simply resumed this line of questioning to clarify a point already made by counsel for Prevatte.

\*777 [6][7] With respect to two acts of uncharged misconduct, we believe that the government failed to establish admissibility. The government introduced one of these acts during the testimony of Officer Thomas of the Hammond Police Department. Officer Thomas testified to pulling over Prevatte in the Lever Brothers Credit Union parking lot for having an expired registration. The relevance of this incident to the crimes at issue is tenuous at best. Nevertheless, we do not think that the defendants were in any way prejudiced by its introduction. In a transcript of over 2000 pages, this incident was described in less than six. In addition, counsel for the defendants brought out on cross that the police officer's concern for criminal activity was unfounded, that no burglary implements were found in the car, and that both defendants were very cooperative with the police. These added elements, in conjunction with the general limiting instruction given by the

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**INSTA-CITE**

CITATION: 16 F.3d 767

**Direct History**

- => 1 **U.S. v. Prevatte**, 16 F.3d 767, 40 Fed. R. Evid. Serv. 499  
(7th Cir.(Ind.), Feb 15, 1994) (NO. 92-3370, 92-3535)  
Appeal After Remand
- 2 **U.S. v. Prevatte**, 66 F.3d 840 (7th Cir.(Ind.), Sep 14, 1995)  
(NO. 94-3360, 94-3361)

**Related References**

- 3 **U.S. v. Bergner**, 800 F.Supp. 659 (N.D.Ind., Jun 10, 1992)  
(NO. HCR 92-042(4))
- 4 **U.S. v. Bergner**, 800 F.Supp. 666 (N.D.Ind., Jun 10, 1992)  
(NO. HCR 92-042(3))
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UNITED STATES of America, Plaintiff-Appellee,  
v.  
Ronald S. SULLIVAN, Defendant-Appellant.

No. 89-2233.

United States Court of Appeals,  
Seventh Circuit.

Argued Dec. 15, 1989.

Decided Aug. 28, 1990.

Defendant was convicted in the United States District Court for the Northern District of Indiana, Rudy Lozano, J., of racketeering, conspiring to engage in racketeering activity, four counts of bribery, and conspiring to defraud United States. He appealed. The Court of Appeals, Kanne, Circuit Judge, held that: (1) evidence that administrative assistant of defendant, who was administrator of city job-creating program under the Comprehensive Employment and Training Act (CETA), solicited bribe from contractor was admissible to show defendant's plan or intent to operate agency through pattern of bribery and corruption; (2) defendant, by failing to object to **cross-examination** of prosecution witness by **codefendant's** counsel which "opened the door" for testimony on **redirect** examination implying that defendant had accepted uncharged bribe, waived right to object to Government's follow-up questioning eliciting such evidence; and (3) evidence established that defendant had hidden ownership interest in corporation which allegedly received bribes, and thus supported convictions of four counts of bribery.

Affirmed.

[1] CRIMINAL LAW ⇔ 1153(1)  
110k1153(1)

On review of decision to admit evidence, Court of Appeals will rarely disturb district court's exercise of discretion and will reverse only for an abuse of discretion.

[2] CRIMINAL LAW ⇔ 371(1)  
110k371(1)

Evidence that administrative assistant of defendant, who was administrator of city job-creating program under CETA, solicited bribe from contractor was

admissible in racketeering and bribery prosecution to show defendant's plan or intent to operate agency through pattern of bribery and corruption. Comprehensive Employment and Training Act of 1973, § 2 et seq., as amended, 29 U.S.C.(1976 Ed.Supp.V) § 801 et seq.; Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

[3] CRIMINAL LAW ⇔ 369.2(1)  
110k369.2(1)

Evidence of uncharged crime may be admitted only if evidence is directed toward establishing matter in issue other than defendant's propensity to commit charged crime, evidence shows that other act is similar enough and close enough in time to be relevant to matter in issue, there is sufficient evidence to support finding by jury that defendant committed similar act, and probative value of evidence is not substantially outweighed by danger of unfair prejudice. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

[4] CRIMINAL LAW ⇔ 698(1)  
110k698(1)

Defendant, by failing to object to **cross-examination** of prosecution witness by **codefendant's** counsel which "opened the door" for testimony on **redirect** examination implying that defendant had accepted uncharged bribe, waived right to object to Government's follow-up questioning eliciting evidence implying such uncharged crime, in racketeering and bribery prosecution; district court had repeatedly warned defendant and finally ruled that pursuit of purported bribe of prosecution witness on cross-examination would open door for redirect examination by Government further exploring issue.

[5] CRIMINAL LAW ⇔ 1169.11  
110k1169.11

Any error in trial court's permitting prosecution witness to testify on redirect examination as to statement implying that defendant had accepted uncharged bribe was harmless, in racketeering and bribery prosecution; declarant testified on rebuttal that he did not have any conversation about bribes with prosecution witness and accused witness of soliciting bribes. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

[6] BRIBERY ⇔ 11

63k11

Evidence was sufficient to establish that defendant, who was administrator of city agency administering CETA program, hid his ownership interest in corporation to which contractors allegedly paid bribes, and thus was sufficient to support his convictions of four counts of bribery; testimony was presented that defendant had acknowledged that he was one-third owner of corporation's operation, and defendant was one of signatories on bank accounts of corporation. Comprehensive Employment and Training Act of 1973, § 2 et seq., as amended, 29 U.S.C.(1976 Ed.Supp.V) § 801 et seq.; 18 U.S.C.A. § 201(c).

[7] CONSPIRACY ⇔ 47(6)

91k47(6)

Conviction of defendant, who was administrator of city agency that administered CETA job training program, of conspiracy to defraud United States for allegedly forming corporation with two others and financing it through use of CETA funds was supported by sufficient evidence, despite defendant's contention that he did not know that companies bribing defendant's corporation were receiving CETA funds to which they were not entitled; evidence was presented of discussions regarding formation of defendant's corporation, contribution of funds to corporation by companies, and defendant's relationship with those who formed companies. 18 U.S.C.A. § 371; Comprehensive Employment and Training Act of 1973, § 2 et seq., as amended, 29 U.S.C.(1976 Ed.Supp.V) § 801 et seq.

[8] BRIBERY ⇔ 10

63k10

Testimony that witness saw defendant take shoe box containing \$31,500 in cash from defendant's office to open two bank accounts for his corporations was admissible, in bribery and racketeering prosecution, to establish that prosecution witness paid substantial bribes to defendant, both in person and through third party.

[8] RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ⇔ 121

319Hk121

Testimony that witness saw defendant take shoe box containing \$31,500 in cash from defendant's office to open two bank accounts for his corporations was admissible, in bribery and racketeering prosecution,

to establish that prosecution witness paid substantial bribes to defendant, both in person and through third party.

\*4 Andrew B. Baker, Jr., Asst. U.S. Atty., Office of the U.S. Atty., Hammond, Ind., for plaintiff-appellee.

Gary S. Germann and Clark W. Holesinger, Portage, Ind., for defendant-appellant.

Before CUDAHY, EASTERBROOK and KANNE, Circuit Judges.

KANNE, Circuit Judge.

An eleven-count indictment was returned against Ronald S. Sullivan and two others charging them with crimes relating to the operation of a municipal government agency which administered a job-training program. The seven counts against Sullivan charged him with racketeering, conspiring to engage in racketeering activity, four counts of bribery, and conspiring to defraud the United States. A jury convicted him on all counts. Sullivan appeals his convictions. We affirm.

## I. FACTUAL BACKGROUND

Sullivan was placed in charge of a program which had the worthy goal of providing training and employment to disadvantaged and unemployed individuals in Gary, Indiana. Unfortunately, Sullivan's personal goals were not as worthy. The Gary Manpower Administration ("GMA") was organized in 1974 as an agency of the City of Gary to administer the (now-repealed) federal Comprehensive Employment and Training Act ("CETA"). GMA disbursed CETA funds to contractors who provided job-training programs. Sullivan was the administrator of GMA from 1974 until 1983 when the agency began phasing out.

Several steps to ensure that CETA funds were properly disbursed to quality contractors were supposed to be employed by GMA. The solicitation of bids for contracts was to be well publicized. Contracts were to be awarded after bids were evaluated by several committees and individuals. The performance of contracts was to be monitored by an independent monitoring unit. However, Sullivan and others in GMA were able to subvert

these accountability procedures and control the disbursement of the CETA funds. The solicitation of bids was not publicized. The awarding of contracts was essentially at the sole discretion of Sullivan. The monitoring process was also undermined. For example, the head of the monitoring unit in the late 1970's, Shirley Montgomery, complained to Sullivan about contractors not complying with contract requirements. Sullivan took no action. Montgomery then made the mistake of complaining to Sullivan about the absenteeism of a GMA employee, Sheila Quarles. Soon thereafter, Sullivan transferred Montgomery and placed Quarles in charge of the monitoring unit. Not coincidentally, Quarles was Sullivan's girlfriend.

In 1979, Leonard Perkins and Carl Deloney formed a business partnership known as Plus, Ltd. After its formation, Plus was awarded a contract for a CETA training program. Before the first payment under the contract was made, Carl Deloney advised Perkins that there was a "cost of doing business in Gary." Carl Deloney told him that to do business in Gary money had to be paid to Sullivan. Perkins complied. He gave kickback money to Carl Deloney who then gave it to Sullivan.

Subsequently, more kickbacks were made to Sullivan in exchange for the awarding of contracts to Plus. Perkins \*5 began recording the payments, with certain codes, on checkbook stubs. In addition to having Carl Deloney deliver the kickbacks, Perkins delivered some payments to Sullivan personally. Perkins later learned that a Joe Cain also had to be paid. Cain was the director of operations of GMA and second in command to Sullivan. Perkins quit making the payments in 1981. After he stopped paying the kickbacks Perkins continued to submit bids but was not awarded any more contracts.

After his association with Perkins ended, Carl Deloney formed a company called VOTEC to carry out training contracts with GMA. When Carl died in 1982, his wife Bernice Deloney took over VOTEC. Just before he left GMA in September, 1981, Cain helped form and finance a company called DECAR.

In the fall of 1982, Sullivan and others began exploring the possibility of leasing the Visions

Lounge and Gazebo Restaurant in the Sheraton Hotel in downtown Gary. Sullivan, Cain, Deloney and others met on two occasions and a new corporation called DVR was formed to lease the operation of the lounge and restaurant. To satisfy state liquor license requirements, the ownership of the corporation was publicly represented to be 60% owned by Cain through DECAR and 40% by Deloney through VOTEC. However, there was evidence showing that the actual ownership of DVR was one-third each by Sullivan, Deloney and Cain.

VOTEC and DECAR were awarded large contracts and increases by Sullivan while GMA was being phased out in 1982. The claims for payment submitted by VOTEC showed that many of its trainees were placed at either VOTEC, DVR or the Gazebo Restaurant. Indeed, some of these people testified that they either had never worked for these entities or had not been placed in full-time jobs.

In August of 1982, Adlee Hodges, the manager of training programs for GMA, was told by Sullivan that her position was being phased out because of lack of funding. However, Sullivan told her that she could continue working for GMA by becoming a contractor. Although Hodges had no business experience, she formed a job-training company with the help of Fred McKinney, the fiscal officer of GMA. Soon thereafter she submitted a proposal to GMA. Hodges was awarded a contract for \$84,702.00 with the condition that she hire a friend of Sullivan. GMA provided furniture for Hodges's office and also assisted in moving the furniture. Hodges hired Sullivan's friend and her company was subsequently awarded more contracts. Later, Sullivan told Hodges that there was a way for contractors to say "thank you" for contracts. Soon thereafter, Hodges received a call from Sullivan's administrative assistant telling her to pay \$2,000.00 to DVR. Hodges delivered a check to GMA for that amount payable to DVR.

During the course of his tenure as head of GMA, Sullivan, accompanied by Fred McKinney, made a trip to Sullivan's bank. Consistent with his "entrepreneurial skills" and in the tradition of other public officials who receive payback for favors bestowed, Sullivan produced a shoebox containing \$31,500.00 in cash. Sullivan used these funds to open an account for two of his corporations.

## II. PROCEDURAL BACKGROUND

In 1989, a federal grand jury returned an eleven-count indictment against Sullivan, Cain and Deloney. Count One charged Sullivan and the co-defendants with conducting an enterprise through a pattern of racketeering activities in violation of 18 U.S.C. § 1962(c). The count alleged thirty-three acts of racketeering in violation of 18 U.S.C. § 201(b) and (c). Count Two charged Sullivan and the co-defendants with conspiring to conduct an enterprise through a pattern of racketeering in violation of 18 U.S.C. § 1962(d). Counts Three, Five, Seven and Nine charged Sullivan with being a public official and soliciting and accepting something of value for himself or another in return for being influenced in the performance of an official duty, in violation of 18 U.S.C. § 201(c). Count Eleven charged Sullivan and the co-defendants \*6 with conspiring to defraud the United States in violation of 18 U.S.C. § 371.

Sullivan entered a plea of not guilty. After a jury trial, Sullivan was found guilty on all counts. He was sentenced to three years of imprisonment on Counts One and Two, and to two years of imprisonment on the remaining counts, with all sentences to run consecutively. In addition, Sullivan was fined a total of \$55,000.00.

## III. DISCUSSION

Sullivan raises a variety of issues on appeal but the primary focus is on evidentiary rulings concerning the testimony of two witnesses, Adlee Hodges and Shirley Montgomery.

### A. Evidentiary Rulings

Two government witnesses, Hodges and Montgomery, were permitted to testify to certain conversations regarding Sullivan. Sullivan claims that the testimony of Hodges was admitted contrary to the requirements of Federal Rule of Evidence 404(b). Similarly, he claims that the testimony of Montgomery, although initially blocked under 404(b), was ultimately admitted in violation of that rule.

[1] On review of a decision to admit evidence, we will rarely disturb the district court's exercise of discretion and will reverse only for an abuse of

discretion. *United States v. Zapata*, 871 F.2d 616, 621 (7th Cir.1989); *United States v. Beasley*, 809 F.2d 1273 (7th Cir.1987); *United States v. Byrd*, 771 F.2d 215, 219 (7th Cir.1985).

### 1. Testimony of Adlee Hodges

[2][3] Sullivan claims that the testimony of Hodges concerning the solicitation of a bribe by a Sullivan aide should have been excluded under Rule 404(b). [FN1] Evidence of other crimes not charged in the indictment may be admitted under Rule 404(b) only if: (1) the evidence is directed toward establishing a matter in issue other than the defendant's propensity to commit the crime charged; (2) the evidence shows that the other act is similar enough and close enough in time to be relevant to the matter in issue; (3) there is sufficient evidence to support a finding by the jury that the defendant committed the similar act; and (4) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. *United States v. Monzon*, 869 F.2d 338, 344 (7th Cir.), cert. denied, --- U.S. ---, 109 S.Ct. 2087, 104 L.Ed.2d 650 (1989); *United States v. Manganelis*, 864 F.2d 528, 531-32 (7th Cir.1988); *Zapata*, 871 F.2d at 620. The rule excludes evidence of "other crimes" to show conformity with character, but permits the admission of such evidence for another purpose such as to show intent or plan.

FN1. Federal Rule of Evidence 404(b) reads: Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Adlee Hodges testified that Sullivan told her there were ways for contractors to say "thank you" for being awarded contracts. Soon thereafter, she received a call from Sullivan's administrative assistant--Lisa Chapa. Before allowing the substance of Hodges's conversation with Chapa to be introduced into evidence, the district court evaluated the proffered testimony under the four-part test and found it to be admissible. Hodges then testified that Chapa told her that she was to contribute \$2,000.00 to a closeout party for GMA

and to make the check payable to DVR. Hodges knew that Sullivan had an ownership interest in DVR, and she delivered the \$2,000.00 check to Chapa at GMA.

As the district court determined, the evidence was directed toward establishing the issue of Sullivan's plan or intent to operate GMA through a pattern of bribery and corruption. The evidence was similar to and virtually contemporaneous with the other acts of bribery solicitation by Sullivan. The evidence could support a jury finding that Sullivan committed the act and its probative value was not substantially \*7 outweighed by the danger of unfair prejudice. Thus, we hold that the district court did not abuse its discretion by admitting this evidence.

## 2. Testimony of Shirley Montgomery

[4] Late in 1981, the Private Industry Council was incorporated. It had independent authority to approve certain kinds of CETA contracts without going through GMA. Shirley Montgomery was the head of the Council.

During its case-in-chief, in the course of the direct examination of Montgomery, but out of the presence of the jury, the government made an offer of proof that she was offered a bribe by Avatus Stone, owner of a company that had contracts with GMA. The government proffered that Stone told Montgomery that he would pay her "enough money to retire" if she would get his contract approved by the Council. Montgomery further indicated in the offer of proof that when she refused, Stone told her "you are certainly stupider than Ron [Sullivan] and Fred McKinney." The court considered the admissibility of this evidence under the Rule 404(b) test. The court determined that the evidence was not sufficient to show Sullivan committed a similar act and it would be unfairly prejudicial to Sullivan to admit the testimony.

After the court initially ruled that the proffered testimony would be inadmissible, counsel for co-defendant Cain informed the court that on cross-examination he intended to elicit from Montgomery the fact that she testified to the grand jury that Stone offered her a bribe. Cain's counsel stated that this questioning would lay a foundation for him to impeach Montgomery by calling Stone as a witness to deny making the bribe. The court informed

counsel for the defendants that Cain's cross-examination might "open the door" on this matter and allow the government to pursue the bribe conversation in detail on redirect examination. Significantly, Sullivan raised no objection to the course outlined by co-defendant Cain.

The government then concluded Montgomery's testimony without any mention of the bribe conversation with Stone. The jury was excused for the day. The judge met with the attorneys and Cain's counsel reiterated his intention to ask Montgomery whether she told the grand jury that Stone attempted to bribe her. Again, no objection was raised by Sullivan. The next morning the judge again met with counsel outside the presence of the jury and Cain's counsel repeated his intention to pursue the matter for the purpose of impeachment. The court then ruled: [FN2]

FN2. This procedure utilized by the court for making an advanced ruling on the admissibility of evidence was in accordance with Fed.R.Evid. 103(c).

It is the court's position right now, unless I hear argument otherwise, gentlemen, that I have no choice but to allow [Cain's counsel] to go into it for the purpose [of impeachment]. Are there going to be any objections?

Notwithstanding the court's indication of its position regarding the admissibility of the Stone-Montgomery bribe conversation and call for any objections, Sullivan remained silent. On cross-examination, Cain's counsel, without objection from Sullivan, elicited from Montgomery her statement that Stone offered her a bribe. As expected, on redirect examination the government sought to bring out the rest of the conversation about the bribe.

(Redirect Examination by the government:)

Q What did he say?

A Told me if I would get a contract passed through my Board of Directors that he would give me enough money to retire; I wouldn't ever have to work again.

Q What did you tell him?

A I told him he--there was no way he could do that. You know, I did not--would not take myself and try to present to the board why we should do a contract with him with all of his contracts showed that he did not do what he was supposed

to do, having done contracts with Gary Manpower for a long time; that he did not--I \*8 could not show the council performance where people had gone through his training and had been placed, and I would not subject myself to what I knew I would get from my council.

Q So you said no deal, I won't take it?

A That's right.

Q What did he say to you?

A Told me how dumb and stupid I--

MR. GERMANN (Sullivan's Counsel):  
Objection.

MR. MILNER (Government Counsel): Excuse me, ma'am.

MR. GERMANN: Objection, Your Honor, two reasons. One, for the reasons that I had indicated earlier yesterday, and secondly, beyond the scope of cross examination of Mr. Jones (Cain's counsel).

THE COURT: With regards to what was mentioned earlier I gave counsel an opportunity to object earlier; they did not. That's overruled and it's overruled insofar as being outside the scope of cross examination. That was gone into.

MR. MILNER:

Q What did--what did Mr. Jones say to you when you told him you didn't want the bribe?

A Mr. Stone.

Q Mr. Stone, I'm sorry?

A Told me how stupid I was, how dumb and stupid I was, and he was certainly glad that Ron and Fred McKinney wasn't dumb as I was.

(Tr. Vol. 5, p. 1018-20.)

The issue presented is whether, by failing to interpose any objection to the cross-examination by Cain's counsel, which "opened the door" for the redirect examination testimony that implied that Stone had bribed Sullivan, Sullivan waived his right to object to the government's follow-up questioning. The court had repeatedly warned counsel for the defendants and finally ruled that the pursuit of Stone's purported bribe of Montgomery on cross-examination would open the door for redirect examination by the government on that issue. Once the subject of the bribe offer was before the jury, the court reasoned that it would be unfair to prohibit the government from exploring the matter further. It was clear to all trial participants, including Sullivan, exactly what additional testimony would be given by Montgomery on redirect examination.

Although it was Sullivan's co-defendant Cain who elicited the response from Montgomery which "opened the door" for the government, Sullivan acquiesced in Cain's cross-examination and thus waived his right to prohibit the government's exploration of the matter on redirect examination. Sullivan could not sit back, let the "door opening" evidence come in unchallenged during cross-examination, and then assert that the government's redirect examination on that issue provided testimony which was unfairly prejudicial under Rule 404(b). The response was not beyond the scope of the cross-examination. The district court did not abuse its discretion in overruling Sullivan's objection and allowing the government to pursue the full conversation between Montgomery and Stone on redirect examination.

[5] Even if this were not the case, any error in the admission of this brief statement would have been harmless. The only testimony the government elicited in this area dealing with Sullivan was that single answer to the question of Stone's response when Montgomery refused the bribe: "Mr. Stone ... told me how stupid I was, how dumb and stupid I was, and he was certainly glad that Ron and Fred McKinney wasn't dumb as I was." The adverse effect of Montgomery's testimony on Sullivan was slight given the single response which merely cast an inference of wrongdoing compared to the substantial amount of other evidence introduced against Sullivan. In addition, Sullivan was actually aided by Stone's rebuttal testimony which served to offset that of Montgomery. Stone denied having any conversation about bribes with her, denied paying any bribes with regard to GMA, and accused Montgomery of soliciting bribes.

## B. Sufficiency of the Evidence

### 1. Standard of Review

An appellant challenging the sufficiency of the evidence to support a jury verdict \*9 bears a "heavy burden" in his attempt to overturn the verdict. *United States v. Nesbitt*, 852 F.2d 1502, 1509 (7th Cir.1988), cert. denied, 488 U.S. 1015, 109 S.Ct. 808, 102 L.Ed.2d 798 (1989). We review all the evidence and all reasonable inferences drawn therefrom in the light most favorable to the government. *Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1942);

United States v. Vega, 860 F.2d 779, 793 (7th Cir.1988). We must uphold a conviction if, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979) (emphasis in original); United States v. Grier, 866 F.2d 908, 922 (7th Cir.1989).

## 2. The Bribery Counts

[6] Sullivan argues that the evidence was insufficient to support his convictions under 18 U.S.C. § 201(c) [FN3]--the four bribery counts. These counts related to payments by Cain and Deloney to DVR. Specifically, Sullivan challenges the sufficiency of the evidence on the element of soliciting or receiving something of value. The government introduced evidence to show Sullivan's ownership interest in DVR and his attempts to gain political favor with Gary city officials who wanted to prevent the closing of the downtown Sheraton Hotel. Sullivan received nothing of value, he argues, because he was not an employee of DVR and any political stature or influence which he gained is intangible and cannot be considered as "anything of value" under the statute.

FN3. As applicable to Sullivan, 18 U.S.C. § 201(c) reads: Whoever, being a public official or person selected to be a public official, directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself or for any other person or entity, in return for: (1) being influenced in his performance of any official act; or (2) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or (3) being induced to do or omit to do any act in violation of his official duty.

This argument must fail. We need not address the assertion that an intangible, such as the enhancement of political influence or stature, does not qualify as something of "value" under the statute. Regardless of the claim of intangible benefits, there was sufficient evidence for the jury to find that Sullivan had a very tangible hidden ownership interest in DVR. He received tangible value from the payments made to DVR. For instance, the manager

of the Visions Lounge testified that Sullivan acknowledged that he was a one-third owner of the operation. Later, Cain confirmed to the manager that the lounge was owned by Sullivan, Deloney and Cain. Deloney told a tax advisor that Sullivan, Cain and he were each one-third owners of DVR. In addition, Sullivan was one of the signatories on the bank accounts of DVR. The determination that Sullivan had an ownership interest in DVR was one for the jury and there was substantial evidence presented to support that proposition. Because the evidence was sufficient to support the other elements of the bribery counts as well, we affirm the convictions.

## 3. The Racketeering and Racketeering Conspiracy Counts

Sullivan was convicted in Count One of conducting an enterprise through a pattern of racketeering activity under 18 U.S.C. § 1962(c) and in Count Two of conspiring to conduct such an enterprise under 18 U.S.C. § 1962(d). He argues that his conviction on Count One should fail because that charge required, pursuant to the jury instruction given, that at least one act of bribery occur after June 22, 1983. This argument, however, is contingent on our finding insufficient evidence to support the four bribery convictions because they were the charged racketeering acts which occurred after June 22, 1983. Sullivan's challenge to Count Two is also contingent on the success of his challenge to the bribery convictions. Because we affirmed the bribery convictions, these arguments are unavailing and the evidence is sufficient to \*10 support the convictions on Counts One and Two.

## 4. The Conspiracy to Defraud the United States Count

[7] Count Eleven charged Sullivan, Cain and Deloney with conspiracy to defraud the United States in violation of 18 U.S.C. § 371. The count alleged Sullivan, Cain and Deloney, by agreement, formed DVR and financed it through the use of CETA funds. Sullivan challenges the sufficiency of the evidence to support the verdict because, he argues, the evidence did not show that he knew DECAR and VOTEC were receiving CETA funds to which they were not entitled. However, the evidence of Sullivan's control over the distribution of CETA funds, the dubious placement of trainees

by VOTEC and DECAR, the discussions regarding the formation of DVR, the contribution of funds to DVR by VOTEC and DECAR, and Sullivan's relationship with Cain and Deloney combined to provide substantial evidence from which the jury could infer his knowledge and participation in the conspiracy. The money which DECAR and VOTEC funnelled to DVR came from GMA as CETA funds. Thus, there was sufficient evidence to support the verdict.

#### C. Admission of Evidence of Cash in a Shoebox

[8] Sullivan argues that the district court erred by admitting testimony of McKinney that he saw Sullivan take a shoebox containing \$31,500 in cash from his office to open two bank accounts for his corporations. The district court admitted the evidence over Sullivan's objection that it was unduly prejudicial under Federal Rule of Evidence 403.

As we previously stated, we give much deference to a district court's determination to admit evidence and will reverse only for abuse of discretion. *Zapata*, 871 F.2d at 621; *United States v. Jackson*, 886 F.2d 838 (7th Cir.1989); *United States v. Allen*, 798 F.2d 985, 1001 (7th Cir.1986). Here, the district judge did not abuse his discretion in balancing the relevancy of the evidence with any danger of unfair prejudice. Much of the evidence against Sullivan was to establish that Perkins paid substantial bribes to Sullivan, both in person and through Carl Deloney. The evidence which disclosed a large amount of cash maintained in a shoebox was highly probative of the bribe payments, and served to corroborate the testimony of Perkins. Its probative value was not substantially outweighed by the danger of any prejudice to Sullivan.

#### IV. CONCLUSION

For the foregoing reasons, the convictions of Ronald Sullivan are

AFFIRMED.

END OF DOCUMENT

**INSTA-CITE**

CITATION: 911 F.2d 2

=> 1 **U.S. v. Sullivan**, 911 F.2d 2, 31 Fed. R. Evid. Serv. 106  
(7th Cir.(Ind.), Aug 28, 1990) (NO. 89-2233)

**Secondary Sources**

**Corpus Juris Secundum (C.J.S.) References**

23A C.J.S. Criminal Law Sec.1232 Note 7+ (Pocket Part)  
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UNITED STATES of America, Plaintiff-Appellee,  
v.  
Ramon Vasquez MORENO, Defendant-Appellant.

No. 80-1280.

United States Court of Appeals,  
Fifth Circuit.  
Unit A

June 30, 1981.

Defendant was convicted before the United States District Court for the Southern District of Texas at Brownsville, James DeAnda, J., of possession of marijuana with intent to distribute and conspiracy to possess marijuana with intent to distribute, and he appealed. The Court of Appeals, Jerre S. Williams, Circuit Judge, held that: (1) evidence on the possession count was sufficient to show that defendant had joint dominion or control over the marijuana, and (2) in light of other testimony given by government witness without objection connecting defendant's brother specifically and defendant's family in general with past marijuana transactions, and considering the statements and actions of the trial court during the Government's redirect examination of the aforesaid witness, the trial court did not abuse its discretion in admitting into evidence references during the witness' redirect examination to the past marijuana dealings of defendant's brothers.

Affirmed.

[1] CRIMINAL LAW ⇔ 1144.13(5)  
110k1144.13(5)

Standard of review in a criminal case when issue is the sufficiency of the evidence is whether jury could have reasonably found that the evidence was inconsistent with every reasonable hypothesis of innocence, and in applying that standard, the Court of Appeals must consider the evidence and all reasonable inferences therefrom in light most favorable to the government.

[1] CRIMINAL LAW ⇔ 1159.2(1)  
110k1159.2(1)

Standard of review in a criminal case when issue is the sufficiency of the evidence is whether jury could have reasonably found that the evidence was

inconsistent with every reasonable hypothesis of innocence, and in applying that standard, the Court of Appeals must consider the evidence and all reasonable inferences therefrom in light most favorable to the government.

[2] CRIMINAL LAW ⇔ 510  
110k510

Generally, a conviction may be based solely on the uncorroborated testimony of an accomplice if the testimony is not incredible or otherwise insubstantial on its face.

[3] DRUGS AND NARCOTICS ⇔ 65  
138k65

Possession of a controlled substance with intent to distribute it may be either actual or constructive. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(a)(1), 21 U.S.C.A. § 841(a)(1).

[4] DRUGS AND NARCOTICS ⇔ 67  
138k67

As with actual possession, constructive possession of contraband may be exclusive or joint and is susceptible of proof by circumstantial as well as direct evidence.

[4] DRUGS AND NARCOTICS ⇔ 123.2  
138k123.2

Formerly 138k123(2), 138k123

As with actual possession, constructive possession of contraband may be exclusive or joint and is susceptible of proof by circumstantial as well as direct evidence.

[5] DRUGS AND NARCOTICS ⇔ 65  
138k65

Constructive possession of contraband may be shown by "ownership, dominion or control over the contraband itself, or dominion or control over the premises or the vehicle in which the contraband was concealed."--Id.

[6] DRUGS AND NARCOTICS ⇔ 123.2  
138k123.2

Formerly 138k123(2), 138k123

On the evidence presented, jury could have reasonably concluded beyond a reasonable doubt that, instead of being a mere "messenger," defendant was an integral part of narcotics distribution operation and that he enjoyed a close and continuous

working relationship with those who may have had actual physical possession of the marijuana; this evidence was sufficient to show that defendant had joint dominion or control over the drug. Comprehensive Drug Abuse Prevention Control Act of 1970, §§ 401(a)(1), 406, 21 U.S.C.A. §§ 841(a)(1), 846.

[7] DRUGS AND NARCOTICS ⇔ 65  
138k65

Physical custody of narcotics by an employee or agent whom one dominates, or whose actions one can control, is sufficient to constitute constructive possession by the principal.

[8] WITNESSES ⇔ 328  
410k328

Government witness' testimony connecting defendant's two brothers with past marijuana transactions in which he had engaged was relevant to the prosecution of defendant for marijuana offenses; it was relevant to the extent that it tended to rehabilitate the credibility of the witness' memory after it was somewhat impeached on cross-examination by several questions of two defense counsel concerning the witness' inability to remember most of the people with whom he had worked in past marijuana transactions. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a)(1), 406, 21 U.S.C.A. §§ 841(a)(1), 846; Fed.Rules Evid. Rules 403, 403 comment, 28 U.S.C.A.

[9] CRIMINAL LAW ⇔ 1153(1)  
110k1153(1)

Process of balancing the probative value of evidence against its potential prejudicial effect is within discretion of trial judge, whose determination is to be upheld unless an abuse of discretion is found. Fed.Rules Evid. Rules 403, 403 comment, 28 U.S.C.A.

[10] CRIMINAL LAW ⇔ 338(7)  
110k338(7)

In light of other testimony given by government witness without objection connecting defendant's brother specifically and defendant's family in general with past marijuana transactions, and considering the statements and actions of the trial court during the Government's redirect examination of the aforesaid witness, the trial court did not abuse its discretion in admitting into evidence references

during the witness' redirect examination to the past marijuana dealings of defendant's brothers. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a)(1), 406, 21 U.S.C.A. §§ 841(a)(1), 846; Fed.Rules Evid. Rules 403, 403 comment, 28 U.S.C.A.

\*311 Phil Harris, Weslaco, Tex., for defendant-appellant.

James R. Gough, Asst. U. S. Atty., Houston, Tex., for plaintiff-appellee.

Appeal from the United States District Court for the Southern District of Texas.

Before BROWN, THORNBERRY and JERRE S. WILLIAMS, Circuit Judges.

