ERIC JASO LEGAL RESEARCH

-Rule 608: EXTRINSIC IMPEACHMENT EVIDENCE

ATTORNEY WORK PRODUCT

Rule 608 - Extrinsic impeachment evid.

From: Rod Rosenstein
To: LJAHN, EJASO, SBATES, JBENNETT, RJAHN
Date: 3/13/96 6:47pm
Subject: Draft Memo re Employment Records

Can we give it a little more of an advocate's tone? Judge Howard always errs in favor of allowing liberal action by the defense. If we tell him he has broad discretion to let them do something, they'll do it; so there's no point in filing anything.

E.g.: Let's give some reasons why it's a bad idea to have a mini-trial on each witness, apart from just time-consuming: distracting the jury; intimidating other witnesses who learn they will be open to attack on anything in their entire lives, etc.

From: Ray Jahn
To: EJASO, JBENNETT, LJAHN, SBATES, RROSENST
Date: 3/13/96 6:52pm
Subject: Draft Memo re Employment Records -Reply

>>>>>>>>>>>>>>>
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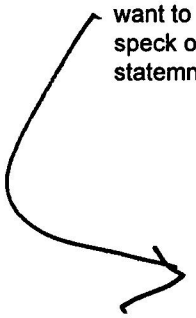
<<<<<<<<<<<<<<<
hit the rules of evidence hard, that the only proper impeachment is prior convictions or some limited specific acts of misconduct but theyt may only be inquired of on cross and cannot be proven by extrinsic evicence remeber we may want to get in susans employment records. the big thing is to prevent the cross examination of hale for every fly speck on the wall. for instance steqlling the widdres money as so eloquently described by brother sutton in opening statemnt.



UNITED STATES of America, Appellee,
v.
Nancy Irene MARTZ, a/k/a Nancy Lebo, Appellant.

No. 91-3205.

United States Court of Appeals,
Eighth Circuit.

Submitted Feb. 12, 1992.

Decided May 18, 1992.
Rehearing and Rehearing En Banc Denied July 8, 1992.

Defendant was convicted of distributing LSD by the United States District Court for the Northern District of Iowa, David R. Hansen, J., and she appealed. The Court of Appeals, Magill, Circuit Judge, held that: (1) defendant was bound by government witness' answer, and could not introduce extrinsic evidence of witness' plea bargaining with government in unrelated case, and (2) district court judge could calculate total weight of LSD involved in defendant's offense by extrapolating weight of lightest known unit across dosage units.

Affirmed.

Heaney, Senior Circuit Judge, dissented and filed opinion.

[1] WITNESSES ⇐ 344(1)
410k344(1)
District court has discretion to allow questioning during cross-examination on specific bad acts of witness not resulting in felony conviction, if those acts concern witness' credibility; however, district court may not use extrinsic evidence to prove that specific bad acts occurred. Fed.Rules Evid.Rule 608(b), 28 U.S.C.A.

[2] WITNESSES ⇐ 344(1)
410k344(1)
Purpose of barring extrinsic evidence of witness' prior bad acts is to avoid holding mini-trials on peripherally related or irrelevant matters. Fed.Rules Evid.Rule 608(b), 28 U.S.C.A.

[3] WITNESSES ⇐ 331.5
410k331.5
Formerly 410k3311/2
Introduction of extrinsic evidence to attack credibility, to extent it is ever permitted, is subject to discretion of trial judge. Fed.Rules Evid.Rule 608(b), 28 U.S.C.A.

[4] WITNESSES ⇐ 352
410k352
While documents may be admissible on cross-examination to prove material fact or bias, they are not admissible merely to show witness' general character for truthfulness or untruthfulness. Fed.Rules Evid.Rule 608(b), 28 U.S.C.A.

[5] WITNESSES ⇐ 330(1)
410k330(1)
Defendant was bound by government witness' answer on cross-examination denying that he had ever plea bargained with government in past, and could not, in attempt to impeach witness' credibility, introduce extrinsic evidence of prior plea bargaining in form of plea document. Fed.Rules Evid.Rule 608(b), 28 U.S.C.A.

[6] DRUGS AND NARCOTICS ⇐ 133
138k133
In computing total weight of LSD involved in defendant's drug distribution offenses, for purpose of computing defendant's base offense level under Federal Sentencing Guidelines, district court properly included weight of drug-laced blotter paper. U.S.S.G § 2D1.1, 18 U.S.C.A.App.

[7] DRUGS AND NARCOTICS ⇐ 133
138k133
In computing total weight of the 33,800 dosage units possessed by narcotics defendant, sentencing court did not have to apply weights listed in Typical Weight Per Unit Table, but could extrapolate weight of lightest known unit across dosage units for purpose of arriving at total weight under the Federal Sentencing Guidelines. U.S.S.G. § 2D1.1, 18 U.S.C.A.App.

***787** Lorraine K. Ingels, Cedar Rapids, Iowa, argued (Gary L. Robinson, on brief), for appellant.

Rodger E. Overholser, Cedar Rapids, Iowa, argued (Patrick J. Reinert, on brief), for appellee.

788 Before MAGILL, Circuit Judge, HEANEY, Senior Circuit Judge, and LARSON, [FN] Senior District Judge.

FN* THE HONORABLE EARL R. LARSON, Senior United States District Judge for the District of Minnesota, sitting by designation.

MAGILL, Circuit Judge.

Nancy Irene Martz appeals her conviction and sentence for distributing LSD. Martz alleges the district court [FN1] erred in refusing to allow her to admit a California court document into evidence to impeach a key government witness. Martz also contests the district court's sentence, claiming the computation of the amount of LSD involved was erroneous. We affirm.

FN1. The Honorable David R. Hansen was a United States District Judge for the Northern District of Iowa at the time judgment was entered. He was appointed to the United States Court of Appeals for the Eighth Circuit on November 18, 1991.

I.

Postal inspectors executed a search warrant on June 26, 1990, and opened a first-class letter addressed to Paul Richard Smith in Charles City, Iowa. The letter, mailed from Oakland, California, contained 500 dosage units of LSD on blotter paper. Smith was arrested and agreed to cooperate in the ongoing investigation. Smith, acting with federal authorities in Iowa, twice wrote to Martz in Oakland requesting to purchase LSD. On both occasions, Smith received the requested LSD blotter sheets in return.

Martz was arrested and charged with three counts of distributing LSD, three counts of using the United States mails to distribute LSD, and one count of conspiracy to distribute LSD. A jury convicted Martz on all counts. The district court attributed 187.9 grams of LSD to Martz for an offense level of 36. The court found that Martz was the manager of a criminal enterprise involving more than five persons and increased Martz' offense level by three to 39. The judge also denied a two-level reduction for acceptance of responsibility. This put the total offense level at 39. With a criminal history in category I, Martz had a sentencing range of 262 to 327 months. The district court sentenced her to 288 months in prison and five years of supervised release.

A. Impeachment of Smith

During Smith's testimony, Martz' attorney cross-examined Smith about the plea agreement Smith had reached with federal prosecutors. Martz also sought to introduce evidence of two prior guilty pleas Smith had entered in California and Utah. [FN2] Martz contended the documents would show Smith's knowledge of how cooperating with authorities could aid Smith in his own criminal case.

FN2. The two documents included the certified record of an unrelated 1987 criminal case from California. In that case, Smith pleaded guilty to two drug possession misdemeanors while two felony drug charges were dismissed. The other document laid out Smith's guilty plea to a Utah felony which resulted in other related charges being dropped.

The district court allowed questioning about the prior pleas to the extent they demonstrated Smith's knowledge of the benefits of plea agreements and his concomitant incentive to aid prosecutors. Smith admitted in testimony that he had been charged with drug crimes in California, but he denied that he received a reduction in charges. Smith testified outside the jury's presence that he never entered a plea agreement in California, but merely pleaded guilty to two misdemeanors. The district court sustained the government's objection to the introduction of the California plea document. The court found that since the California plea required no cooperation or testimony from Smith, it gave Smith no incentive to cooperate with prosecutors and had no bearing on Smith's potential bias or prejudice. Therefore, the California document was excluded under Rule 608(b) of the Federal Rules of Evidence, which precludes the use of extrinsic evidence to prove specific instances of conduct to attack the witness' credibility. On appeal, Martz asserts the district court erred in refusing to allow introduction of the California document to impeach Smith.

[1][2][3] *789 Rule 608(b) gives the court discretion to allow questioning during cross-

examination on specific bad acts not resulting in the conviction for a felony if those acts concern the witness' credibility. United States v. Hastings, 577 F.2d 38, 40-41 (8th Cir.1978). The rule, however, forbids the use of extrinsic evidence to prove that the specific bad acts occurred. Fed.R.Evid. 608(b). The purpose of barring extrinsic evidence is to avoid holding mini-trials on peripherally related or irrelevant matters. Carter v. Hewitt, 617 F.2d 961, 971 (3d Cir.1980) (citing 3A Wigmore on Evidence, § 979 at 826-27 (Chadbourn rev. ed. 1970)). The introduction of extrinsic evidence to attack credibility, to the extent it is ever admissible, is subject to the discretion of the trial judge. United States v. Capozzi, 883 F.2d 608, 615 (8th Cir.1989), cert. denied, 495 U.S. 918, 110 S.Ct. 1947, 109 L.Ed.2d 310 (1990).

[4][5] The district court allowed Martz to cross-examine Smith about prior guilty pleas he had made and whether he had come to realize the benefits of cutting deals with prosecutors in the past. But in conducting this questioning, Martz was required to "take his answer." Capozzi, 883 F.2d at 615; McCormick on Evidence § 42 at 92 (3d ed. 1984). While documents may be admissible on cross-examination to prove a material fact, United States v. Opager, 589 F.2d 799, 801-02 (5th Cir.1979), or bias, United States v. James, 609 F.2d 36, 46 (2d Cir.1979), cert. denied, 445 U.S. 905, 100 S.Ct. 1082, 63 L.Ed.2d 321 (1980), they are not admissible under Rule 608(b) merely to show a witness' general character for truthfulness or untruthfulness. United States v. Whitehead, 618 F.2d 523, 529 (4th Cir.1980); James, 609 F.2d at 46. The credibility determination pertinent to the Martz trial concerned whether Smith would lie in his testimony against Martz to receive favorable treatment from prosecutors. The issue was not whether Smith, in fact, received a reduced sentence in California for pleading guilty to two misdemeanors, or whether the charges were merely dropped by prosecutors on account of lack of evidence, crowded court dockets, or other unrelated reasons. Martz' attorney argued to the district court that "a sufficient record has been made at least to establish a question for the jury at least as to whether or not a plea bargain was entered into and whether or not the defendant received the benefit of the bargain." Tr. at 192. This argument represents exactly the type of mini-trial over a collateral matter that Rule 608(b) forbids.

Martz relies on Carter, 617 F.2d 961, for the proposition that documents admitted as evidence during cross-examination of the witness do not violate Rule 608(b). Carter 's holding was much narrower. In Carter, [FN3] the Third Circuit admitted the letter in question only after the witness admitted its authenticity. The court specifically held that extrinsic evidence could not be admitted after a witness denied a charge.

> FN3. In Carter, a prison inmate sued prison officials in a § 1983 action stemming from an alleged beating. On cross-examination of the plaintiff, defense attorneys introduced a letter written by the plaintiff they allege outlined a scheme to encourage inmates to file false brutality charges against prison officials. Carter, 617 F.2d at 964-65.

> [I]f refutation of the witness's denial were permitted through extrinsic evidence, these collateral matters would assume a prominence at trial out of proportion to their significance. In such cases, then, extrinsic evidence may not be used to refute the denial, even if this evidence might be obtained from the very witness sought to be impeached.

Carter, 617 F.2d at 970. Therefore, the district court did not abuse its discretion in refusing to admit the California plea document into evidence.

B. Sentence

Martz contests her sentence based on the district court's computation of the total weight of the LSD involved. Martz contends the district court should have compiled the total weight by using the Typical Weight Per Unit Table contained in application note 11 of U.S.S.G. § 2D1.1. Utilizing this table, Martz argues, would have resulted in an offense level of 28 rather than 36.

[6] The district court attributed 33,800 dosage units of LSD to Martz and that figure is not contested on this appeal. In ***790** computing the total weight, the district court correctly included the weight of the drug-laced blotter paper. Chapman v. United States, --- U.S. ----, 111 S.Ct. 1919, 1922, 114 L.Ed.2d 524 (1991); United States v. Bishop, 894 F.2d 981, 985 (8th Cir.), cert. denied, --- U.S. ----, 111 S.Ct. 106, 112 L.Ed.2d 77 (1990). The court, however, noted that blotters that were tested

contained varying weights, ranging from .00692 grams per dose to .0055 grams per dose. The actual weight of only 1800 of the dosage units was known. Applying the rule of lenity, the district court attributed the lightest known weight to all dosage units and arrived at a total of 185.9 grams (33,800 doses times .0055 grams). The court added to that figure two liquid grams of LSD that were not applied to blotter paper but were attributed to Martz. [FN4] The resulting total was 187.9 grams.

> FN4. The district court rejected the government's argument that blotter paper weight should be added to the two grams of liquid LSD merely because Martz' pattern was always to sell LSD on blotter paper.

[7] Martz argues that the district court should have applied the weight listed in the Typical Weight Per Unit Table contained in application note 11 of U.S.S.G. § 2D1.1. This table reveals a per-unit weight for LSD of .05 milligrams and would result in a total weight of 1.69 grams for the 33,800 doses. Adding in the two grams of liquid LSD and the 11 grams of LSD listed in the indictment would total 14.69 grams of LSD. This computation would have given Martz a base offense level of 28.

The district court's determination that extrapolating the lightest-known unit across the dosage units is a more reliable estimate than using the Typical Weight Per Unit Table was not erroneous. Application note 11 to U.S.S.G. § 2D1.1, itself, notes its inaccuracy and cautions that it should only be used when a more reliable estimate of weight is unavailable.

> If the number of doses, pills, or capsules but not the weight of the controlled substance is known, multiply the number of doses, pills, or capsules by the typical weight per dose in the table below to estimate the total weight of the controlled substance.... Do not use this table if any more reliable estimate of the total weight is available from case-specific information.

The note provides further that the table does not include the weight of the carrying mechanism.

> For controlled substances marked with an asterisk [including LSD], the weight per unit shown is the weight of the actual controlled substance, and not generally the weight of the mixture or substance containing the controlled substance. Therefore, use of this table provides a very conservative estimate of the total weight.

U.S.S.G. § 2D1.1 & comment. (n.11). Since all of these doses were on blotter paper, the weight of the blotter paper and the LSD obviously provides a more reliable estimate than the naked drug itself.

In Bishop, 894 F.2d at 987, we upheld the estimate of a total amount of LSD based on the district court's extrapolating the lightest known weight over the total number of dosage units, including those that were unrecovered. Martz attempts to distinguish Bishop by arguing that the sample of blotter paper tested in her case did not constitute a representative sample. Unlike Bishop, the blotter paper in this case did not come from the same source at the same time. Nevertheless, the district court found that there was adequate case-specific information to estimate the total weight by extrapolating the lightest known weight over all the doses.

Random testing of drugs may be sufficient for sentencing purposes. United States v. Johnson, 944 F.2d 396, 404-05 (8th Cir.), cert. denied, --- U.S. ----, 112 S.Ct. 646, 116 L.Ed.2d 663 (1991). In Johnson, this court refused to adopt the requirement that a representative sample of drugs from each independent source be tested. See also United States v. Follett, 905 F.2d 195, 196-97 (8th Cir.1990) (estimate of drug weight permissible in plea agreement although no LSD blotters were ***791** recovered and weighed), cert. denied, --- U.S. ----, 111 S.Ct. 2796, 115 L.Ed.2d 970 (1991).

While there may arise situations where a sample is too small or too arbitrary to extrapolate fairly over a large number of dosage units that come from disparate sources, this is not such a case. First, all of the dosage units came from Martz. Martz' bare assertion that some of the blotter sheets may have been prepared by someone else is not enough to discredit the finding that the dosage units all were distributed by Martz, consisted of LSD-laced blotter paper, and were similar in appearance. Second, in order to reduce her offense level even one step to 34, Martz would have to show that the average weight of the dosage units weighed about half of the lightest known dosage unit (.0029 compared to .0055). See U.S.S.G. § 2D1.1(c). The evidence does not show that such a wide variance is possible since the known weights were clustered at . 0055 to .00692. Moreover, a cursory review of LSD blotter

weights from other cases reveals that .0055 rests at the bottom of the logical range. Compare United States v. Marshall, 908 F.2d 1312, 1316 (7th Cir.1990) (en banc) (per-dose weights of .0057 grams and .00964 grams), aff'd sub nom. Chapman v. United States, --- U.S. ----, 111 S.Ct. 1919, 114 L.Ed.2d 524 (1991); United States v. Bishop, 704 F.Supp. 910 (N.D.Iowa 1989) (per-dose weight of .0075 grams), aff'd, 894 F.2d 981 (8th Cir.), cert. denied, --- U.S. ----, 111 S.Ct. 106, 112 L.Ed.2d 77 (1990); United States v. Andress, 943 F.2d 622 (6th Cir.1991) (per-dose weight of .0065 grams), cert. denied, --- U.S. ----, 112 S.Ct. 1192, 117 L.Ed.2d 433 (1992); United States v. Leazenby, 937 F.2d 496 (10th Cir.1991) (per-dose weight of .0060 grams); United States v. Larsen, 904 F.2d 562 (10th Cir.1990) (per-dose weight of .0061 grams), cert. denied, --- U.S. ----, 111 S.Ct. 2800, 115 L.Ed.2d 973 (1991); United States v. Elrod, 898 F.2d 60 (6th Cir.) (per-dose weight of .0055 grams), cert. denied, --- U.S. ----, 111 S.Ct. 104, 112 L.Ed.2d 74 (1990); United States v. Rose, 881 F.2d 386 (7th Cir.1989) (per-dose weight of .0154 grams); United States v. DiMeo, 753 F.Supp. 23 (D.Me.1990) (per-dose weight of .0069 grams), aff'd without opinion, 946 F.2d 880 (1st Cir.1991). Therefore, we find that the district court did not err in determining that extrapolating the lightest known weight over all the dosage units was a more reliable estimate than using the bare drug weight found in the table.

II.

We find that the district court did not abuse its discretion in refusing to admit extrinsic evidence to impugn a witness' credibility. Further, we find that the district court properly calculated Martz' sentence. The decision below, therefore, is affirmed.

HEANEY, Senior Circuit Judge, dissenting.

In my view, Nancy Martz should have been permitted to introduce into evidence two documents which established that the government informant was lying when he testified that he had not entered into plea agreements in state courts in California and Utah. With respect to drug related offenses in those states, the exhibits were not offered to prove that Smith had prior drug convictions, but rather to attack his credibility. Smith's credibility was crucial--his testimony was essential to Martz's conviction. The admission of these documents could have been accomplished quickly, and it would not have given rise to a mini-trial.

Although the Carter case well supports Martz's position, the majority distinguishes Carter on the grounds that the document in that case was admitted only after the witness admitted its authenticity. Here, however, the trial court did not ever question Smith as to the authenticity of the plea agreement. If faced with questioning about the previous plea agreements, Smith may well have backed off his previous statements, and his credibility would have been damaged.

I also believe that the majority errs in affirming the sentence. This court, over ***792** my dissent, recently held en banc that we must follow policy statements and commentary to bring about consistency in sentencing. United States v. Kelley, 956 F.2d 748, 756 (8th Cir.1992) (en banc). One would think that we would be bound by that decision where the policy statement or commentary requires a shorter sentence as well as where it requires a longer sentence.

But, apparently this is not to be the case even though the application note here is clear and precise: "If the number of doses ... but not the weight of the controlled substance is known, multiply the number of doses ... by the typical weight per dose in the table below to estimate the total weight of the controlled substance." U.S.S.G. § 2D1.1 (Application Note 11). The weight of each dose was not known; thus, the table had to be used.