JERRE S. WILLIAMS, Circuit Judge:

Ramon Vasquez Moreno, appellant, was convicted by a jury of possession of marijuana with intent to distribute it in violation of 21 U.S.C. s 841(a)(1) (1976), and of conspiracy to possess marijuana with intent to distribute it in violation of 21 U.S.C. ss 841(a)(1) and 846 (1976). Appellant now appeals these convictions on two grounds: (1) the alleged insufficiency of the evidence on the possession count; and (2) the error allegedly committed by the district court in admitting into evidence certain references to the past marijuana dealings of appellant's brothers. Since we find that the evidence was sufficient to sustain appellant's conviction on the possession count, and that the district court did not abuse its discretion on the evidentiary point, we affirm.

I. Facts

Viewing the evidence in the light most favorable to the government, *Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1942), the facts are as follows.

Appellant operated Moreno's Gulf Service Station in Los Fresnos, Texas, located in the Rio Grande Valley of Texas. According to the uncorroborated testimony of Johnny Lee Guidry, an unindicted co-conspirator, appellant, while at his service station on August 16, 1977, told Guidry to load 1,936 pounds of marijuana which was owned by appellant's

brother, Carlos Moreno. The marijuana, contained in burlap sacks, and the tractor-trailer, upon which the marijuana was to be loaded, were concealed in a shed located about 20 miles away in Las Llesgas, Texas. Carlos Moreno also owned the tractor-trailer. Surprisingly, the record does not reflect the ownership of the shed.

Guidry, Juan Vasquez, and a third, unidentified person drove to the shed and loaded the sacks containing the marijuana onto the trailer, covering the sacks with grain and the trailer itself with a tarpaulin. Upon completing these tasks, the three men returned to appellant's service station and informed appellant that the trailer had been loaded. Guidry and the other two men were to be paid \$200.00 each by either Carlos or Ramon Moreno for their work. Payment was to be made after the marijuana had reached its destination of Austin, Texas, and payment therefor had been received.[FN1]

FN1. None of these men received payment for his services because the marijuana never reached its destination.

When the day turned to night, Guidry, Juan Vasquez, Julian Henry Garza, Paulino Pena, and Vicente Arredondo went to the shed and connected the trailer to the tractor. Then, Arredondo, driving the marijuana-laden tractor-trailer, and Pena and Garza, following in an automobile, left the shed for Austin. The latter two men were supposed to call Ramon Moreno, appellant here, to report whether the tractor-trailer had gotten through the border patrol checkpoint in Sarita, Texas, located between Las Llesgas and Austin. After the tractor-trailer departed, Guidry and Vasquez returned to appellant's service station. Pena and Garza eventually called the service station, \*312 informing everyone that the border patrol agents at the border patrol checkpoint had discovered the marijuana. The next morning, appellant, his brother Carlos, Guidry, Pena, Garza, and two or three other people met at appellant's service station and discussed the preceding night's events.

Appellant, along with three other codefendants,[FN2] was indicted for conspiracy to possess marijuana with intent to distribute it, and for possession of marijuana with intent to distribute it. Appellant was convicted on both counts. He does

not challenge the sufficiency of the evidence on the conspiracy count. He does, however, challenge the sufficiency of the evidence on the possession count. He further contends that both of his convictions should be reversed on the ground that the district court committed reversible error in permitting the government to elicit on its redirect examination of Guidry references to the past marijuana dealings of appellant's brothers. We address each contention separately.

FN2. Julian Henry Garza, Juan Vasquez, and Paulino Pena.

## II. Sufficiency of the Evidence

Appellant contends that the evidence was insufficient to support his conviction for the substantive offense of possession of marijuana with intent to distribute it. He argues that there was insufficient evidence to show that he "possessed" the marijuana, and claims that he instead was a mere messenger who simply conveyed an instruction from his brother Carlos to Guidry. Appellant notes that the only testimony relating to him was that of Guidry, whose testimony was given as part of a plea bargaining agreement in connection with a previous conviction for possession of cocaine.

[1] The standard of review in a criminal case when the issue is the sufficiency of the evidence is whether the jury could have reasonably found that the evidence was inconsistent with every reasonable hypothesis of innocence. *United States v. Rodgers*, 624 F.2d 1303, 1306 (5th Cir. 1980), cert. denied, - U.S. -, 101 S.Ct. 1360, 67 L.Ed.2d 342 (1981); *United States v. Witt*, 618 F.2d 283, 284 (5th Cir. 1980), cert. denied, --U.S. --, 101 S.Ct. 234, 66 L.Ed.2d 107 (1980). In applying this standard, we must consider the evidence and all reasonable inferences therefrom in a light most favorable to the government. *Glasser v. United States*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942); *United States v. Thompson*, 603 F.2d 1200, 1204 (5th Cir. 1979).

[2] We note at the outset that the absence of corroboration of Guidry's testimony regarding appellant does not by itself bar conviction. Generally, a conviction may be based solely upon the uncorroborated testimony of an accomplice if the testimony is not incredible or otherwise insubstantial on its face. *United States v. Garner*, 581 F.2d 481,

486, n. 2 (5th Cir. 1978); *United States v. Kelley*, 559 F.2d 399, 400 (5th Cir. 1977), cert. denied, 434 U.S. 1000, 98 S.Ct. 644, 54 L.Ed.2d 497 (1977).

[3] It is well settled that possession of a controlled substance with the intent to distribute it, in violation of 21 U.S.C. s 841(a)(1) (1976), may be either actual or constructive. *United States v. Martinez*, 588 F.2d 495, 498 (5th Cir. 1979); *United States v. Felts*, 497 F.2d 80, 82 (5th Cir. 1974), cert. denied, 419 U.S. 1051, 95 S.Ct. 628, 42 L.Ed.2d 646 (1974).

[4][5] As with actual possession, constructive possession may be exclusive or joint, *United States v. Martinez*, 588 F.2d at 498, and is susceptible of proof by circumstantial as well as direct evidence. *United States v. Maspero*, 496 F.2d 1354 (5th Cir. 1974). Constructive possession may be shown by "ownership, dominion or control over the contraband itself, or dominion or control over the premises or the vehicle in which the contraband was concealed." *United States v. Martinez*, 588 F.2d at 498, quoting *United States v. Salinas-Salinas*, 555 F.2d 470, 473 (5th Cir. 1977). "(M)ere presence in the area where the narcotic is discovered or mere association with the person who does control the drug or the property where it is located, is insufficient to support a finding of possession." *United States v. Stephenson*, 474 F.2d 1353, 1355 (5th Cir. 1973) (citations omitted).

Since there is no evidence that appellant was ever in actual, physical possession of the marijuana, his conviction for possession may stand only if the evidence establishes constructive possession. Having carefully reviewed the record, we find that the evidence is sufficient to establish that appellant had dominion or control over the marijuana throughout the transaction. While at his service station, appellant instructed Guidry to go to the shed and load the marijuana into the tractor-trailer. Either appellant or his brother Carlos was to pay Guidry and the other men who participated in the operation for their work in loading and delivering the marijuana. After the men loaded the marijuana, they immediately returned to appellant's service station and informed appellant that the loading had been performed. When the tractor-trailer departed for its intended destination, the participants who remained in Los Fresnos congregated at appellant's service

station that night. Further, it was appellant who was to receive the telephone call from Pena and Garza informing everyone whether the tractor-trailer managed to get past the border patrol station without the marijuana being discovered.[FN3] Finally, appellant's service station was the location at which the participants in this distribution scheme, including appellant, met the morning after the marijuana was discovered.

FN3. The record does not indicate who actually received the telephone call.

[6][7] From this evidence, the jury could have reasonably concluded beyond a reasonable doubt that, instead of being a mere "messenger," appellant was an integral part of the narcotics distribution operation and that he enjoyed a close and continuous working relationship with those, such as his brother Carlos or Guidry, who may have had actual physical possession of the marijuana. This evidence is sufficient to show that he had joint dominion or control over the drug. See *United States v. Candanoza*, 431 F.2d 421, 424-25 (5th Cir. 1970); *Cazares-Ramirez v. United States*, 406 F.2d 228, 233-34 (5th Cir. 1969), cert. denied, 397 U.S. 926, 90 S.Ct. 933, 25 L.Ed.2d 106 (1970); *United States v. McGruder*, 514 F.2d 1288, 1290 (5th Cir. 1975), cert. denied, 423 U.S. 1057, 96 S.Ct. 790, 46 L.Ed.2d 646 (1976); cf. *United States v. Stephenson*, 474 F.2d 1353, 1355 (5th Cir. 1973) (insufficient working relationship found). Not only did appellant instruct and monitor the progress of the men who had actual possession of the marijuana, but he, along with his brother Carlos, also had the authority and the responsibility to pay them for their services. Physical custody of narcotics by an employee or agent whom one dominates, or whose actions one can control, is sufficient to constitute constructive possession by the principal. *United States v. Maroy*, 248 F.2d 663 (7th Cir. 1957), cert. denied, 355 U.S. 931, 78 S.Ct. 412, 2 L.Ed.2d 414 (1958); *United States v. Hernandez*, 290 F.2d 86, 90 (2d Cir. 1961).

We accordingly cannot say that, as a matter of law, reasonable conclusions other than guilt could be drawn from the evidence viewed most favorably to the government. We will not disturb the jury verdict on the possession count.

### III. Admissibility of Evidence

Appellant's second contention on appeal is that the district court erred in allowing the prosecution to elicit, over objection, testimony from government witness Guidry concerning past marijuana dealings of appellant's brothers. After having carefully reviewed the context in which this testimony was given, and having considered the nature of similar testimony given earlier during the course of Guidry's testimony, we find that this contention is without merit.

During the cross-examination of Guidry by counsel for one of the codefendants in this case, counsel elicited the fact that Guidry had loaded marijuana approximately fifty times in the preceding four or so years. Defense counsel for some of the codefendants then conducted a general attack on Guidry's credibility by attempting to show a disparity between Guidry's memory of past loadings and his memory of the \*314 transaction that is the subject of the prosecution in this case. Counsel for one codefendant asked Guidry to recount some of the specifics of his past loadings, such as the number of sacks involved in each transaction and the incidents in which he had not received payment for his services. Guidry had noticeable difficulty recalling these facts, even though he could do so with respect to the transaction at hand. Defense counsel then asked Guidry, without objection from appellant's counsel, whether it was true that Guidry could remember the names of only some of the people with whom he had worked in past marijuana transactions. He then elicited the fact that Guidry could not recall the names of everyone with whom he had worked in the past transactions. Counsel for another codefendant continued this line of attack, eliciting the fact that the transaction involved in this case was one of only a very few transactions with respect to which Guidry could recall specific people, and the only one about which he had made specific identifications to law enforcement authorities. The purpose behind all of this cross-examination, of course, was to suggest that Guidry's unusually good memory as to the marijuana transaction involved in this case was either mistaken, fabricated by Guidry, or coached by the government.

On redirect examination,[FN4] government counsel asked Guidry whether the occasions \*315 on which he had loaded marijuana in the past, as Guidry had testified he had done on cross-examination, had been for "the same Moreno

family." Appellant's attorney's objection was overruled on the ground that the government was referring to Carlos Moreno, appellant's brother, whose name, according to the court, "(had) been bandied around in this case both by the defense and the prosecution " Record, vol. 2, at 86. Government counsel responded affirmatively to the court's query whether Carlos Moreno was indeed the subject of the government's question. The government then narrowed its question to one concerning Carlos Moreno, asking whether any arrests had arisen in any of Carlos Moreno's past transactions. After asking a few questions about a Carlos Berrera from Mexico, the government then asked Guidry, over defense counsel's objection, whether he became involved with Carlos Moreno when he (Guidry) first began to engage in marijuana transactions. An ensuing discussion between defense counsel and the court on the propriety of the questioning prevented Guidry from ever answering the question. Then, over defense counsel's objection, the government elicited the fact that Guidry knew a Eugenio Moreno, that Eugenio Moreno was "(o)ne of the brothers," and that Guidry had "work(ed) for him at the same time (he had) worked for Carlos Moreno." Record, vol. 2, at 88. At this point, the court sustained appellant's attorney's objection to any further questions along this line. The court stated that the government had been permitted to ask about the names of people in past transactions, but that it was not to inquire into the specifics of any past transaction.

FN4. The relevant portion of the government's redirect examination of Guidry proceeded as follows: BY MR. DE LUNA: Q Now, Mr. Guidry, you were asked on cross-examination about all of these many times you have loaded marijuana before. Do you recall that? A Yes. Q Was that for the same Moreno family? A Yes, it was. MR. WEISFELD: We will object to that. There is one man here at trial and there is not the Moreno family. I am representing Ramon Moreno and that's it. THE COURT: Well, Carlos Moreno's name has been bandied around in this case both by the defense and the prosecution, and I will overrule the objection. I assume that's what he is referring to. MR. DE LUNA: Yes, sir. BY MR. DE LUNA: Q And as you were working for Mr. Moreno, at the time for Carlos Moreno, the tractor-trailers you loaded, did some of them get busted? A This one did. Q But at any of the other times

you have been asked about, did some of the others get busted? A I don't believe so. Q Is that the reason strike that. You testified there were some people also from the Mexican side involved. Do you know a person by the name of Carlos Berrera? A Yes, I do. Q Who is that? A A person that I used to get pot from, marijuana. Q Where is he from? A Matamoros. At least he lives there. Q Now, when you first became involved in these marijuana deals, did you become involved with Carlos Moreno? A Would you repeat that? MR. WEISFELD: Your Honor, we will object to the continued examination along this line. It has nothing to do with the case THE COURT: Well, he has been asked on cross about various transactions and had been berated because he didn't remember some of the names, and I guess he is trying to go into those matters. I will overrule your objection. MR. MORENO (counsel for a codefendant): If it please the Court, with all due respect, those questions were addressed to the matter of impeachment, whether or not this witness was telling the truth. It doesn't go to the issue of what happened here on August 16 and 17 of 1977. THE COURT: Well, defense counsel went into it. I am going to overrule the objection. BY MR. DE LUNA: Q Do you know Eugenio Moreno? A Yes, I do. Q Who is he? A One of the brothers. MR. WEISFELD: Your Honor, may we approach the Bench, please? THE COURT: No, sir. I will let you approach the Bench during the recess. BY MR. DE LUNA: Q Did you work with him? A Yes, I had. Q Did you work for him at the same time you worked for Carlos Moreno? A Yes, I have. MR. WEISFELD: Would you note our exception to this line of questioning, Your Honor? THE COURT: I don't mind him mentioning other names because I think he was asked on cross. MR. DE LUNA: They opened the door, Your Honor. THE COURT: Well, I am not going to open the door. We are going to try these defendants and nobody else, Mr. De Luna. MR. DE LUNA: Judge, they questioned that he couldn't remember the other people, and I am asking him if he remembers the other people. THE COURT: That's fine. You have asked him, but don't go into any other transactions because I have sustained the objection. MR. DE LUNA: That's fine. BY MR. DE LUNA: Q Do you know whether Eugenio Moreno is related to Ramon Moreno? THE COURT: I will sustain the objection. The jury will not consider that for any purpose whatsoever.

Don't go into it any more, Mr. De Luna, please.

The basis of appellant's objection to Guidry's testimony apparently was that the testimony was irrelevant and that, even if relevant, its probative value was substantially outweighed by the danger of unfair prejudice that it presented. See Fed.R.Evid. 403.

[8] Contrary to appellant's first assertion, Guidry's testimony connecting appellant's two brothers with past marijuana transactions in which he had engaged was relevant to the case. It was relevant to the extent that it tended to rehabilitate the credibility of Guidry's memory after it was somewhat impeached on cross-examination by the several questions of two defense counsel concerning Guidry's inability to remember most of the people with whom he had worked in past marijuana transactions.

[9] The more difficult question, however, is whether the relevance of this testimony was substantially outweighed by the danger of unfair prejudice. "Unfair prejudice," within the meaning of Rule 403 of the Federal Rules of Evidence, means "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." Fed.R.Evid. 403, Advisory Committee's Note. The process of balancing the probative value of evidence against its potential prejudicial effect is within the discretion of the trial judge, whose determination is to be upheld unless an abuse of discretion is found. *United States v. Jackson*, 576 F.2d 46, 49 (5th Cir. 1978); *United States v. McRae*, 593 F.2d 700, 707-08 (5th Cir. 1979), cert. denied, 444 U.S. 862, 100 S.Ct. 128, 62 L.Ed.2d 83 (1979); *United States v. Vitale*, 596 F.2d 688, 689 (5th Cir. 1979), cert. denied, 444 U.S. 868, 100 S.Ct. 143, 62 L.Ed.2d 93 (1979).

\*316 Viewed in isolation, without considering his entire testimony, Guidry's testimony on redirect examination concerning appellant's brothers appears to have posed some danger of unfair prejudice in that it could have led the jury to convict appellant either because he was somehow "guilty by association" or because he was a member of a family that had dealt with marijuana in the past.

Nevertheless, it was within the district court's discretion to determine both whether the evidence

presented "an undue tendency to suggest a decision on an improper basis," Fed.R.Evid. 403, Advisory Committee's Note (emphasis added), and, even if it did, whether this unfair prejudice substantially outweighed the probative value of the evidence. Fed.R.Evid. 403; United States v. McRae, 593 F.2d at 707. After carefully reviewing the record as a whole and the dialogue during the redirect examination of Guidry in particular, we hold that the district court did not abuse its discretion in allowing into evidence Guidry's testimony concerning the past marijuana transactions of appellant's brothers.

In the first place, Guidry's testimony on **redirect** examination about appellant's brothers was largely cumulative to testimony elicited by defense counsel themselves on **cross-examination**. Earlier, during **cross-examination** by counsel for one of appellant's **codefendants**, Guidry testified, without objection from appellant's counsel, that he had loaded marijuana for Carlos Moreno in the past. Guidry further testified on cross-examination, again without objection, that one difference between the transaction involved in this case and past transactions in which he had been involved was that, in the transaction involved here, "(t)he Morenos had their own trailer now." Guidry then added that "(t)hey had used other people's trailers." Like his testimony during redirect examination, this testimony strongly suggests that at least some members of the Moreno family have been involved in marijuana transactions in the past. In fact, on direct examination Guidry testified, without objection from defense counsel or further elaboration by Guidry, that appellant himself had "sent" Guidry to the shed in Las Llesgas "before." Guidry's testimony on redirect examination regarding appellant's brothers thus was largely cumulative of his earlier testimony. The trial court apparently recognized this fact to some extent when it noted during the government's redirect examination of Guidry that "Carlos Moreno's name has been bandied around in this case both by the defense and the prosecution" Record, vol. 2, at 86. The trial court properly could view this cumulative effect as significantly reducing any unfair prejudice Guidry's testimony on redirect examination may have had. See United States v. Jackson, 576 F.2d at 49, n. 5. If there were prejudice, it was created largely by defense counsel themselves in their cross-examination of Guidry.

In addition to the largely cumulative effect of Guidry's redirect examination testimony, any unfair prejudice caused by this testimony was further reduced by the trial court's statements and actions during the testimony. When Guidry testified that he had loaded marijuana for "the same Moreno family" before, the court narrowed "the Moreno family" to Carlos Moreno, about whose past marijuana dealings there already had been substantial testimony. Further, after allowing the government to ask a few questions about appellant's brother Eugenio, the court cut off any further questions along that line and instructed the jury not to consider "for any purpose whatsoever" the government's question whether Eugenio Moreno was related to appellant. The court properly allowed the government to inquire into the names of people in past transactions. This questioning was a direct response to the trial strategy of defense counsel, who had first asked questions concerning names. Beyond this inquiry into names, however, the court did not permit the government to delve into the specifics of any past transaction.

[10] Accordingly, in light of the other testimony given by Guidry without objection connecting appellant's brother Carlos specifically and appellant's family in general with past marijuana transactions, and \*317 considering the statements and actions of the trial court during the government's redirect examination of Guidry, we cannot say that the trial court abused its discretion in admitting into evidence the references during Guidry's redirect examination to the past marijuana dealings of appellant's brothers. See United States v. Brown, 482 F.2d 1226 (8th Cir. 1973) (rehabilitation of attacked memory with testimony regarding narcotics traffic and habits of narcotics dealers in area); United States v. Vaughn, 486 F.2d 1318 (8th Cir. 1973) (after impeachment suggesting improbability, rehabilitation showing recent similar heroin transactions by other persons allowed).

Since we reject both of appellant's contentions on this appeal, we affirm his conviction on both counts.

AFFIRMED.

END OF DOCUMENT

**INSTA-CITE**

CITATION: 649 F.2d 309

**Direct History**

=> 1 **U. S. v. Moreno**, 649 F.2d 309, 8 Fed. R. Evid. Serv. 1041  
(5th Cir.(Tex.), Jun 30, 1981) (NO. 80-1280)

**Negative Indirect History**

Declined to Extend by

2 **Lewis v. Velez**, 149 F.R.D. 474, 39 Fed. R. Evid. Serv. 402  
(S.D.N.Y., May 19, 1993) (NO. 89 CIV. 5085 (MJL))

**Secondary Sources**

**Corpus Juris Secundum (C.J.S.) References**

28 C.J.S. Drugs and Narcotics Sec.190 Note 60

28 C.J.S. Drugs and Narcotics Sec.191 Note 74

98 C.J.S. Witnesses Sec.488 Note 61 (Pocket Part)

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Citation	Rank(R)	Page(P)	Database	Mode
640 F.2d 1000	R 11 OF 24	P 1 OF 54	ALLFEDS	Page
7 Fed. R. Evid. Serv. 1678				
<b>(Cite as: 640 F.2d 1000)</b>				

UNITED STATES of America, Appellee,  
v.

Gary HALBERT, Appellant.  
No. 78-3278.

United States Court of Appeals,  
Ninth Circuit.

Argued Sept. 4, 1979.

Submitted Jan. 28, 1980.

Decided March 6, 1981.

The United States District Court for the Central District of California, Malcolm M. Lucas, J., convicted defendant of mail fraud in connection with scheme to market items commemorating the Nation's Bicentennial, and defendant appealed. The Court of Appeals held that: (1) prosecutor's references to guilty pleas of codefendants were permissible; (2) reversal was required by lack of appropriate instructions to jury on limited purpose for which guilty pleas could be used; (3) materiality of misrepresentations was clearly established by the evidence, and thus failure to instruct on materiality was not error; (4) evidence was sufficient for jury; (5) employment of alias could evidence fraudulent activity under mail fraud statute; (6) trial judge did not  
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substantive evidence of guilt. Baker v. United States, supra, 393 F.2d at 614. Furthermore, introduction of the guilty plea as evidence of credibility requires that the plea be brought to the jury's attention, but does not sanction allowing the subject to be disproportionately emphasized or repeated.  
B.

Applying the principles we have outlined to this case, the issues are two: (1) did the prosecution offer the evidence of the guilty pleas for a permissible purpose such as establishing witness credibility and (2) if the purpose was legitimate, did the trial court's instructions adequately explain to the jury the purpose for which the evidence could be used.

(1)

[8] Reviewing the record here, we find that the prosecutor carefully limited his inquiries about the guilty pleas. On direct examination, questioning did no more than elicit the fact that guilty pleas were entered. No editorial comment or unnecessary elaboration occurred. The brief questioning about the existence of the pleas was clearly relevant as evidence bearing on the witnesses' credibility.

\*1006 [9] The prosecutor was also within his rights on this record in asking Bucklan on redirect again about his guilty plea. On cross examination, defense counsel had elicited numerous statements that Bucklan lacked intent to defraud and that he believed that he would be able to fulfill the promises he  
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(Cite as: 640 F.2d 1000, \*1006)

and Halbert had made to the customers they allegedly defrauded. On redirect, Bucklan admitted in response to the prosecutor's questions that he was aware that false statements were made to customers and he had pleaded guilty to a crime requiring such knowledge. This questioning was intended to dispel any impression of unwitting misrepresentation and the suggestion that the actions of defendant and the witness were innocent. This was not improper or undue reiteration of the guilty plea.

[10] Similarly, reference to the pleas in the prosecution's closing argument was in response to comments by the defense. Defense counsel discussed the guilty pleas in his closing argument, contending that Bucklan and Halbert lacked intent to defraud:

Now, I think you must consider that statement (Bucklan's lack of intent) in light of the facts, and both Mr. Culbertson and Mr. Bucklan said that, and I think that puts into proper perspective their pleas of guilty to one count and their making a deal, because they got up here and said, when presented by the government, that they hadn't done any wrong, so there are a lot of reasons why people can do things when it is to their advantage.

The prosecutor responded:

(The defense) has referred to (Bucklan and Culbertson) as the government's star witnesses. Well, I can't say that I'm too happy with that. When you are presenting the evidence of a crime, you have to present the evidence of

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**INSTA-CITE**

CITATION: 640 F.2d 1000

=> 1 **U. S. v. Halbert**, 640 F.2d 1000, 7 Fed. R. Evid. Serv. 1678  
(9th Cir.(Cal.), Mar 06, 1981) (NO. 78-3278)

**Secondary Sources**

**Corpus Juris Secundum (C.J.S.) References**

72 C.J.S. Post Office Sec.29 Note 59

72 C.J.S. Post Office Sec.39 Note 48

72 C.J.S. Post Office Sec.39 Note 49

72 C.J.S. Post Office Sec.43 Note 17

98 C.J.S. Witnesses Sec.472 Note 40.10 (Pocket Part)

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UNITED STATES of America, Plaintiff-Appellee,  
v.  
Luis BELTRAN-RIOS, Defendant-Appellant.

No. 88-5279.

United States Court of Appeals,  
Ninth Circuit.

Argued and Submitted May 2, 1989.

Decided July 6, 1989.

Defendant was convicted in the United States District Court for the Southern District of California, Judith Nelson Keep, J., of importation of controlled substance and possession of controlled substance with intent to distribute, and he appealed. The Court of Appeals, Fletcher, Circuit Judge, held that: (1) drug courier profile evidence was admissible to rebut defense efforts to characterize defendant as "poor simple farmer," and (2) duress defense instruction did not improperly make immediate surrender element of defense.

Affirmed.

[1] CRIMINAL LAW ⇔ 376  
110k376

Criminal profiles generally have no place as substantive evidence of guilt at trial.

[2] CRIMINAL LAW ⇔ 378  
110k378

In narcotics prosecution, trial court did not abuse its discretion in permitting prosecution to adduce drug courier profile evidence for limited purpose of rebutting defense efforts to characterize defendant as "poor simple farmer."

[3] CRIMINAL LAW ⇔ 662.8  
110k662.8

Permitting police officer's drug courier profile testimony did not violate defendant's confrontation rights despite his contention that testimony was in part based on information obtained from DEA and that admission of such hearsay testimony thus deprived defendant of effective opportunity to confront adverse witnesses through cross-examination; officer himself had 16 years' experience and had worked on hundreds of drug

cases, and defendant had ample opportunity to cross-examine officer about his opinion. U.S.C.A. Const.Amend. 6.

[4] CRIMINAL LAW ⇔ 38  
110k38

Before defendant is entitled to instruction on defense of duress, he must establish prima facie case of elements of that defense by establishing immediate threat of death or serious bodily injury, well-grounded fear that threat will be carried out, and lack of reasonable opportunity to escape threatened harm; requirement that defendant submit to proper authorities after attaining position of safety has independent significance only in prison escape case.

[5] CRIMINAL LAW ⇔ 772(6)  
110k772(6)

Duress defense instruction that permitted jury to consider whether narcotics defendant took opportunity to escape harm with which he allegedly had been threatened by submitting to authorities at first reasonable opportunity did not improperly make submission to authorities independent element of defense but only permitted jury to consider factor in evaluating defendant's reasonable opportunity to escape.

\*1209 Janice Hogan, Federal Defenders of San Diego, Inc., San Diego, Cal., for defendant-appellant.

Patrick K. O'Toole, Asst. U.S. Atty., San Diego, Cal., for plaintiff-appellee.

Appeal from the United States District Court for the Southern District of California.

Before FLETCHER, NELSON and NORRIS,  
Circuit Judges.

FLETCHER, Circuit Judge:

Beltran-Rios was convicted of importation of a controlled substance and possession of a controlled substance with intent to distribute. He appeals the conviction, contending that the district court erred in allowing the Government to introduce expert testimony describing the "profile" characteristics of drug couriers, and that the jury instruction on the elements of Beltran's duress defense was erroneous.

We affirm.

I.  
FACTS

At approximately 9:00 a.m. on February 16, 1988, Luis Beltran-Rios entered the pedestrian inspection area of the Calexico, California Port of Entry. Customs Agent Donald Hylton performed a pat-down search of Beltran and found three small packages of heroin in Beltran's shoes. Beltran was placed under arrest, and was questioned by Customs and DEA agents. During the course of this questioning, Beltran gave several conflicting explanations for the presence of heroin in his shoes.

On February 22, 1988, a two count indictment was filed in the United States District Court for the Southern District of California, charging Beltran with violations of 21 U.S.C. §§ 952, 960 (importation of a controlled substance) and 21 U.S.C. § 841(a)(1) (possession of a controlled substance with intent to distribute). On February 26, Beltran pleaded not guilty. Beltran filed a motion to suppress physical evidence as well as statements he made to Customs and DEA agents. The district court denied this motion after an April 25 hearing. A jury trial began on May 17, 1988.

Beltran offered duress as his major defense at trial. Beltran argued that he brought heroin into the United States \*1210 against his will because an individual named Jesus Holguin Lopez approached him and demanded that he do so. Lopez allegedly threatened to kill Beltran or his family if he did not comply. Beltran presented testimony from a Father Augustin Gonzalez-Magana attesting to Beltran's good reputation and Lopez's reputation as a dangerous drug trafficker. In his opening statement, defense counsel also emphasized Beltran's vulnerability to Lopez's threats, portraying Beltran as a simple, poor farmer. Counsel pursued a related theme in cross-examination, questioning witnesses about Beltran's appearance in an effort to emphasize that Beltran dressed poorly, and did not display flashy or expensive jewelry.

Allegedly to rebut the "poor simple farmer" theme, the Government introduced expert testimony describing the characteristics of the typical drug courier, or "mule." The Government's expert witness, Deputy Sheriff Jose Moreno-Nava, testified

that mules were generally poor, sympathetic-looking individuals, who went into the drug courier trade because it is the only way for such individuals to make money quickly. This testimony was admitted over defense counsel's objection.

After the presentation of the evidence, counsel and the trial judge conferred concerning the instructions. The judge indicated that she would not give the defendant's proposed duress instruction, but would give a modified version of the Ninth Circuit Model Jury Instruction on duress. Defense counsel objected, contending that the instruction improperly introduced a requirement of prompt surrender to the authorities as an element of the defense.

On May 20, 1988, the jury returned a verdict of guilty on both counts. On July 11, 1988, Beltran was sentenced to 33 months in custody, and a term of three years of supervised release. This appeal follows. We have jurisdiction under 28 U.S.C. § 1291.

II.  
DISCUSSION

A. Admission of Nava's Testimony

Over the objection of defense counsel, the district court permitted Nava to testify about the characteristics of the typical drug courier. Nava testified that "[y]our typical mule would be a poorer individual, who does not wear flashy clothes or jewelry, and is, like I say, in the--he's the bottom of the totem pole in the organization but he is a paid individual by that organization." Reporter's Transcript (RT) vol. II at 275. [FN1] Beltran argues that admission of this testimony was an abuse of discretion because the use of such profiles is of limited probative value and is extremely prejudicial. The district court has broad discretion to admit or exclude expert testimony. The court's decision to admit Nava's "drug courier profile" testimony therefore is reviewed for abuse of discretion. *United States v. Gillespie*, 852 F.2d 475, 478 (9th Cir.1988).

FN1. The trial judge instructed the jury to disregard the portion of Nava's testimony in which he stated that "[t]he individual that is generally doing the muling is an older individual...." RT at 274.

[1] The use of criminal profiles as evidence of guilt in criminal trials has been severely criticized. As the Eleventh Circuit has pointed out,

[d]rug courier profiles are inherently prejudicial because of the potential they have for including innocent citizens as profiled drug couriers.... Every defendant has a right to be tried based on the evidence against him or her, not on the techniques utilized by law enforcement officials in investigating criminal activity. Drug courier profile evidence is nothing more than the opinion of those officers conducting an investigation.... [W]e denounce the use of this type of evidence as substantive evidence of the defendant's innocence or guilt.

United States v. Hernandez-Cuartas, 717 F.2d 552, 555 (11th Cir.1983). Similarly, in Gillespie, 852 F.2d at 479-80, we found the admission of the testimony of a clinical psychologist describing the common characteristics \*1211 of child molesters to be reversible error.

The hostility exhibited by the lower courts to the use of criminal profiles as substantive evidence of guilt is not undermined by the Supreme Court's recent decision in United States v. Sokolow, --- U.S. ---, ---, 109 S.Ct. 1581-1586, 104 L.Ed.2d 1 (1989). Sokolow merely establishes that a law enforcement official may make an investigative stop based on observed behavior consistent with DEA drug courier profiles. There is no indication that the Court's approval of profiles to help establish reasonable suspicion warranting further investigation extends to use of profile evidence at trial. Beltran's argument that such profiles generally have no place as substantive evidence of guilt at trial is still valid.