Unlike the majority, I do not believe extrapolation would be proper in this case. Unlike the situation in Bishop, the blotter paper here did not come from the same source at the same time. United States v. Bishop, 894 F.2d 981, 987 (8th Cir.1990). Moreover, the amount of blotter paper weighed was a small fraction (approximately five percent) of the total amount attributed to Martz. Under these circumstances, the district court did not have enough "case-specific information" from which to make a "more reliable estimate of the total weight." U.S.S.G. § 2D1.1 (Application Note 11). Compare United States v. Shabazz, 933 F.2d 1029, 1034 (D.C.Cir.1991) (use of table in Note 11 not required where defendant conceded estimated weight

of dilaudid pills was accurate, and where estimated weight was supported by data from Physicians Desk Reference, the manufacturer, and the DEA).

The majority opinion buttresses the district court's findings by favorably comparing the district court's calculation of the average weight per dose of the dosage unit (.0055 grams) to LSD blotter weights set forth in reported cases from other circuits. See ante at 791. Although the majority's review is interesting, I do not see how findings of fact from other cases can constitute "case-specific" evidence to support the district court's findings of fact in this case.

The majority also reports that a wide variance in blotter paper weights would not be possible in this case "because the known weights were clustered at .0055 to .00692." See ante at 791. With all due respect, I think this reasoning is circular: because only three samples were taken, there is no way to know whether there was a wide variance between blotter paper weights, yet the limited sample is used as proof that there was not a wide variance in weights. Moreover, there was a wide variance between even the three samples--the heaviest sample was almost twenty-five percent heavier than the lightest sample.

While it would have taken a short time to accurately determine the weight per dose, the government did not make this effort. Thus, the court was obligated to follow the table.

END OF DOCUMENT

INSTA-CITE

CITATION: 964 F.2d 787

Direct History

=> 1 **U.S. v. Martz,** 964 F.2d 787, 35 Fed. R. Evid. Serv. 962 (8th Cir.(Iowa), May 18, 1992) (NO. 91-3205), rehearing denied (Jul 08, 1992)
Certiorari Denied by
2 Martz v. U.S., 506 U.S. 1038, 113 S.Ct. 823, 121 L.Ed.2d 694, 61 USLW 3435 (U.S.Iowa, Dec 14, 1992) (NO. 92-6315)

Secondary Sources

Corpus Juris Secundum (C.J.S.) References
28A C.J.S. Drugs and Narcotics Sec.277 Note 70

GORDON et al.
v.
UNITED STATES.

No. 182.

Supreme Court of the United States

Argued Dec. 17, 18, 1952.

Decided Feb. 2, 1953.

Defendants were convicted in the District Court for the Northern District of Illinois, Eastern Division, of unlawful possession of goods stolen while in interstate commerce and of further transporting such goods in interstate commerce, and they appealed. The Court of Appeals, 196 F.2d 886, affirmed, and certiorari was granted by the Supreme Court on limited questions concerning production and admission of documentary evidence tending to impeach the testimony of a prosecution witness. The Supreme Court, Mr. Justice Jackson, held that where defendants' accomplice, who gave implicating testimony, admitted on cross-examination that between time of his apprehension and final implicating statement to Government, he had made several statements not implicating defendants, when foundation was laid and it was shown that specific statements were in Government's possession, and no privilege was asserted, denial of defendants' motion to produce such statements for inspection was error.

Judgment reversed.

[1] WITNESSES ⚿ 319
410k319
Where the Government's case in a criminal prosecution may stand or fall on the jury's belief or disbelief of one witness, that witness' credibility is subject to close scrutiny.

[2] CRIMINAL LAW ⚿ 627.6(2)
110k627.6(2)
Formerly 110k6271/2
In the absence of specific legislation, the question whether a document should be ordered to be produced for inspection is governed by the principles of the common law as interpreted by the courts of the United States in the light of reason and experience.

[3] CRIMINAL LAW ⚿ 627.7(3)
110k627.7(3)
Formerly 110k6271/2
Where defendants' accomplice, who gave testimony against them, admitted on cross-examination that between time of his apprehension and final implicating statement to Government, he had made statements not implicating defendants, when foundation was laid and it was shown that specific statements were in Government's possession, and no privilege was asserted by Government, denial of defendants' motion to produce such statements for inspection was error even though it might subsequently have been disclosed that matter contained in statements was not admissible in evidence.

[4] CRIMINAL LAW ⚿ 627.6(2)
110k627.6(2)
Formerly 110k6271/2
For purposes of a motion to produce documentary evidence for inspection, it need only appear that the evidence is relevant, competent, and outside of any exclusionary rule, and it is not sufficient basis for denial of motion, that trial judge might have, in exercise of his discretion, excluded the evidence without thereby committing reversible error, since the question on application for order to produce is one of admissibility under the traditional canons of evidence.

[5] WITNESSES ⚿ 405(1)
410k405(1)
The self-contradiction of a witness by prior statements may be shown only on a matter material to the substantive issues of the trial.

[6] CRIMINAL LAW ⚿ 400(1)
110k400(1)
An admission by a prosecution witness that a contradiction of his testimony is contained in a document evidencing prior statement, does not bar admission of the document itself in evidence, providing document meets all requirements of admissibility and no valid claim of privilege is raised against it.

[7] CRIMINAL LAW ⚿ 400(1)
110k400(1)

Where accomplice who gave testimony against defendant admitted, on cross-examination that certain documents, representing statements made by him contradictory of his testimony, were in possession of the Government, such admission did not preclude defendants from demanding production of, and introducing the documents in evidence but best evidence rule required that defendants be permitted to introduce the document as best illustrating to the jury its impeaching weight and significance.

[7] CRIMINAL LAW ⇐ 441
110k441
Where accomplice who gave testimony against defendant admitted, on cross-examination that certain documents, representing statements made by him contradictory of his testimony, were in possession of the Government, such admission did not preclude defendants from demanding production of, and introducing the documents in evidence but best evidence rule required that defendants be permitted to introduce the document as best illustrating to the jury its impeaching weight and significance.

[8] WITNESSES ⇐ 372(2)
410k372(2)
In prosecution for unlawful possession of goods stolen while in interstate commerce, and for further transporting goods in interstate commerce, wherein testimony of purported accomplice was given against defendants, exclusion on cross-examination of transcript of proceedings at which accomplice witness pleaded guilty, showing statement by trial judge, when discussing accomplice's expectation of recommendation for lenient sentence or for probation, that accomplice should tell all that he knew even though it might involve others, with result that defendants were thereafter involved, was error. 18 U.S.C.A. §§ 659, 2314.

[9] CRIMINAL LAW ⇐ 1169.1(4)
110k1169.1(4)
Formerly 110k1169(1)
In prosecution of defendants for unlawfully possessing property stolen while in interstate commerce, and for further transporting such goods in interstate commerce, record established that combined errors in refusing order for production of documentary evidence tending to impeach testimony of an accomplice witness, and in excluding transcript of proceedings at which accomplice entered plea of guilty, which contained admonition, made before sentencing, that he should disclose all he knew, even though it might involve others, were sufficient to constitute reversible error. 18 U.S.C.A. §§ 659, 2314; Fed.Rules Crim.Proc. rule 52, 18 U.S.C.A.

[9] CRIMINAL LAW ⇐ 1170.5(1)
110k1170.5(1)
Formerly 110k11701/2(1)
In prosecution of defendants for unlawfully possessing property stolen while in interstate commerce, and for further transporting such goods in interstate commerce, record established that combined errors in refusing order for production of documentary evidence tending to impeach testimony of an accomplice witness, and in excluding transcript of proceedings at which accomplice entered plea of guilty, which contained admonition, made before sentencing, that he should disclose all he knew, even though it might involve others, were sufficient to constitute reversible error. 18 U.S.C.A. §§ 659, 2314; Fed.Rules Crim.Proc. rule 52, 18 U.S.C.A.

[10] CRIMINAL LAW ⇐ 1153(4)
110k1153(4)
An appellate court must give a trial judge wide latitude in controlling cross-examination, and especially when same pertains to matters dealing with collateral evidence as to character, but such principle will not justify a curtailment of evidence which keeps from the jury relevant and important facts bearing on the trustworthiness of crucial testimony. Fed.Rules Crim.Proc. rule 52, 18 U.S.C.A.

****371 *414** Messrs. George F. Callaghan and Maurice J. Walsh, Chicago, Ill., for petitioners.

Mr. John R. Wilkins, Washington, D.C., for respondent.

***415** Mr. Justice JACKSON delivered the opinion of the Court.

Petitioners Gordon and MacLeod were convicted on an indictment of four counts, two charging unlawful possession of goods stolen while in interstate commerce [FN1] and two that defendants caused this property to be further transported in

interstate commerce. [FN2] The Court of Appeals affirmed, [FN3] and we granted certiorari limited to questions concerning production and admission of documentary evidence tending to impeach the testimony of a prosecution witness. [FN4]

FN1. 18 U.S.C. (Supp. V) s 659, 18 U.S.C.A. s 659.

FN2. 18 U.S.C. (Supp. V) s 2314, 18 U.S.C.A. s 2314.

FN3. 7 Cir., 196 F.2d 886.

FN4. 344 U.S. 813, 73 S.Ct. 33.

The Government proved that film being shipped from Rochester, New York, to Chicago, Illinois, was stolen from a truck in Chicago and that part of it later had been recovered in Detroit. To implicate the two petitioners, it relied principally on one Marshall, who, in Detroit, had pleaded guilty to unlawful possession of the film. Marshall testified that he and a codefendant, Swartz, who died before trial, on several occasions had driven from Detroit to Chicago and back. On each visit they had stopped at petitioner Gordon's Chicago jewelry store. On one trip, according to Marshall, Gordon accompanied them to a garage in that city and there Gordon and a man resembling MacLeod helped to load into into Marshall's car film that was stacked in the garage. A week later, Marshall said, he and Swartz again called on Gordon, when the latter sent them to see 'Ken' at an address which he wrote on a piece of paper. At this address, MacLeod identified himself as 'Ken,' and again the three men loaded film from the garage into Marshall's car.

***416** Partial corroboration of Marshall was supplied by a Federal Bureau of Investigation agent, who had been watching the garage. He testified that on the latter occasion he saw Marshall and Swartz drive up to MacLeod's address, whereupon MacLeod removed an old truck from the garage. Later, Swartz and Marshall drove away with film cartons stacked on the back seat of Marshall's car.

Both petitioners took the stand and denied complicity in the theft and knowledge that the film was stolen. While their physical movements as recited by them were not materially different from those related by government witnesses, petitioners gave a different and innocent version of the relationship of their acts to the criminal transactions. Gordon testified that the deceased Swartz was a business acquaintance who asked on the first visit if Gordon knew of a garage where a truck could be temporarily stored. Gordon called MacLeod, who was his partner in a rooming-house venture, and told him that he would send two men over who wished to use a garage back of the rooming house. MacLeod testified that he had not known ****372** either of the men before they placed a truck in the garage and that, at their request he had helped load film from the truck into Marshall's car merely as a favor.

On cross-examination, Marshall admitted that between his apprehension and his final statement to the Government, which implicated petitioners, he had made three or four statements which did not. Petitioners requested the trial judge to order the Government to produce these earlier statements. The request was denied. Marshall also admitted that, one week before he made any statement incriminating petitioners, he had pleaded guilty to unlawful possession of the film in a federal court in Detroit. He was still unsentenced and no date for sentencing had been set, although nine months had elapsed since this plea was received. He denied that he had received ***417** any promise of immunity or threats which would influence him to testify as he did. Petitioners then sought to introduce from the transcript of the Detroit proceeding this statement made to Marshall by the federal district judge: 'Very well, the plea of guilty is accepted. Now, I am going to refer your case to the Probation Department for presentence report. I think I should say to you, as I said to your lawyer yesterday when he and Mr. Smith called upon me in chambers yesterday morning, that it seemed to me that if you intended to plead guilty and expected a recommendation for a lenient sentence or for probation from the Probation Department, that it would be essential that you satisfy the Probation Department that you have given the law enforcement authorities all the information concerning the merchandise involved in this proceeding. * * * I am not holding out any promises to you, but I think you would be well advised to tell the probation authorities the whole story even though it might involve others.' This was excluded on the objection that it was immaterial.

[1] The trial judge in his charge and the Court of

Appeals in its opinion [FN5] recognized that, where, as here, the Government's case may stand or fall on the jury's belief or disbelief of one witness, his credibility is subject to close scrutiny. But the question for this Court is whether rejection of petitioners' two efforts to impeach the credibility of Marshall did not withhold from the jury information necessary to a discriminating appraisal of his trustworthiness to the prejudice of petitioners' substantial rights. The two issues stand on somewhat different grounds.

FN5. 196 F.2d 886, 888.

The request by the accused to order production of Marshall's earlier statements was cast in terms of obtaining access to documentary evidence rather than an offer *418 that would require a ruling on its admissibility. But the Government apparently concedes, as we think it must, that if it would have been prejudicial error for the trial judge to exclude these statements, had the defense been able to offer them, it was error not to order their production. The relation of admissibility to production for inspection is by no means settled in the various jurisdictions, but we conclude that the Government does not concede enough. Demands for production and offers in evidence raise related issues but independent ones, and production may sometimes be required though inspection may show that the document could properly be excluded.

[2] In the absence of specific legislation, questions of this nature are governed 'by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.' [FN6] Apparently, earlier common law did not permit the accused to require production of such documents. [FN7] Some state jurisdictions still recognize no comprehensive right to see documents in the hands of the prosecution merely because they might aid in the preparation or presentation **373 of the defense. [FN8] We need not consider such broad doctrines in order to resolve this case, which deals with a limited and definite category of documents to which the holdings of this opinion are likewise confined.

FN6. Funk v. United States, 290 U.S. 371, 54 S.Ct. 212, 78 L.Ed. 369; Fed.Rules Crim.Proc. rule 26, 18 U.S.C.A.

FN7. 6 Wigmore on Evidence, s 1859g.

FN8. 2 Wharton's Criminal Evidence (11th ed.) s 785.

[3] By proper cross-examination, defense counsel laid a foundation for his demand by showing that the documents were in existence, were in possession of the Government, were made by the Government's witness under examination, were contradictory of his present testimony, and that the contradiction was as to relevant, important and material matters which directly bore on the main *419 issue being tried: the participation of the accused in the crime. The demand was for production of these specific documents and did not propose any broad or blind fishing expedition among documents possessed by the Government on the chance that something impeaching might turn up. [FN9] Nor was this a demand for statements taken from persons or informants not offered as witnesses. [FN10] The Government did not assert any privilege for the documents on grounds of national security, confidential character, public interest, or otherwise.

FN9. As to the pretrial discovery stage, compare Fed.Rules Civ.Proc. rule 34, 28 U.S.C.A., with the narrower provisions of Fed.Rules Crim.Proc. rule 16.

FN10. In Goldman v. United States, 316 U.S. 129, 62 S.Ct. 993, 86 L.Ed. 1322, the notes sought to be inspected had neither been used in court, nor was there any proof that they would show prior inconsistent statements.

Despite some contrary holdings on which the courts below may have relied, we think their reasoning is outweighed by that of highly respectable authority in state and lower federal courts in support of the view that an accused is entitled to the production of such documents. [FN11] Indeed, we would find it hard to withstand the force of Judge Cooley's observation in a similar situation that 'the state has no interest in interposing any obstacle to the disclosure of the facts, unless it is interested in convicting accused parties on the testimony of untrustworthy persons.' [FN12] In the light of our reason and experience, the better rule is that upon the foundation that was laid the court should have overruled the objections which the Government advanced and ordered production of the

documents.

FN11. Asgill v. United States, 4 Cir., 60 F.2d 776; United States v. Krulewitch, 145 F.2d 76, 79, 156 A.L.R. 337; People v. Davis, 52 Mich. 569, 18 N.W. 362; State v. Bachman, 41 Nev. 197, 168 P. 733; People v. Schainuck, 286 N.Y. 161, 164, 36 N.E.2d 94; People v. Walsh, 262 N.Y. 140, 186 N.E. 422.

FN12. People v. Davis, 42 Mich. 569, 573, 18 N.W. 362, 363.

*420 [4][5] The trial court, of course, had no occasion to rule as to their admissibility, and we find it appropriate to consider that question only because the Government argues that the trial judge, in the exercise of his discretion, might have excluded these prior contradictory statements and since that would not have amounted to reversible error, it was not such to decline their production. We think this misconceives the issue. It is unnecessary to decide whether it would have been reversible error for the trial judge to exclude these statements once they had been produced and inspected. [FN13] For production purposes, it need only appear that the evidence is relevant, competent, and outside of any exclusionary rule; for rarely can the trial judge understandingly exercise his discretion to exclude **374 a document which he has not seen, and no appellate court could rationally say whether the excluding of evidence unknown to the record was error, or, if so, was harmless. The question to be answered on an application for an order to produce is one of admissibility under traditional canons of evidence, and not whether exclusion might be overlooked as harmless error.

FN13. We note in passing that the rules relating to impeachment by prior self-contradiction, which provide that such contradiction may be shown only on a matter material to the substantive issues of the trial, contain within themselves a guarantee against multiplication and confusion of issues. Therefore the discretion of the trial judge in excluding otherwise admissible evidence of this type is not as wide as it is in the vague and amorphous area of cross-examination of character witnesses. See Michelson v. United States, 335 U.S. 469, 69 S.Ct. 213, 93 L.Ed. 168.

[6][7] The Court of Appeals affirmed on the ground that Marshall's admission, on cross-examination, of the implicit contradiction between the documents and his testimony removed the need for resort to the statements and the admission was all the accused were entitled to demand. We cannot agree. We think that an admission that a contradiction is contained in a writing should not bar admission of the document itself in evidence, providing *421 it meets all other requirements of admissibility and no valid claim of privilege is raised against it. [FN14] The elementary wisdom of the best evidence rule rests on the fact that the document is a more reliable, complete and accurate source of information as to its contents and meaning than anyone's description and this is no less true as to the extent and circumstances of a contradiction. We hold that the accused is entitled to the application of that rule, not merely because it will emphasize the contradiction to the jury, but because it will best inform them as to the document's impeaching weight and significance. [FN15] Traditional rules of admissibility prevent opening the door to documents which merely differ on immaterial matters. The alleged contradictions to this witness' testimony relate not to collateral matters but to the very incrimination of petitioners. Except the testimony of this witness be believed, this conviction probably could not have been had. Yet, his first statement was that he got the film from Swartz; his first four statements did not implicate these petitioners and his fifth did so only after the judicial admonition we will later consider. The weight to be given Marshall's implication of the petitioners was decisive. Since, so far as we are now informed by the record, we think the statements should have been admitted, we cannot accept the Government's contention based on a premise that the court was free to exclude them. It was error to deny the application for their production.

FN14. 3 Wigmore on Evidence, s 1037; 3 Wharton's Criminal Evidence (11th ed.) s 1309.

FN15. The best evidence rule is usually relied upon by one opposing admission, on the ground that the evidence offered by the proponent does not meet its standards. Its merit as an assurance of the most accurate record possible commends its extension to this unique situation where it is the proponent who seeks to rely on it.

[8] The second effort to impeach Marshall was to

offer parts already quoted from the transcript of proceedings *422 in Detroit. Although Marshall admitted pleading guilty to the offense and that nine months later he was still unsentenced, he denied that he had received either promises or threats. The transcript would have shown the jury that a federal judge, who still retained power to fix his sentence, in discussing Marshall's expectation of a 'recommendation for a lenient sentence or for probation' had urged him to tell all he knew, 'even though it might involve others.' Involvement of others, whom Marshall had not theretofore mentioned, soon followed. We think the jury should have heard this warning of the judge, which was an addition to the matter brought out on cross-examination. The question for them is not what the judge intended by the admonition, nor how we, or even they, construe its meaning. We imply no criticism of it, and he expressly stated that he was holding out no promise. But the question for the jury is what effect they think these words had on the mind and conduct of a prisoner whose plea of guilty put him in large measure in the hands of the speaker. They might have regarded it as an incentive to involve others, and to supply a motive for Marshall's testimony other than a duty to recount the facts as best he could remember them. Reluctant as we are to differ with an experienced trial judge **375 on the scope of cross-examination, the importance of this witness constrains us to hold that the transcript was erroneously excluded.