[2] The Government, while conceding that profile testimony is generally undesirable as evidence of guilt, argues that Nava's testimony was permissible in this case because defense counsel "opened the door" to this line of questioning by emphasizing Beltran's apparent poverty. The record clearly demonstrates defense counsel's efforts to raise an inference that Beltran was not a drug courier because his life-style was inconsistent with that line of business. In cross-examination of the Government's first witness, Customs Agent Donald Hylton, the following exchange took place:

Mr. Ainbinder: Does he [Beltran] look essentially the same as he did on the 16th?

A: Yes.

Q: You don't remember any gold rings on his fingers?

A: No. I can't recall any--

Q: Rolex watches?

A: No, sir.

Q: Gold chains?

A: No.

Q: Expensive jewelry, that kind of thing?

A: No.

Q: And as you inspected him in secondary and then in the pat-down area, I take it you went through his things pretty carefully?

A: Yes.

Q: Did you find any large amounts of money?

A: No.

RT vol. I at 182.

Defense counsel pursued a similar line of questioning in cross-examination of DEA Agent Eddie Marquez:

Q: Now, I would like you to take a look at Mr. Beltran as he is seated here today. I know his exact clothing is a little different, but does he appear to be about the same as he was on the 16th of February?

A: Yes, he was.

Q: He's not missing any thing like expensive jewelry or something--

A: No, sir.

Q: Same simple sort of clothes?

A: Yes.

Q: And as he sits here today, is that the same calm look you saw when you entered in the little detention room?

A: Yes.

Q: Now, you said he had a lot of receipts. Have you gone through them all?

A: Yes. I have made xerox copies of everything.

Q: And what we see in those receipts are literally years of collections. Years. Isn't there?

A: That's correct.

\* \* \*

Q: Now, in those receipts is there anything to reflect purchases of things like T.V.'s?

A: None.

Q: Automobiles?

A: None.

Q: Anything to reflect bank accounts with large sums of money?

A: Not that I could tell.

Q: Investments in stocks, bonds or certificates of deposit?

A: No sir.

Q: No documents showing the purchase of a number of head of cattle recently?

\*1212 A: Not recently. I know there is one said how many he may have owned, but I don't recall exactly.

Q: No purchase of jewelry or that kind of thing?

A: No sir.

Q: You had a chance to go through the rest of Mr. Beltran's things. Do you recall at any time, can you tell us today, did he have a large amount of cash on him?

A: I don't believe he did.

RT vol. II at 235-37.

The purpose of this questioning is clear--counsel is trying to suggest to the jury that Beltran is not part of a smuggling operation because he lacks the accoutrements of wealth associated with such a profitable activity. In light of this testimony, the district court concluded that the Government should have an opportunity to rebut the inference that defense counsel was trying to raise.

What I am going to do is allow limited inquiry. I am worried about too much prejudice on it.... So at least I think by having everybody look, you had him stand up, did he have on gold chains, did he appear wealthy, did he have a lot of cash, I think at least it would be proper to say that most of the couriers that they see, that he's aware of are not wealthy and wearing gold chains. They are not on that end of the distribution scheme. Because there's been a suggestion raised by you that, because he's not in gold chains and having a lot of money, he's clearly not involved.

RT vol. II at 271-72. The Government then elicited the testimony from Deputy Nava that Beltran challenges here.

We previously have allowed the Government to introduce otherwise excludable testimony when the defendant "opens the door" by introducing potentially misleading testimony. See e.g., *United States v. Segall*, 833 F.2d 144, 148 (9th Cir.1987) (defense counsel's introduction of cross-examination evidence creating a false impression that defendant retained in her bank account funds under investigation "opened the door" to re-direct testimony that only a fraction of that money was retained); *United States v. Giese*, 597 F.2d 1170,

1188-90 (9th Cir.), cert. denied, 444 U.S. 979, 100 S.Ct. 480, 62 L.Ed.2d 405 (1979) (defense testimony relating to 18 books owned and read by defendant suggesting his left-wing but non-violent, non-revolutionary political views "opened the door" to cross-examination on other books defendant had sold, owned or read).

This type of rebuttal testimony may include criminal profile testimony. For example, in *United States v. Taylor*, 716 F.2d 701 (9th Cir.1983), the defendant, Steven Pressler, who was convicted of conspiracy to manufacture amphetamines, argued that the trial court erred in not sustaining his objections to certain questions asked by the Government at trial. Pressler's role in the amphetamine manufacturing enterprise was apparently limited to picking up necessary chemicals at a chemical supply store. On cross-examination, defense counsel asked the DEA agent witness whether drug manufacturers use third parties to pick up chemicals to insulate themselves from detection. On re-direct, the prosecuting attorney asked the witness whether, in his experience, these third parties are always, sometimes, or never involved in the illegal manufacturing operation. The witness replied that, in his experience, "innocent" third parties were not used to pick up chemicals. We found that defense counsel "opened the door" to that line of questioning. 716 F.2d at 710.

However, the case most closely on point is the Second Circuit's decision in *United States v. Khan*, 787 F.2d 28 (2d Cir.1986). In *Khan*, the defendant, a Pakistani accused of selling narcotics in the U.S., argued that the trial court erred in allowing the introduction of "irrelevant and unfairly prejudicial" expert testimony about heroin trafficking in Pakistan. The expert witness, a DEA agent, testified that (1) heroin was extremely inexpensive in Pakistan; (2) it was common for Pakistani dealers to advance heroin to each other without immediate payment; (3) heroin dealers in Pakistan, like other Pakistanis, wore the same \*1213 national dress--pantaloons, baggy pants, and a knee length top. 787 F.2d at 34.

The appellate court ruled that this evidence was relevant, and that it was within the discretion of the trial court to allow it. The court noted that

Khan attempted to rebut the government's portrayal of him as a major drug dealer by

suggesting that he was a poor man.... The expert testimony was relevant to rebut Khan's arguments to the jury and show that (1) Khan did not need a large sum of money to deal in large amounts of heroin in Pakistan, and (2) even if Khan had made a great deal of money in the heroin trade, it would not necessarily show from the manner of his dress.

Id.

Although Beltran is correct that this type of profile evidence is potentially dangerous, the cases suggest that it is permissible in certain limited circumstances. The district court determined that Nava's testimony was necessary to rebut the inference that defense counsel attempted to create. The district court was aware of the potential prejudice, and attempted to keep it at a minimum by sustaining several objections, and striking one portion of Nava's testimony from the record. We conclude that the district judge did not abuse her discretion. [FN2]

FN2. We emphasize that the holding in this case is a relatively narrow one. The Government may introduce profile testimony of this sort only to rebut specific attempts by the defense to suggest innocence based on the particular characteristics described in the profile.

#### B. Witness Confrontation

[3] Beltran also argues that Nava's drug courier profile testimony, which was based in part upon information obtained from DEA officials, was hearsay, and that admission of this testimony deprived Beltran of an effective opportunity to confront adverse witnesses through cross-examination. Whether Beltran's sixth amendment right to confront witnesses against him was violated is a question of law, reviewed de novo. *United States v. McConney*, 728 F.2d 1195 (9th Cir.) (en banc), cert. denied, 469 U.S. 824, 105 S.Ct. 101, 83 L.Ed.2d 46 (1984). Beltran's confrontation argument is without merit.

Nava testified that in his sixteen years as a law enforcement official, he has worked on hundreds of drug cases, with as many as four hundred directly involving smuggling of drugs into the United States. RT vol. II at 251. He also testified that he worked as an undercover agent in Mexico for two years, and

that he personally had received drugs from couriers on as many as one hundred occasions. *Id.* at 263. Thus, his opinion about the typical characteristics of drug couriers is derived largely from personal experience. [FN3] Defense counsel unquestionably had ample opportunity to cross-examine Nava about his expert opinion, and the sources of information upon which that opinion was based. This is a sufficient basis upon which to reject Beltran's confrontation clause argument.

FN3. To the extent that Nava's testimony was based upon information obtained other than through personal observation, it was permissible, being based upon information of the type reasonably relied upon by experts in forming expert opinions. See *United States v. Golden*, 532 F.2d 1244 (9th Cir.), cert. denied, 429 U.S. 842, 97 S.Ct. 118, 50 L.Ed.2d 111 (1976) (holding it proper to admit DEA agent's testimony about market value of heroin where that testimony was based in part upon information obtained from other undercover agents; such information is of the type reasonably relied upon by experts determining prevailing prices in clandestine markets). Beltran does not dispute that Nava is an expert on narcotics smuggling.

#### C. The Duress Instruction

[4] Before a defendant is entitled to an instruction on the defense of duress, he must establish a prima facie case of the three elements of that defense: (1) an immediate threat of death or serious bodily injury; (2) a well-grounded fear that the threat will be carried out; and (3) lack of a reasonable opportunity to escape the threatened harm. *United States v. Jennell*, 749 F.2d 1302, 1305 (9th Cir.1984), cert. denied, 474 U.S. 837, 106 S.Ct. 114, 88 L.Ed.2d 93 (1985); *United States v. Contento-Pachon*, 723 F.2d 691, 693 (9th Cir.1984). We noted in *Jennell* that a fourth \*1214 element is also sometimes required; the defendant must submit to the proper authorities after attaining a position of safety. 749 F.2d at 1305. However, this fourth element has independent significance only in prison escape cases. *Id.*

[5] The district court gave the following instruction relating to duress:

The defendant has offered evidence to show that at the time the crime charged in the indictment was committed, defendant was in fear of his life and

the lives of his mother and sister.

A defendant is not guilty of a crime if the defendant participated in it only because of a belief with good reason:

1. That defendant or his family would suffer immediate and serious injury or death if the defendant did not participate; and
2. That defendant had no other reasonable way of escaping such immediate injury or death.

The Government must prove the defendant's guilt beyond a reasonable doubt. To do so, the Government must prove beyond a reasonable doubt either one of the two following elements:

1. That when the defendant committed the crime, defendant did not have a reasonable belief that serious and immediate injury would follow, or
2. That at that time defendant had a reasonable opportunity to escape such serious and immediate injury or death. In evaluating a reasonable opportunity to escape, you may consider whether defendant took the opportunity to escape the threatened harm by submitting to authorities at the first reasonable opportunity.

RT vol. II, at 522-23 (emphasis added). Beltran argues that this instruction is erroneous because it permits the Government to satisfy its burden of proof by showing that Beltran did not immediately surrender to the proper authorities upon his initial entry in to the United States. Beltran insists that the highlighted language in the instruction imports a fourth element into the duress defense that is inappropriate outside the context of prison escape cases. Jury instructions are considered as a whole to determine if they are misleading or inadequate. *United States v. Burgess*, 791 F.2d 676, 680 (9th Cir.1986). The trial judge has substantial latitude in tailoring the instructions, and challenges to the formulation adopted by the court are reviewed for abuse of discretion. *Id.*

The major flaw of Beltran's argument is that the instruction as given does not make submission to the authorities an independent fourth element to a duress defense. The instruction quite clearly invites the jury to consider submission to the authorities as one factor in evaluating the third prong of the duress defense, lack of reasonable opportunity to escape. Nothing in the wording of the instruction suggests that failure to submit to the authorities precludes a finding of duress.

Considering submission to the authorities as an

element of opportunity to escape does not appear to be inconsistent with Ninth Circuit authority on duress. As we noted in *Contento-Pachon*:

In cases not involving escape from prison there seems to be little difference between the third basic requirement that there be no reasonable opportunity to escape the threatened harm and the obligation to turn oneself in to the authorities on reaching a point of safety. Once a defendant has reached a position where he can safely turn himself in to the authorities he will likewise have a reasonable opportunity to escape the threatened harm.

723 F.2d at 695 (emphasis added). See also *Jennell*, 749 F.2d at 1305 (quoting *Contento-Pachon*). The challenged instruction appears to embody fairly the view expressed in *Jennell* and *Contento-Pachon*; as a practical matter, whether the defendant submits to the proper authorities at the first reasonable opportunity is closely related to whether the defendant has a reasonable opportunity to escape the threatened harm. Taken as a whole, the duress instruction does not appear to be misleading, and the trial judge did not abuse her discretion in adopting this particular formulation.

**\*1215 III.  
CONCLUSION**

Under the circumstances of this case, the district court's carefully considered decision to allow testimony describing the profile characteristics of drug couriers was not an abuse of discretion. The defendant's right to confront witnesses against him was not abridged. The district court's formulation of the jury instructions on duress was not misleading, and was within the discretion of the district court.

**AFFIRMED.**

**END OF DOCUMENT**

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CLIENT IDENTIFIER: EHJ  
DATE OF REQUEST: 04/10/96

**INSTA-CITE**

CITATION: 878 F.2d 1208

=> 1 **U.S. v. Beltran-Rios**, 878 F.2d 1208, 28 Fed. R. Evid. Serv. 127  
(9th Cir.(Cal.), Jul 06, 1989) (NO. 88-5279)

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Citation	Rank(R)	Page(P)	Database	Mode
69 F.3d 419	R 2 OF 32	P 1 OF 108	ALLFEDS	P LOCATE
43 Fed. R. Evid. Serv. 225				
<b>(Cite as: 69 F.3d 419)</b>				

UNITED STATES of America, Plaintiff-Appellee,  
v.

Milton EDWARDS, Defendant-Appellant.

UNITED STATES of America, Plaintiff-Appellee,  
v.

Terry RATLIFF, Sr., Defendant-Appellant.

UNITED STATES of America, Plaintiff-Appellee,  
v.

William Thomas LAWRENCE, Defendant-Appellant.

UNITED STATES of America, Plaintiff-Appellee,  
v.

Kerry CHAPLIN, Defendant-Appellant.

Nos. 94-5202 to 94-5204 and 95-5003.

United States Court of Appeals,

Tenth Circuit.

Oct. 24, 1995.

Defendants were convicted of conspiracy to possess with intent to distribute and to distribute cocaine, and two defendants were convicted of use of communication facility in facilitating violation of federal narcotics laws, in  
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69 F.3d 419	R 2 OF 32	P 88 OF 108	ALLFEDS	P LOCATE
<b>(Cite as: 69 F.3d 419, *434)</b>				

innocence.' " Williams, 45 F.3d at 1484 (quoting Zafiro v. United States, 506 U.S. 534, 113 S.Ct. 933, 122 L.Ed.2d 317 (1993)). "Neither a mere allegation that defendant would have a better chance of acquittal in a separate trial, nor a complaint of the 'spillover effect' [of damaging evidence] is sufficient to warrant severance." United States v. Levine, 983 F.2d 165, 167 (10th Cir.1992) (quotations omitted).

[32] We conclude Defendant has failed to show the requisite prejudice warranting severance. As we have stated, the facts of this case were not so intricate as to render the jury unable to segregate the evidence associated with each defendant's individual actions. See supra part III.B.2. Moreover, the district court minimized any possible prejudice by instructing the jury that "[i]t is your duty to give separate and individual consideration to the evidence as it relates to each individual defendant [and] leav[e] out of consideration entirely any evidence admitted solely against some other defendant or defendants." See \*435 Vol. I, Tab 96, p. 6; Zafiro, 113 S.Ct. at 938 ("[L]imiting instructions ... often will suffice to cure any risk of prejudice."). Under these circumstances, we conclude the district court did not abuse its discretion in denying Defendant's motion to sever.

V. 404(b) Evidence

[33] Defendants Edwards and Lawrence contend the district court erred in admitting evidence of prior bad acts pursuant to Fed.R.Evid. 404(b). We review  
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 (Cite as: 69 F.3d 419, \*435)

the district court's decision to admit evidence under Rule 404(b) for an abuse of discretion. *United States v. Patterson*, 20 F.3d 809, 812 (10th Cir.), cert. denied, --- U.S. ----, 115 S.Ct. 128, 130 L.Ed.2d 72 (1994).

During trial, the government moved to admit excerpts from testimony given by Edwards and Lawrence as government witnesses at an unrelated 1991 cocaine conspiracy trial in the Northern District of Oklahoma. The excerpts included testimony in which Edwards and Lawrence testified that they had known each other for at least five or six years and became involved in the cocaine business in 1986. Edwards testified that he had purchased two to three kilograms of cocaine from Lawrence in 1986 and began purchasing cocaine in Los Angeles and Houston for resale in Tulsa, in 1988. Lawrence testified that he and Edwards had made two or three trips to Houston to purchase cocaine, and would place the cocaine inside a spare tire before returning to Tulsa.

[34] The government offered the prior testimony in order to rebut Defendants' contention that they were not involved in a cocaine conspiracy with each other and with J. Grist. Thus, under Rule 404(b), the government contended that the prior testimony showed knowledge of the charged conspiracy and an absence of mistake. Defendants objected to the admission of the testimony contending that even if the evidence was admitted for a proper purpose under Rule 404(b), the evidence was more prejudicial than probative and should be excluded. The district court overruled the objection stating that

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 (Cite as: 69 F.3d 419, \*435)

"[i]t's the view of the Court that such evidence of prior statements, activities would ... go to the issues of motive, knowledge, opportunity, and absence of mistake or accident, and would therefore be appropriate." [FN11] Vol. XI at 804. The court therefore admitted the prior testimony.

FN11. Defendant Lawrence appears to suggest that the district court erred in admitting the prior testimony because it failed to articulate the specific purpose for which the evidence was admitted, but instead merely restated the language of Rule 404(b). We disagree.

We have held that "a broad statement merely invoking or restating Rule 404(b) will not suffice" to identify the specific purpose for which a district court admitted Rule 404(b) evidence. *United States v. Kendall*, 766 F.2d 1426, 1436 (10th Cir.1985), cert. denied, 474 U.S. 1081, 106 S.Ct. 848, 88 L.Ed.2d 889 (1986). However, even if the district court fails to specifically articulate the basis for admission, the error is harmless as long as a proper purpose is apparent from the record. *United States v. Record*, 873 F.2d 1363, 1373 (10th Cir.1989). As our analysis indicates, the specific purpose for admitting the prior testimony in the instant case is apparent from the record.

[35] Defendants contend the district court improperly admitted the prior  
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testimony under Rule 404(b) because the evidence related to events which occurred in 1988 and was thus too remote in time to the events charged in the instant case. Consequently, Defendants contend that the probative value of the evidence was substantially outweighed by its prejudicial impact. [FN12]

FN12. Fed.R.Evid. 404(b) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Evidence of a defendant's prior crimes, wrongs, or acts is "admissible only for limited purposes and only when various prerequisites are satisfied." United States v. Robinson, 978 F.2d 1554, 1558 (10th Cir.1992), cert. denied, --- U.S. ----, 113 S.Ct. 1855, 123 L.Ed.2d 478 (1993). Rule 404(b) requires that

(1) the evidence must be offered for a proper purpose; (2) the evidence must be relevant; (3) the trial court must make a Rule 403 determination of whether the \*436 probative value of the similar acts is substantially outweighed by its potential for unfair prejudice; and (4) pursuant to Fed.R.Evid. 105, the  
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trial court shall, upon request, instruct the jury that the evidence of similar acts is to be considered only for the proper purpose for which it was admitted.

United States v. Johnson, 42 F.3d 1312, 1315 (10th Cir.1994) (quotation omitted). " 'We have previously recognized the highly probative value of uncharged prior acts evidence to show motive, intent, knowledge or plan in the context of a conspiracy prosecution.' " United States v. Easter, 981 F.2d 1549, 1554 (10th Cir.1992) (quoting United States v. Record, 873 F.2d 1363, 1375 (10th Cir.1989)), cert. denied, --- U.S. ----, 113 S.Ct. 2448, 124 L.Ed.2d 665 (1993). This is particularly true where the uncharged acts are **similar** in method to the charged **conspiracy** and sufficiently close in time. Id.

Here, Defendants' prior acts involved their joint efforts regarding distribution of cocaine purchased in and transported from Houston, Texas--a similar scheme with which Defendants were eventually charged--and were sufficiently close in time to the charged conduct. See United States v. Wint, 974 F.2d 961, 967 (8th Cir.1992) (narcotics offense committed five years earlier was "reasonably close in time" to charged offense), cert. denied, --- U.S. ----, 113 S.Ct. 1001, 122 L.Ed.2d 151 (1993); United States v. Drew, 894 F.2d 965, 970 (8th Cir.) (evidence of defendant's participation in running drug house three years earlier to offense in question probative of issues of intent, knowledge, and plan), cert. denied, 494 U.S. 1089, 110  
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**(Cite as: 69 F.3d 419, \*436)**

S.Ct. 1830, 108 L.Ed.2d 959 (1990). In this context, the prior acts evidence was highly relevant to show Defendants' knowledge of the plan or scheme to possess and distribute cocaine. Furthermore, the prior acts evidence rebutted Defendants' claim that they were not involved in a cocaine conspiracy with each other. See Easter, 981 F.2d at 1554 (upholding the admission of prior acts evidence under similar circumstances).

In addition, the probative value of the evidence was not substantially outweighed by its potential for unfair prejudice. Although the district court did not explicitly rule on the prejudicial impact of the evidence, the court admitted the evidence following Defendants' objections based upon prejudice. Thus, "we can assume the judge weighed the prejudicial impact against the probative value of the evidence", Patterson, 20 F.3d at 814, before making the final determination to admit the prior testimony. Because "[w]e are required to give the trial court 'substantial deference' in Rule 403 rulings", *id.* (quoting Easter, 981 F.2d at 1554), we will not disturb the district court's implicit determination regarding the probative value of the evidence. See *id.* Moreover, the district court's jury instructions included an instruction limiting the use of the prior acts evidence. Under these circumstances, we conclude the district court did not abuse its discretion in admitting the prior acts evidence pursuant to Rule 404(b).

#### VI. Defendant Edwards' Pro Se Issues

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## INSTA-CITE

CITATION: 69 F.3d 419

## Direct History

- => 1 **U.S. v. Edwards**, 69 F.3d 419, 43 Fed. R. Evid. Serv. 225  
(10th Cir.(Okla.), Oct 24, 1995) (NO. 94-5202, 95-5003, 94-5203,  
94-5204)  
Petition for Certiorari Filed, 64 USLW 3593 (Feb 23, 1996)  
(NO. 95-1355)
- => 2 **U.S. v. Edwards**, 69 F.3d 419, 43 Fed. R. Evid. Serv. 225  
(10th Cir.(Okla.), Oct 24, 1995) (NO. 94-5202, 95-5003, 94-5203,  
94-5204)  
Petition for Certiorari Filed (Feb 29, 1996) (NO. 95-8147)
- => 3 **U.S. v. Edwards**, 69 F.3d 419, 43 Fed. R. Evid. Serv. 225  
(10th Cir.(Okla.), Oct 24, 1995) (NO. 94-5202, 95-5003, 94-5203,  
94-5204)  
Petition for Certiorari Filed (Mar 04, 1996) (NO. 95-8134)
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30 Fed. R. Evid. Serv. 244				
<b>(Cite as: 894 F.2d 965)</b>				

UNITED STATES of America, Appellee,  
v.  
Earl D. DREW, a/k/a Derrick/Dereck Drew, Appellant.  
UNITED STATES of America, Appellee,  
v.  
Dennis Edward DREW, Appellant.  
UNITED STATES of America, Appellee,  
v.  
Hampton David STEWART, Jr., a/k/a Snookie, Appellant.  
Nos. 88-2661, 88-2662 and 88-2668.  
United States Court of Appeals,  
Eighth Circuit.  
Submitted June 12, 1989.  
Decided Jan. 17, 1990.

Defendants were convicted in the United States District Court for the Western District of Missouri, Scott O. Wright, Chief Judge, for conspiracy and substantive offenses arising out of operation of drug house. Defendants appealed. The Court of Appeals, Bowman, Circuit Judge, held that: (1) evidence supported one defendant's conviction for using or carrying firearm  
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<b>(Cite as: 894 F.2d 965, *968)</b>				

sufficient evidence to find that Earl Drew participated in the operation of a drug house, that a gun was present at the drug house and in Drew's possession and control, and that Drew "use[d]" a firearm during the commission of a drug trafficking crime.

C.

Earl Drew raises two separate issues concerning the government's closing argument. \*969 We review the trial court's rulings on objections to statements made in closing argument under an abuse of discretion standard. United States v. Flynn, 852 F.2d 1045, 1055 (8th Cir.), cert. denied, --- U.S. ----, 109 S.Ct. 511, 102 L.Ed.2d 546 (1988).

First, appellant again invokes his theory on the meaning of "use" under the firearm statute in arguing that the government misstated the law in closing argument thereby denying appellant his due process rights under the Fifth Amendment of the Constitution. [FN2] Because we find Drew's interpretation of the law as requiring an actual or threatened discharge of a firearm contrary to any plausible reading of s 924, [FN3] we obviously find no error in the government's failure to present appellant's version of the law to the jury during closing argument.

FN2. In our opinion, the challenged portion of the government's closing argument, cut short by appellant's objection at trial, was rather generous  
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in its inclusion of appellant's theory of the gun's purpose:

And you need not find that that was the only possible use for the gun. I mean, you might use it to protect yourself, you might use it for target shooting, you might use it to do whatever you want to do for sport, for show, whatever, but if one day a week or one night a week he used that gun to protect those drugs, to protect his money or to protect himself when he came to the door early in the morning, and you've heard testimony that that's what it was about--.

Tr. Vol. 4 at 11.

FN3. We note that appellant's objection at trial, that "[a]nyone in this country can protect themselves with a [hand]gun in the morning when someone comes to the door at 4:00 [a.m.]," Tr. Vol. 4 at 11-12, happens to be an incorrect statement of the law in several localities in this country including the seat of federal government. See D.C.Code Ann. s 6-2312(4) (1989 Repl.Vol.).

[5] Appellant's second complaint with the closing argument is that government counsel misstated the law by describing "beyond a reasonable doubt" as equivalent to being "sure" or "certain." The relevant definitions given by Webster's Third New International Dictionary (unabridged) (1981), for "certain" Copr. (C) West 1996 No claim to orig. U.S. govt. works

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are: "not to be doubted as a fact: INDISPUTABLE ... given to or marked by complete assurance and conviction, lack of doubt ... through or as if through infallible knowledge." Id. at 367. And those for "sure" are: "assured in mind: having no doubt ... marked by ... feelings of confident certainty and conviction esp. of the rightness of one's judgment ... objectively certain: admitting of no doubt ... marked by unquestionable fact, verity, or substantiation." Id. at 2299.

To the extent that the words "sure" and "certain" differ in meaning from "beyond a reasonable doubt," it is not the defendant who should be protesting: the definitions of "sure" and "certain" appear to encompass even doubts that do not merit the qualifier "reasonable." Although we think prosecutors would be well advised to avoid trying to explain to the jury the meaning of "beyond a reasonable doubt" (this is a function properly performed only by the trial judge), the error here favored the defendants and was harmless beyond a reasonable doubt. We therefore decline to reverse on this ground.

D.

Earl Drew next contends that evidence of his drug dealing prior to the period covered in the indictment was improperly admitted. The admissibility of prior bad acts evidence is governed by Rule 404(b) of the Federal Rules of Evidence.

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, Copr. (C) West 1996 No claim to orig. U.S. govt. works

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however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The decision to admit evidence of prior bad acts is within the sound discretion of the trial judge, see, e.g., *United States v. Gustafson*, 728 F.2d 1078, 1083 (8th Cir.), cert. denied, 469 U.S. 979, 105 S.Ct. 380, 83 L.Ed.2d 315 (1984), subject only to an abuse of discretion standard of review by this Court. *United States v. Bowman*, 798 F.2d 333, 337 (8th Cir.1986), cert. denied, 479 U.S. 1043, 107 S.Ct. 906, 93 L.Ed.2d 856 \*970 (1987). Indeed, "reversal is only commanded when 'it is clear that the questioned evidence has no bearing upon any of the issues involved.'" *United States v. Thompson*, 503 F.2d 1096, 1098 (8th Cir.1974) (quoting *Wakaksan v. United States*, 367 F.2d 639, 645 (8th Cir.1966), cert. denied, 386 U.S. 994, 87 S.Ct. 1312, 18 L.Ed.2d 341 (1967)). We find no reason to reverse the District Court's ruling.

There is no question that the evidence of appellant's prior narcotics transactions has some bearing on his guilt in the charged narcotics offenses as showing, among other things, opportunity, intent, preparation, and plan. That this evidence is relevant to a material issue raised is not even challenged by appellant.

[6] While conceding that evidence of his previous narcotics transactions was  
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relevant on a material issue, appellant argues that three other requirements for admission were not met. Appellant first claims that his previous operation of a drug house was not sufficiently close in time to the charged offense. See *United States v. Marshall*, 683 F.2d 1212, 1215 (8th Cir.1982). Government witness Frank Biondo testified that Drew had operated a drug house as far back as 1985 and that at some point in 1986 the operation moved to a different house. His testimony did not suggest, however, that there had been any significant interruption in Drew's operation of drug houses.

[7] Although proximity in time combined with similarity in type of crime virtually guarantees admittance of prior bad acts evidence, see, e.g., *United States v. Anderson*, 879 F.2d 369, 378 (8th Cir.), cert. denied, --- U.S. ----, 110 S.Ct. 515, 107 L.Ed.2d 516 (1989), these are only factors tending to negate the possibility that the evidence was improperly introduced to "prove the character of a person in order to show action in conformity therewith." Fed.R.Evid. 404(b). The ultimate question always remains whether the evidence "is admissible to prove any relevant issue other than the character of the defendant or his propensity toward criminal activity." *United States v. McDaniel*, 773 F.2d 242, 247 (8th Cir.1985).

We have frequently sustained the admission of prior bad acts evidence without so much as a passing mention of closeness in time and similarity of the prior act to the charged offense when it was relevant to an issue other than the  
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character of the defendant, such as motive, intent, or absence of mistake. See *United States v. Felix*, 867 F.2d 1068, 1072 (8th Cir.1989); *United States v. Pierce*, 792 F.2d 740, 743 (8th Cir.1986). In the case of "signature" crimes, or "other crimes by the accused so nearly identical in method as to earmark them as the handiwork of the accused," C. McCormick, McCormick on Evidence s 190(3), at 559 (E. Cleary 3d ed. 1984), the time factor is obviously much less important than in the typical 404(b) case. Evidence offered to prove motive by showing the existence of a larger plan, on the other hand, could properly include evidence of a wholly different prior bad act committed in connection with the charged offense. *Id.* See, e.g., *Grandison v. State*, 305 Md. 685, 735-36, 506 A.2d 580, 605, cert. denied, 479 U.S. 873, 107 S.Ct. 38, 93 L.Ed.2d 174 (1986) (indictment in federal narcotics case admissible in state prosecution for hiring an assassin to kill witness in federal case). Proximity in time and similarity of conduct are only factors that may be considered by the trial judge in deciding whether to admit evidence of prior bad acts; they are not requirements for admission.

Moreover, whether under the rubric of "intent," "knowledge," or "common plan or scheme," we have repeatedly upheld the admission of prior drug transactions in cases charging narcotics violations. See, e.g., *United States v. Haynes*, 881 F.2d 586, 590 (8th Cir.1989); *United States v. Maichle*, 861 F.2d 178, 180 (8th Cir.1988); *United States v. Norton*, 846

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F.2d 521, 524 (8th Cir.1988). We may add Drew's case to the list without delving into the precise timing of his prior drug dealings which, in any event, apparently continued straight up to, indeed through, the time period of the charged conspiracy.

\*971 [8] Drew next argues that the evidence of his prior drug dealing did not satisfy the "clear and convincing" standard, which until recently was the requirement for such evidence in this Circuit. More than one month before Drew went to trial, however, the Supreme Court rejected the "clear and convincing" standard, holding that evidence of prior bad acts may be admitted "if there is sufficient evidence to support a finding by the jury that the defendant committed the [prior acts]." *Huddleston v. United States*, 485 U.S. 681, 685, 108 S.Ct. 1496, 1499, 99 L.Ed.2d 771 (1988); see also *id.* at 685 n. 2, 108 S.Ct. at 1499 n. 2 (distinguishing requirements for admission of such evidence among the circuits). The government's evidence of Drew's prior drug transactions consisted of the testimony of Frank Biondo, one of the government's principal witnesses throughout the trial. We cannot say the District Court abused its discretion in admitting this evidence under either the "clear and convincing" standard or the Huddleston standard.

Finally, Drew invokes the residual complaint available under Rule 403 of the Federal Rules of Evidence that the "probative value [of the evidence was] substantially outweighed by the danger of unfair prejudice." Fed.R.Evid. 403.

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## INSTA-CITE

CITATION: 894 F.2d 965

## Direct History

- => 1 **U.S. v. Drew**, 894 F.2d 965, 30 Fed. R. Evid. Serv. 244  
(8th Cir.(Mo.), Jan 17, 1990) (NO. 88-2661, 88-2662, 88-2668)  
Certiorari Denied by
- 2 **Drew v. U.S.**, 494 U.S. 1089, 110 S.Ct. 1830, 108 L.Ed.2d 959  
(U.S.Mo., Apr 16, 1990) (NO. 89-6845)  
AND Denial of Post-Conviction Relief Affirmed by
- 3 **Drew v. U.S.**, 46 F.3d 823 (8th Cir.(Mo.), Feb 01, 1995) (NO. 94-2348)  
Certiorari Denied by
- 4 **Drew v. U.S.**, 116 S.Ct. 72, 133 L.Ed.2d 33, 64 USLW 3215, 64 USLW 3240  
(U.S., Oct 02, 1995) (NO. 94-2007)
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UNITED STATES of America, Appellee,  
v.  
Wayne WOMOCHIL, Appellant.

No. 84-2591.

United States Court of Appeals,  
Eighth Circuit.

Submitted Sept. 10, 1985.

Decided Dec. 9, 1985.

Rehearing and Rehearing En Banc Denied Jan. 30,  
1986.

Defendant was convicted of conspiring to distribute cocaine and of possession of cocaine with intent to distribute, in the United States District Court for the District of Nebraska, Clarence Arlen Beam, J., after that same court had denied suppression motions, 579 F.Supp. 804, and defendant appealed. The Court of Appeals, Floyd R. Gibson, Senior Circuit Judge, held that: (1) incriminating statement attributed to declarant by another person in witness' presence was admissible under the coconspirator hearsay exception; (2) otherwise inadmissible testimony was admissible on redirect examination to correct false impression left by defendant on cross-examination; and (3) alleged prosecutorial misconduct did not require mistrial.

Affirmed.

[1] CRIMINAL LAW ⇔ 427(5)  
110k427(5)

For an out-of-court statement to be admitted against defendant under the coconspirator exception the hearsay rule under Fed.Rules Evid.Rule 801(d)(2)(E), 28 U.S.C.A., Government must show by preponderance of independent evidence that conspiracy existed, that defendant and declarant were members of the conspiracy, and that statement was made during the course of and in furtherance of the conspiracy.

[2] CRIMINAL LAW ⇔ 1158(4)  
110k1158(4)

District court's determination as to admissibility of coconspirator's hearsay statements will not be reversed unless it is clearly erroneous.

[3] CRIMINAL LAW ⇔ 427(5)

110k427(5)

Evidence was sufficient to support finding that defendant and declarant were members of cocaine distribution conspiracy and that declarant made incriminating statement in furtherance of that conspiracy, so that declarant's statement implicating defendant fell under the coconspirator exception to the hearsay rule under Fed.Rules Evid.Rule 801(d)(2)(E), 28 U.S.C.A.

[4] CRIMINAL LAW ⇔ 422(1)  
110k422(1)

Declarant's statement incriminating defendant, which fell under the coconspirator exception to the hearsay rule under Fed.Rules Evid.Rule 801(d)(2)(E), 28 U.S.C.A., was not rendered inadmissible by fact that statement was not made to witness but was attributed to declarant by another person in witness' presence.

[5] WITNESSES ⇔ 287(1)  
410k287(1)

District court did not abuse its discretion in allowing Government on redirect examination of Government witness to elicit inadmissible testimony to which defense counsel had not opened the door during cross-examination, where defendant had elicited the same testimony during voir dire out of presence of jury and had left mistaken impression by later selective cross-examination before jury.

[6] CRIMINAL LAW ⇔ 706(2)  
110k706(2)

Defendant charged with conspiracy to distribute cocaine was not entitled to mistrial on ground of prosecutor's improper questioning of witness as to contents of package delivered for defendant, which questions were never answered, or for prosecutor's unsuccessful proffer of inadmissible evidence.

[6] CRIMINAL LAW ⇔ 706(3)  
110k706(3)

Defendant charged with conspiracy to distribute cocaine was not entitled to mistrial on ground of prosecutor's improper questioning of witness as to contents of package delivered for defendant, which questions were never answered, or for prosecutor's unsuccessful proffer of inadmissible evidence.

[7] WITNESSES ⇔ 287(1)  
410k287(1)

Prosecutor was entitled to question federal agent on

redirect examination as to information received regarding defendant's previous dealings with narcotics, which would have otherwise been inadmissible, in order to correct false impression created by evidence elicited on cross-examination that defendant had never been arrested or charged with such offenses; reference to such testimony was likewise permissible in prosecutor's closing argument.

\*1312 J. William Gallup, Omaha, Neb., and a supplemental brief filed by Alan P. Caplan, Cleveland, Ohio, for appellant.

Stephen Anderson, Asst. U.S. Atty., Omaha, Neb., for appellee.

Before ROSS, Circuit Judge, FLOYD R. GIBSON, Senior Circuit Judge, and ARNOLD, Circuit Judge.

FLOYD R. GIBSON, Senior Circuit Judge.

Wayne Womochil appeals from a final judgment entered by the district court [FN1] on a jury verdict finding him guilty of one count of conspiring to distribute cocaine in violation of 21 U.S.C. § 846, and one count of possessing cocaine with intent to distribute in violation of 21 U.S.C. § 841(a)(1). The district court sentenced Womochil to twelve years in prison on each count, to be served concurrently, and ordered him to pay a \$5,000 fine on each count. Womochil, who had been indicted along with ten other defendants, makes several arguments on appeal, centering on the admission of certain evidence and the allegedly improper conduct of the prosecutor. Finding none of Womochil's arguments to be of merit, we affirm the district court's judgment.

FN1. The Honorable C. Arlen Beam, United States District Judge for the District of Nebraska.

The indictment against Womochil and the other defendants resulted from a three-year investigation, jointly conducted by local and state law enforcement personnel as well as the Federal Bureau of Investigation (FBI), into illegal narcotics transactions in the Omaha, Nebraska area. The investigation was intended to uncover the identity of the "king pin" suppliers of cocaine in the area; that is, those persons responsible for distributing cocaine

to individual sellers. After investigators had used conventional methods such as surveillance, pen register devices, and the use of informants, confidential sources, and undercover officers, the County Attorney for Douglas County, Nebraska applied to Douglas County District Court Judge James Murphy for electronic surveillance authorization. On July 13, 1982, the date of the application, Judge Murphy authorized the wiretaps for a period of thirty days from the date of hook-up, without terminating when the described communications were first obtained. Those phones authorized by Judge Murphy to be intercepted by wiretap included defendant Ronald Bartrem's residential line, two Omaha businesses' lines, and a dental laboratory. Upon applications supported by affidavits, thirty-day extensions of the interceptions were granted on August 12, September 10, October 19, and November 17 of 1982.

In addition to these telephone interceptions, the Douglas County attorney also sought and was granted authority on July 29, 1982 to place an electronic device, or "bug," in defendant Bartrem's apartment and at the dental laboratory. The bugs were used to monitor conversations between Bartrem and co-defendant Joseph J. Bongiorno in regard to the sale of cocaine. Subsequent extensions of this authorization kept the bugging devices in use through November 28, 1982. In brief, the evidence obtained through the use of the wiretaps and bugs disclosed that Womochil originally distributed cocaine to Harry Gilbert, who in turn distributed the cocaine to Bartrem and Bongiorno. Bartrem and Bongiorno, acting as partners, then distributed the cocaine to other individuals. Later in the conspiracy Womochil bypassed Gilbert to distribute cocaine directly to Bartrem, who bought the cocaine on behalf of himself and Bongiorno.

I. Denial of Womochil's Motion to Suppress Evidence Obtained by Interception of Wire and Oral Communications

Womochil, along with several of his co-defendants and other defendants in related \*1313 cases, filed a pretrial motion to suppress the evidence obtained by use of the wiretaps and bugs. The district court denied all such motions in *United States v. Van Horn*, 579 F.Supp. 804 (D.Neb.1984). On appeal Womochil argues that the district court's denial of his motion to suppress was

improper for several reasons. First, Womochil contends that because the wiretaps were granted by a county judge upon application by the county attorney, the validity of the court authorization of the wiretaps should be determined by Nebraska law. Second, Womochil asserts that all of the authorization orders were invalid because the government failed to establish in the affidavits supporting its applications that normal investigative procedures had been used without success and without the prospect of success in the future. Third, Womochil argues that the authorization orders failed to comply with both state and federal statutes because they did not limit the interceptions to a period long enough to achieve the objective of the authorization. Fourth, Womochil maintains that because the Nebraska wiretap statute allows only officers of the state or a political subdivision thereof to make the interceptions, the FBI agents were improperly authorized to participate in the wiretaps. Finally, Womochil contends that the government made no attempt to minimize the interception of personal, "non-criminal" calls.

The district court thoroughly addressed and disposed of all of these arguments in its published opinion. See Van Horn, 579 F.Supp. at 809-817. We have carefully considered all of Womochil's contentions in regard to the propriety of the electronic surveillance conducted in this case, as well as the district court's exhaustive response to these contentions. We see no need to reiterate or elaborate on the district court's well-reasoned discussion. Womochil does not point to any flaws in the district court's opinion; indeed, he does not even cite to that opinion in his brief. We therefore affirm the district court's denial of Womochil's motion to suppress the evidence obtained by use of the wiretaps and bugs.

## II. Admission of Alleged Hearsay Evidence

Womochil next assigns as error the district court's admission of certain statements, which he contends constituted hearsay because they were not the statements of a coconspirator, nor were they made in the course of the conspiracy or in furtherance of it. Womochil asserts that impermissible hearsay testimony was admitted on two occasions at trial. The first occurrence of the testimony to which Womochil objects was on direct examination of Gilbert Lascala, an alleged coconspirator of

Bongiorno's, Bartrem's, and Womochil's. The prosecutor questioned Lascala about whether he had ever discussed with Bartrem or Bongiorno their sources of cocaine:

Q: Did [Bongiorno] say who [Bartrem] was getting it from?

A: On one occasion there he said he was getting it from--

Mr. Gallup (Womochil's defense counsel): Oh, just a moment, Judge, that's hearsay.

THE COURT: Overruled.

Q: Did [Bongiorno] say from whom he was getting his--Ronald Bartrem was getting his cocaine?

A: He said he was getting it from his brother-in-law or a cousin or an uncle or somebody like that.

Mr. Gallup: I want to object again to that and move for a mistrial.

Transcript at 640-41. After a conference at the bench and an in chambers hearing the next day, the district court overruled the defendant's mistrial motion and permitted Lascala's answer to stand.

Because the evidence before this point in the trial had already established that Womochil was Bartrem's brother-in-law, Womochil alleges that this testimony was devastating to his case, despite the district court's comment to the contrary. He contends that because Lascala's testimony concerned a statement not made by Bartrem, but attributed to Bartrem by Bongiorno, the statement was inadmissible hearsay. Further, Womochil alleges that no foundation \*1314 was laid as to when the alleged conversation between Lascala and Bongiorno took place; such foundation would have to establish that the conversation took place during the conspiracy or it would not have been admissible.

[1] We think Womochil's contentions are without merit, and that the testimony in question was admissible under Fed.R.Evid. 801(d)(2)(E) as the statement of a coconspirator of a party during the course and in furtherance of the conspiracy. For an out-of-court statement to be admitted against a defendant under the coconspirator exception of Fed.R.Evid. 801(d)(2)(E), the Government must show by a preponderance of independent evidence that a conspiracy existed, that the defendant and the declarant were members of the conspiracy, and that the statement was made during the course and in furtherance of the conspiracy. *United States v. Helmelt*, 769 F.2d 1306, 1312 (8th Cir.1985);

United States v. Johnson, 767 F.2d 1259, 1271 (8th Cir.1985). Womochil does not contend that a conspiracy did not exist, or that Bongiorno, Bartrem, and Lascala were not coconspirators. Rather, Womochil asserts that the Government failed to show by a preponderance of independent evidence that he was a member of the conspiracy, or that the statement was made during the course and in furtherance of the conspiracy.

[2][3] The district court's determination as to the admissibility of coconspirator's statements under Fed.R.Evid. 801(d)(2)(E) will not be reversed unless it is clearly erroneous. United States v. DeLuna, 763 F.2d 897, 909 (8th Cir.1985) (quoting United States v. Singer, 732 F.2d 631, 636 (8th Cir.1984)). We are satisfied that the Government proved by a preponderance of the evidence that Womochil was a member of the conspiracy in question. Janet Meadows, a former girlfriend of Gilbert's, testified as to Womochil's frequent visits to Gilbert's house, during which Womochil and Gilbert would meet behind closed doors in Gilbert's bedroom, where Gilbert kept cocaine. Law enforcement agents testified that Womochil was observed on one occasion at the dental laboratory that served as a locus of the drug transactions, and at a meeting at or near a drugstore with other coconspirators. Womochil's own statements recorded pursuant to the wiretaps, admissible under Fed.R.Evid. 801(d)(2)(A) as admissions of a party-opponent, also constitute independent evidence of his role in the conspiracy. Further, Russell Rockwell testified that he had delivered a paper sack containing something from Womochil to Bartrem (see Section III below). Also, Officer Griffith, on cross-examination by defense counsel, testified as to his theory of Womochil's role in the conspiracy.

[4] As for the "in the course of" requirement, contrary to Womochil's assertion Lascala testified that his conversation with Bongiorno took place during the course of the conspiracy. As well, Bongiorno's statement to Lascala was made in furtherance of the conspiracy. "Statements of a coconspirator identifying a fellow coconspirator as his source of controlled substances is in furtherance of the conspiracy and therefore admissible." United States v. Anderson, 654 F.2d 1264, 1270 (8th Cir.), cert. denied, 454 U.S. 1127, 102 S.Ct. 978, 71 L.Ed.2d 115 (1981). See also United States v. Fitts, 635 F.2d 664, 666 (8th Cir.1980); United

States v. Carlson, 547 F.2d 1346, 1362 (8th Cir.1976), cert. denied, 431 U.S. 914, 97 S.Ct. 2174, 53 L.Ed.2d 224 (1977). Finally, we disagree with Womochil's contention that because the statement as to Bartrem's source of cocaine was not made by Bartrem, but attributed to him by Bongiorno, it was inadmissible hearsay. See, e.g., Carlson, 547 F.2d at 1361-62 (court admitted, under Fed.R.Evid. 801(d)(2)(E), testimony of DEA Agent Nelson that another DEA agent told him that coconspirator Dahl stated that his source of cocaine was defendant Hofstad). In sum, we cannot say that the district court's decision to admit Lascala's testimony was improper.

The second point in the testimony which Womochil alleges involved impermissible hearsay occurred during redirect examination of Lascala by the Government:

\*1315 Q: Mr. Gallup [Womochil's defense counsel] asked you on Cross Examination whether Ronald Bartrem had told you he had gotten his cocaine from Harry Gilbert; is that right?

A: Right.

Q: And what did Ronald Bartrem tell you?

THE COURT: Excuse me--

Mr. Gallup: I am going to object to that \* \* \* \*  
Transcript at 702-03. Womochil claims that on cross-examination of Lascala, Womochil's defense counsel questioned him solely about statements he had made to the FBI when they came to see him in the penitentiary. No inquiry was made on cross-examination, Womochil asserts, as to Lascala's conversations with Bartrem in the penitentiary. Thus, because defense counsel had not opened the door to permit evidence of conversations between Lascala and Bartrem, Womochil contends that the court erred in admitting the prosecutor's questions in regard to such conversations.

In admitting the testimony in question, the district court determined after a hearing out of the presence of the jury that the prosecutor's question about Lascala's conversations with Bartrem was necessary to correct a false impression left by defense counsel on cross-examination. Specifically, prior to cross-examining Lascala, defense counsel voir dired him out of the presence of the jury in regard to Defense Exhibit 401, a statement made by Lascala to the FBI. During this voir dire defense counsel elicited from Lascala a statement that Bartrem had told him while they were in Leavenworth that he had gotten

cocaine from Womochil and then later from Gilbert. On cross-examination of Lascala in front of the jury, however, defense counsel repeatedly left the impression that Lascala had told the FBI that Gilbert alone had been Bartrem's cocaine source. The district court, therefore, allowed the prosecutor on redirect examination to correct this false impression by bringing out Lascala's complete statement as to Bartrem's source of cocaine.

[5] The scope of redirect examination is within the sound discretion of the district court, *United States v. McDaniel*, 773 F.2d 242, 246 (8th Cir.1985); *United States v. Foley*, 683 F.2d 273, 276-77 (8th Cir.), cert. denied, 459 U.S. 1043, 103 S.Ct. 463, 74 L.Ed.2d 613 (1982), and we will reverse the district court only upon a showing of abuse of its discretion. *United States v. Taylor*, 599 F.2d 832, 839 (8th Cir.1979). We find no such abuse of the district court's discretion in its decision to allow the Government to clear up the false impression created on cross-examination as to Lascala's testimony. This court has repeatedly allowed the use of otherwise inadmissible evidence on redirect examination to clarify or complete an issue opened up by defense counsel on cross-examination. See, e.g., *United States v. Young*, 553 F.2d 1132, 1135 (8th Cir.), cert. denied, 431 U.S. 959, 97 S.Ct. 2686, 53 L.Ed.2d 278 (1977) (and cases cited therein).

### III. Alleged Prosecutorial Misconduct

We next address Womochil's argument that the district court erred in denying his many motions for mistrial based on the prosecutor's alleged misconduct. In support of his contention Womochil cites to specific incidents during the trial in which he asserts that the prosecutor employed "illegal tactics." The first such incident occurred on direct examination of Government witness Russell Rockwell. Rockwell had previously pleaded guilty to violating 21 U.S.C. § 843(b) (1984), by telephoning Womochil on November 8, 1982 and telling Womochil he had delivered cocaine to Bartrem. At trial Rockwell testified that he had delivered a package to Bartrem at Womochil's request. The questioning which Womochil finds objectionable was as follows:

Q: Do you remember ever telling anyone that it was cocaine that was in that sack that you were taking to Ronald Bartrem?

Mr. Gallup: I am going to object to that, your Honor, there is no proper and sufficient foundation and I object to that and I move for a mistrial.

....

\*1316 THE COURT: Yes, sustained on foundation.

....

Q: Well, Mr. Rockwell, do you ever remember telling anyone that you had told Mr. Womochil on the phone that you had delivered cocaine to Ronald Bartrem?

Mr. Gallup: I am going to object to that \* \* \* \*

THE COURT: Overruled. He may answer if he can.

A. When I pleaded \* \* \* \*

Mr. Gallup: I object. That is not responsive and I move for a mistrial \* \* \* \*

Transcript at 908-09. After a conference at the bench out of the hearing of the jury the court held that insufficient foundation had been laid as to Rockwell's knowledge of what was in the package. The court sustained the objection to the question, directing the jury to disregard it, but overruled the motion for a mistrial. After this ruling by the court, the questioning continued:

Q: At the time that you carried the sack to Ronald Bartrem, did you have an opinion at that time as to what was in the sack?

Transcript at 913. Defense counsel's objection to this question was again sustained by the court.

The second instance of alleged prosecutorial misconduct occurred after Womochil's defense counsel had used Officer Griffith's affidavits, prepared in support of an application for a wiretap order, in cross-examining the police officer. The prosecutor then offered the affidavits, Defendant's Exhibit 404, into evidence; Womochil's objection was sustained. Womochil then moved for a mistrial based on the prosecutor's "continually offering inadmissible items." The court did not grant the motion.

Womochil next asserts that the prosecutor acted improperly during redirect examination of FBI Agent Murphy. On cross-examination of Murphy the following exchange took place between Womochil's defense counsel and Murphy:

Q: \* \* \* And [Womochil] has never, to your knowledge, ever been arrested or accused of drug trafficking or drug violations of any type up until

this particular case, isn't that true?

A: Do you mean by official process accused of it?

Q: Yes.

A: Not that I'm aware of.

Transcript at 126-27. Shortly thereafter, on redirect, the prosecutor questioned Agent Murphy as follows:

Q: Agent Murphy, you indicated that you never learned that prior to this case that Mr. Womochil had gone through the official process of being charged on another narcotics-related matter.

A: That's correct, yes.

Q: That's not to say that you hadn't received other information with respect to Wayne Womochil and previous dealings with narcotics?

Mr. Gallup: I am going to object to that, it's incompetent, immaterial and irrelevant and goes beyond the scope of the Cross Examination.

THE COURT: Overruled.

Q: And have you received other information?

A: Oh, yes. Yes, many times.

Q: What has been the nature of that information?

Mr. Gallup: The same objection, hearsay, incompetent, immaterial and irrelevant.

Transcript at 128. The prosecutor ultimately withdrew the last question, conceding that it called for hearsay. The record does not show, however, that Womochil moved for a mistrial in connection with Murphy's testimony.

As his final examples of prosecutorial misconduct Womochil points to certain questions asked by the prosecutor of Officer Griffith on redirect examination, the answers to which were referred to in the Government's closing argument. As stated \*1317 above, on cross-examination of Griffith defense counsel used Exhibit 404, consisting of affidavits and applications for wiretap orders, to impeach him by showing he had made prior inconsistent statements in the exhibit. The Government contends that the net result of this attack on Griffith's testimony was to leave the jury with the impression that the exhibit contained the latest and best information, and that Griffith's opinions brought out on cross-examination were unreliable insofar as they contradicted the exhibit. The court permitted the prosecutor on redirect, over Womochil's objection, to ask Griffith whether various individuals who had been subjects of the narcotics investigation had been interviewed since the affidavits were written. The court subsequently overruled Womochil's motion for a mistrial based

on this questioning of Griffith. Later, in his summation of the evidence, the prosecutor referred to Griffith's testimony that further investigation, including interviews with Bartrem and Cenon Ortiz, was conducted after the affidavits and wiretap applications were made. Womochil's objection and mistrial motion were overruled, although the court cautioned the jury to "decide the case upon the evidence that is before you and not what in Final Argument counsel have said the evidence might be." Womochil contends that the Government's closing argument allowed the jury to infer that Bartrem and Ortiz had implicated him in their interviews.

[6][7] At the outset we note that the district court has broad discretion in determining whether a defendant has been so prejudiced as to require a mistrial. *United States v. Robinson*, 774 F.2d 261 at 277 (8th Cir.1985); *United States v. Panas*, 738 F.2d 278, 285 (8th Cir.1984). We conclude that the instances of alleged prosecutorial misconduct cited by Womochil neither individually nor collectively rise to the requisite level of prejudice to warrant a mistrial. The question directed to Rockwell as to statements he had made concerning the contents of the package delivered was never answered. We cannot say that the mere asking of an improper question prejudiced Womochil's case. See *Robinson*, at 277; *United States v. Givens*, 712 F.2d 1298, 1301 (8th Cir.1983), cert. denied, 465 U.S. 1009, 104 S.Ct. 1005, 79 L.Ed.2d 237 (1984). Likewise, Womochil's contention that the Government's proffer of Defendant's Exhibit 404 into evidence prejudiced his case is without merit. Finally, the Government's lines of questioning of Agent Murphy and Officer Griffith on redirect examination were necessary to correct false inferences left by defense counsel after cross-examination of these witnesses. In Agent Murphy's case, defense counsel opened the door to questions about whether the agent had ever received information as to Womochil's involvement with narcotics by creating the false impression on cross-examination that Womochil had never come under suspicion with respect to drugs. As to Officer Griffith's testimony, the questioning as to investigations conducted subsequent to his writing the affidavits in support of the wiretap applications helped correct the inference left on cross-examination that those affidavits contained the most current and correct information available. As we discussed above in Section II, when defense counsel

leaves a false impression after cross-examining a witness, the court may allow the use of otherwise inadmissible evidence on redirect to clarify the issue. *Young*, 553 F.2d at 1135. Because the questioning of Officer Griffith was not in error, the prosecutor's reference to the officer's testimony in his summation was likewise permissible. The trial court has broad discretion in controlling the substance of closing arguments. *United States v. Lewis*, 759 F.2d 1316, 1350 (8th Cir.1985); *United States v. Nabors*, 761 F.2d 465, 470 (8th Cir.), cert. denied, --- U.S. ---, 106 S.Ct. 148, 88 L.Ed.2d 123 (1985). The district court's caution to the jury to decide the case based on the evidence and not on the final argument cured any potential error. See *Llach*, 739 F.2d 1322 at 1330 (8th Cir.1984); *United States v. Schwartz*, 655 F.2d 140, 142 (8th Cir.1981). In sum, the district court \*1318 did not abuse its discretion in denying Womochil's motions for mistrial.

#### IV. Conclusion

This court by previous order has denied Womochil's request for a second opportunity to present oral argument, due to the failure of his attorney, Alan P. Caplan, to appear on the date originally scheduled. In rendering this opinion we have given full consideration to the arguments presented in Womochil's brief to this court. Finding none of those arguments to be of merit, however, we affirm his conviction.

END OF DOCUMENT

**INSTA-CITE**

CITATION: 778 F.2d 1311

**Direct History**

- 1 U.S. v. Van Horn, 579 F.Supp. 804 (D.NE, Jan 30, 1984)  
(NO. CR 83-0-54, CR 83-0-55, CR 83-0-57, CR 83-0-56)  
Order Affirmed by
- => 2 **U.S. v. Womochil**, 778 F.2d 1311 (8th Cir.(Neb.), Dec 09, 1985)  
(NO. 84-2591)

**Secondary Sources**

**Corpus Juris Secundum (C.J.S.) References**

23A C.J.S. Criminal Law Sec.1250 Note 79  
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UNITED STATES of America, Appellee,  
v.

Lynn M. FINCH, Appellant.

No. 93-1560.

United States Court of Appeals,  
Eighth Circuit.

Submitted Oct. 14, 1993.

Decided Jan. 25, 1994.

Rehearing and Suggestion for Rehearing En Banc  
Denied March 3, 1994.

Defendant was convicted in the United States District Court for the District of North Dakota, Rodney S. Webb, Chief Judge, of conspiracy to distribute cocaine and possession with intent to distribute. Defendant appealed. The Court of Appeals, Morris Sheppard Arnold, Circuit Judge, held that: (1) convictions were supported by sufficient evidence; (2) prosecutor's statements in closing argument were not impermissible; (3) admission of photograph was harmless; and (4) in determining amount of controlled substance involved in offense for sentencing purposes, trial court properly considered amounts of cocaine involved in counts that did not result in conviction but were part of conspiracy.

Affirmed.

[1] CRIMINAL LAW ⇔ 878(4)  
110k878(4)

Consistency of jury's verdict is not necessary.

[2] CRIMINAL LAW ⇔ 1175  
110k1175

Even where verdicts are clearly inconsistent, Court of Appeals will not invade province of jury.

[3] CRIMINAL LAW ⇔ 1134(1)  
110k1134(1)

Criminal defendant is afforded protection against jury irrationality or error by independent review of sufficiency of evidence, a review properly undertaken by appellate courts.

[4] CRIMINAL LAW ⇔ 1144.13(6)  
110k1144.13(6)

On review of defendant's conviction for conspiracy to distribute cocaine, Court of Appeals would consider all of evidence presented at trial, not just evidence relating to the one substantive offense for which she was convicted. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 406, 21 U.S.C.A. § 846.

[5] CONSPIRACY ⇔ 23.1  
91k23.1

Proof of buyer-seller relationship without more is not sufficient to prove conspiracy.

[6] CONSPIRACY ⇔ 47(12)  
91k47(12)

Conviction of conspiracy to distribute cocaine was supported by testimony of unindicted coconspirator which was not facially incredible or insubstantial, and others as to defendant's involvement in conspiracy. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 406, 21 U.S.C.A. § 846.

[7] CRIMINAL LAW ⇔ 508(9)  
110k508(9)

Testimony of accomplice alone may be sufficient to convict defendant if testimony is not incredible or insubstantial on its face.

[8] DRUGS AND NARCOTICS ⇔ 123.2  
138k123.2

Formerly 138k123(2)

Conviction of possession with intent to distribute was supported by testimony of unindicted coconspirator, which was not facially incredible or insubstantial. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(a)(1), 21 U.S.C.A. § 841(a)(1).

[9] CRIMINAL LAW ⇔ 1159.4(2)  
110k1159.4(2)

It is jury's role to assess credibility of witnesses.

[10] CRIMINAL LAW ⇔ 713  
110k713

Court of Appeals examines allegedly improper statements of prosecutor within context of entire trial to determine first whether remarks were in fact improper, and second whether remarks were so offensive so as to deprive defendant of fair trial.

[11] CRIMINAL LAW ⇔ 720(5)  
110k720(5)

Prosecutor's statements in closing argument that witness was telling truth, that defense attorney was trying to mislead jury, and that evidence showed that defendant was guilty, were not impermissible; read in context, prosecutor was merely arguing that jury should accept state's interpretation of evidence rather than defendant's interpretation.

[11] CRIMINAL LAW ⇔ 720(7.1)  
110k720(7.1)

Prosecutor's statements in closing argument that witness was telling truth, that defense attorney was trying to mislead jury, and that evidence showed that defendant was guilty, were not impermissible; read in context, prosecutor was merely arguing that jury should accept state's interpretation of evidence rather than defendant's interpretation.

[11] CRIMINAL LAW ⇔ 723(1)  
110k723(1)

Prosecutor's statements in closing argument that witness was telling truth, that defense attorney was trying to mislead jury, and that evidence showed that defendant was guilty, were not impermissible; read in context, prosecutor was merely arguing that jury should accept state's interpretation of evidence rather than defendant's interpretation.

[12] WITNESSES ⇔ 285.1  
410k285.1

Cross-examination of witness about particular topic does not necessarily **open door** to **redirect** examination and additional evidence relating to topic; evidence introduced must rebut something that has been elicited on cross-examination.

[13] CRIMINAL LAW ⇔ 1169.1(10)  
110k1169.1(10)

Admission of photograph of two people, neither of whom was witness at trial, using cocaine at party that defendant did not attend was harmless; photograph could hardly have incriminated or prejudiced defendant.

[14] DRUGS AND NARCOTICS ⇔ 133  
138k133

In determining amount of controlled substance involved in offense for sentencing purposes, where defendant was convicted of conspiracy to distribute cocaine as well as one count of distribution of

cocaine, trial court properly considered amounts of cocaine involved in counts that did not result in conviction but were part of conspiracy. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401, 401(a, b), 21 U.S.C.A. §§ 841, 841(a, b); U.S.S.G. § 1B1.3(a), 18 U.S.C.A.App.

[15] DRUGS AND NARCOTICS ⇔ 133  
138k133

When punishment depends on amount of controlled substance involved in offense, amount need be proven only by preponderance of evidence.

**\*229** Counsel who presented argument on behalf of the appellant was Phillip S. Resnick of Minneapolis, MN.

Counsel who presented argument on behalf of the appellee was Keith W. Reisenauer, Assistant U.S. Attorney, of Fargo, ND.

Before MORRIS SHEPPARD ARNOLD, Circuit Judge, HEANEY and ROSS, Senior Circuit Judges.

**\*230** MORRIS SHEPPARD ARNOLD, Circuit Judge.

A grand jury indicted Lynn M. Finch and five others charging them with one count of conspiracy to distribute cocaine and conspiracy to possess cocaine with intent to distribute it in violation of 21 U.S.C. § 846, and forty-five substantive counts of distribution or possession of cocaine in violation of 21 U.S.C. § 841(a)(1). Twelve of the forty-five substantive counts charged Finch with possession or distribution of cocaine, each in connection with different shipments of cocaine spaced approximately one month apart. The five other conspirators either pleaded guilty or agreed to plead guilty before Finch's trial. A jury convicted Finch of conspiracy and one substantive count, acquitted her of two substantive counts, and were undecided on the remaining nine substantive counts. The trial court [FN1] sentenced Finch to fifteen months in prison, the final six months of which are to be served in a halfway house, followed by three years of supervised release. Finch appeals the convictions and the sentence.

FN1. The Honorable Rodney S. Webb, United States District Judge for the District of North

Dakota.

I.

Finch challenges the sufficiency of the evidence with respect to both convictions. She argues that her conviction for conspiracy should be reversed because the jury convicted her of only one act of buying or selling cocaine. Since evidence of only a single purchase or sale of cocaine is not evidence of a conspiracy, she argues, the evidence did not support the conviction. She further argues that in order to have convicted her of the substantive count, the jury must have believed the government's principal witness, Brian Solum, an unindicted co-conspirator who had agreed to cooperate with the government; but, her argument continues, since the jury acquitted her of two substantive counts, and failed to agree on a verdict regarding the other counts, the jury must have also disbelieved Solum. She is, therefore, making two different but related claims, and is conflating two distinct issues. One claim is that the convictions should be reversed because they are inconsistent with both the acquittals and the failure to reach verdicts on the other counts. The second claim is that the convictions should be reversed because the evidence is insufficient to support them. These claims raise different issues and we therefore review them separately. See *United States v. Powell*, 469 U.S. 57, 67, 105 S.Ct. 471, 478, 83 L.Ed.2d 461 (1984); *United States v. Suppenbach*, 1 F.3d 679, 681 (8th Cir.1993).

A.

Finch apparently finds the jury's verdict infirm because it is inconsistent for two reasons. First, if the jury disbelieved the testimony so thoroughly that it acquitted on two counts, and did not find the testimony credible enough to agree to convict on nine counts, there could not have been sufficient evidence to convict Finch of conspiracy to distribute cocaine and one count of possession with intent to distribute cocaine. Second, if the jury acquitted or could not reach a verdict on all but one of the counts of possession with intent to distribute, there could not have been sufficient evidence to convict Finch of conspiracy to distribute cocaine. The jury's verdicts, according to Finch's argument, are therefore inconsistent, and the convictions should be vacated. Our review of the record reveals, however, that the evidence against Finch was probably

strongest for the count on which she was convicted, and probably weakest for the counts of which she was acquitted.