[9][10] We believe, moreover, that the combination of these two errors was sufficiently prejudicial to require reversal. The Government, in its brief, argues strongly for the widest sort of discretion in the trial judge in these matters and urges that even if we find error or irregularity we disregard it as harmless [FN16] and affirm the conviction. We *423 are well aware of the necessity that appellate courts give the trial judge wide latitude in control of cross-examination, especially in dealing with collateral evidence as to character. Michelson v. United States, 335 U.S. 469, 69 S.Ct. 213, 93 L.Ed. 168. But this principle cannot be expanded to justify a curtailment which keeps from the jury relevant and important facts bearing on the trustworthiness of crucial testimony. Reversals should not be based on trivial, theoretical and harmless rulings. But we cannot say that these errors were unlikely to have influenced the jury's verdict. We believe they prejudiced substantial rights and the judgment must be reversed.

FN16. Fed.Rules Crim.Proc. rule 52 admonishes us that 'Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.'

Reversed.

END OF DOCUMENT

DELAWARE
v.
William A. FENSTERER.

No. 85-214.

Nov. 4, 1985.

Defendant was convicted in state court of murder, and he appealed. The Delaware Supreme Court, 493 A.2d 959, reversed, and certiorari was sought. The Supreme Court held: (1) that admission of testimony of prosecution's expert witness who was unable to recall the basis for his opinion did not deny defendant his Sixth Amendment right to confrontation where he was able to demonstrate to the jury that the witness could not recall the theory upon which his opinion was based and was able to suggest to the jury that the witness had relied on a theory which the defense expert considered baseless, and (2) admission of testimony did not deprive defendant of due process.

Reversed and remanded.

Justice Stevens filed an opinion concurring in the judgment.

Justice Marshall dissented from summary disposition.

Justice Blackmun would grant certiorari and give plenary consideration.

[1] CRIMINAL LAW ⇐ 662.7
110k662.7
The Confrontation Clause [U.S.C.A. Const.Amend. 6] guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way and to whatever extent the defense might wish.

[2] CRIMINAL LAW ⇐ 662.3
110k662.3
Admission of testimony by prosecution expert who could not remember theory on which he based his opinion did not deprive defendant of his right to confront the witnesses against him, where cross-examination of prosecution's expert demonstrated to the jury that the expert could not recall the theory upon which he based his opinion that a hair found on the alleged murder weapon had been forcibly removed from the victim and where defense was able to suggest through its own expert that the prosecution expert had relied on a theory which the defense expert considered baseless. U.S.C.A. Const.Amend. 6.

[3] CRIMINAL LAW ⇐ 662.1
110k662.1
The Confrontation Clause [U.S.C.A. Const.Amend. 6] includes no guaranty that every witness called by the prosecution will refrain from giving testimony that is marred by forgetfulness, confusion, or evasion.

[4] CRIMINAL LAW ⇐ 662.7
110k662.7
Confrontation Clause [U.S.C.A. Const.Amend. 6] is generally satisfied when the defense is given a full and fair opportunity to probe and expose infirmities in prosecution testimony through cross examination, thereby calling to the attention of the fact finder the reasons for giving scant weight to the witness' testimony.

[5] CONSTITUTIONAL LAW ⇐ 268(10)
92k268(10)
Fact that voir dire examination of prosecution's expert alerted both prosecution and defense to expert's lapse of memory with respect to the basis for his opinion did not obligate the prosecution to refrain from calling the witness without refreshing his recollection; prosecution's foreknowledge that its expert would be unable to give the precise basis for his opinion did not impose an obligation, as a matter of due process, to refrain from introducing the expert's testimony. U.S.C.A. Const.Amend. 5.

[5] CRIMINAL LAW ⇐ 706(1)
110k706(1)
Fact that voir dire examination of prosecution's expert alerted both prosecution and defense to expert's lapse of memory with respect to the basis for his opinion did not obligate the prosecution to refrain from calling the witness without refreshing his recollection; prosecution's foreknowledge that its expert would be unable to give the precise basis for his opinion did not impose an obligation, as a matter of due process, to refrain from introducing the expert's testimony. U.S.C.A. Const.Amend. 5.

*16 **292 PER CURIAM.

In this case, the Delaware Supreme Court reversed respondent William Fensterer's conviction on the grounds that the admission of the opinion testimony of the prosecution's expert witness, who was unable to recall the basis for his opinion, **293 denied respondent his Sixth Amendment right to confront the witnesses against him. 493 A.2d 959 (1985). We conclude that the Delaware Supreme Court misconstrued the Confrontation Clause as interpreted by the decisions of this Court.

I

Respondent was convicted of murdering his fiancee, Stephanie Ann Swift. The State's case was based on circumstantial evidence, and proceeded on the theory that respondent had strangled Swift with a cat leash. To establish that the cat leash was the murder weapon, the State sought to prove that two hairs found on the leash were similar to Swift's hair, and that one of those hairs had been forcibly removed. To prove these theories, the State relied on the testimony of Special Agent Allen Robillard of the Federal Bureau of Investigation.

At trial, Robillard testified that one of the hairs had been forcibly removed. He explained that, in his opinion, there are three methods of determining that a hair has forcibly *17 been removed: (1) if the follicular tag is present on the hair, (2) if the root is elongated and misshaped, or (3) if a sheath of skin surrounds the root. However, Robillard went on to say that " 'I have reviewed my notes, and I have no specific knowledge as to the particular way that I determined the hair was forcibly removed other than the fact that one of those hairs was forcibly removed.' " Id., at 963. On cross-examination, Agent Robillard was again unable to recall which method he had employed to determine that the hair had forcibly been removed. He also explained that what he meant by "forcibly removed" was no more than that the hair could have been removed by as little force as is entailed in " 'brushing your hand through your head or brushing your hair.' " Pet. for Cert. 7. The trial court overruled respondent's objection that the admission of Robillard's testimony precluded adequate cross-examination unless he could testify as to which of the three theories he relied upon, explaining that in its view this objection went to the weight of the evidence rather than its admissibility.

The defense offered its own expert in hair analysis, Dr. Peter DeForest, who agreed with Agent Robillard that the hairs were similar to Swift's. Doctor DeForest testified that he had observed that one of the hairs had a follicular tag. He also testified that he had spoken by telephone with Robillard, who advised him that his conclusion of forcible removal was based on the presence of the follicular tag. App. to Pet. for Cert. D-2. Doctor DeForest then proceeded to challenge the premise of Robillard's theory--that the presence of a follicular tag indicates forcible removal. According to Dr. DeForest, no adequate scientific study supported that premise, and a follicular tag could be attached to hairs that naturally fall out.

On appeal, the Delaware Supreme Court reversed respondent's conviction on the authority of the Confrontation Clause. Nothing that "[t]he primary interest secured by the Clause is the right of cross-examination," 493 A.2d, at 963, *18 the court reasoned that "[e]ffective cross-examination and discrediting of Agent Robillard's opinion at a minimum required that he commit himself to the basis of his opinion." Id., at 964 (footnote omitted). Absent such an acknowledgment of the basis of his opinion, the court believed that "defense counsel's cross-examination of the Agent was nothing more than an exercise in futility." Ibid. Since the court could not rule out the possibility that Robillard could have been "completely discredited" had he committed himself as to the theory on which his conclusion was based, it held that respondent "was denied his right to effectively cross-examine a key state witness." Ibid. Accordingly, the court reversed without reaching respondent's additional claim that Robillard's testimony was inadmissible under the pertinent Delaware Rules of Evidence. We now reverse the Delaware Supreme Court's holding that Agent Robillard's inability to recall the method whereby he arrived at his opinion rendered the admission of that opinion violative of respondent's **294 rights under the Confrontation Clause.

II

This Court's Confrontation Clause cases fall into two broad categories: cases involving the admission of out-of-court statements and cases involving

restrictions imposed by law or by the trial court on the scope of cross-examination. The first category reflects the Court's longstanding recognition that the "literal right to 'confront' the witness at the time of trial ... forms the core of the values furthered by the Confrontation Clause." California v. Green, 399 U.S. 149, 157, 90 S.Ct. 1930, 1934, 26 L.Ed.2d 489 (1970). Cases such as Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), and Dutton v. Evans, 400 U.S. 74, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970), gave rise to Confrontation Clause issues "because hearsay evidence was admitted as substantive evidence against the defendants." Tennessee v. Street, 471 U.S. 409, 413, 105 S.Ct. 2078, 2081, 85 L.Ed.2d 425 (1985). Cf. Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968).

***19** The second category of cases is exemplified by Davis v. Alaska, 415 U.S. 308, 318, 94 S.Ct. 1105, 1111, 39 L.Ed.2d 347 (1974), in which, although some cross-examination of a prosecution witness was allowed, the trial court did not permit defense counsel to "expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness." As the Court stated in Davis, supra, at 315, 94 S.Ct., at 1110, "[c]onfrontation means more than being allowed to confront the witness physically." Consequently, in Davis, as in other cases involving trial court restrictions on the scope of cross-examination, the Court has recognized that Confrontation Clause questions will arise because such restrictions may "effectively ... emasculate the right of cross-examination itself." Smith v. Illinois, 390 U.S. 129, 131, 88 S.Ct. 748, 750, 19 L.Ed.2d 956 (1968).

This case falls in neither category. It is outside the first category, because the State made no attempt to introduce an out-of-court statement by Agent Robillard for any purpose, let alone as hearsay. Therefore, the restrictions the Confrontation Clause places on "the range of admissible hearsay," Roberts, supra, at 65, 100 S.Ct., at 2538, are not called into play.

[1] The second category is also inapplicable here, for the trial court did not limit the scope or nature of defense counsel's cross-examination in any way. The Court has recognized that "the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but [also] ... allowed to impeach, i.e., discredit, the witness." Davis, 415 U.S., at 316, 94 S.Ct., at 1110. But it does not follow that the right to cross-examine is denied by the State whenever the witness' lapse of memory impedes one method of discrediting him. Quite obviously, an expert witness who cannot recall the basis for his opinion invites the jury to find that his opinion is as unreliable as his memory. That the defense might prefer the expert to embrace a particular theory, which it is prepared to refute with special vigor, is irrelevant. " 'The main and essential purpose of confrontation is to secure ***20** for the opponent the opportunity of cross-examination.' " Id., at 315-316, 94 S.Ct., at 1109-10 (quoting 5 J. Wigmore, Evidence § 1395, p. 123 (3d ed. 1940) (emphasis in original)). Generally speaking, the Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish. See Roberts, 448 U.S., at 73, n. 12, 100 S.Ct., at 2543, n. 12 (even where the only opportunity the defense has to cross-examine the declarant is at a preliminary hearing, except in "extraordinary cases" where defense counsel provided ineffective representation at the earlier proceeding, "no inquiry into 'effectiveness' is required"). This conclusion is confirmed by the fact that the assurances ****295** of reliability our cases have found in the right of cross-examination are fully satisfied in cases such as this one, notwithstanding the witness' inability to recall the basis for his opinion: the factfinder can observe the witness' demeanor under cross-examination, and the witness is testifying under oath and in the presence of the accused. See id., at 63, n. 6, 100 S.Ct., at 2537-38, n. 6.

[2] We need not decide whether there are circumstances in which a witness' lapse of memory may so frustrate any opportunity for cross-examination that admission of the witness' direct testimony violates the Confrontation Clause. In this case, defense counsel's cross-examination of Agent Robillard demonstrated to the jury that Robillard could not even recall the theory on which his opinion was based. Moreover, through its own expert witness, the defense was able to suggest to the jury that Robillard had relied on a theory which the defense expert considered baseless. The Confrontation Clause certainly requires no more

than this.

Although Green, supra, involved a witness who professed a lapse of memory on the stand, that case lends no support to respondent. In pertinent part, Green was a case in which a minor named Porter informed a police officer of a transaction in which he claimed Green supplied him with drugs. At trial, Porter professed to be unable to recall how he obtained *21 the drugs. The prosecution then introduced Porter's prior inconsistent statements as substantive evidence. Green, 399 U.S., at 152, 90 S.Ct., at 1932. This Court held that "the Confrontation Clause does not require excluding from evidence the prior statements of a witness who concedes making the statements, and who may be asked to defend or otherwise explain the inconsistency between his prior and his present version of the events in question, thus opening himself to full cross-examination at trial as to both stories." Id., at 164, 90 S.Ct., at 1938. However, the Court also concluded that, in the posture of that case, it would be premature to reach the question "[w]hether Porter's apparent lapse of memory so affected Green's right to cross-examine as to make a critical difference in the application of the Confrontation Clause...." Id., at 168, 90 S.Ct., at 1940. In this connection, the Court noted that even some who argue that "prior statements should be admissible as substantive evidence" believe that this rule should not apply to "the case of a witness who disclaims all present knowledge of the ultimate event," because "in such a case the opportunities for testing the prior statement through cross-examination at trial may be significantly diminished." Id., at 169, n. 18, 90 S.Ct., at 1940-41, n. 18 (citations omitted).

We need not decide today the question raised but not resolved in Green. As Green's framing of that question indicates, the issue arises only where a "prior statement," not itself subjected to cross-examination and the other safeguards of testimony at trial, is admitted as substantive evidence. Since there is no such out-of-court statement in this case, the adequacy of a later opportunity to cross-examine, as a substitute for cross-examination at the time the declaration was made, is not in question here.

[3][4] Under the Court's cases, then, Agent Robillard's inability to recall on the stand the basis for his opinion presents none of the perils from which the Confrontation Clause protects defendants in criminal proceedings. The Confrontation Clause includes no guarantee that every witness called by the *22 prosecution will refrain from giving testimony that is marred by forgetfulness, confusion, or evasion. To the contrary, the Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose these infirmities through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness' testimony. Accordingly, we hold that the admission into evidence of Agent Robillard's opinion **296 did not offend the Confrontation Clause despite his inability to recall the basis for that opinion.

[5] The Delaware Supreme Court also appears to have believed that the prosecution breached its "serious obligation not to obstruct a criminal defendant's cross-examination of expert testimony," 493 A.2d, at 963, seemingly because the prosecution knew in advance that Agent Robillard would be unable to recall the basis for his opinion when he testified at trial. While we would agree that Robillard's testimony at the voir dire examination must be taken to have alerted both the prosecution and the defense to his lapse of memory, see App. to Brief in Opposition A-1, we do not think the prosecution was obliged to refrain from calling Robillard unless it could somehow refresh his recollection. Whether or not, under state law, Robillard's opinion should have been admitted into evidence, nothing in the Federal Constitution forbids the conclusion reached by the trial court in this case: that the expert's inability to recall the basis for his opinion went to the weight of the evidence, not its admissibility. See United States v. Bastanipour, 697 F.2d 170, 176-177 (CA7 1982), cert. denied, 460 U.S. 1091, 103 S.Ct. 1790, 76 L.Ed.2d 358 (1983). That being so, the prosecution's foreknowledge that its expert would be unable to give the precise basis for his opinion did not impose an obligation on it, as a matter of due process, to refrain from introducing the expert's testimony unless the basis for that testimony could definitely be ascertained. We need not decide whether the introduction of an expert opinion with no basis could ever be so lacking in reliability, and so prejudicial, as to *23 deny a defendant a fair trial. The testimony of Dr. DeForest, suggesting

the actual basis for Robillard's opinion and vigorously disputing its validity, utterly dispels any possibility of such a claim in this case.

The petition for certiorari is granted, the judgment of the Delaware Supreme Court is reversed, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

It is so ordered.

Justice MARSHALL dissents from this summary disposition, which has been ordered without affording the parties prior notice or an opportunity to file briefs on the merits. See Maggio v. Fulford, 462 U.S. 111, 120-121, 103 S.Ct. 2261, 2265-66, 76 L.Ed.2d 794 (1983) (MARSHALL, J., dissenting); Wyrick v. Fields, 459 U.S. 42, 51-52, 103 S.Ct. 394, 397-98, 74 L.Ed.2d 214 (1982) (MARSHALL, J., dissenting).

Justice BLACKMUN would grant certiorari and give this case plenary consideration.

Justice STEVENS, concurring in the judgment.

Summary reversal of a state supreme court's application of federal constitutional strictures to its own police and prosecutors in novel cases of this kind tends to stultify the orderly development of the law. Because I believe this Court should allow state courts some latitude in the administration of their criminal law, [FN1] I voted to deny certiorari. Cf. California v. Carney, 471 U.S. 386, 395, 105 S.Ct. 2066, 2071, 85 L.Ed.2d 406 (1985) (STEVENS, J., dissenting).

> FN1. In California v. Green, 399 U.S. 149, 171, 90 S.Ct. 1930, 1941-1942, 26 L.Ed.2d 489 (1970), THE CHIEF JUSTICE wrote separately "to emphasize the importance of allowing the States to experiment and innovate, especially in the area of criminal justice." He correctly observed that "neither the Constitution as originally drafted, nor any amendment, nor indeed any need, dictates that we must have absolute uniformity in the criminal law in all the States." Id., at 171-172, 90 S.Ct., at 1941-42.

On the merits, I find the issue much closer to the question reserved in California v. Green, 399 U.S. 149, 168-170, 90 S.Ct. 1930, 1940-41, 26 L.Ed.2d 489 *24 (1970), than does the Court. The question reserved in Green concerned the admissibility of an earlier out-of-court statement by the witness Porter of which Porter **297 disclaimed any present recollection at the time of trial. [FN2] The question decided by the Court today concerns the admissibility of an earlier out-of-court conclusion reached by a witness who disclaims any present recollection of the basis for that conclusion. The reasons for carefully reserving the question in Green persuade me that this case should not be decided without full argument. Nevertheless, because the Court has granted certiorari and decided to act summarily, because I am not persuaded that the Federal Constitution was violated, and because the State Supreme Court remains free to reinstate its judgment on the basis of its interpretation of state law, I reluctantly concur in the judgment.

> FN2. "Whether Porter's apparent lapse of memory so affected Green's right to cross-examine as to make a critical difference in the application of the Confrontation Clause in this case is an issue which is not ripe for decision at this juncture" (footnote omitted). Id., at 168-169, 90 S.Ct., at 1940-41. See also id., at 169, n. 18, 90 S.Ct., at 1940-41, n. 18.

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Citation | Rank(R) | Page(P) | Database | Mode
939 F.2d 416 | R 6 OF 26 | P 1 OF 39 | ALLFEDS | Page
33 Fed. R. Evid. Serv. 1017
(Cite as: 939 F.2d 416)

UNITED STATES of America, Plaintiff-Appellee,
v.
Jack Lee SCROGGINS, Defendant-Appellant.
No. 90-2580.
United States Court of Appeals,
Seventh Circuit.
Argued Feb. 28, 1991.
Decided Aug. 2, 1991.

Defendant was convicted in the United States District Court, Central District of Illinois, Richard Mills, J., of conspiracy to distribute cocaine and was sentenced to 33 months in prison. Defendant appealed. The Court of Appeals, Ripple, Circuit Judge, held that: (1) trial court did not abuse its discretion in prohibiting defendant from questioning key government witness regarding possible sex change operation; (2) there was sufficient evidence that defendant was integral part of cocaine distribution conspiracy to support his conviction; (3) evidence did not establish that defendant agreed to be involved only in small-scale sales such that 140 grams of cocaine involved in final transaction before his arrest could not be considered in sentencing; but (4) record of sentencing proceedings left uncertain whether sentencing

increased to 20 because of his possession of a firearm. His criminal history category was I, resulting in a sentencing range of thirty-three to forty-one months. The court sentenced Mr. Scroggins to thirty-three months.

II
ANALYSIS

A. Challenges to Conviction

1. Pretrial motions

[1] In his brief, Mr. Scroggins touches on several alleged errors by the district court in its handling of the pretrial motions concerning NA's possible sex change operation. In essence, his position is that the district court abused its discretion by foreclosing potential avenues of impeachment of NA, a key witness against Mr. Scroggins. He acknowledges, however, that "the sexual orientation of a witness generally will not be the subject of proper impeachment." Appellant's Br. at 28 (citing United States v. Colyer, 571 F.2d 941, 946 n. 7 (5th Cir.) (homosexual orientation irrelevant to credibility), cert. denied, 439 U.S. 933, 99 S.Ct. 325, 58 L.Ed.2d 328 (1978); Fed.R.Evid. 608). Mr. Scroggins insists ***421** that he "sought to inquire of [NA] as to her sexual identity not for the purposes of impugning her moral character but rather to determine whether she was masquerading as a woman when she in fact was not." Id. at 28-29.