[1][2][3] Even if the verdicts were inconsistent, moreover, we would still refuse to reverse the convictions because of the role of the jury and its verdict in our legal system. It is well established that consistency of a jury's verdicts is not necessary. *Dunn v. United States*, 284 U.S. 390, 393, 52 S.Ct. 189, 190-91, 76 L.Ed. 356 (1932) (Holmes, J., for a majority of 8-1); see also *Powell*, supra, 469 U.S. at 63, 105 S.Ct. at 476 (Rehnquist, J., for a unanimous Court) (reaffirming *Dunn* ); *Suppenbach*, supra, 1 F.3d at 681. "That the verdict may have been the result of compromise, or of a mistake on the part of the jury, is possible. But verdicts cannot be upset by speculation or inquiry into such \*231 matters." *Dunn*, supra, 284 U.S. at 394, 52 S.Ct. at 191. The jury here may have acquitted Finch of certain counts and failed to reach verdicts on other counts in order to exercise lenity or to mitigate punishment. Although such an exercise of power is impermissible, it is nevertheless not reviewable. *Dunn*, supra, 284 U.S. at 393, 52 S.Ct. at 190-91; *Powell*, supra, 469 U.S. at 65-66, 105 S.Ct. at 476-77. Juries in common-law courts have exercised this impermissible power for eight hundred years. T. Green, *Verdict According to Conscience* (1985). Even where verdicts are clearly inconsistent, we will not invade the province of the jury; indeed, the Supreme Court will not allow such an invasion. *Powell*, supra, 469 U.S. at 57, 105 S.Ct. at 471. A criminal defendant "is afforded protection against jury irrationality or error by the independent review of the sufficiency of the evidence," a review properly undertaken by the appellate courts. *Powell*, supra, 469 U.S. at 67, 105 S.Ct. at 478. It is to that review that we now turn.

B.

[4] The government presented evidence of twenty shipments of cocaine that took place over approximately twenty months. The government alleged that twelve of these involved Finch. The evidence relevant to the conviction for conspiracy, as Finch herself points out, is all of the evidence, not just the evidence relevant to the substantive count for which she was convicted. *Powell*, supra, 469 U.S. at 67, 105 S.Ct. at 478; *Jackson v.*

Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). When we review Finch's conviction for conspiracy, therefore, we consider all of the evidence presented at trial, not just the evidence relating to the one substantive offense for which she was convicted. "We will reverse 'only if we conclude that a reasonable fact-finder must have entertained a reasonable doubt about the government's proof of one of the offense's essential elements.' " *United States v. Rogers*, 982 F.2d 1241, 1244 (8th Cir.1993) (quoting *United States v. Ivey*, 915 F.2d 380, 383 (8th Cir.1990)), cert. denied sub nom. *Philipp v. United States*, --- U.S. ---, 113 S.Ct. 3017, 125 L.Ed.2d 706 (1993).

[5] Finch is correct that proof of a buyer-seller relationship without more is not sufficient to prove a conspiracy. *United States v. Prieskorn*, 658 F.2d 631, 633 (8th Cir.1981). We have held that it is proper for a trial court to refuse to instruct the jury explicitly that proof of a buyer-seller relationship is insufficient to prove a conspiracy where the evidence did not support such an instruction because there was evidence of distribution of large amounts of cocaine over a significant period of time. *United States v. Turner*, 975 F.2d 490, 497 (8th Cir.1992), cert. denied sub nom. *Dowdy v. United States*, --- U.S. ---, 113 S.Ct. 1053, 122 L.Ed.2d 360 (1993). We have also held that a court's refusal to give such an instruction was not plain error where the circumstances of the single sale of cocaine at issue suggested that the cocaine had been purchased for resale. *United States v. Hamell*, 931 F.2d 466 (8th Cir.) (sale of eighty-two grams of ninety percent pure cocaine), cert. denied, --- U.S. ---, 112 S.Ct. 347, 116 L.Ed.2d 286 (1991).

[6][7] Because we consider all of the evidence presented at trial, we consider here evidence of Finch's role in the distribution of twelve shipments of cocaine. Finch testified at trial, denying any involvement in any conspiracy. Solum and others testified that Finch took part in the purchase and distribution of cocaine. The testimony of an accomplice alone may be sufficient to convict a defendant if the testimony is not incredible or insubstantial on its face. *United States v. Starcevic*, 956 F.2d 181, 185 (8th Cir.1992). We do not find Solum's testimony to be incredible or insubstantial, and we note, moreover, that his was not the only testimony that incriminated Finch. There was evidence to show Finch's involvement in the

purchase of cocaine from Las Vegas, Nevada, and its subsequent distribution in the Fargo area. There was evidence to show that by pooling their resources the participants in North Dakota obtained cocaine more efficiently than they could have had they been acting alone, and more efficiently than Solum had done when he was purchasing smaller quantities of the drug. There was evidence that Finch knew that in addition to Solum, there were others who participated in the \*232 purchasing of cocaine from a source in Las Vegas and its subsequent distribution. There was evidence showing that the amounts involved in the shipments and distribution were greater than necessary for personal use. There was sufficient evidence, therefore, for the jury to have concluded that there was indeed a conspiracy and that Finch was one of the conspirators. We affirm the conviction for conspiracy to distribute cocaine.

[8][9] Finch's conviction for possession with intent to distribute must be affirmed for similar reasons. Solum's testimony was not facially incredible or insubstantial. It is true that the credibility of Solum and other witnesses as well as that of Finch was at issue. But it is the jury's role to assess the credibility of witnesses. The evidence was sufficient for a jury to find Finch guilty beyond a reasonable doubt.

## II.

[10][11] Finch makes four other arguments in her appeal. She maintains, first, that the convictions should be reversed because the prosecutor improperly vouched for the government's evidence and attacked Finch's trial counsel during the government's closing argument. We must therefore examine the allegedly improper statements "within the context of the entire trial to determine first whether the remarks were in fact improper, and second whether the remarks were so offensive so as to deprive the defendant of a fair trial." *United States v. Eldridge*, 984 F.2d 943, 946 (8th Cir.1993) (citing *United States v. Young*, 470 U.S. 1, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985)). Finch is challenging the propriety of the government's statements in its closing argument that a witness was telling the truth, that the defense attorney was trying to mislead the jury, and that the evidence showed that Finch was guilty. (Finch objected at trial to only the first of these.) One witness (Solum) was

truthful, the government argued, because he did not testify that Finch had been involved in and knew about all the shipments of cocaine, but rather testified to her relatively limited involvement. The government argued that Finch's attorney was trying to mislead the jury by drawing attention to facts not relevant to and not inconsistent with Finch's involvement in the conspiracy. Finally, the government summarized the evidence by stating that the evidence showed that Finch was guilty beyond a reasonable doubt. Read in context there is nothing impermissible about the government's statements: the government was merely arguing that the jury should accept its interpretation of the evidence rather than the defendant's interpretation. We do not find such statements to be improper.

Finch next asserts that a photograph of one of her friends using cocaine was improperly admitted into evidence. The photograph had been provided to the government by Roxanne Claerbout, one of its witnesses. The first reference to the photograph at trial occurred when Finch cross-examined Claerbout at length about a photograph that she had supplied to the government in connection with this case. The government neither had introduced the photograph as evidence nor had examined Claerbout about it. On re-direct examination the government introduced the photograph as evidence over Finch's objection. Claerbout testified that the photograph had been taken at a party about six years before the trial and depicted two individuals, one of whom was snorting cocaine. Finch was not depicted in the photograph and, according to Claerbout's testimony, did not attend the party; neither of the people in the photograph testified at trial. The trial court concluded that the photograph was admissible because Finch had established its relevance by examining the witness about it.

[12] Finch's purpose in examining Claerbout about the photograph remains unclear. Questions about the photograph may have been part of Finch's impeachment of Claerbout's credibility. Indeed, Claerbout at first denied having given the government any photographs, then admitted that she had, and finally admitted that she had a "memory problem." On the other hand, however, Finch may have been attempting to lead the jury to the conclusion that the government failed to introduce the photograph because of the government's own misconduct or because \*233 it contained exculpatory

evidence. We believe that the trial court's conclusion that the photograph was admissible merely because Finch had opened the door to such evidence is a misapprehension of the law, although a common one. Cross-examination of a witness about a particular topic does not necessarily open the door to re-direct examination and additional evidence relating to that topic. *Hamilton v. Nix*, 809 F.2d 463, 469 (8th Cir.) (en banc), cert. denied, 483 U.S. 1023, 107 S.Ct. 3270, 97 L.Ed.2d 768 (1987). The evidence introduced must rebut something that had been elicited on cross-examination. *Id.*

[13] Here, as in *Hamilton*, the evidence admitted on re-direct examination does not seem to rebut anything, except perhaps an inference of prosecutorial misconduct. It does not seem to rehabilitate the witness since it confirms what she testified to on cross-examination, namely that she gave the government a photograph that did not depict Finch. Although the evidence might have been admitted to rebut an inference of wrong-doing, the government did not make such an argument at trial and the court did not admit it for such a reason. We are convinced, however, that admitting the photograph and the related testimony was harmless because a picture of two people, neither of whom was a witness at the trial, using cocaine at a party that Finch did not attend could hardly have incriminated or prejudiced Finch.

Finch's final contention is that her sentence is improper because it was determined in part by looking at conduct that the trial court should not have considered. She argues that her sentence should be determined only by considering the amount of cocaine involved in the substantive count for which she was convicted, that the other substantive counts should not have been considered, and that she should not have been held responsible for the total amount of cocaine involved in the conspiracy because the total amount was not foreseeable.

[14][15] Finch was convicted of conspiracy to distribute cocaine in violation of 21 U.S.C. § 846. Punishment under Section 846 is the same as the punishment specified for the substantive offense that was the object of the conspiracy. The substantive offense here, distribution of a controlled substance, is proscribed in Section 841(a), and the punishment specified in Section 841(b) depends on the amount

of the controlled substance involved in the offense. 21 U.S.C. § 841. When the punishment depends on the amount of the controlled substance involved in the offense, that amount need be proven only by a preponderance of the evidence. *United States v. Payne*, 940 F.2d 286, 292 (8th Cir.1991), cert. denied sub nom. *Bogan v. United States*, ---U.S. ---, 112 S.Ct. 616, 116 L.Ed.2d 638 (1992), and sub nom. *Ransom v. United States*, --- U.S. ---, 112 S.Ct. 1589, 118 L.Ed.2d 307 (1992). Relevant conduct includes all acts committed during the commission of the offense for which Finch was convicted as well as all reasonably foreseeable acts of others in furtherance of the jointly undertaken criminal activity. U.S.S.G. § 1B1.3(a). Finch was convicted of conspiracy to distribute cocaine as well as one count of distribution of cocaine. Thus, the amounts of cocaine for which Finch can be held responsible need not have been proven beyond a reasonable doubt, and the trial court, therefore, could have considered the amounts of cocaine involved in the counts that did not result in conviction because they were part of the conspiracy.

The conspiracy in this case involved twenty shipments of cocaine over twenty months and a total amount of cocaine well in excess of two kilograms. Finch was indicted for her participation in twelve of these shipments. Eleven of the twelve involved between 112 and 168 grams of cocaine; the twelfth involved 252 grams. Finch's shares of the shipments were between seven and forty-two grams of each of the first eleven, and between twenty-eight and fifty-six grams of the twelfth. The trial court did not hold Finch responsible for the two shipments that were the subject of the counts of which she was acquitted, and held her responsible only for the lowest amount of the range established for each of the other shipments. Thus, the trial court calculated that the total amount of cocaine for which Finch was responsible was 91 grams, that is, nine shipments of seven grams and one shipment of 28 grams. This \*234 results in a base offense level of 16. U.S.S.G. § 2D1.1(c)(14). The trial court reduced the offense level to 12 because Finch was a minimal participant in the overall conspiracy. U.S.S.G. § 3B1.2. The trial court found Finch's criminal history category to be category III, having found five criminal history points. This results in a sentencing range of fifteen to twenty-one months; the trial court imposed a sentence of fifteen months. We find that the evidence adequately supported the trial court's

finding that Finch was responsible for conspiring to distribute a total of ninety-one grams of cocaine, and find no error in the trial court's calculation of the sentence.

We note that the government suggests in its brief that the trial court improperly calculated the base offense level because Finch should have been held responsible not only for the amount of cocaine she actually possessed or distributed, but for the total amount of cocaine foreseeably involved in the conspiracy. The government did not, however, appeal the sentence, and we therefore decline to reach this issue.

### III.

For the reasons given, we affirm Finch's conviction and sentence.

END OF DOCUMENT

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CLIENT IDENTIFIER: EHJ  
DATE OF REQUEST: 04/10/96

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**INSTA-CITE**

CITATION: 16 F.3d 228

**Direct History**

=> 1 **U.S. v. Finch**, 16 F.3d 228, 40 Fed. R. Evid. Serv. 230  
(8th Cir.(N.D.), Jan 25, 1994) (NO. 93-1560), rehearing and  
suggestion for rehearing en banc denied (Mar 03, 1994)  
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CLIENT IDENTIFIER: EHJ  
DATE OF REQUEST: 04/10/96  
THE CURRENT DATABASE IS CTA

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Citation		Page (P)	Database	Mode
809 F.2d 463	FOUND DOCUMENT	P 1 OF 60	CTA	Page
<b>(Cite as: 809 F.2d 463)</b>				

Reed Wayne HAMILTON, Appellant,  
v.

Crispus NIX, Warden, and Attorney General of the State of Iowa, Appellees.  
No. 84-2089.

United States Court of Appeals,  
Eighth Circuit.

Submitted May 15, 1986.

Decided Jan. 12, 1987.

Petitioner, who had been convicted in state court of first-degree murder and voluntary manslaughter, filed federal petition for writ of habeas corpus. The United States District Court for the Southern District of Iowa, Harold D. Vietor, Chief Judge, denied relief, and petitioner appealed. The Court of Appeals, 781 F.2d 619, Lay, Chief Judge, vacated and remanded. On the state's petition for rehearing en banc, the Court of Appeals, Bowman, Circuit Judge, held that: (1) identity and testimony of defendant's mother and her companion tending to inculcate defendant was admissible under independent source rule; (2) admission of marijuana defendant allegedly stole from victim was harmless error; (3) allegedly improper remarks by prosecutor during opening statement and in closing argument did not deprive petitioner of fair trial; and (4) sufficient circumstantial evidence supported finding of guilty  
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809 F.2d 463	FOUND DOCUMENT	P 27 OF 60	CTA	Page
<b>(Cite as: 809 F.2d 463, *469)</b>				

the police. The State concedes that the marijuana was not admissible under either the independent source, attenuation, or inevitable discovery exception.

[5][6] At trial the State sought to justify the admission of the marijuana on the ground that the defense had "opened the door" to its admission by cross-examining Maxine Hamilton about her activities in regard to the suitcase of marijuana. The trial judge admitted the marijuana as "rebuttal testimony." The State does not explain in its brief exactly what evidence or testimony it sought to rebut by introducing the marijuana. Nor are we able to discern from the trial transcript a proper reason for its admission as rebuttal evidence. Therefore, we hold that its admission into evidence was error. Compare *Agnello v. United States*, 269 U.S. 20, 46 S.Ct. 4, 70 L.Ed. 145 (1925) and *United States v. James*, 555 F.2d 992 (D.C.Cir.1977) with *Walder v. United States*, 347 U.S. 62, 74 S.Ct. 354, 98 L.Ed. 503 (1954). Our review of the entire trial transcript convinces us, however, that the error was harmless. There was strong circumstantial evidence to permit the jury to conclude beyond a reasonable doubt that Hamilton had robbed Pappas of marijuana. See Part III, *infra*. The marijuana itself added little if anything to the State's case. Thus, it was harmless error to admit it into evidence. See *Milton v. Wainwright*, 407 U.S. 371, 92 S.Ct. 2174, 33 L.Ed.2d 1 (1972).

## II.

Hamilton next contends that improper remarks by the prosecutor in the opening  
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CLIENT IDENTIFIER: EHJ  
DATE OF REQUEST: 04/10/96

CITATION: 809 F.2d 463

## INSTA-CITE

PAGE 5 OF 6

## Direct History

- 17 Hamilton v. Nix, 781 F.2d 619 (8th Cir.(Iowa), Dec 31, 1985)  
(NO. 84-2089)  
Rehearing Granted by
- 18 Loeffler v. Carlin, 788 F.2d 494, 40 Empl. Prac. Dec. P 36,154  
(8th Cir.(S.D.), Apr 08, 1986) (NO. 84-2553-EM, 84-2574-EM,  
85-1301-NI, 84-2089-SI, 84-2617-SD)  
AND On Rehearing
- => 19 **Hamilton v. Nix**, 809 F.2d 463 (8th Cir.(Iowa), Jan 12, 1987)  
(NO. 84-2089)  
Certiorari Denied by
- 20 Hamilton v. Nix, 483 U.S. 1023, 107 S.Ct. 3270, 97 L.Ed.2d 768  
(U.S.Iowa, Jun 26, 1987) (NO. 86-6523)

## Related References

- 21 State v. Hamilton, 309 N.W.2d 471 (Iowa, Aug 26, 1981) (NO. 64359)

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CLIENT IDENTIFIER: EHJ  
DATE OF REQUEST: 04/10/96  
THE CURRENT DATABASE IS CTA

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UNITED STATES of America, Plaintiff-Appellant,  
v.  
Donald Wesley TAYLOR, Defendant-Appellee.  
UNITED STATES of America, Plaintiff-Appellee,  
v.  
Steven Wayne PRESSLER, and Donald Wesley  
Taylor, Defendant-Appellants.

Nos. 81-1769, 81-1770 and 81-1785.

United States Court of Appeals,  
Ninth Circuit.

Argued and Submitted Sept. 17, 1982.

Decided Sept. 23, 1983.

Defendants were convicted in the United States District Court for the District of Arizona, William P. Copple, J., of conspiracy to manufacture amphetamines and attempt to manufacture amphetamines. Both defendants appealed, and the Government appealed from the dismissal of a dangerous special drug offender notice it filed against one defendant. The Court of Appeals, Boochever, Circuit Judge, held that: (1) there was probable cause for the issuance of a warrant to search one defendant's home; (2) the detention of a codefendant during the execution of the warrant to search the house and vehicle could not be justified as being incident to the execution of the search; (3) the initial handcuff detention of the codefendant did not amount to an arrest without probable cause; (4) it was not necessary to grant the codefendant's motion for a severance; (5) the codefendant's confrontation rights were not violated; (6) the evidence was sufficient to sustain the conviction of the codefendant, despite his claim that he was merely an unwitting errand runner; (7) the jury was inadequately instructed on the substantial step requirement, mandating reversal of the attempt conviction; and (8) the dangerous special drug offender notice was properly dismissed.

Affirmed in part and reversed in part.

Fletcher, Circuit Judge, concurred in the result with an opinion.

[1] SEARCHES AND SEIZURES ⇌ 105.1  
349k105.1

Formerly 349k105, 349k3.4  
Validity of search warrant depends upon sufficiency of what is found within four corners of underlying affidavit. U.S.C.A. Const.Amend. 4.

[2] SEARCHES AND SEIZURES ⇌ 113.1  
349k113.1

Formerly 349k113, 349k3.6(2)  
Affidavit in support of issuance of search warrant is sufficient if it establishes probable cause, that is, if stated facts would reasonably allow magistrate to believe that evidence will be found in stated location. U.S.C.A. Const.Amend. 4.

[3] SEARCHES AND SEIZURES ⇌ 111  
349k111

Formerly 349k3.6(4)  
Affidavit in support of search warrant need not establish that it is "more likely than not" that evidence will be found or preclude other innocent interpretations for activities at defendant's house; affidavit is required only to enable magistrate to conclude that it would be reasonable to seek evidence at place indicated by affidavit. U.S.C.A. Const.Amend. 4.

[4] SEARCHES AND SEIZURES ⇌ 200  
349k200

Formerly 349k3.9  
Deference is accorded to magistrate's decision to issue search warrant. U.S.C.A. Const.Amend. 4.

[5] DRUGS AND NARCOTICS ⇌ 188(2)  
138k188(2)

Formerly 138k188  
Information regarding defendant's previous drug history was relevant to determination as to whether there was probable cause to justify search of defendant's home in that information was consistent with agent's and police chemist's opinions regarding suspicious activities detailed in two affidavits. U.S.C.A. Const.Amend. 4.

[6] DRUGS AND NARCOTICS ⇌ 188(8)  
138k188(8)

Formerly 138k188  
Defendant's claim that agent's information in affidavit in support of search warrant was stale failed where affidavit disclosed that beeper still signaled that box of precursor chemicals was at defendant's residence on day warrant was sought.

U.S.C.A. Const.Amend. 4.

[7] DRUGS AND NARCOTICS ⇔ 182.5(2)  
138k182.5(2)

Formerly 138k182(6), 349k7(20)

Use of beeper tracking device in box containing chemicals ordered by suspect allegedly involved in operation of amphetamine laboratory did not violate Fourth Amendment where warrant was obtained for its installation. U.S.C.A. Const.Amend. 4.

[8] DRUGS AND NARCOTICS ⇔ 188(2)  
138k188(2)

Formerly 138k188

Facts before magistrate were sufficient to establish probable cause to believe that evidence of drug-related activity would be found at defendant's residence. U.S.C.A. Const.Amend. 4.

[9] SEARCHES AND SEIZURES ⇔ 141  
349k141

Formerly 349k3.8(1)

Detention of codefendant during execution of search of defendant's house could not be upheld as incident to execution of search warrant where codefendant was not detained in or adjoining the place being searched and was obviously in no position to facilitate orderly completion of search of house while lying handcuffed face down in a ditch some distance from the house. U.S.C.A. Const.Amend. 4.

[10] ARREST ⇔ 63.5(6)  
35k63.5(6)

Law enforcement officers had legitimate investigatory purpose in stopping defendant who was driving truck away from his home based on founded suspicion that defendant had been manufacturing amphetamines in his home. U.S.C.A. Const.Amend. 4.

[11] ARREST ⇔ 63.5(7)  
35k63.5(7)

When police officer stopped defendant and his apparent confederate to question them during investigation of whether defendant was manufacturing amphetamines in his home, officers were justified in drawing their weapons in self-protection after having been told that defendant was dangerous and that others with defendant should also be considered dangerous. U.S.C.A. Const.Amend. 4.

[12] ARREST ⇔ 63.5(7)  
35k63.5(7)

Handcuffing and frisk of codefendant who was in defendant's truck which was subject of investigatory stop was justified after codefendant had disobeyed order to raise his hands and had made furtive movements inside truck where his hands could not be seen and, further, having codefendant lie down and be handcuffed during frisk did not convert it into an arrest necessitating probable cause. U.S.C.A. Const.Amend. 4.

[12] ARREST ⇔ 63.5(8)  
35k63.5(8)

Handcuffing and frisk of codefendant who was in defendant's truck which was subject of investigatory stop was justified after codefendant had disobeyed order to raise his hands and had made furtive movements inside truck where his hands could not be seen and, further, having codefendant lie down and be handcuffed during frisk did not convert it into an arrest necessitating probable cause. U.S.C.A. Const.Amend. 4.

[13] ARREST ⇔ 63.5(9)  
35k63.5(9)

Upon completing frisk of codefendant who had been in defendant's truck which was subject of investigatory stop, it was not necessary for officers to remove handcuffs or return codefendant to his feet immediately upon completing frisk in that restrictions eliminated possibility of assault or attempt to flee. U.S.C.A. Const.Amend. 4.

[14] ARREST ⇔ 63.4(12)  
35k63.4(12)

There was probable cause to arrest codefendant who matched description of person who had picked up drug precursor chemicals ordered by another for defendant and had inquired about purchasing laboratory glassware and who claimed to be living at defendant's trailer home which was repository of chemicals and drug formulae and which was suspected site of drug laboratory. U.S.C.A. Const.Amend. 4.

[14] ARREST ⇔ 63.4(17)  
35k63.4(17)

There was probable cause to arrest codefendant who matched description of person who had picked up drug precursor chemicals ordered by another for defendant and had inquired about purchasing

laboratory glassware and who claimed to be living at defendant's trailer home which was repository of chemicals and drug formulae and which was suspected site of drug laboratory. U.S.C.A. Const.Amend. 4.

[15] CRIMINAL LAW ⇔ 622.2(9)  
110k622.2(9)  
Formerly 110k622(2)

It was not necessary to sever trial of two defendants charged with offenses arising out of operation of, or attempt to operate, amphetamine laboratory in one defendant's home where nontestifying defendant's statement that codefendant wanted to shoot it out with the police was merely cumulative to agent's testimony that codefendant had given the same information.

[16] CRIMINAL LAW ⇔ 662.10  
110k662.10  
Formerly 110k662(1)

Codefendant's confrontation rights were not violated by Government's failure to recall agents who had overheard statements by codefendant concerning whether, when rearrested, he had told his girl-friend to tell defendant to "get out of there" and whether he had told agent that he lived at defendant's residence so as to rebut defendant's denial of having made those statements. U.S.C.A. Const.Amend. 6.

[17] CRIMINAL LAW ⇔ 396(1)  
110k396(1)

Defense counsel opened the door to allegedly objectionable questioning involving drug enforcement administration agent's testimony that, in his experience, "innocent" third parties were not used to pick up chemicals for drug manufacturers where, on cross-examination, defense counsel had asked agent whether or not drug manufacturers used "intermediaries" or "third parties" to pick up chemicals so as to insulate themselves from detection. Fed.Rules Evid.Rule 611(a), 28 U.S.C.A.

[18] CONSPIRACY ⇔ 47(12)  
91k47(12)

Evidence was sufficient to sustain convictions for conspiracy to manufacture amphetamines and attempt to manufacture amphetamines despite codefendant's claim that he was nothing more than unwitting errand runner.

[18] DRUGS AND NARCOTICS ⇔ 123.1  
138k123.1

Formerly 138k123(1), 138k123

Evidence was sufficient to sustain convictions for conspiracy to manufacture amphetamines and attempt to manufacture amphetamines despite codefendant's claim that he was nothing more than unwitting errand runner.

[19] CRIMINAL LAW ⇔ 1036.4  
110k1036.4

Defendants' failure to object to one of two chemical containers which was admitted in prosecution for conspiracy to manufacture amphetamines and attempt to manufacture amphetamines precluded reversal absent plain error. Fed.Rules Evid.Rule 103(a)(1), (d), 28 U.S.C.A.

[20] CRIMINAL LAW ⇔ 404.60  
110k404.60

Formerly 110k404(4)

Fact that contents of two chemical containers were not tested went to weight to be given that evidence in prosecution for conspiring to manufacture amphetamines and attempt to manufacture amphetamines, not to admissibility, where adequate foundation was laid by identifying exhibits as filled containers labeled "platinum oxide" and "hydrogen" that were seized at defendant's residence. Fed.Rules Evid.Rules 103(a)(1), (d), 901, 28 U.S.C.A.

[21] CRIMINAL LAW ⇔ 720(7.1)  
110k720(7.1)

Formerly 110k720(7)

Once two chemical containers that were labeled were admitted in prosecution for conspiring to manufacture amphetamines and attempt to manufacture amphetamines, it was not improper for prosecution to argue that in all likelihood contents of containers matched their labels. Fed.Rules Evid.Rules 103(a)(1), (d), 901, 28 U.S.C.A.

[22] CRIMINAL LAW ⇔ 1169.1(10)  
110k1169.1(10)

Error, if any, in admitting two chemical containers that were labeled, but the contents of which were never chemically tested, was not prejudicial given extensive number of chemical exhibits introduced at trial.

[23] DRUGS AND NARCOTICS ⇔ 132  
138k132

Convictions for attempt to manufacture amphetamines could not stand where jury was not instructed on substantial step requirement, but instruction merely required "some act" in effort to bring about or accomplish forbidden object. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 406, 21 U.S.C.A. § 846.

[24] DRUGS AND NARCOTICS ⇔ 133  
138k133

Under section providing that, in no case shall fact that defendant is alleged to be dangerous special drug offender be an issue upon the trial of such felonious violation, be disclosed to jury, or be disclosed before any plea of guilty or nolo contendere or verdict or finding of guilty to presiding judge without consent of parties, it is "fact" of notice, not supporting details, that "shall" not be disclosed prematurely. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 409(a), 21 U.S.C.A. § 849(a).

[25] DRUGS AND NARCOTICS ⇔ 133  
138k133

Notice that one defendant was dangerous special drug offender was properly dismissed where notice had been brought to attention of district judge presiding over trial, rather than to attention of district's chief judge, judge continued to preside over trial and did not notify parties of problem until notice was unsealed. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 409(a), (e)(3), 21 U.S.C.A. § 849(a), (e)(3).

\*704 Gary V. Scales, Asst. U.S. Atty., Phoenix, Ariz., for plaintiff-appellant.

George F. Klink, David M. Heller, McGroder, Pearlstein, Peppler & Tryon, Phoenix, Ariz., for defendant-appellee.

On Appeal from the United States District Court for the District of Arizona.

Before FLETCHER and BOOCHEVER, Circuit Judges, and KENYON, [FN\*] District Judge.

FN\* The Honorable David V. Kenyon, United States District Judge for the Central District of California, sitting by designation.

BOOCHEVER, Circuit Judge:

Donald Wesley Taylor and Steven Wayne Pressler were convicted of conspiracy to manufacture amphetamines and attempt to manufacture amphetamines. The Government and both defendants appeal. Taylor contends that the search of his residence was illegal because the information contained in the affidavit offered in support of the warrant failed to establish probable cause. Pressler contends that: (1) the trial court erred in denying his motion to suppress because his arrest was based on less than probable cause, (2) his trial should have been severed from Taylor's trial, (3) the district court committed reversible error by allowing certain questions during cross-examination, and (4) the evidence was insufficient to support his convictions. Both defendants contend that: (1) the trial court erred in allowing the Government to comment on the contents of two chemical bottles that were labeled but never analyzed, and (2) under the facts of this case, the jury instruction on attempt was inadequate. The Government appeals the dismissal of the "Dangerous Special Drug Offender" notice it filed against Taylor.

FACTS

The essence of the Government's case was that Taylor was operating, or attempting to make operable, an amphetamine laboratory at his home in Camp Verde, Arizona. Taylor has a ten-year history of being involved in the illegal manufacture of amphetamines. Pressler's principal role in the scheme appears to have been to pick up previously ordered chemicals at a chemical supply store.

The Government's investigation commenced when orders were placed at a Phoenix chemical supply store for chemicals used in manufacturing amphetamines. The first two orders were placed by a woman who identified herself as Carla Delwisch, the maiden name of Taylor's wife. Personnel at the chemical supply store notified the Drug Enforcement Administration ("DEA") that orders had been placed for suspect chemicals. Although the first two orders were placed by Carla Delwisch, a man later identified by a store employee as Pressler picked up the chemicals. The second time Pressler came to the store to pick up the chemicals, he also picked up several chemical supply catalogues and ordered additional chemicals.

In late January of 1981, based on the information

obtained from the chemical supply store, DEA agents secured a warrant authorizing them to hide a "beeper" tracking device in a box containing the chemicals ordered by Pressler. On February 2, 1981, Sharon Coley (Taylor's sister) picked up the beeper box and brought it to her home. Sometime between February 13th and 18th, the beeper box was removed from Coley's home to Taylor's home. Prior to the time the beeper box was moved, the DEA agents watching Coley's house observed Taylor transfer boxes from the house to Taylor's vehicle. Also prior to the date the beeper box was moved, Pressler visited the chemical supply store again to inquire about expensive laboratory glassware.

**\*705** On February 20, 1981, DEA and state agents executed search warrants at the residences of Coley and Taylor. The principal evidence found at Coley's home were receipts for the chemicals she and Pressler had picked up and a radio scanner tuned to a DEA channel.

Prior to executing the warrant for Taylor's home, the police and DEA agents borrowed a firetruck, disguised themselves as firemen and told residents that a propane truck had overturned nearby. They also had volunteer firemen man a roadblock while dressed as emergency medical technicians. The Government claims this was done as a safety precaution because of the explosive nature of the chemicals they suspected were being stored at the house, but testimony at trial indicates that this was done as a ruse to get Taylor to vacate his house.

Before execution of the search warrant, Taylor and Pressler attempted to drive away from the house, but were stopped and arrested. Taylor was arrested at gunpoint when he stepped out of his vehicle.

The parties give differing accounts of Pressler's arrest. It is clear that another officer approached the vehicle while Taylor was being arrested and told Pressler to raise his hands and step out. Pressler failed to comply until the officer repeated his order several times. The Government states in its brief that Pressler became "verbally uncooperative" when he stepped out so the agent ordered him to lie face down in a ditch and handcuffed him. The Government further states that several minutes later, a second agent approached Pressler, recognized

Pressler from a description given by an employee at the chemical supply house as the person who had picked up the chemicals, and arrested him.