We find no abuse of discretion on the record before us. The district

court is authorized to "exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to ... protect witnesses from harassment or undue embarrassment." Fed.R.Evid. 611(a). Even if we were to acknowledge that NA's sexual identity had any potential relevance to her credibility, we would not conclude that the court erred in protecting NA from the much more obvious potential of such harassment and embarrassment. [FN1] Furthermore, Mr. Scroggins had ample opportunity to attack NA's credibility on other, more relevant, grounds. For example, on cross-examination, NA acknowledged that her recommended sentence pursuant to her plea agreement was contingent on her testifying against Mr. Scroggins--the only remaining defendant who had not pled guilty or had charges dismissed. With such obvious impeachment material available to Mr. Scroggins, the district court certainly was not obligated to permit a line of questioning that was more likely to distract the jury than to inform it of relevant evidence.

FN1. Cf. United States v. Masters, 924 F.2d 1362, 1368 (7th Cir.) (no reversible error when district court limited cross-examination concerning witness' acknowledged habit of wearing women's underwear in case in which female victim's body had been found without panties; details of the "fetish would have been spicy, but peripheral to the issues because there was no suggestion that violence was an aspect of the fetish"), cert.

denied, --- U.S. ----, 111 S.Ct. 2019, 114 L.Ed.2d 105 (1991). The cross-examination prohibited in regards to NA's sexual identity was much more peripheral than the cross-examination that this court held properly limited in Masters.

2. Sufficiency of evidence

Mr. Scroggins contends that the government failed to present sufficient evidence to sustain his conviction for conspiracy to distribute cocaine. As this court has noted many times, those who raise sufficiency of evidence challenges bear a "heavy burden." E.g., United States v. Valencia, 907 F.2d 671, 676 (7th Cir.1990). "The test is whether, after viewing the evidence in the light most favorable to the government, 'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " United States v. Pritchard, 745 F.2d 1112, 1122 (7th Cir.1984) (quoting Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979) (emphasis in original)); accord United States v. Lamon, 930 F.2d 1183, 1190 (7th Cir.1991).

[2] [3] [4] As Mr. Scroggins acknowledges, a defendant indicted for conspiracy also may be convicted on an aiding and abetting theory. See United States v. Galiffa, 734 F.2d 306, 312 (7th Cir.1984). Because the jury was so instructed, we shall examine the evidence in terms of aiding and abetting

INSTA-CITE

CITATION: 939 F.2d 416

Direct History

=> 1 **U.S. v. Scroggins,** 939 F.2d 416, 33 Fed. R. Evid. Serv. 1017 (7th Cir.(Ill.), Aug 02, 1991) (NO. 90-2580)
Appeal After Remand
2 U.S. v. Scroggins, 980 F.2d 733 (7th Cir.(Ill.), Dec 03, 1992) (TABLE, TEXT IN WESTLAW, NO. 92-1576)

Negative Indirect History

Not Followed as Dicta
3 U.S. v. Sassi, 966 F.2d 283 (7th Cir.(Ill.), Jun 30, 1992) (NO. 92-1258) (Additional History)

UNITED STATES of America, Appellee,
v.
Evonna Victoria JOHNSON, Appellant.

No. 91-3694.

United States Court of Appeals,
Eighth Circuit.

Submitted May 12, 1992.

Decided July 10, 1992.

Defendant was convicted of possession with intent to distribute cocaine base after jury trial in the United States District Court for the District of Minnesota, Paul A. Magnuson, J. Defendant appealed. The Court of Appeals, Wollman, Circuit Judge, held that: (1) disallowing cross-examination of police witness for impeachment purposes on collateral issue of internal police investigation resulting in officer's suspension was not abuse of discretion; (2) disallowing cross-examination of prosecution witnesses about investigation of defendant's estranged husband to demonstrate motive for officers to testify falsely against defendant was not abuse of discretion; and (3) exclusion of evidence of potential penalty codefendant faced by claiming it was she who had thrown crack cocaine out window and not defendant was not abuse of discretion.

Affirmed.

[1] WITNESSES ⇐ 330(3)
410k330(3)
Disallowing questioning of police witness for impeachment purposes on collateral issue of internal police investigation as result of which officer had been suspended from police department was not abuse of discretion; evidence of officer's internal suspension was totally unrelated to issues involved in trial of defendant on drug charges. Fed.Rules Evid.Rule 608(b), 28 U.S.C.A.

[2] WITNESSES ⇐ 331.5
410k331.5
Formerly 410k3311/2
Rules of evidence do not permit specific instances of witness' conduct to be proved by extrinsic evidence; to extent that such evidence is ever admissible, introduction of extrinsic evidence to attack credibility is subject to discretion of trial court. Fed.Rules Evid.Rule 608(b), 28 U.S.C.A.

[3] WITNESSES ⇐ 331.5
410k331.5
Formerly 410k3311/2
Results of investigations of internal affairs of police departments are not in all cases inadmissible for impeachment purposes; there may be situations in which evidence from such internal investigations will bear heavily on credibility of testifying police officer, and, in such situations, district court should deem itself free to allow such inquiries during cross-examination.

[4] WITNESSES ⇐ 330(3)
410k330(3)
Disallowing cross-examination of prosecution witnesses about investigation and prosecution of defendant's estranged husband to demonstrate motive for officers to testify falsely against defendant was not abuse of discretion; investigation and prosecution of husband was based upon search of residence different from that search in defendant's case, and officers' reports regarding arrest of defendant had already been filed and testimony before grand jury had already been given at time suppression order was entered in case against husband in another court.

[5] WITNESSES ⇐ 318
410k318
Excluding evidence of potential penalty codefendant faced by claiming that it was she, rather than defendant who had thrown crack cocaine out window to bolster codefendant's credibility in defendant's trial was not abuse of discretion. Fed.Rules Evid.Rule 804(b)(3), 28 U.S.C.A.

***765** Michael W. McNabb, Burnsville, Minn., argued, for appellant.

Margaret T. Burns, Minneapolis, Minn., argued, for appellee.

Before RICHARD S. ARNOLD, Chief Judge, BRIGHT, Senior Circuit Judge, and WOLLMAN, Circuit Judge.

WOLLMAN, Circuit Judge.

Evonna V. Johnson appeals from her conviction for possession with intent to distribute ***766** cocaine base, in violation of 21 U.S.C. 841(a)(1). We affirm.

I.

On February 13, 1991, Minneapolis police officers executed a search warrant at Johnson's residence. The first officer to enter the residence testified that he saw two black females--Johnson and Demellon Horton--in the home. After the officers entered the home, Johnson was seen running into the bedroom and throwing a red pantyhose bag out of the window.

The police seized the red bag, which contained thirteen grams of cocaine base, and arrested Johnson. Following her conviction, Johnson was sentenced to 120 months' imprisonment. She now appeals from three evidentiary rulings made by the district court.

II.

"The admissibility of evidence is primarily a determination to be made by the district court ..., and [we] will not substitute its judgment unless there has been an abuse of discretion." United States v. Abodeely, 801 F.2d 1020, 1022 (8th Cir.1986) (citation omitted).

[1] Johnson first argues that the district court abused its discretion by excluding evidence that one of the government's witnesses, Officer Doran, had been suspended from the police department for three days without pay in May 1991 for having left in-service training without permission, having worked on an off-duty job during a period of in-service training, and having lied to his supervisor about when he had reported to the off-duty job. Defense counsel sought to introduce the letter of suspension, pursuant to Federal Rule of Evidence 608(b), to impeach Doran's credibility. [FN1] The district court refused to admit the letter and refused to allow defense counsel to cross-examine Doran about the substance of the letter.

FN1. Although the record does not reflect defense counsel's offer of the letter of suspension, we accept counsel's representation that he offered it under Rule 608(b).

[2] Federal Rule of Evidence 608(b) does not permit specific instances of a witness' conduct to be proved by extrinsic evidence. United States v. Martz, 964 F.2d 787, 788-89 (8th Cir.1992). "The purpose of barring extrinsic evidence is to avoid mini-trials on peripherally related or irrelevant matters." [FN2] Id. To the extent that such evidence is ever admissible, the introduction of extrinsic evidence to attack credibility is subject to the discretion of the trial court. Id. at 788-89; United States v. Capozzi, 883 F.2d 608, 615 (8th Cir.1989), cert. denied, 495 U.S. 918, 110 S.Ct. 1947, 109 L.Ed.2d 310 (1990). Given the broad discretion granted to the trial court and Rule 608(b)'s stricture against the introduction of such evidence, we conclude that the district court did not err in refusing to admit the letter of suspension.

FN2. The government states that it would have offered evidence to show that Doran was exonerated on the charges contained in the letter and that thus there would have been a "mini-trial" on this collateral issue.

Although Rule 608(b) states that specific instances of past conduct "may, however, in the discretion of the court, ... be inquired into on cross-examination," the district court did not allow defense counsel to inquire into the circumstances surrounding Doran's suspension. The district court did, however, allow the prosecution to impeach Ms. Horton, who testified that it was she who threw the cocaine base out of the window, with a pending charge of giving a false name to a police officer.

Defense counsel objected to the government's attempt to impeach Ms. Horton with the testimony that she had given a false name to the police, arguing that that evidence should be ruled inadmissible in view of the district court's earlier ruling prohibiting cross-examination regarding Doran's suspension. The district court resolved the apparent inconsistency by concluding that the two situations did not "fall in the same category." The court noted that when the police questioned Horton at Johnson's residence, she gave them a false name; when ***767** the police arrested Horton on another occasion, she gave the police a false name. The district court determined that evidence of Doran's internal suspension, in contrast, was "totally unrelated" to the issues involved in Johnson's trial.

As an additional reason for its ruling, the district court stated that "[i]nternal affairs investigations must, need to and have to reside within police departments." The court added that "a minor ... investigation report, ... should not be the public subject of cross examination of the witness at every time that he testifies [after] making an arrest."

[3] We conclude that the district court did not abuse its discretion by disallowing questioning on the collateral issue of the internal police investigation. See Martz, at 788-89. We do not concur, however, in the district court's observation that the results of the investigations of the internal affairs of police departments must in all cases be ruled inadmissible for impeachment purposes. There may indeed be situations in which evidence from such internal investigations will bear heavily on the credibility of a testifying police officer. In such situations, a district court should deem itself free to allow such inquiries during cross-examination.