The record supports Pressler's contention that he did not become "verbally uncooperative", as the Government describes it, until after he was handcuffed face down in the ditch.

The agents proceeded to search Taylor's residence and seized hundreds of items, including some of the chemicals necessary to manufacture amphetamines, Taylor's handwritten formulas for producing controlled substances, and miscellaneous laboratory equipment. Agents failed to find any already-produced amphetamines or a working laboratory.

Taylor and Pressler were charged in a four count indictment with conspiring to manufacture amphetamines during two separate time periods, attempt to manufacture amphetamines (21 U.S.C. §§ 841(a)(1), 846 (1976)), and use of a firearm during the commission of a felony (18 U.S.C. § 924(c)(1) (Supp. V 1981)). After a nine-day trial, both defendants were convicted of one of the two conspiracy charges and the attempt charge and acquitted on the other two counts. Pressler was sentenced to concurrent sentences of five years on each count, of which only the first six months had to be spent in prison. Taylor received sentences of five years imprisonment on the conspiracy count, followed by five years of probation on the attempt count.

#### I. Search Warrant

Taylor contends that the warrant to search his house, yard, and vehicle was based on less than probable cause because the information in the supporting affidavit was either stale or was obtained from tracking the beeper device. The argument is meritless because the information obtained from tracking the beeper was not constitutionally infirm and amply corroborated the allegedly stale information.

[1][2][3] The validity of a search warrant depends upon the sufficiency of what is found within the four corners of the underlying affidavit. *United States v. Martinez*, 588 F.2d 1227, 1234 (9th Cir.1978). An affidavit is sufficient if it establishes probable cause;

that is, if the stated facts would reasonably allow a magistrate to believe that the evidence will be found in the stated location. *Id.* Thus, contrary to Taylor's contention, the affidavit need not establish that it was "more likely than not" that evidence would be found or preclude other \*706 innocent interpretations for the activities at his house. The affidavit need only "enable the magistrate to conclude that it would be reasonable to seek the evidence in the place indicated by the affidavit." *United States v. Hendershot*, 614 F.2d 648, 654 (9th Cir.1980).

[4] Deference is accorded to a magistrate's decision to issue a warrant. *Martinez*, 558 F.2d at 1234. Three "types" of information were offered in support of the search warrant in this case. First, the agent gave detailed information regarding Taylor's involvement in manufacturing amphetamines over the previous ten years. Second, the agent's affidavit incorporated the previous affidavit made by the same agent to obtain the warrant to install and track the beeper device. The beeper affidavit described the suspicious transactions at the chemical supply store and included an expert chemist's opinion that the chemicals were "probably" being used to manufacture illegal drugs. Third, the agent detailed the information derived from tracking the beeper to Coley's and Taylor's homes.

[5][6] The information regarding Taylor's previous drug history was relevant in that it was consistent with the agent's and police chemist's opinions regarding the suspicious activities detailed in the two affidavits. Taylor's claim that the agent's information was stale overlooks the fact that the affidavit disclosed that the beeper still signalled that the box of precursor chemicals was at Taylor's residence the day the warrant was sought.

Taylor's contention that the electronic beeper violated his privacy rights in his home has been answered by *United States v. Knotts*, --- U.S. ---, 103 S.Ct. 1081, 75 L.Ed.2d 55 (1983), and *United States v. Brock*, 667 F.2d 1311 (9th Cir.1982). In *Knotts*, the Supreme Court held that the tracking of a warrantless beeper placed in a drum of chloroform was neither a "search" nor a "seizure" within the meaning of the fourth amendment. 103 S.Ct. at 1087. There could be no expectation of privacy where the automobile transporting the drum was in plain view while on public thoroughfares or where

the drum was open to observation while in the "open fields" while on private property. *Id.* 103 S.Ct. at 1085-86. The Court did not reach the issues of the warrantless installation of the beeper, *id.* 103 S.Ct. at 1084 n. \*, or of the permissibility of monitoring the movement of the beeper while within the private residence. *Id.* 103 S.Ct. at 1087. These questions have been answered in this circuit by *Brock*.

[7] In *Brock*, this court upheld the warrantless [FN1] installation and monitoring of a beeper in a can of precursor, non-contraband chemicals. 667 F.2d at 1322. The court held that monitoring the device after it was carried into a private residence was not a "search" due to the minimal degree of intrusion. *Id.* at 1321-22. There can be no fourth amendment objection to the use of the beeper in the present case because a warrant for its installation was obtained. [FN2]

FN1. We agree with Judge Adams, concurring in *Brock*, that it is certainly the better practice for the Government to obtain a warrant from a magistrate before installing and monitoring beeper devices. 667 F.2d at 1324-25 (Adams, J., concurring). In this case, such a warrant was obtained.

FN2. The beeper was not used to monitor movement of the chemicals within the house, so that issue is not before us.

[8] The facts before the magistrate were sufficient to establish probable cause to believe that evidence of drug-related activity would be found at Taylor's residence.

## II. Motion to Suppress

Pressler argues that: (1) *Michigan v. Summers*, 452 U.S. 692, 101 S.Ct. 2587, 69 L.Ed.2d 340 (1981), is inapplicable because it was unnecessary to detain him during the execution of the warrant to search Taylor's house and vehicle; (2) the initial handcuffed detention constituted an arrest without probable cause, not a stop as permitted \*707 by *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 22 L.Ed.2d 889 (1968); and (3) the officers lacked probable cause to arrest.

The district court denied the suppression motion. It found that the first officer's "detention" of

Pressler was justified under *Michigan v. Summers* and that there was probable cause for arrest by the time the second officer became involved. A clearly erroneous standard of review is applied to the historical facts found by the trial court. As to the determination of probable cause, we reach the same result under either a clearly erroneous standard or de novo review. We shall consider each of the points raised by Pressler.

#### A. Detention Incident to Execution of a Search Warrant

[9] The district court upheld Pressler's detention under *Michigan v. Summers*, 452 U.S. 692, 101 S.Ct. 2587, 69 L.Ed.2d 340 (1981), as a seizure incident to the execution of a search warrant. In *Summers*, the Supreme Court held that "for Fourth Amendment purposes, ... a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted." 452 U.S. at 705, 101 S.Ct. at 2595. The Court noted that the detention constituted a "seizure" without probable cause. *Id.* at 696, 101 S.Ct. at 2590.

The applicability of *Summers* presents a close question. Initially we note that there is no merit to Pressler's attempt to distinguish *Summers* on the grounds that he lacked an interest in the premises subject to the warrant sufficient for standing and was not at the premises when detained. The Court clearly framed *Summers* in terms of "occupants", not owners, and explicitly found no constitutional significance in the fact that some of the "occupants" were seized on the sidewalk as they were leaving the house. *Id.* at 702 n. 16, 101 S.Ct. at 2594 n. 16.

On the other hand, however, much of the justification for the rule announced in *Summers* is inapplicable to Pressler's situation. In *Summers*, the "occupants" were kept in or brought back into the house being searched and kept there throughout the search or at least until the police discovered sufficient evidence to justify arresting them. The Court discerned two governmental purposes justifying the detention: (1) "preventing flight in the event that incriminating evidence is found", *id.* at 702, 101 S.Ct. at 2594, and (2) facilitating "the orderly completion of the search" by the presence of the occupants of the premises, *id.* at 703, 101 S.Ct.

at 2594. The second purpose is based on the notion that the "self-interest [of the detained individuals] may induce them to open locked doors or locked containers to avoid the use of force that is not only damaging to property but may also delay the completion of the [search]." *Id.*

It is clear from the first officer's testimony at the suppression hearing that neither of these purposes motivated his detention of Pressler. Nor was Pressler's detention likely to advance either governmental purpose articulated in *Summers*, especially the second. Unlike the individuals in *Summers*, Pressler was not detained in or adjoining the place being searched and was obviously in no position to facilitate the orderly completion of the search of Taylor's home while lying handcuffed face down in a ditch some distance from the house. [FN3]

FN3. Although the Government does not argue the point, it is plausible that Pressler might have been taken to Taylor's house during the search but for the second officer formally arresting him shortly after the initial seizure. Nothing in the record, however, suggests that the officers intended to do so.

We conclude that the detention of Pressler cannot be justified on the basis of *Michigan v. Summers*.

#### B. Terry Stop

Using the ruse described above, law enforcement officers had evacuated Taylor's neighborhood. Taylor and Pressler eventually left Taylor's house in Taylor's truck, \*708 Taylor driving. When, within a short distance, Taylor spotted one of the officers, Agent Teague, Taylor stopped the truck, got out, and approached Teague to ask what was happening. Officers on the scene had been warned that prior experience with Taylor indicated that he was likely to be dangerous. Teague stopped Taylor at gunpoint, while another agent, Gamble Dick, approached the vehicle with his gun drawn and aimed at Pressler, who was seated in the passenger seat of the truck. Agent Dick ordered Pressler to raise his hands. Pressler did not comply, but made furtive movements with his hands inside the vehicle. Dick again ordered Pressler to raise his hands, and again Pressler did not comply. Finally, Pressler complied the third time the officer gave him the

order. Dick directed Pressler to lie face down in a ditch where he was handcuffed and frisked. Within a very short time, Agent Checkoway arrived on the scene. Checkoway recognized Pressler as the person who had picked up chemicals ordered by "Delwish" and had inquired at the chemical company about purchasing expensive laboratory glassware. Pressler also volunteered to the officers that he lived at Taylor's house, which was the repository of the chemicals and the site of the suspected drug laboratory. Checkoway formally arrested Pressler.

We consider each of the actions taken by the officers toward Pressler: Agent Dick's armed approach, the handcuffing, and the arrest. In our view, the initial detention and handcuffing of Pressler were justified as a Terry stop. Subsequently, when Agent Checkoway formally arrested Pressler he had probable cause to do so.

[10][11] The law enforcement officers had a legitimate investigatory purpose in stopping Taylor, founded suspicion that he was manufacturing amphetamines, as had been detailed in the affidavit in support of the search warrant. When the officers stopped Taylor and his apparent confederate, Pressler, to question them, we believe that the officers were justified in drawing their weapons in self-protection. The Supreme Court has recognized "that the policeman making a reasonable investigatory stop should not be denied the opportunity to protect himself from attack by a hostile suspect." *Adams v. Williams*, 407 U.S. 143, 146, 92 S.Ct. 1921, 1923, 32 L.Ed.2d 612 (1972). [FN4] The purpose of a Terry stop is "to allow the officer to pursue his investigation without fear of violence". *Adams*, 407 U.S. at 146, 92 S.Ct. at 1923. Earlier on the day in question, Agent Dick and the other officers on the scene had attended a briefing where they had been told that Taylor was dangerous and were warned that others with Taylor should also be considered dangerous.

FN4. We are now concerned with more than the governmental interest in investigating crime; in addition, there is the more immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him. Certainly it would be unreasonable to require that police officers take unnecessary risks in the performance of their

duties. American criminals have a long tradition of armed violence, and every year in this country many law enforcement officers are killed in the line of duty, and thousands more are wounded. *Terry v. Ohio*, 392 U.S. 1, 23, 88 S.Ct. 1868, 1881, 22 L.Ed.2d 889 (1967).

Pressler argues that *United States v. Strickler*, 490 F.2d 378 (9th Cir.1974), mandates a different result. In *Strickler*, the police were watching a house where they expected cocaine to be delivered. The police observed a car drive past the house twice, the unknown occupants of the car looking in the direction of the house the first time. Later at some distance from the house police cars surrounded the car and one of the officers pointed a gun at the occupants of the car and ordered them to raise their hands. The court stated that it could not equate the armed approach to a surrounded vehicle whose occupants have been commanded to raise their hands with the brief investigatory stop authorized by *Terry* and *Adams*. 490 F.2d at 380. On the facts of the case, though, it is clear that the drawing of weapons would not have been permissible for other grounds: the police \*709 had no legitimate fear for their safety and only tenuous reasons to believe that the occupants of the car were involved in the drug transaction. In the present case, the law enforcement agents had strong evidence of drug activity and valid reason to fear for their safety.

[12] The handcuffing and frisk of Pressler for weapons was similarly justified. Twice Pressler had disobeyed an order to raise his hands, and he made furtive movements inside the truck where his hands could not be seen. At this point Agent Dick found it wise to frisk Pressler for weapons. Because there were two suspects and only two or three officers on the scene, Agent Dick deemed it prudent to have Pressler lie down and be handcuffed during the frisk. We have previously held that the use of handcuffs, if reasonably necessary, while substantially aggravating the intrusiveness of an investigatory stop, do not necessarily convert a Terry stop into an arrest necessitating probable cause. *United States v. Bautista*, 684 F.2d 1286, 1289 (9th Cir.1982). See *United States v. Thompson*, 597 F.2d 187, 190 (9th Cir.1979). Likewise, requiring the suspect to lie down while a frisk is performed, if reasonably necessary, does not transform a Terry stop into an arrest.

[13] After frisking Pressler, the officers required him to remain in this prone, handcuffed position for three to five minutes before he was formally placed under arrest by Agent Checkoway. During this time, Pressler was "extremely verbally abusive" and "quite rowdy". It was not necessary for the officers to remove Pressler's handcuffs or to return Pressler to his feet immediately upon completing the frisk. The restrictions eliminated the possibility of an assault or attempt to flee, particularly if an arrest became imminent, as indeed it did. See *Bautista*, 684 F.2d at 1290.

### C. The Arrest

[14] When Agent Checkoway arrived on the scene, he consulted with other officers, recognized Pressler, and formally placed Pressler under arrest. Checkoway recognized Pressler as matching the description of a person who had picked up drug precursor chemicals ordered by "Delwish", and had inquired about purchasing laboratory glassware. The description included height, weight, age, hair color and length, and beard type. The courier was also described as wearing a Harley-Davidson belt buckle. Pressler fit the description in all respects. In addition, Checkoway knew of Pressler's claim of also living at Taylor's trailer home, which was the repository of the chemicals and drug formulae and the suspected site of the drug laboratory. In all, we conclude that Agent Checkoway possessed probable cause to arrest Pressler.

We therefore affirm the district court denial of the motion to suppress.

### III. Severance

[15] Pressler contends that the trial court committed reversible error in refusing to sever his trial from Taylor's. The issue concerns testimony given by a DEA agent regarding statements allegedly made by Taylor and Pressler while the agent was driving the two defendants to the police station to be booked. According to agent Parra, Taylor said that he had considered shooting it out with the law enforcement agents but had decided against it because he felt that he had not done anything wrong. He convinced Pressler to come out peacefully and they unloaded their guns. Agent Parra stated further that Pressler had said that he

avored shooting it out with the law enforcement officers but that he had agreed with Taylor and decided against it. Pressler also allegedly said that he did not trust law enforcement officers and that it had been his experience that they could not be trusted. At trial, Pressler testified that he never made the statement to agent Parra about preferring to shoot it out, but was unable to question Taylor about the conversation with agent Parra because Taylor chose not to testify, as was his right.

\*710 The general rule is that defendants jointly charged are jointly tried. See *United States v. Gay*, 567 F.2d 916, 919 (9th Cir.), cert. denied, 435 U.S. 999, 98 S.Ct. 1655, 56 L.Ed.2d 90 (1978). This rule is applicable in conspiracy cases. *United States v. Escalante*, 637 F.2d 1197, 1201 (9th Cir.), cert. denied, 449 U.S. 856, 101 S.Ct. 154, 66 L.Ed.2d 71 (1980). Fed.R.Crim.P. 14 provides, however, that the trial court may grant a severance when it appears that a defendant would suffer significant prejudice from a joint trial.

Pressler argues that his trial should have been severed from Taylor's, citing *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968) and *Douglas v. Alabama*, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965). *Bruton* is inapplicable here because Taylor's statement that Pressler wanted to shoot it out with the police was merely cumulative to Agent Parra's testimony that Pressler had given the same information. Pressler cross-examined Agent Parra about the conversation. Pressler took the stand and denied that the conversation took place. We therefore affirm the denial of severance.

### IV. Improper Questioning at Trial

[16] Pressler contends that the trial court committed reversible error in not sustaining his objections to certain questions asked by the Government at trial. First, the prosecutor asked Pressler whether, when re-arrested on May 7, 1981, in the presence of DEA agents he had told his girlfriend to tell Taylor to "get out of there". The prosecutor also asked Pressler if he had told a DEA agent that he lived at the Taylor residence. Pressler denied making these statements, and the Government did not offer testimony from the agents in question to support the questions. Pressler relies

on *County of Maricopa v. Maberry*, 555 F.2d 207 (9th Cir.1977). He contends that his confrontation rights were violated by the Government's failure to recall the agents who overheard the statements so as to rebut Pressler's denial of having made them. We disagree. The statements made in this case were not nearly so inflammatory as those in *Maberry*. See *United States v. Jones*, 592 F.2d 1038, 1044 n. 9 (9th Cir.), cert. denied, 441 U.S. 951, 99 S.Ct. 2179, 60 L.Ed.2d 1056 (1979) (pointing out that *Maberry* was a case in which the complained of questioning was highly "prejudicial", clearly "improper", and "unethical").

[17] The second line of allegedly objectionable questioning involved DEA Agent Henderson's testimony. On cross-examination, defense counsel asked the DEA agent whether or not drug manufacturers use "intermediaries" or "third parties" to pick up chemicals so as to insulate themselves from detection. On re-direct, the prosecuting attorney asked the witness whether, in his experience, these third parties are always, sometimes, or never involved in the illegal manufacturing operation. The witness answered that, in his experience, "innocent" third parties were not used to pick up chemicals. We find that defense counsel "opened the door" to this line of questioning, see *United States v. Millican*, 424 F.2d 1038, 1039-40 (5th Cir.1970), and that the trial court did not abuse its discretion in permitting the question. Fed.R.Evid. 611(a).

#### V.

##### Sufficiency of the Evidence

[18] Pressler next contends that there was insufficient evidence to support a conviction on either count. In addressing this contention, the reviewing court determines whether the evidence, viewed in the light most favorable to the Government, would permit any rational trier-of-fact to conclude that the defendant was guilty beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19, 99 S.Ct. 2781, 2788, 61 L.Ed.2d 560 (1979); *United States v. Nelson*, 419 F.2d 1237, 1241 (9th Cir.1969).

Pressler argues that the evidence, even when viewed under the appropriate standard, failed to show that he was something more than an unwitting errand runner. He contends that the Government

did no more \*711 than pile inference upon inference to persuade the jury that he was a major actor, rather than an "unsuspecting pawn", in Taylor's scheme.

The difficulty with Pressler's argument is that the reviewing court must respect the exclusive province of the jury to determine the credibility of witnesses, resolve evidentiary conflicts, and draw reasonable inferences from proven facts. See *United States v. Ramos*, 558 F.2d 545, 546 (9th Cir.1977). There was sufficient evidence to support the verdicts against Pressler. There was testimony, inter alia, that Pressler picked up the suspect chemicals ordered by Taylor's wife; that he later secured a catalogue of chemicals and inquired about purchasing expensive laboratory glassware (he failed to claim any legitimate use for the glassware at trial); that he periodically resided at Taylor's house, where extensive precursor chemical supplies and laboratory equipment were found; and that he made the incriminating statement about wanting to shoot it out with police.

#### VI.

##### Admission of and Reference to Unanalyzed Chemical Exhibits

Taylor, joined by Pressler (by incorporation), contends the trial court abused its discretion in admitting and allowing the Government to refer to two chemical containers that were labeled, but the contents of which were never chemically tested. Defendants contend that there was inadequate foundation to admit the exhibits.

[19][20][21][22] The contention is meritless. First, the defendants' failure to object to one of the two exhibits precludes reversal absent plain error. Fed.R.Evid. 103(a)(1), (d). Second, the Government laid an adequate foundation by identifying the exhibits as filled containers labeled "platinum oxide" and "hydrogen" that were seized at Taylor's residence. See Fed.R.Evid. 901. The fact that the exhibits were never analyzed goes to their weight as evidence, not their admissibility. See *United States v. Brewer*, 630 F.2d 795, 801-02 (10th Cir.1980). Third, once the exhibits were admitted it was not improper for the prosecution to argue that in all likelihood the contents matched the label. Finally, given the extensive number of chemical exhibits introduced at trial, it seems unlikely that the admission of these two exhibits,

even if improper, was prejudicial error. We therefore find no reversible error.

## VII.

### The Convictions of Attempt

[23] The defendants were convicted of both attempt and conspiracy under 21 U.S.C. § 846. They contend that the trial court did not adequately instruct the jury on attempt. In *United States v. Snell*, 627 F.2d 186, 187 (9th Cir.1980) (per curiam), cert. denied, 450 U.S. 957, 101 S.Ct. 1416, 67 L.Ed.2d 382 (1981), this court stated that a conviction for attempt requires proof of culpable intent and conduct constituting a substantial step toward commission of the crime that strongly corroborates that intent. In the case before us, the district court instructed the jury on attempt that:

To "attempt" an offense means willfully to do some act in an effort to bring about or accomplish something the law forbids to be done.

An act is done willfully if done voluntarily and intentionally and with the specific intent to do something the law forbids; that is to say, with bad purpose either to disobey or to disregard the law.

This instruction was taken verbatim from 1 E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions*, § 14.21, at 437 (3d ed. 1977). [FN5]

FN5. In *United States v. Conway*, 507 F.2d 1047, 1052 (5th Cir.1975), the Fifth Circuit held that the first paragraph of the instruction, standing alone, instructed the jury accurately on the applicable law. The contention made in *Conway* was that the instruction "gave an inadequate definition of the word 'attempt' ", defendant citing no authority. The contention was apparently not made that the instruction failed to require a substantial step. Moreover, in *Conway* the defendant had failed to object and so the court reviewed for plain error. In the present case, a timely objection was made, accompanied by a suggested alternative instruction.

\*712 The instruction given nowhere discussed the substantial step requirement. The instruction merely required "some act" in an effort to bring about or accomplish a forbidden object. "Some act" could include an act of mere preparation, which does not constitute a substantial step. E.g., *United States v. Manley*, 632 F.2d 978, 987 (2d Cir.1980), cert. denied, 449 U.S. 1112, 101 S.Ct. 922, 66 L.Ed.2d

841 (1981). Counsel objected to the instruction and submitted a requested instruction distinguishing between mere preparation and an overt act likely to result in the commission of the offense. We therefore hold that on the facts of this case the jury instruction was inadequate, and reverse each of the defendants' convictions of attempt. [FN6]

FN6. We are also disturbed by an ambiguity in the statute that the defendants were convicted of violating. A single section of title 21 makes "attempt or conspiracy" to violate the Drug Abuse Prevention and Control Act a crime. 21 U.S.C. § 846. The statute seems to create only a single offense, denominated "attempt or conspiracy". The facts of this case indicate only a single course of action. We acknowledge that, under some circumstances, Congress may have intended separate punishment for attempt and conspiracy under section 846. Conceivably, a conspiracy to manufacture followed by a later, separate attempt to manufacture could constitute separately punishable offenses. For example, if two people agreed to manufacture amphetamines and ordered a chemical to further that purpose, the requirements of conspiracy would be met. If a year later one of them built a laboratory, assembled all necessary ingredients and started the manufacturing process but was apprehended before completing it, punishment might be permissible for the conspiracy and the attempt. But here, in contrast, there is but a single course of criminal conduct. Normally this case would be suitable for application of the doctrine of lenity whereby a "Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." *Whalen v. United States*, 445 U.S. 684, 695 n. 10, 100 S.Ct. 1432, 1440 n. 10, 63 L.Ed.2d 715 (1980) (quoting *Ladner v. United States*, 358 U.S. 169, 178, 79 S.Ct. 209, 214, 3 L.Ed.2d 199 (1958)). See also *Busic v. United States*, 446 U.S. 398, 406-07, 100 S.Ct. 1747, 1752-53, 64 L.Ed.2d 381 (1980) ("ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity"); *United States v. Bass*, 404 U.S. 336, 347, 92 S.Ct. 515, 522, 30 L.Ed.2d 488 (1971). It is unnecessary for us to resolve this issue, however, in view of our reversal of the convictions for attempt.

VIII.  
Special Drug Offender Notice

Prior to trial, the Government filed a notice with the district court clerk pursuant to 21 U.S.C. § 849(a) (1976) that Taylor was a dangerous special drug offender as defined by section 849(e)(3) (1976). Two days into the nine-day trial, the clerk's office inadvertently brought the notice to the attention of the judge presiding over Taylor's trial rather than to the attention of the district's chief judge. The trial judge continued to preside over the trial, and did not notify the parties of the problem until the notice was unsealed when the guilty verdicts were returned. At that point, the trial judge recused himself, and reassigned all further proceedings to another judge. The second judge dismissed the notice, finding that 21 U.S.C. § 849(a) imposes strict liability on the Government to insure that the trial judge does not learn of the notice prematurely. Section 849(a) provides, in relevant part:

In no case shall the fact that the defendant is alleged to be a dangerous special drug offender be an issue upon the trial of such felonious violation, be disclosed to the jury, or be disclosed before any plea of guilty or nolo contendere or verdict or finding of guilty to the presiding judge without the consent of the parties.

The Government concedes that section 849(a) was violated, but contends the error was harmless because: (1) the judge learned only that a notice had been filed, not its contents, (2) the disclosure did not affect the trial judge's impartiality, and (3) the violation was attributable to the clerk's office, not the Government. None of these is relevant.

[24] As noted by the second district judge, section 849(a) unambiguously provides \*713 that it is the "fact" of the notice, not the supporting details, that "shall" not be disclosed prematurely. See *United States v. Bailey*, 537 F.2d 845, 849 (5th Cir.1976), cert. denied, 429 U.S. 1051, 97 S.Ct. 764, 50 L.Ed.2d 767 (1977).

[25] The Government's contention that the disclosure did not affect the trial judge is pure speculation. As the district court in *United States v. Tramunti*, 377 F.Supp. 6, 10 (S.D.N.Y.1974), modified on other grounds, 513 F.2d 1087 (2d Cir.1975), noted in rejecting the same argument:

[w]hether or not I believe that I was at all consciously or subconsciously influenced by having seen the notice before the verdict, I do not feel free to ignore the clear provisions of Section 849. The potential penalties to which Section 849 subjects a defendant are very grave indeed, and in seeking to have them imposed the government must precisely follow all of the procedural safeguards which the section requires.

Finally, while the Government was not directly responsible for the violation, it was certainly better situated than Taylor to have prevented its occurrence. Moreover, the Government offers no cogent reason why the defendant should bear the effects of the mistake regardless of whose fault the mistake was.

The dismissal of the special drug offender notice is affirmed.

CONCLUSION

Each defendant's conviction of conspiracy is **AFFIRMED**. Each defendant's conviction of attempt is **REVERSED**. The dismissal of the special drug offender notice as to Taylor is **AFFIRMED**.

FLETCHER, Circuit Judge, concurring:

I concur in the result, and I join all of the majority opinion except Part VII. I write separately on the effect of conviction of both attempt and conspiracy under 21 U.S.C. § 846. Although I agree that the sentences imposed for attempt must be vacated, I rest my conclusion on a different reason.

21 U.S.C. § 846 (1976) provides that Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

The statute thus prescribes punishment for one who "attempts or conspires" to commit any offense defined in the subchapter. Based on a given course of conduct, a defendant may be convicted of the section 846 offense if a jury unanimously agrees that the Government has proven the elements of either attempt or conspiracy. But a defendant may not be

punished for both attempt and conspiracy based on a single course of conduct merely because the elements of both offenses are present.

To be sure, there will be situations where multiple punishments under section 846 will be proper. Such instances will arise when a defendant "attempts or conspires" to violate the drug laws on two completely separate occasions. For example, a defendant who engages in a conspiracy to manufacture and sell amphetamines that ends, and who later separately attempts by himself to manufacture and sell the substance, could be separately punished for two distinct violations of section 846.

The instant case does not present such a situation. The defendants acted in concert for the purpose of setting up an amphetamine laboratory in Taylor's home. Based on this conduct, they were found guilty of conspiracy. The statute does not authorize additional punishment for "attempt" based on the same conduct. I would vacate the attempt sentences without reference to the jury instruction given.

END OF DOCUMENT

**INSTA-CITE**

CITATION: 716 F.2d 701

**Direct History**

- => 1 **U.S. v. Taylor**, 716 F.2d 701, 14 Fed. R. Evid. Serv. 218  
(9th Cir.(Ariz.), Sep 23, 1983) (NO. 81-1769, 81-1770, 81-1785)

**Negative Indirect History**

Declined to Follow by

- 2 **U.S. v. Savaiano**, 843 F.2d 1280, 25 Fed. R. Evid. Serv. 725  
(10th Cir.(Kan.), Mar 30, 1988) (NO. 86-2530, 86-2507)  
(Additional History)

Declined to Extend by

- 3 **U.S. v. Contreras**, 950 F.2d 232 (5th Cir.(Tex.), Dec 23, 1991)  
(NO. 91-2021) (Additional History)

**Secondary Sources**

**Corpus Juris Secundum (C.J.S.) References**

- 22A C.J.S. Criminal Law Sec.572 Note 34  
79 C.J.S. Searches and Seizures Sec.151 Note 67

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UNITED STATES of America, Plaintiff-Appellee,  
v.  
Martin TUCHOW and Louis Farina, Defendants-  
Appellants.

Nos. 84-1350, 84-1364.

United States Court of Appeals,  
Seventh Circuit.

Argued Oct. 30, 1984.

Decided July 19, 1985.

Defendants were convicted before the United States District Court for the Northern District of Illinois, John F. Grady, J., of violations of the Hobbs Act, and they appealed. The Court of Appeals, Coffey, Circuit Judge, held that: (1) district court did not err when it allowed receipt of "other acts" evidence; (2) testimony of victims was properly admitted under state of mind exception to hearsay rule; (3) while district court erred in not giving limiting instruction regarding statements made by coconspirator prior to time defendant joined extortion conspiracy, error was harmless; (4) evidence was sufficient to support convictions for conspiracy to extort money in connection with application for building permit; (5) evidence was sufficient to sustain convictions for attempted extortion; (6) evidence was sufficient to sustain defendant's conviction for attempting to extort \$25,000 from partnership which applied for building permit; (7) instruction with respect to issue of representation evidence was not improper; and (8) case would be remanded to allow defendants their right to allocution at sentencing hearing.

Affirmed and remanded.

[1] CRIMINAL LAW ⇌ 369.2(1)  
110k369.2(1)

"Other acts" evidence is admissible only if: evidence is directed toward establishing a matter in issue other than defendant's propensity to commit crime charged; evidence shows that other act is similar enough and close enough in time to be relevant to matter at issue; evidence is clear and convincing; and probative value of evidence is not substantially outweighed by danger of unfair prejudice. Fed.Rules Evid.Rule 404(b), 28

U.S.C.A.

[2] CRIMINAL LAW ⇌ 371(1)  
110k371(1)

Tape recorded conversation between defendant and his barber, wherein defendant, a city alderman, allegedly offered to bribe a municipal court judge to dismiss a speeding ticket, was admissible in extortion prosecution under Federal Evidence Rule 404(b) pertaining to receipt of "other acts" evidence, as it was directed toward establishing defendant's intent in accepting money for his efforts in obtaining building permit, it was similar enough and close enough in time to be relevant, evidence was clear and convincing as conversations between barber and defendant were recorded on tape, and any prejudice from admission of evidence was outweighed by its probative value. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

[3] CRIMINAL LAW ⇌ 1153(1)  
110k1153(1)

Any determination balancing prejudice against evidence's relevance is reversible only if district court abused its discretion. Fed.Rules Evid.Rule 403, 28 U.S.C.A.

[4] EXTORTION AND THREATS ⇌ 5  
165k5

In a Hobbs Act prosecution for extortion, government is required to prove criminal intent on part of accused. 18 U.S.C.A. § 1951.

[5] CRIMINAL LAW ⇌ 371(1)  
110k371(1)

Evidence of tape recorded conversations between defendant and contractor concerning an agreement that defendant, a deputy city commissioner, would arrange a job in city government for contractor's nephew for \$2,500 and would fix a drunk driving citation for contractor's uncle for \$1,000 was admissible in prosecution of defendant for extorting money from contractor in connection with building permit application, under Federal Evidence Rule 404(b) pertaining to "other acts" evidence, considering that evidence was relevant in establishing defendant's intent to engage in conspiracy with alderman in order to obtain illegal building permit, evidence was similar enough to obtaining of illegal building permit to be relevant, and evidence of the other acts was clear and

convincing. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

[6] CRIMINAL LAW ⇔ 622.1(2)  
110k622.1(2)

A motion for severance of defendants is committed to discretion of the district court and its decision will only be reversed upon a strong showing of prejudice to moving defendant. Fed.Rules Cr.Proc.Rule 14, 18 U.S.C.A.

[6] CRIMINAL LAW ⇔ 1166(6)  
110k1166(6)

A motion for severance of defendants is committed to discretion of the district court and its decision will only be reversed upon a strong showing of prejudice to moving defendant. Fed.Rules Cr.Proc.Rule 14, 18 U.S.C.A.

[7] CRIMINAL LAW ⇔ 622.2(8)  
110k622.2(8)

District court did not abuse its discretion in denying severance motion based on allowance of "other acts" evidence as to codefendant, considering clear language contained in court's limiting instructions that evidence as to codefendant's "other acts" was to be considered against codefendant only. Fed.Rules Cr.Proc.Rule 14, 18 U.S.C.A.

[8] EXTORTION AND THREATS ⇔ 5  
165k5

In a Hobbs Act prosecution for extortion under color of official right, government must establish not only victim's state of mind at time of alleged extortion but also intent of defendant. 18 U.S.C.A. § 1951.

[9] CRIMINAL LAW ⇔ 419(2.20)  
110k419(2.20)  
Formerly 110k419(1)

In prosecution of city alderman for extortion in connection with scheme to obtain illegal building permit, testimony of victims that they believed they were being extorted was admissible under state of mind exception to hearsay rule, notwithstanding claim of defendant that testimony was untrustworthy because it was contractor who conveyed information to victims as to progress made in obtaining building permit, since taped conversations revealing details of extortion scheme demonstrated that information concerning payments made to alderman was accurately conveyed to victims. 18 U.S.C.A. §

1951; Fed.Rules Evid.Rule 803(3), 28 U.S.C.A.

[10] CRIMINAL LAW ⇔ 1172.2  
110k1172.2

Limiting instruction given to jury in extortion prosecution prior to its consideration of state of mind evidence in form of testimony of victims did not prejudice defendant's case, considering that although he objected to introduction of the evidence he never registered any objection to language used by court in limiting instruction, and that instruction did not direct a verdict against defendant but properly instructed jury that victims' state of mind could provide some evidence as to whether defendant, a city alderman, intended that payments to obtain building permit represent his attorney fees, rather than a bribe. 18 U.S.C.A. § 1951; Fed.Rules Evid.Rule 803(3), 28 U.S.C.A.

[11] CRIMINAL LAW ⇔ 673(1)  
110k673(1)

Although statements made by conspirator to government informant prior to time defendant joined building permit extortion conspiracy were admissible to establish nature and objective of conspiracy, district court erred in not giving limiting instruction stating that while such statements could be used as evidence of nature and objective of conspiracy, they could not be used as independent evidence establishing defendant's participation in conspiracy; however, error was harmless since independent evidence establishing that defendant joined conspiracy was overwhelming. Fed.Rules Evid.Rule 801(d)(2)(E), 28 U.S.C.A.

[11] CRIMINAL LAW ⇔ 1173.2(9)  
110k1173.2(9)

Although statements made by conspirator to government informant prior to time defendant joined building permit extortion conspiracy were admissible to establish nature and objective of conspiracy, district court erred in not giving limiting instruction stating that while such statements could be used as evidence of nature and objective of conspiracy, they could not be used as independent evidence establishing defendant's participation in conspiracy; however, error was harmless since independent evidence establishing that defendant joined conspiracy was overwhelming. Fed.Rules Evid.Rule 801(d)(2)(E), 28 U.S.C.A.

[12] CONSPIRACY ⇔ 23.1

91k23.1

Formerly 91k23, 91k24

In order to establish a conspiracy, government must prove there was an agreement between two or more persons to commit an unlawful act, that defendant was a party to the agreement, and that an overt act was committed in furtherance of the agreement by one of the coconspirators.

[12] CONSPIRACY ⇔ 27

91k27

In order to establish a conspiracy, government must prove there was an agreement between two or more persons to commit an unlawful act, that defendant was a party to the agreement, and that an overt act was committed in furtherance of the agreement by one of the coconspirators.

[13] CONSPIRACY ⇔ 47(3.1)

91k47(3.1)

Formerly 91k47(3)

Evidence in prosecution of city alderman and deputy city commissioner for conspiracy to extort money under the Hobbs Act, in connection with scheme to obtain illegal building permit, including taped conversations between government informant and alderman as well as between informant and city commissioner, was sufficient to refute alderman's claim that \$50,000 payment represented his attorney fees for his help in obtaining a simple building permit, and thus to sustain convictions. 18 U.S.C.A. § 1951.

[14] EXTORTION AND THREATS ⇔ 4

165k4

Required interstate commerce nexus needed to establish federal jurisdiction in an extortion case under the Hobbs Act is de minimis. 18 U.S.C.A. § 1951.

[15] EXTORTION AND THREATS ⇔ 6

165k6

As long as an extortion payment is made to an official because of his position, an act of "extortion" as defined in section of the Hobbs Act [18 U.S.C.A. § 1951(b)(2)] is committed.

See publication Words and Phrases for other judicial constructions and definitions.

[16] EXTORTION AND THREATS ⇔ 15

165k15

Evidence in prosecution of city alderman and deputy city commissioner under the Hobbs Act, for extortion in connection with application for building permit, including fact that alderman attempted to block construction project which cost approximately \$1.5 million and was built with over \$400,000 in materials from outside of Illinois, was sufficient to support jury's conclusion that actions of officials had a potential direct effect on interstate commerce, and thus to sustain convictions for attempted extortion. 18 U.S.C.A. § 1951(b)(2).

[17] EXTORTION AND THREATS ⇔ 15

165k15

Evidence in Hobbs Act prosecution of city alderman for attempting to extort \$25,000 from partnership in exchange for building permit, including testimony of partner that alderman demanded \$25,000 for permit and that after partners agreed to pay amount, permit was finally issued to general contractor, was sufficient to sustain conviction, notwithstanding alderman's claim that \$25,000 payment was a legal fee for his work in representing partnership on related real estate and tax matters. 18 U.S.C.A. § 1951.

[18] CRIMINAL LAW ⇔ 1166.22(3)

110k1166.22(3)

Judge's statement to defense counsel in presence of jury in which judge admonished counsel not to continue to object to witness' testimony, as court considered there was a standing objection and that testimony would be unduly interrupted, did not rise to level of prejudicial error, where, after hearing counsel's explanation that counsel had misunderstood that judge considered his objections to be continuing throughout testimony, judge apologized to defense counsel for misunderstanding and later explained to jury that counsel was not being intentionally disruptive and that they should disregard court's remark.

[19] CRIMINAL LAW ⇔ 1166.22(3)

110k1166.22(3)

Although district court's comment to defense counsel in front of jury that he would have to "screen defense counsel's questions if I cannot trust you to ask proper questions" may have been a harsh admonishment, it did not prejudice defendant's case, considering that it was a single isolated comment in a three-week long trial in which proof of guilt was substantial.

[20] CRIMINAL LAW ⇔ 1172.2  
110k1172.2

With regard to instruction that evidence of good reputation should "not constitute an excuse to acquit" defendant, if the jury, after weighing all evidence including evidence of good character, is convinced beyond a reasonable doubt that defendant is guilty of crime charged in the indictment, fact that "excuse to acquit" language is used does not constitute reversible error as long as phrase "including the evidence of good character" is included in the instruction.

[21] CRIMINAL LAW ⇔ 1181.5(8)  
110k1181.5(8)

Where defendants were denied right of allocution at sentencing hearings, case would be remanded back to district court to allow them opportunity to make a statement on their own behalf before sentence was imposed. Fed.Rules Cr.Proc.Rule 32(a)(1)(C), 18 U.S.C.A.

**\*858** Allan A. Ackerman, Ackerman & Egan, Chicago, Ill., for plaintiff-appellee.

William Bryson, Asst. U.S. Atty., Chicago, Ill., for defendants-appellants.

Before CUDAHY and COFFEY, Circuit Judges, and GRANT, Senior District Judge. [FN\*]

FN\* The Honorable Robert A. Grant, Senior District Judge for the Northern District of Indiana, is sitting by designation.

COFFEY, Circuit Judge.

The defendants Tuchow and Farina appeal a jury verdict finding them guilty of violating the Hobbs Act, 18 U.S.C. § 1951. [FN1] We affirm their convictions, but remand this case to allow the defendants' their right to allocution at the sentencing hearing.

FN1. § 1951. Interference with commerce by threats or violence "(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this

section shall be fined not more than \$10,000 or imprisoned not more than twenty years, or both.

\* \* \*

"(2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

"(3) The term 'commerce' means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

I.

The majority of the evidence introduced at trial was gathered through the use of taped conversations between Jack Walsh, the government's key witness, and the defendants Tuchow and Farina. On appeal, the defendants dispute the inferences to be drawn from the statements recorded on tape.

Shortly after Jack Walsh purchased a home remodeling company named J.C. Construction in 1979, the FBI approached Walsh and informed him that they had evidence of his participation in a bank fraud. Because of this evidence, Walsh agreed to cooperate with the FBI which was conducting several other fraud investigations in Chicago in late 1979. To aid in these investigations, the FBI placed listening and recording devices throughout Walsh's office and in his telephone. In early 1980, Walsh learned of the Kenton Court condominium rehabilitation project **\*859** from a friend in the construction business and immediately contacted Kaplan, a partner in the project to express his interest in the rehabilitation venture. The other individuals who comprised the Kenton Court partnership were Messrs. Radek and Golding, both of whom testified at trial. After examining the project's blueprints, Walsh concluded that the project did not meet the City of Chicago building code requirements as the building did not have enough fire exits (although he apparently did not inform the Kenton partners of his observations). [FN2] Walsh then contacted the FBI and told them

that he needed a building permit for a job which, in his opinion, did not meet the Chicago building code requirements and that he would contact a friend, the defendant Farina, to get the permit "fixed."

FN2. After his initial meeting with Tuchow, Walsh entered into a contract with the Kenton partners on June 9, 1980 to act as the general contractor for the condominium rehabilitation project.

On May 20, 1980, Walsh called Farina and arranged to meet with him at a Chicago restaurant on the following day, May 21, 1980. When he met Farina on May 21, Walsh told him that he needed his help "in getting a building permit through" since the building had "some violations in it." Walsh testified that Farina promised to help for a \$2,000 fee and warned Walsh that "now this may cost you a little more you know, whatever the situation takes." Farina, who at the time was the Deputy Commissioner of Sanitation for the City of Chicago, then suggested that he would have to bring the ward committeeman for the area, the defendant Tuchow, into the deal. Later during this May 21 conversation, Farina made several incriminating statements referring to the expected payoffs, including "for God's sake, don't tell people what you give me" and "I'll take it from here. Cause I wanna drop the money first." On June 3, Walsh again met with Farina and gave him \$2,000, which was supplied to Walsh by the FBI; and at that time Farina warned Walsh not to show the money or it would "kill us all." Farina then telephoned Tuchow's office and told Tuchow that he had a client with a building permit problem for Tuchow and told him that "since it's in your ward, I think you should handle it." [FN3] When Walsh again met with Farina on June 4, at Farina's office in city hall, Farina explained to Walsh that he had spoken with several of his contacts who had indicated that Tuchow was not powerful enough to obtain the building permit. Farina suggested that Walsh wait until Farina was elected alderman in the fall, however, Walsh declined and asked to see Tuchow, to which Farina responded "if you want to take that chance, we'll take it." Farina and Walsh then walked to Tuchow's office. On the way Farina asked Walsh for another \$1,000 for Tuchow and he also informed Walsh that it could cost "at least \$10,000" to obtain the building permit.

FN3. Farina further explained to Walsh "he'll take

it from there. He'll take it from there, and that's it .... We got the right connection. Now if he can't do it, nobody can do it." Farina also told Walsh not to use his name with anyone because of the FBI investigations taking place in Chicago at that time.

Farina and Walsh arrived in Tuchow's office, where Tuchow explained that his price for the building permit "won't be exorbitant, but it will be substantial." Tuchow also informed Walsh that others would have to be involved. After the meeting, Farina told Walsh that it would cost more than the \$10,000 he had previously quoted and that he needed another \$1,000 to get Tuchow "going on finding out whoever he has to find out to fix the permit."

On June 11, after receiving money from the FBI, Walsh gave Farina \$1,000 to be passed on to Tuchow. During this meeting, Farina again cautioned Walsh not to mention any names since two other aldermen had recently been convicted for fixing a building permit. Farina told Walsh that Tuchow's fee for help in obtaining the permit would be approximately \$1,000 per condominium unit or \$47,000.

\*860 In the meantime, the Kenton Court partnership had applied for a Federal Housing and Urban Development loan guarantee commitment of \$1.5 million to help finance the project. The application for the guarantee needed to be submitted by June 27, 1980. Thus, Radek, one of the partners in the project, met with Walsh during the week of June 11th to express his concern about the time it was taking to obtain the building permit. Walsh reassured Radek that he would obtain the permit since he had earlier paid money to Farina and Tuchow; Radek responded that he did not believe any payments were necessary since the project was legitimate. On June 25, Tuchow called Walsh and told him that it looked as if the permit would go through. Walsh explained to Tuchow the emergency facing the Kenton Court partners concerning the HUD deadline and Tuchow responded that he would supply Walsh with a letter the next day authorizing Walsh to begin demolition work. During the conversation, Walsh told Tuchow that Farina had quoted a price of \$47,000 for Tuchow's assistance; Tuchow responded by asking whether he (Walsh) had given Farina the \$1,000 payment and Walsh answered in the affirmative.

Later that day Walsh spoke with Golding, one of the Kenton Court partners, and explained that he had made payoffs to various officials for the project and that more money was expected. On June 26, Walsh went to City Hall to pick up the letter authorizing the demolition work. Tuchow and Walsh began to discuss the fee to be paid and Tuchow stated that "well, Louis shouldn't be setting prices .... I don't think I discussed that with him"; he then stated "I think Louie [Farina] misunderstood me. I told him a job like this here, to get you cleared in everything to go ahead. Got to be worth at least fifty up front." Tuchow then inquired, "when can some of this come in" to which Walsh replied, "when you want it." Walsh then agreed to pay Tuchow the following week after Tuchow returned from vacation. Walsh, Tuchow, and Noonan, an employee in the City's building department, then arranged for a demolition authorization letter to be issued the next day.

It was at this time that the FBI caught wind that Walsh was involved in another bank fraud scheme and directed him to withdraw from the Kenton Court project. As a result, Walsh informed Farina and Tuchow that he could not go forward with the deal because the Kenton partners were not willing to pay Tuchow's fee and refused to repay Walsh the money he had already paid out. Tuchow responded "that's okay, we'll just stop the job." Tuchow also informed Walsh that he did not want to deal with the partnership because "I don't even know them." Tuchow then explained to Walsh that he had put him in a bad spot since he (Tuchow) had already promised "the guy over there" (supposedly referring to Noonan) "a lot more than a couple of grand." Walsh apologetically offered that "if it takes 5 ... if it takes 10 uh, I'll do that and I don't wanna, I don't wanna embarrass myself." Tuchow accepted the \$10,000 offer, "if you can get me 10 ... I'll just have to spread that around." In another conversation that same day, Walsh asked Tuchow what would happen if the Kenton partnership attempted to obtain a permit on its own and Tuchow responded "It's up to them ... if they want to go out, they won't get it though."

Over the next several weeks, Walsh began to make periodic payments on the \$10,000 promise. On July 24 Walsh made a \$2,000 payment to Tuchow and on July 30 he made a \$1,000 payment. On October 21, Walsh made another \$1,000 payment to Tuchow. During this meeting Walsh

asserted that he had paid Tuchow \$4,000, \$3,000 directly and \$1,000 through Farina. Tuchow expressed his frustration to Walsh about Farina's greed explaining that Farina had only given Tuchow \$500 of the \$1,000 payment intended for Tuchow, while he (Tuchow) had fairly split the proceeds of an earlier payment with Farina.

Sometime in mid-July, 1980, after Walsh informed the Kenton Court partners that he was withdrawing as the general contractor \*861 from the project, one of the partners, Radek, went to City Hall in an attempt to obtain the building permit. There he met Noonan, an employee in the City Building Department, who refused to issue a permit to Radek. Noonan told Radek that the permit had been paid for and was in Walsh's name. When Radek offered to pay the \$250.00 permit fee, Noonan told Radek that he could only obtain the permit if Walsh agreed to the transfer. Noonan, testifying at trial, stated that he had been instructed by Tuchow not to authorize any transfer of the building permit at that time. Golding, called by the government as a hostile witness, testified that at a Kenton Court partnership meeting they agreed to contact Tuchow to see what could be done concerning obtaining the building permit. [FN4] During Golding's meeting with Tuchow, Tuchow demanded \$50,000, but the partnership refused to pay this amount. Golding and Tuchow subsequently settled on a \$25,000 payment which was to be characterized as a legal fee. Golding, in his testimony to the Grand Jury which was later admitted at trial, told Tuchow that he felt as if he was being extorted to which Tuchow replied that he needed the money "to take care of some people." In the fall of 1980, the Kenton partnership retained another general contractor to begin work on the project. After the general contractor told Golding that the plans were inadequate, Golding responded by telling the contractor not to worry about it since he had "people downtown that would take care of it." [FN5] Late in the fall of 1980, after the partnership had agreed to pay Tuchow \$25,000, the building permit was issued by the building department.

FN4. Golding testified that the idea to contact Tuchow came from one of his son's friends who is an attorney in Chicago and had ties to Tuchow.

FN5. The trial court judge allowed in this evidence

since it was offered not to prove the truth of the matter asserted but rather to prove the fact that the statements were made by Golding in order to establish his state of mind. The jury was instructed that it was to consider the testimony in that light.

[1] Based upon this evidence the Grand Jury returned a seven-count indictment. In Count I, Tuchow was indicted for conspiring to extort money from the Kenton Court partnership and from Jack Walsh. Tuchow was also indicted for separate acts of attempting to extort money from the Kenton Court partnership (Count VII) and from Jack Walsh (Counts IV, V, and VI). Farina was also indicted for conspiring with Tuchow to extort money (Count I) and two separate acts of extortion of money (Counts II, III). The jury returned a verdict of guilty on all seven counts. Tuchow was sentenced to concurrent terms of eight years while Farina was sentenced to concurrent terms of four years on each of the counts contained within the indictment.

During the trial, over the defendants' objections, the district court judge allowed certain "other acts" evidence under Fed.R. of Evid.Rule 404(b). On appeal, both defendants claim that the "other acts" evidence was improperly admitted. Further, Tuchow alleges that the district court erred in admitting hearsay evidence of taped conversation between Farina and Walsh prior to Walsh being introduced to Tuchow. The defendants' other grounds for reversal include claims that there was insufficient evidence to support the charges of conspiracy and attempted extortion and further that the evidence was insufficient to establish a nexus between interstate commerce and the extortion payments made by Walsh (Counts IV, V, VI).

## II.

### A. "Other Acts" Evidence.

Both Farina and Tuchow complain that the district court erred when it allowed receipt of "other acts" evidence under Fed.R.Evid. Rule 404(b). [FN6] Specifically, Tuchow \*862 argues that the court erred when it received in evidence a tape recorded conversation between Tuchow and his barber, a Mr. Herzog, wherein Tuchow allegedly offered to bribe a municipal court judge to dismiss a speeding ticket. Farina also argues that the court erred in admitting a taped conversation between himself and Walsh

wherein Farina agreed to find a government job for Walsh's nephew for \$2,500 and fix a drunken driving ticket for Walsh's uncle for \$1,000.

FN6. Rule 404(b) states: "Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of a mistake or accident."

"According to Rule 404(b), evidence of other acts cannot be introduced to establish the defendant's bad character or to show his propensity to commit the act in question simply because he committed a similar act in the past."

United States v. Chaimson, 760 F.2d 798 (7th Cir.1985). Rather, this "other acts" evidence is admissible only if:

"(1) The evidence is directed toward establishing a matter in issue other than the defendant's propensity to commit the crime charged, (2) the evidence shows that the other act is similar enough and close enough in time to be relevant to the matter in issue ..., (3) the evidence is clear and convincing, and (4) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice."

Id. at 804, quoting United States v. Shackleford, 738 F.2d 776, 779 (7th Cir.1984); see also United States v. Stump, 735 F.2d 273, 275 (7th Cir.), cert. denied, --- U.S. ---, 105 S.Ct. 203, 83 L.Ed.2d 134 (1984); United States v. Kane, 726 F.2d 344, 348 (7th Cir.1984).

[2] Herzog testified that he contacted Tuchow after receiving a speeding ticket in late 1980. In one of the conversations, Tuchow told Herzog that he had discovered the name of the presiding judge on the case and offered to "give him a little, you know, something." In a later conversation, he told Herzog that he had talked to the judge and instructed Herzog to tell the court clerk that "Mr. Tuchow is your lawyer and he's going to try to get out here [to the court]." Tuchow also stated that "the judge got your name, so he will take care of it." Herzog testified that Tuchow did not represent him as an attorney during his traffic court appearance and that he could not remember the outcome of the case.

Rule 404(b) states that other acts evidence may "be admissible for other purposes, such as proof of motive, opportunity, [or] intent ...." At trial, Tuchow did not deny the fact that he discussed and received money for his efforts in obtaining the building permit. Rather, he characterized these discussions with Walsh and Golding during opening argument and throughout the trial as legitimate exchanges concerning his attorney fees for representing their interests in obtaining the building permit. Intent became an issue once Tuchow characterized his discussions as a legitimate exchange concerning his attorney fees. See *United States v. Price*, 617 F.2d 455, 459 (7th Cir.1979) (issue of intent raised during opening argument opens the door to Rule 404(b) evidence). Since Tuchow's defense at trial related directly to the issue of his intent, the discussion between Herzog and Tuchow where Tuchow contemplated bribing a trial court judge in order to fix a traffic ticket was relevant in assessing Tuchow's characterization of his discussions with Walsh and the members of the Kenton partnership. Thus, the first factor in assessing the admissibility of evidence under Rule 404(b) is satisfied.

This "other act" evidence is also "similar enough and close enough in time to be relevant ...." The conversations with Herzog occurred in late 1980, during the period the application for the building permit was pending. Tuchow contends that the conversations concerned what could be characterized as a bribery attempt and since he was prosecuted for extortion and not bribery his conversations with Herzog were too dissimilar for purposes of comparison. We disagree. Tuchow's defense rested on his assertion that his relationship between Walsh and the Kenton partnership was only one of attorney and client. The government sought to prove that Tuchow \*863 did not regard this relationship as anything approximating an attorney-client relationship. In this regard, evidence of his conversation with Herzog concerning bribing a municipal court judge to fix Herzog's traffic ticket was relevant as Tuchow had proposed to take care of the problem not by legitimately representing Herzog at his trial but by contacting the judge and "giving the judge a little something," which Herzog believed to mean money. The similarity between this conduct and Tuchow's discussions with Walsh and Golding over his "fee" for helping them obtain a building permit is that Tuchow did not undertake to

represent these parties as an attorney, but sought to improperly influence particular governmental decisions, whether it be handling a traffic ticket or obtaining a building permit, through the use of money. Both the "other act" evidence and offense charged in this case focused on the conduct of Tuchow. Both acts concerned discussions of distributing money in order to influence an office holder's actions. "The degree of similarity is relevant only insofar as the acts are sufficiently alike to support an inference of criminal intent .... The prior acts need not be duplicates of the one for which the defendant is now being tried." See *United States v. Radseck*, 718 F.2d 233, 236-37 (7th Cir.1983) citing *United States v. O'Brien*, 618 F.2d 1234, 1238 (7th Cir.), cert. denied, 449 U.S. 858, 101 S.Ct. 157, 66 L.Ed.2d 73 (1980). [FN7]

FN7. Tuchow compares this case to *United States v. Dothard*, 666 F.2d 498 (11th Cir.1982), which held, in part, that admission of other acts evidence constituted reversible error. Dothard involved a defendant who allegedly falsely filed a United States Army Reserve Enlistment Form; however, the defendant in that case denied filling out the form and denied any knowledge of the false answer by the person who did in fact fill out the form. Thus, that case is readily distinguishable since the defendant Dothard denied the act of filling out the form itself. In this case, Tuchow does not deny the discussions concerning the money to be paid for his help in obtaining the building permit. Rather, it is the characterization of those discussions, which directly impacts upon Tuchow's intent and, thus, his guilt or innocence. See also, *Shackleford*, 738 F.2d at 782.

The third factor to be considered under Rule 404(b) is whether evidence of the other acts was clear and convincing. In this case, the conversations between Herzog and Tuchow were recorded on tape and Herzog testified that he logically assumed Tuchow's reference to "giving the judge a little something" meant money. Tuchow argues that since Herzog was in fact fined by the trial court for his speeding offense, albeit minimally, there is no evidence that a bribe took place. However, the government offered this evidence not to establish the fact that the defendant had completed an act of bribery, but to demonstrate that Tuchow believed, as he told Herzog, that he was capable of fixing the case. The fact that Tuchow's statements were

recorded on tape provided direct evidence of the other act evidence and, thus, the clear and convincing standard was met in this case. See *United States v. Dolliole*, 597 F.2d 102, 107 (7th Cir.1979) (direct evidence of defendant's participation in other acts satisfies the clear and convincing standard); see also, *United States v. Hyman*, 741 F.2d 906, 913 (7th Cir.1984).

[3] Finally, if all the other factors are satisfied, the judge must also be convinced that any prejudice from admission of this evidence is outweighed by its probative value. This determination, involving a Fed.R.Evid. Rule 403 determination balancing the prejudice against the evidence's relevance, is reversible only if the district court abused its discretion. See, e.g., *United States v. Falco*, 727 F.2d 659, 665 (7th Cir.1984); *United States v. Weidman*, 572 F.2d 1199, 1201-02 (7th Cir.1978), cert. denied, 439 U.S. 821, 99 S.Ct. 87, 58 L.Ed.2d 113 (1978). In this case the district court conducted a separate hearing, weighed all of the evidence and, after admitting the evidence, specifically instructed the jury as to the limitations on its use. In our review of the record, we find no abuse of discretion. [FN8] Thus, we hold that Herzog's testimony \*864 and the taped conversations between Herzog and Tuchow were properly received in evidence under Rule 404(b).

FN8. Tuchow also argues that the district court judge failed to make an explicit finding under Rule 403 and thus the fourth factor under the Rule 404(b) analysis is lacking. However, as this court stated in *United States v. Hyman*, 741 F.2d 906 (7th Cir.1984), the "trial court's evidentiary rulings are 'within its sound discretion and must be accorded great deference ....' Further, we have refused repeatedly to require a mechanical recitation of Rule 403's formula, on the record, as a prerequisite to admitting evidence under Rule 404(b)." *Id.* at 913 (citations omitted). When the correct reasons for the ruling are apparent on the record, we will not presume the wrong ones. See *United States v. Price*, 617 F.2d 455, 460 (7th Cir.1979).

Farina claims that the trial judge erred when he allowed in evidence of tape recorded conversations between Farina and Walsh concerning an agreement that Farina would arrange a job in city government for Walsh's nephew for \$2,500 and would fix a drunk driving citation for Walsh's uncle for \$1,000.

These conversations were recorded on tape and took place in late 1980 and early 1981.

[4] Farina's intent, just as Tuchow's, also was an issue at trial. In a Hobbs Act prosecution, "the government is required to prove criminal intent on the part of the accused." *United States v. Price*, 617 F.2d 455, 460 (7th Cir.1979). At trial, Farina did not dispute the fact that discussions took place concerning the exchange of money; rather, he disputed the meaning to be attached thereto. One of Farina's defenses was that he was not engaged in any conspiracy with Tuchow; rather, as suggested in his counsel's opening argument, Farina was merely "conning" Walsh out of some money. *Id.* at 459 (issue of intent raised during opening argument opens the door to Rule 404(b) evidence during government's case-in-chief); *Shackleford*, 738 F.2d at 781 (evidence of other acts may be admissible during government's case-in-chief where defendant raises issue of intent). [FN9] The evidence that Farina obtained a job for Walsh's nephew for \$2,500 and fixed a drunk driving ticket for another \$1,000 was relevant in establishing that Farina did not intend to "con" Walsh. This evidence indicated, similar to obtaining the job for Walsh's nephew and fixing the drunk driving ticket, that Farina intended to follow through on his promise to help Walsh obtain the building permit. Thus, the "other acts" evidence was relevant in establishing his intent to engage in a conspiracy with Tuchow in order to obtain the illegal permit.

FN9. During trial, the defense counsel cross-examined Walsh attempting to demonstrate that Farina did not intend to engage in a conspiracy with Tuchow as he (Farina) believed he was simply introducing Walsh to Tuchow in order for the two to establish an attorney-client relationship. During closing argument, Farina's counsel argued that Farina did not act with an unlawful intent since Farina believed that he was introducing Walsh to Tuchow so that Walsh could obtain legitimate legal services from Tuchow. This line of defense was developed after introduction of the other acts evidence.

[5][6][7] Moreover, it is uncontested that the evidence of Farina's other acts was clear and convincing since the tape recordings provided direct evidence that Farina obtained a job for Walsh's nephew and fixed the traffic ticket. This type of

conduct of bribing government officials is indistinguishable from obtaining an illegal building permit from government officials. Finally, the district court did not abuse its discretion in admitting the "other acts" evidence. The court properly instructed the jury regarding the parameters within which this evidence could be considered, concluding with: "it is very important that you understand the very limited purpose of this evidence; first consider it only as to the defendant Farina; secondly, consider it only on the question of what Farina's knowledge and intent were in the case that is on trial here ...." Although Farina argues that the time occupied at trial concerning the "other acts" evidence (45 pages of transcript) was much greater than the time spent proving his direct involvement in the crimes charged in the indictment (30 pages of transcript), the point where so much other act evidence was introduced as to prejudice his defense was not reached in this case. Thus, the district court did not \*865 err in admitting evidence of Farina's previous bribes under Rule 404(b). [FN10]

FN10. Tuchow argues that because the district court allowed in "other acts" evidence as to Farina, the district court should have granted Tuchow's motion for severance of his trial. However, a motion for severance under Fed.R.Crim.P. Rule 14 is committed to the discretion of the district court and its decision will only be reversed upon a "strong showing of prejudice" to the moving defendant. *United States v. Dalzotto*, 603 F.2d 642, 646 (7th Cir.1979). The defendants must show that their joinder deprived them of a fair trial. *United States v. Percival, et al.*, 756 F.2d 600, 610 (7th Cir.1985). After a review of the record, we hold that the court did not abuse its discretion in denying the severance motion given the clear language contained in the court's limiting instructions that the evidence as to Farina's other acts was to be considered against Farina only. See *id.*

#### B. State of Mind Testimony.

Tuchow was also indicted for and convicted of attempting to extort \$25,000 from the Kenton Court partnership (Count VII). At trial, the government introduced the testimony of Golding and Radek, two partners in the partnership, under the state of mind exception to the hearsay rule, Fed.R.Evid. Rule

803(3). [FN11] The jury was also instructed that the testimony of Radek and Golding was offered to establish their state of mind at the time of the extortion attempt during the summer of 1980 and not to prove any of the matters asserted therein.

FN11. Federal Rule of Evidence 803(3) provides: "The following are not excluded by the hearsay rule, even though the declarant is available as a witness: "(3) Then existing mental, emotional, or physical condition.--Statement of the declarant's then existing state of mind, emotion, sensation or physical condition (such as intent, claim, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification or terms of the declarant's will."

One of the conversations that Tuchow found particularly objectionable occurred on June 19, 1980 between Walsh and Radek. Walsh testified that during this conversation he informed Radek that he had paid money to Tuchow and Farina to obtain the permits. Radek responded that he did not believe that the partnership had to pay bribe money since the deal was legitimate. Tuchow also objected to Radek's testimony that Walsh had told him that he (Walsh) had paid \$2,000 to Farina and \$1,000 to Tuchow; Radek further testified that since he believed the deal was legitimate there was no need for the partnership to make payments to city officials. Radek also testified that he went to the building commissioner's office to obtain the permit but that Mr. Noonan, an employee in the city's building department, denied him the permit explaining that a fee had been paid for the permit and he would need a document from Walsh assigning the permit to him. Radek offered to pay the \$250.00 fee for the permit, but Noonan refused to accept the offer. Radek returned to his office and discussed the deal with one of his partners, a Mr. Kaplan, while expressing his belief that the building permit was being blocked because certain promised payments had not been made. The defendants objected to this testimony as inadmissible hearsay. Finally, Tuchow objected to introduction of a taped conversation between Walsh and Golding on June 25, 1980, discussing Walsh's progress in obtaining the building permit. During this conversation, Walsh told Golding that he had to "drop a little here and drop a little there," to which Golding responded

"oh I know that" and "you don't get nothing done in Chicago without that." Walsh also explained to Golding that he had to pay \$2,000 to Farina and \$1,000 to Tuchow and Golding responded "oh, yeah. Everybody is on our side." [FN12]

FN12. The text of the conversation is as follows:  
WALSH: "You know how the situations work down at City Hall, so I wound up uh I hadda drop a uh two grand to Louie and then a thousand to Marty and then uh, you know, to get the show on the road. So I'm drop, you know, and then uh he came back with another figure. I said look, you do what you have to do and get this baby goin so we get some uh work done there. Now the Alderman is definitely interested in seeing that thing improved. GOLDING: "Oh, yeah. Everybody is on our side. WALSH: "So what happened is that Marty, Marty is the committeeman there. GOLDING: "Humm. WALSH: "So how can you beat it? GOLDING: "Yeah. WALSH: "You know he's my guy. GOLDING: "Marty Tuchow? WALSH: "Tuchow, yeah."

**\*866** [8] In a Hobbs Act prosecution under 18 U.S.C. § 1951, the government must establish not only the victim's state of mind at the time of the alleged extortion but also the intent of the defendant.

"In a Hobbs Act prosecution for extortion under color of official right, the government must prove that the victim paid money to the defendant because of the defendant's official position. Evidence of the victim's state of mind is thus an essential element of the government's case. See *United States v. Braasch*, 505 F.2d 139, 151 (7th Cir.1974), cert. denied, 421 U.S. 910, 95 S.Ct. 1561, 43 L.Ed.2d 775 (1975). In addition the government must prove criminal intent on the part of the accused. See *United States v. Adcock*, 558 F.2d 397, 402 (8th Cir.), cert. denied, 434 U.S. 921, 98 S.Ct. 395, 54 L.Ed.2d 277 (1977)." *Price*, 617 F.2d at 459. Radek's and Golding's testimony that they believed they were being extorted established the victim's state of mind and thus one of the elements of the offense. [FN13]

FN13. Further, the testimony of Radek and Golding was relevant evidence as to Tuchow's intent. Certainly, if Radek and Golding testified that they believed the requested payments were for legitimate lawyer fees, Tuchow's claim of innocence would

seem to be reasonable. Conversely, if they believed payments were being made because the defendants were city officials and that more payments were being demanded this would provide relevant evidence as to whether Tuchow viewed his demand for payment as an extortion attempt or as legitimate lawyer fees.

[9][10] Tuchow, however, specifically complains that since it was Walsh who conveyed the information to Radek and Golding as to the progress made in obtaining the building permit, it was not he, but Walsh who induced their state of mind and thus this testimony should not have been allowed as it was untrustworthy. Admittedly, if Walsh had been Tuchow's agent or had Tuchow spoken directly to Golding and Radek, then their testimony would have been admissible under Fed.R.Evid. Rule 801(d)(2)(A) as an admission of a party opponent. [FN14] However, Golding's and Radek's testimony definitely reflected their state of mind at the time of the alleged extortion attempts during the summer of 1980 and thus was admissible under Fed.R.Evid. Rule 803(3). Tuchow's complaint that the information which induced their state of mind was relayed to Golding and Radek by Walsh rather than Tuchow is of no consequence since the essential information--that Tuchow had requested payments be made in order to get the permit and that more payments would be required--was correctly conveyed by Walsh to Radek and Golding as evidenced in the taped conversations between Tuchow and Walsh and Farina and Walsh. [FN15] The indicia of reliability, **\*867** which is not present in many hearsay situations, is certainly provided in the taped conversations revealing the details of the extortion scheme. Because the record indicates that the information concerning the payments made to Tuchow and Farina was accurately conveyed to them, it is clear that their "state of mind" was induced by accurate information. Contrary to Tuchow's assertion that such evidence effectively directs the verdict against him, this evidence establishes only one of the elements of the crime--the victim's state of mind. The defendant can still defend his case by demonstrating he did not have the requisite intent. Accordingly, we hold that the district court did not abuse its discretion in allowing this state of mind evidence to be introduced at trial. [FN16]

FN14. Tuchow cites *United States v. Summers*, 598

F.2d 450 (5th Cir.1979) to support his position that Golding's and Radek's testimony should have been excluded. In Summers, testimony detailing conversations between an FBI informant and one of the victims of the defendant's extortion scheme was admitted at trial. The Fifth Circuit held that the district court erred in admitting this evidence, but found the error to be harmless given the abundance of properly admitted evidence establishing guilt. Our case is distinguishable from Summers on two grounds. First, the Summers decision noted that the evidence of the conversations was offered to prove the truth of the matter asserted therein and thus should have been excluded as hearsay. In this case, as the jury was instructed by the district court, the evidence was not offered to prove the truth of what was asserted by Radek's and Golding's statements, but rather to prove the victims' state of mind. Further, Summers did not analyze whether the evidence would have been admissible under the hearsay exception for state of mind evidence, Fed.R.Evid. Rule 803(3). In this case, the evidence was clearly admitted to demonstrate the state of mind of the victims, Golding and Radek, two partners in the Kenton Court Partnership.

FN15. As detailed in the fact section of this opinion, the taped conversations between Tuchow and Walsh demonstrate that Tuchow demanded that an additional \$47,000 be paid by Walsh and the partnership. Further, Tuchow asked Walsh whether he had paid the \$1,000 to Farina intended for Tuchow. This information was correctly conveyed by Walsh to the Kenton partners. In fact, the only misinformation conveyed by Walsh to Radek was the fact that he made payments to Tuchow and Farina totalling \$5,000, when in fact he had spent only \$3,000 at the time.

FN16. Tuchow also complains of the limiting instruction given to the jury prior to its consideration of the state of mind evidence. The contested portion of the instruction is as follows: "Now, one of the questions you are going to have to decide ... is were these legal fees ... or were they extortion payments that were being requested? "Now, what they were depends in large part upon the intent of these defendants ... [t]hat is really the principal question that you are going to have to decide.... "One of the things that is relevant to that question is what was the state of mind of these developers. What was the effect of what was said

on their minds? "Now you have heard tapes and you are going to hear some more tapes now that have a bearing on that latter question: What was going on in the mind of Mr. Golding when this \$25,000 was being discussed ...? "Now that doesn't mean that this is necessarily the same way Tuchow regarded it, or Farina regarded it. It doesn't mean that at all. He might have had a misunderstanding. That would be, of course, for you to decide, but it is, nonetheless, relevant for you to know or hear evidence of what it was these people were saying at the time." The judge completed the instruction by cautioning the jury that certain of the taperecorded statements were not offered to prove the truth of the matter asserted but only to indicate the state of mind of the declarant. Tuchow's argument that this instruction somehow prejudiced his case is meritless for two reasons. First, although he objected to the introduction of the evidence he never registered any objection to the language used by the court in the limiting instruction. Second, contrary to Tuchow's suggestion, this instruction did not direct a verdict against Tuchow; rather, the jury was properly instructed that the developer's state of mind may provide some evidence as to whether Tuchow intended the demanded payments to truly represent his attorney fees. See supra, note 15. Thus, this instruction did not unfairly prejudice Tuchow's defense in any respect.

### C. Hearsay Conversations.

[11] Tuchow contends that the district court erred when it admitted evidence of taped conversations between Farina and Walsh that occurred prior to the establishment of the conspiracy between himself and Farina. Specifically, Tuchow complains that Farina introduced Walsh to Tuchow on June 4, 1980, and the referred to cited conversations (May 21 and June 3) took place prior to the time Tuchow became a part of the conspiracy through his contacts with Farina. Tuchow argues that the evidence constitutes hearsay when used against him and that the coconspirator exception to the hearsay rule does not apply because he was not a member of the conspiracy at the time of conversations between Walsh and Farina; thus, the district court should have at least given a limiting instruction explaining to the jury that these statements could not be considered as evidence of Tuchow's involvement because he had not as of that date joined the conspiracy. The statements that Tuchow specifically

complains of occurred during the taped conversations of May 21 and June 3, 1980 between Farina and Walsh. During the meeting on May 21, Farina told Walsh that it would cost Walsh \$2,000 to bring someone in to handle obtaining the permit. Farina also instructed Walsh not to mention the terms of their deal to anyone, "for God's sake, don't tell people what you give me." Farina then advised Walsh that he would "take it from there. Cause I wanna drop the money first." Finally, on June 3, imploring "Don't ever show it, don't ever, please," Farina told Walsh that the \$2,000 \*868 payment should be kept out of Walsh's business records. The government argues that these conversations were not offered to prove the truth of the matter asserted (see Fed.R.Evid. Rule 801(c)), and thus do not constitute hearsay. Accordingly, the government contends that these statements were admissible against Tuchow. *Anderson v. United States*, 417 U.S. 211, 219-20, 94 S.Ct. 2253, 2260-61, 41 L.Ed.2d 20 (1974). [FN17]

FN17. In making its ruling on the admissibility of the co-conspirator statements, the court stated at the end of the trial: "I think there are very few so-called co-conspirator exception statements in this case. Offhand I can't think of any, but there probably are some. Most of the material to which objection was made as hearsay was not in my view hearsay because it wasn't offered for the truth of what was asserted; but if there were any statements which were offered for the truth of the assertions contained therein, then I find that by the greater weight of the evidence, those statements were made by one or the other of the alleged co-conspirators in furtherance of the conspiracy and during the course of the conspiracy and, therefore, they are admissible against each of the defendants." (Tr. 1133).

In this case, Tuchow does not analyze whether the testimony he challenged was being offered to assert the truth of the matter therein or whether it was offered simply as proof of some other matter. Specifically, the statements the defendants complain of relating to Farina's instructions to Walsh not to tell anyone of the pending deal and not to reflect on his records any of the payments made to Farina, including Farina's request for a \$2,000 payment, were offered by the government for the sole purpose of explaining the nature and scope of the secretive and conspiratorial scheme to obtain the building

permit and to establish the conspiracy itself. [FN18] See *United States v. Magnus*, 743 F.2d 517, 522 (7th Cir.1984). In *Magnus*, our court held that statements made by the coconspirator prior to the time he joined the conspiracy were admissible as non-hearsay evidence since the statements were not offered to prove the truth of the statements offered, but rather to set forth the illegality, nature and scope of the anticipated conspiratorial scheme. See also, *United States v. Bobo*, 586 F.2d 355, 372 (5th Cir.1978), cert. denied, 440 U.S. 976, 99 S.Ct. 1546, 59 L.Ed.2d 795 (1979).

FN18. Indeed, as stated in *United States v. Gibson*, 675 F.2d 825, 834 (6th Cir.1982), the proffered "statement was not hearsay under Federal Rule of Evidence 801(c): it was not offered to show that the substance of [the declarant's] utterance was either true or false. Indeed a suggestion or an order is not subject to verification at all because such utterances do not assert facts." In this case, since Farina's instructions to Walsh were not offered to prove the truth of the matters asserted therein, they did not assert facts subject to verification. Thus, these statements were not hearsay.

Further, in *United States v. Santiago*, 582 F.2d 1128, 1134 (7th Cir.1978), this court held that if a conspiracy is established by a preponderance of the evidence, statements made by one co-conspirator during the course and in furtherance of the conspiracy may be admissible against another co-conspirator. *Id.* at 1134. In *United States v. Coe*, 718 F.2d 830 (7th Cir.1983), we explained that our ruling in *Santiago* did not change the law in this circuit that where the defendant later became a member of the conspiracy statements made by a co-conspirator during the course and in furtherance of the conspiracy were admissible against the defendant to demonstrate the nature and objectives of the conspiracy which he subsequently joined. *Id.* at 839; [FN19] see also *Magnus*, 743 F.2d at 521; *United States v. Harris*, 729 F.2d 441, 448 (7th Cir.1984).

FN19. In *Coe*, the defendant Coe and a government informant had extensive discussions as to a possible drug deal. It was not until an April 15, 1982 telephone conversation that Coe told the informant that he (Coe) had obtained a buyer. The court held that evidence of the conversations between the

informant and Coe prior to April 15 could not be admitted under the co-conspirator rule, Fed.R.Evid. 801(d)(2)(E), against the defendants who later joined the conspiracy since this was insufficient evidence to establish a "joint venture" or conspiracy between Coe and the informant prior to this date. See Coe, 718 F.2d at 840.

In this case, the taped conversations clearly establishes that on May 20 Walsh \*869 called Farina to arrange a meeting to discuss obtaining a building permit and that on May 21 Farina and Walsh met and entered into an agreement to obtain the illegal building permit. During the first portion of the May 21 conversation, Walsh told Farina that he needed help in "getting a building permit through" since the building had "some violations in it." Farina agreed to help if Walsh paid him \$2,000. He also told Walsh that it would probably "cost you a little more ...." As required by our Coe decision, the necessary conspiracy or "joint venture" (for evidentiary purposes) between Farina and Walsh, the government informant, was established by a preponderance of the evidence at this point. Coe, 718 F.2d at 835, 840; United States v. Gil, 604 F.2d 546, 549 (7th Cir.1979). Thus, the subsequent statements made on May 21 and June 3 by Farina revealing the secretive and illegal nature of the conspiracy to obtain the building permit were admissible. Coe, 718 F.2d 839. However, we request that in the future district courts give a limiting instruction stating that while such statements may be used as evidence revealing the nature and objective of the conspiracy, such statements should not be used as independent evidence establishing the defendant's participation in the conspiracy. The fact such an instruction was not given in this case, however, was harmless error since the independent evidence establishing that Tuchow joined the conspiracy was overwhelming. See the discussion in Section III-A of this opinion.

### III.

#### A. Sufficiency of the Evidence--Conspiracy.

[12] Tuchow and Farina both contend that there was insufficient evidence to support their conviction for conspiracy to extort money under the Hobbs Act, 18 U.S.C. § 1951. Tuchow argues that the evidence failed to establish proof of an agreement between Farina and himself and that based upon the

evidence presented, it was reasonable to infer that he was acting only as an attorney representing his client in obtaining a building permit. Farina also argues that he merely introduced Walsh to Tuchow as an attorney who could represent Walsh in obtaining the building permit. The indictment in this case charged that "Martin Tuchow and Louis Farina, defendants herein, and divers [sic] other persons known and unknown to the Grand Jury, did knowingly, willfully and unlawfully ... conspire ... to commit extortion ...." In order to establish a conspiracy, the government must prove that there was an agreement between two or more persons to commit an unlawful act, that the defendant was a party to the agreement, and that an overt act was committed in furtherance of the agreement by one of the coconspirators. See, e.g., United States v. Roman, 728 F.2d 846, 859 (7th Cir.), cert. denied, --- U.S. ---, 104 S.Ct. 2360, 80 L.Ed.2d 832 (1984); United States v. Mayo, 721 F.2d 1084, 1088 (7th Cir.1983).

[13] Tuchow's defense at trial was that he was simply charging a fee for his professional services in helping Walsh and the Kenton partnership obtain a building permit. However, sufficient evidence was introduced to rebut this defense and establish, beyond a reasonable doubt, that an illegal conspiracy existed between Tuchow and Farina. During a June 3, 1980 phone conversation between Farina and Tuchow, Farina explained that he had a "client" with a building permit problem and that "since it's in your [Tuchow's] ward, I think you should handle it and advise." Farina then told Walsh, "he'll take it from there, and that's it .... We got the right connection." The next day, Farina introduced Walsh to Tuchow in Tuchow's office. Tuchow told Walsh that his fee "won't be exorbitant, but it will be substantial," and that additional fees would be necessary in order to obtain the building permit, "if I'm gonna take this over, there might be somebody else involved, you know .... We're grown men." Prior to this June 4 meeting, Farina informed Walsh that he would need \$1,000 to pay to Tuchow and after the meeting Farina told Walsh that the fee for the permit would be considerably higher \*870 than the \$10,000 previously quoted to Walsh. On June 11, Walsh gave Farina \$1,000 to pass along to Tuchow. Farina also told Walsh that the cost to obtain the building permit would be approximately \$47,000. During a later taped conversation on June 25,

Tuchow asked Walsh whether he had given Farina the \$1,000 and Walsh indicated that he had done so. The following day when Walsh went to City Hall to obtain the demolition authorization letter, Tuchow affirmed that his fee would be approximately \$50,000 and that while the usual practice was to "pay up front" Tuchow would accept the payment at a later date since Walsh was Farina's friend. Finally, during a taped conversation in October of 1981, Tuchow told Walsh that Farina had given him only \$500.00 of the initial \$1,000 payment made in early June and that he (Tuchow) had given Farina \$500.00 from one of the payments that Walsh had made in July.

Given the volume of evidence in the form of taped conversations between Walsh and Tuchow as well as between Walsh and Farina, the jury was justified in rejecting Tuchow's specious claim that the \$50,000 payment represented his attorney fees for his help in obtaining a simple building permit. When viewed in the light most favorable to the government, there is more than sufficient evidence in this case to support both Tuchow's and Farina's convictions for conspiracy. See *Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1942).

#### B. Interstate Commerce.

Tuchow next asserts that there was insufficient evidence introduced at trial to support his convictions under Counts IV, V, and VI charging him with attempted extortion [FN20] since Walsh was no longer involved in the Kenton Court project when he made payments to Tuchow and thus there could be no effect on interstate commerce. The Hobbs Act, 18 U.S.C. § 1951(a), provides that anyone who "in any way or degree obstructs, delays or affects commerce or the movement of any article or commodity in commerce" violates the terms of the Act. The three counts contained in the indictment charged that on July 24, 30, and October 21, 1980, Tuchow did "attempt to affect commerce ... by extortion as defined in Title 18 United States Code section 1951(b)(2), in that ... Tuchow did ... unlawfully obtain [\$1,000] from Jack Walsh and J.C. Construction Co. ... said consent being induced by the wrongful use of fear of economic harm and under color of official right." [FN21]

FN20. The indictment apparently charged attempted extortion since Walsh used FBI supplied money to

pay off Tuchow. See *United States v. Rindone*, 631 F.2d 491, 493 (7th Cir.1980).

FN21. Walsh paid Tuchow \$1,000 on July 30 and October 21, 1980 and paid Tuchow \$2,000 on July 24, 1980.

Walsh testified that besides performing construction work, J.C. Construction Company also did window and window frame replacements, and that the window materials were ordered from firms outside of the state of Illinois. However, the construction portion of the business, except for the Kenton Court project, had not landed a construction or remodeling contract during 1980, although Walsh testified that he continued to bid on projects until late 1980 when the company went out of business. When Walsh withdrew as the general contractor for the Kenton Court project, he was replaced by another general contractor who ordered a significant amount of supplies from outside of Illinois.

[14] Tuchow concedes that the required interstate commerce nexus needed to establish federal jurisdiction in this case is *de minimis*. See *United States v. Mattson*, 671 F.2d 1020, 1024 (7th Cir.1982) (holding that the Hobbs Act proscribes not only illegal acts that have an actual effect on interstate commerce, but also "threatened or potential effects which never materialized because extortionate demands are met"); see also *United States v. Glynn*, 627 F.2d 39, 41 (7th Cir.1980); *United States v. Price*, 617 F.2d 455, 457 (7th Cir.1979). Nevertheless, Tuchow contends \*871 that no actual effect on interstate commerce was demonstrated in this case since Walsh's J.C. Construction Company was not viable as it had obtained only one construction contract, the Kenton Court project, during the time in which Walsh owned the company. [FN22] Tuchow further contends that any potential effect on interstate commerce was negated when the FBI directed Walsh to withdraw in early July from the Kenton Court project, prior to the time the actual extortion payments were made. [FN23]

FN22. Walsh purchased J.C. Construction Co. sometime in 1980.

FN23. Tuchow relies on *United States v. Elder*, 569 F.2d 1020 (7th Cir.1978), where our court held that the required interstate commerce nexus was not

established where the indictment charged a continuing extortion and the company allegedly extorted had earlier ceased to purchase any materials outside of Illinois and had decided to dissolve during the time of the alleged extortion. For the reasons explained in this section of the opinion, the Elder decision is inapposite in this case.

Tuchow's interpretation of the indictment in this case is much too narrow since he limits his argument to the fact that Walsh and J.C. Construction Company's trade in interstate commerce was not affected by his actions. Counts IV, V, and VI of the indictment in this case charged that Tuchow attempted to "affect interstate commerce" when he extorted money from Walsh. [FN24] The indictment does not charge that Walsh and J.C. Construction Company's trade in interstate commerce was affected. Rather, all counts contained in the indictment allege that Tuchow (and Farina) had attempted by their actions to affect commerce, one of the requisite elements of the offense.

FN24. The evidence presented at trial and the instruction given to the jury concerning the required nexus between the extortion payments and the effect on interstate commerce are consistent with the theory that by blocking the building permit, Tuchow affected interstate commerce. The interstate commerce instruction given at trial for all counts charged in the indictment is as follows: "You may find that the interstate commerce element of the charge is satisfied if you find beyond a reasonable doubt: "That some of the materials which were to be used in the rehabilitation of the Kenton Court project originated or would have originated outside the state of Illinois. "In order to satisfy this element of the offense, the government need not prove that the defendant knew or intended that his actions would or could affect commerce. It is only necessary that the natural consequences of the defendant's acts would have been to probably or potentially affect commerce in any minimal way or degree. This instruction embodies the "direct" effect theory (versus the indirect or "depletion-of-assets" theory) in explaining the required interstate commerce nexus. See *United States v. Mattson*, 671 F.2d 1020, 1023 n. 1 (7th Cir.1982). The defendant neither objected to nor proposed any other instruction detailing the required effect on

interstate commerce.

[15][16] The evidence in this case, when viewed in the light most favorable to the government, demonstrates that during the fall of 1980, when Walsh continued making extortion payments to Tuchow, Tuchow attempted to block the Kenton Court partnership's efforts to obtain a building permit. It was established at trial that the project, which was undertaken by another general contractor in the fall of 1980 shortly after Walsh withdrew, cost approximately \$1.5 million and was built with over \$400,000 of materials from outside of Illinois. In July, 1980, after Walsh indicated to Tuchow that he was withdrawing from the rehabilitation project, Tuchow expressed his dissatisfaction and told Walsh that he owed him money because of various commitments Tuchow had already made to other city employees. Walsh then agreed to pay Tuchow \$10,000 of the original \$50,000 negotiated payment. [FN25] During this conversation, Walsh informed Tuchow that the partnership was not willing to pay Tuchow's demanded fee, nor were they willing to reimburse Walsh for the money already spent. When Walsh asked Tuchow what would happen if the partnership attempted to obtain \*872 the building permit, Tuchow responded, "it's up to them .... They won't get it through." Further, Noonan testified that sometime during July and October Tuchow instructed him not to authorize any transfer of the building permit. [FN26] Tuchow apparently believed that by holding up the permit during this time he was helping Walsh regain the money that Walsh had paid to Tuchow. Further, Tuchow had earlier expressed reluctance to deal with the Kenton Court partnership since he did not know the partners involved and he preferred to deal with Walsh. The logical inference from this evidence is that by blocking the permit during the fall of 1980 Tuchow was attempting to force the partnership not only to reimburse Walsh for the money Walsh already had spent, but also to force the partners to keep Walsh as their general contractor. [FN27] Certainly, the jury might very well have reasoned that Tuchow's order to block the partnership's efforts to obtain the permit during the period when Walsh was making these payments to Tuchow had a potential direct effect of interfering with the project and interstate commerce. *Mattson*, 671 F.2d at 1024; *Rindone*, 631 F.2d at 493. [FN28]

FN25. Under the Hobbs Act, as long as the payment is made to an official because of his position, an act of extortion, as defined in 18 U.S.C. § 1951(b)(2), is committed. See, e.g., *United States v. Schmidt*, 760 F.2d 828, 830 (7th Cir.1985); *United States v. Rindone*, 631 F.2d 491, 495 (7th Cir.1980).

FN26. During the conversation in which Tuchow and Walsh agreed on the \$10,000 payment, Tuchow told Walsh that Walsh's withdrawing from the project had put him (Tuchow) in a "bad spot" because "I got Pat Noonan to go ahead and do that for me [issue the permit] on a promise...."

FN27. The transcript of the taped conversation between Walsh and Tuchow which occurred on October 1, 1980, reveals: TUCHOW: "See, here's where we stand with that right now. The permit's in your name. What's your company? WALSH: "J.C. Construction. TUCHOW: "J.C. Construction. And the permit is in your name. If you wanna give them your permit you can assign it to them. WALSH: "That's what I thought. TUCHOW: "Now, if they wanna go with somebody else they've got to start from scratch. They cannot get your permit. I already went up there to make sure. WALSH: "Okay, okay. TUCHOW: "I wanna put you in a position where at least let'em come to you. WALSH: "Yeah. Okay, that's what I thought too. TUCHOW: "That's exactly."

FN28. In his brief, Farina adopts by incorporation Tuchow's argument that his conviction under Counts II and III must be reversed as interstate commerce was not affected by his actions. Although not clearly set forth in his brief, we reject his apparent challenge to the sufficiency of the evidence on these counts. His indictment charges that he affected commerce when he extorted money from Walsh on June 3 and 11. At this time Walsh was clearly acting on behalf of the Kenton Court partnership which was about to invest considerable sums of money in the rehabilitation project. As indicated, the project did eventually use over \$400,000 of materials from outside the State of Illinois. Thus, Farina's actions did have a potential effect on interstate commerce.

#### C. Kenton Court Partnership.

[17] Count VII of the indictment charged that Tuchow attempted to extort \$25,000 from Golding and the Kenton Court partnership. Tuchow again argues that his relationship with Golding was one of an attorney and client and thus there was insufficient evidence to support the jury's verdict under Count VII.

In the late summer of 1980, Golding met with Tuchow in an attempt to obtain the building permit. During their initial meeting Tuchow originally demanded \$50,000; however, Tuchow agreed to accept a \$25,000 payment instead. Tuchow points to the fact that Golding, who testified as a hostile witness for the government, considered the requested \$25,000 payment as a legal fee for Tuchow's work in representing the partnership in related real estate and tax matters. However, this testimony was contradicted by Golding's earlier Grand Jury testimony wherein Golding testified that he never hired Tuchow as his attorney; that he believed he was being extorted by Tuchow's request for \$25,000; and that he believed the partnership would not have obtained the permit but for Tuchow's help. Further, Golding testified that Tuchow told him that he needed the \$25,000 to "take care of some people." After the partners agreed to pay this amount, the building permit was finally issued to their new general contractor late in the fall \*873 of 1980. Viewing the evidence presented in the light most favorable to the government, sufficient evidence was introduced to affirm Tuchow's conviction on this extortion count.

#### IV.

Tuchow next argues that he was deprived of a fair trial because of the court's unprovoked hostility and bias toward his defense counsel. He also claims that the jury was improperly instructed with respect to the issue of reputation evidence and that he was denied his right of allocution as required by Fed.R.Crim.P. 32(a)(1).

The defendant argues that the court expressed such hostility toward his attorney at trial that his defense was unduly prejudiced. The first incident occurred when Tuchow's attorney objected to Art Radek's testimony concerning what Walsh had told Radek during an earlier meeting. The court instructed the jury that this evidence was not being offered to prove the truth of the matter asserted in Walsh's

statements made to Radek, but was instead offered to prove the fact that the statements had been made. The court explained to Tuchow's attorney that "I understand your objection is continuing." Tuchow's attorney then made a series of objections during Radek's testimony regarding other conversations that Radek had with Walsh, Noonan, and Kaplan. The court instructed counsel that its same ruling applied to these conversations. After another objection, the court and Tuchow's attorney engaged in the following exchange:

MR. CROWLEY: "Your Honor, I don't know if it is necessary for me to repeat the objection as to each one of these separate conversations.

THE COURT: "No, it isn't.

MR. CROWLEY: "All right.

THE COURT: "And this is almost entirely nonhearsay anyway, and to the extent it might have some material that requires an instruction to the jury, I have given that instruction.

MR. MURTAUGH: "Just so the record is clear, Mr. Farina joins in the objection.

THE COURT: "Yes, all right. Now, the point of handling these things in advance is to avoid interrupting the flow of the testimony. Now, let's not interrupt the flow of the testimony unnecessarily to raise objections that I have already indicated are standing objections.

The record is clear, proceed.

MR. CROWLEY: "Your Honor, so that the record is clear, I have a standing objection--

THE COURT: "The record is clear. Proceed, Mr. Schweitzer.

MR. CROWLEY: "All right, thank you.

BY MR. SCHWEITZER:

"Q: Sir, when did you speak--

THE COURT: "The record was clear before we ever entered into this courtroom, and you know it. "Proceed."

The second incident occurred during the cross-examination of Herzog, a witness who testified as to Tuchow's "other acts" during the time of the alleged extortion. During this cross-examination, Tuchow's counsel began to ask Herzog whether he knew if Tuchow was married, had any children, and if he was aware that Tuchow had gone to law school late in life. At this point, the trial court judge interrupted (apparently the government's attorney was already on his feet ready to object) and informed Tuchow's attorney that he was not going to allow this line of questioning since it was not

within the scope of direct examination. When Tuchow's counsel attempted to explain what he was trying to accomplish, the judge then requested a sidebar "to see what the next question is going to be." Tuchow's attorney told the court that "I am going to go to a different area, your Honor." And the court responded "I'm going to have to screen the questions if I cannot trust you to ask proper questions. Come on over." At the sidebar Tuchow's counsel argued that since the government attorney had asked Golding if he knew whether Tuchow was a lawyer and a ward committeeman he was also entitled to ask \*874 Golding questions about Tuchow's status. The district court told Tuchow's counsel that his questions had nothing to do with what was asked during direct examination and that if he did ask such questions he would "sit" on the attorney "good and hard ... in the presence of the jury ...."

[18] After reviewing the record, we conclude that the judge's statements made in the presence of the jury fail to rise to a level of prejudicial error. As to the first incident, after the initial encounter between the judge and defense counsel, concerning counsel's continuing objection, the defense counsel explained to the district court that he had misunderstood that the district court considered his objections to be continuing throughout Radek's testimony. After hearing this explanation the district court apologized to defense counsel for the misunderstanding and then later explained to the jury that "I am satisfied that Mr. Crowley ... was not being intentionally disruptive. I apologized to him at that time for the remark I made, and I now request that you too disregard that remark." The judge's original remarks did not appear to be harsh and his subsequent apology to defense counsel and explanation to the jury certainly eliminated any possible prejudice.

[19] As to the second occurrence, it appears that defense counsel was attempting to introduce evidence of Tuchow's background through Herzog, as Tuchow elected not to testify in this case. The defense counsel breached the boundary of permissible cross-examination since these questions were well beyond the scope of direct examination. A trial court must necessarily be granted wide latitude in determining the proper scope of cross-examination, see, e.g., *United States ex rel. Blackwell v. Franzen*, 688 F.2d 496, 500 (7th

Cir.1982), and in this case the district court determined that the defense counsel's cross-examination exceeded the permissible boundary. While the district court's comment in front of the jury that he would have to "screen defense counsel's questions if I cannot trust you to ask proper questions" appears, in isolation, to be a harsh admonishment, our review of the record reveals that this single comment taken in the context of the entire three-week long trial, in which the proof of guilt was substantial; failed to prejudice the defendant's case. See *United States v. Sennett*, 505 F.2d 774, 779 (7th Cir.1974); cf. *United States v. Blakey*, 607 F.2d 779, 788 (7th Cir.1979). [FN29]

FN29. Tuchow further alleges that the district court's treatment of the defense counsel's objections during trial, as compared to that of the government's, indicated an unfavorable slant toward the government's case. However, after reviewing the record, and specifically those areas of concern to the defendant, we find his argument to be without merit.

[20] Tuchow also claims that the jury was improperly instructed with respect to the issue of reputation evidence. During trial Tuchow had several witnesses testify as to his good character. The contested jury instruction read in part:

"The circumstances may be such that evidence of good character may alone create a reasonable doubt of defendant's guilt, or although without it the other evidence would be convincing. However, evidence of good reputation should not constitute an excuse to acquit the defendant, if the jury, after weighing all the evidence including the evidence of good character is convinced beyond a reasonable doubt that the defendant is guilty of the crime charged in the indictment."

Tuchow relies on *United States v. Leigh*, 513 F.2d 784 (5th Cir.1975), where the Fifth Circuit ruled that similar language as that italicized above was improper and constituted reversible error. However, in *United States v. Picketts*, 655 F.2d 837, 842 (7th Cir.1981), we distinguished the Leigh case and held that the same instruction as given in this case was proper. See also *United States v. Hyman*, 741 F.2d 906, 910-11 (7th Cir.1984) citing *Picketts* with approval. While we would ask that district courts use the Seventh Circuit Pattern Instruction which does not employ the "excuse to acquit" language, the fact that such language \*875 is

used in the instruction does not constitute reversible error as long as the phrase "including the evidence of good character" is included in the instruction. *Picketts*, 655 F.2d at 842; see also *Fed.Crim. Jury Instructions of the Seventh Circuit*, § 3.15 (1980).

[21] Finally, we hold that since both the government and the defendants agree that Tuchow and Farina were denied the right of allocution under *Fed.R.Crim.P.* 32(a)(1)(C) at the sentencing hearings, this case must be remanded back to the district court to allow the defendants the opportunity to make a statement on their own behalf before the sentence is imposed.

V.

We affirm the defendants' convictions on all counts and remand this case back to the district court to allow the defendants an opportunity to exercise their right of allocution.

END OF DOCUMENT

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CLIENT IDENTIFIER: EHJ  
DATE OF REQUEST: 04/10/96

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**INSTA-CITE**

CITATION: 768 F.2d 855

=> 1 **U.S. v. Tuchow**, 768 F.2d 855, 18 Fed. R. Evid. Serv. 699  
(7th Cir.(Ill.), Jul 19, 1985) (NO. 84-1350, 84-1364)

**Secondary Sources**

**Corpus Juris Secundum (C.J.S.) References**

22A C.J.S. Criminal Law Sec.570 Note 8  
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