[4] Johnson next argues that the district court erred by excluding evidence that would have established a motive for the police officers to testify falsely against her. Johnson sought to cross-examine prosecution witnesses about the investigation and prosecution of Johnson's estranged husband, Richard McElrath. Defense counsel sought to demonstrate that the police department's desire to insure McElrath's conviction was intense enough to provide a motive for the officers to testify falsely against Johnson for the purpose of coercing her into cooperating with them in the case against McElrath. After hearing defense counsel's offer of proof, the district court determined that this evidence was irrelevant.

Having reviewed the record, we conclude that the district court did not abuse its discretion by excluding this evidence. Among other things, the investigation and prosecution of McElrath was based upon a search of a residence different from that searched in the present case. Additionally, McElrath was already in federal custody at the time Johnson's house was searched and she was arrested. Although evidence against McElrath was later suppressed by another court, the officers' reports regarding their arrest of Johnson had already been filed and their testimony before the grand jury already given at the time the suppression order was entered. Thus, their search of Johnson's residence and their account of the circumstances of her arrest could not have been motivated by any perceived need for further evidence against McElrath.

[5] Finally, Johnson argues that the district court abused its discretion by excluding evidence of the potential penalty Ms. Horton faced by claiming that it was she who had thrown the crack out of the window. By establishing that Ms. Horton was aware that the penalty for possessing thirteen grams of crack was a sentence of not less than five years' imprisonment, Johnson sought to bolster Ms. Horton's credibility, on the assumption that no one would expose herself to that severe a penalty unless she had in fact committed the act giving rise to that penalty. The district court sustained the government's objection to this line of questioning.

Although the district court might well have decided to admit this proffered testimony, cf. Fed.R.Evid. 804(b)(3) (statement tending to subject declarant to criminal liability not excluded by hearsay rule), we conclude that it did not abuse its discretion by excluding this evidence.

We express our appreciation to appointed counsel for his zealous efforts on Johnson's behalf, both at trial and on appeal.

The judgment of conviction is affirmed.

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INSTA-CITE

CITATION: 968 F.2d 765

Direct History

=> 1 **U.S. v. Johnson,** 968 F.2d 765, 36 Fed. R. Evid. Serv. 47 (8th Cir.(Minn.), Jul 10, 1992) (NO. 91-3694)
Certiorari Denied by
2 Johnson v. U.S., 506 U.S. 980, 113 S.Ct. 481, 121 L.Ed.2d 386, 61 USLW 3355 (U.S.Minn., Nov 09, 1992) (NO. 92-6150)

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873 F.2d 1049 | R 7 OF 26 | P 1 OF 31 | ALLFEDS | Page
28 Fed. R. Evid. Serv. 200
(Cite as: 873 F.2d 1049)

UNITED STATES of America, Plaintiff-Appellee,
v.
Ibukun O. MAYOMI, Defendant-Appellant.
No. 87-2658.
United States Court of Appeals,
Seventh Circuit.
Argued Nov. 10, 1988.
Decided May 1, 1989.

Defendant was convicted before the United States District Court for the Northern District of Illinois, Harry D. Leinenweber, J., of one count of attempted possession of heroin with intent to distribute, one count of possession of heroin with intent to distribute, and seven counts of importation of controlled substance. On his appeal, the Court of Appeals, Coffey, Circuit Judge, held that: (1) detention of defendant's mail which was received at private mail box service was justified by FBI agent's reasonable suspicion that mail contained heroin; (2) length of time letters were held prior to issuance of search warrant was reasonable; and (3) district court did not abuse its discretion in precluding cross-examination regarding identity of informant who initially contacted the FBI with information that accidentally opened envelope

defendant lacks sufficient facts to support his speculative assertion that St. John's veracity should be called into question. In any event, we agree with the statement of the Tenth Circuit that:

"the Supreme Court's decision in Roviaro v. United States, 353 U.S. 53, 59, 77 S.Ct. 623, 627, 1 L.Ed.2d 639 (1957), ... acknowledged the public's interest in protecting the identity of confidential informants in order to encourage the flow of information necessary in criminal prosecutions.... [T]he public's interest, as recognized in Roviaro, imposes procedural requirements and evidentiary burdens on a defendant who requests the disclosure of the confidential informant."

United States v. Bloomgren, 814 F.2d 580, 584 (10th Cir.1987). Because the defendant failed to comply with the procedural requirements set forth in Franks, supra, he has waived the issue on appeal. We refuse to consider his attack on the search warrant in the context of his argument that the district court abused its discretion in limiting the cross-examination of the government witnesses.

[4] We reach a similar conclusion regarding the defendant's contention that the district court erred in precluding cross-examination of Ashton on his relationship with Agent St. John in investigations prior to the present case. "[T]he decision to not allow cross-examination of a witness concerning

investigations other than those related to the case on trial falls within the discretion of the district court." Silva, 781 F.2d at 110 (citing United States v. Murphy, 768 F.2d 1518, 1536 (7th Cir.1985), cert. denied, 475 U.S. 1012, 106 S.Ct. 1188, 89 L.Ed.2d 304 (1986)).

In this case, the district judge ruled not to allow questioning about Ashton's relationship with St. John in previous FBI investigations because defense counsel failed to establish that such questioning was either necessary or relevant to the real issues in the case: namely, whether the defendant knowingly attempted to possess, possessed and imported heroin. Both at trial and on appeal the defendant argues that this line of questioning was relevant and necessary because the absence of information on Ashton's prior relationship with the FBI made it impossible for the jury to reach an informed decision regarding Ashton's credibility. We disagree.

The Supreme Court, in Delaware v. Fensterer, 474 U.S. 15, 20, 106 S.Ct. 292, 295, 88 L.Ed.2d 15, 19 (1985) (per curiam), stated that "the Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." (Emphasis in original). The record reflects that Mayomi's attorney cross-examined Ashton extensively on his encounters with ***1057** the defendant at Scanner Services, the details of how and when he accidentally cut open the first envelope found to contain brown heroin, and his

subsequent cooperation with the FBI in its investigation of the defendant.

From our review of the record we are convinced that the district court afforded the defendant ample opportunity to elicit sufficient information from Ashton concerning his involvement in this case such that the jury could make an informed decision regarding his credibility as a witness. [FN9] The question of whether Ashton had been involved in previous FBI investigations was, at best, only marginally relevant to the central issues in this case and a sojourn into this matter would have served only to confuse the jury on those issues. [FN10] As Delaware v. Van Arsdall, supra, teaches, a district court has wide latitude to impose reasonable limits on cross-examination based on concerns of this nature. Accordingly, we hold that it was not an abuse of discretion for the district court to preclude cross-examination of Ashton on this issue.

FN9. In fact, as we noted in note 3, supra, Mayomi's attorney failed to take full advantage of the opportunity he had by failing to ask Ashton whether he had cut open the first envelope at the direction of the FBI.

FN10. We note that the defendant's attempt to challenge the veracity of Ashton, as well as that of the government on a matter that should have been brought to the attention of the court in a Franks motion, see supra note

8, was nothing more than an attempt to confuse the jury on the real issues set for trial--namely, whether the defendant knowingly possessed, attempted to possess, and imported heroin. We caution trial counsel that such "fishing expeditions" are not viewed favorably by this court. Given the already overcrowded dockets of the federal judiciary, if the defendant actually had information that Ashton had been involved in previous FBI investigations, he should have made a proper offer of proof in the district court.

Even if we were to agree with the contention that the district court had abused its discretion in limiting the scope of the defendant's cross-examination of Ashton, which we do not, the Supreme Court has held that violations of the Confrontation Clause are subject to harmless error analysis. Delaware v. Van Arsdall, 475 U.S. at 681, 106 S.Ct. at 1436, 89 L.Ed.2d at 684. In light of the overwhelming evidence against Mayomi regarding his involvement in the importation and possession of heroin, we hold that any error in limiting the defendant's cross-examination of Ashton, with respect to either the identity of the informant or Ashton's previous involvement, if any, in FBI investigations, was harmless.

IV.

The district court's refusal to suppress the contents of the envelopes

CLIENT IDENTIFIER: EHJ
DATE OF REQUEST: 03/14/96

INSTA-CITE

CITATION: 873 F.2d 1049

Direct History

1 U.S. v. Mayomi, 1987 WL 16629 (N.D.Ill., Aug 31, 1987) (NO. 86 CR 535)
Judgment Affirmed by
=> 2 **U.S. v. Mayomi,** 873 F.2d 1049, 28 Fed. R. Evid. Serv. 200 (7th Cir.(Ill.), May 01, 1989) (NO. 87-2658)

Secondary Sources

Corpus Juris Secundum (C.J.S.) References
72 C.J.S. Post Office Sec.64 Note 67 (Pocket Part)

UNITED STATES, Appellee,
v.
Mushtaq MALIK, a/k/a Mushtaq Ahmed,
Defendant, Appellant.

No. 90-1549.

United States Court of Appeals,
First Circuit.

Heard Jan. 9, 1991.

Decided March 18, 1991.

Defendant was convicted in the United States District Court for the District of Massachusetts, Frank H. Freedman, Chief Judge, of conspiring to import, and importing, heroin. Defendant appealed. The Court of Appeals, Breyer, Chief Judge, held that: (1) District Court was justified in forbidding defendant to cross-examine key government witnesses about one witness' terrorist activities and affiliation with radical organizations; (2) government agent's testimony about defendant's statements about prior involvement in smuggling scheme was admissible; and (3) agent's testimony that he understood defendant to claim that he was famous heroin smuggler was admissible.

Affirmed.

[1] WITNESSES ⇐ 344(1)
410k344(1)
District court was justified in forbidding narcotics defendant to ask key government witnesses about one witness' alleged terrorist activities and affiliations with radical political groups, notwithstanding defendant's contentions that such limitation prevented him from developing defense theory--defendant merely "played along" with witness in narcotics transaction in effort to get one group's money back and further revolutionary plot to overthrow foreign government--and that line of questioning would also have helped to impeach witness; defense theory was not clearly developed at time of cross-examination or even during defendant's presentation of evidence, trial court could have determined that impeachment value of membership in radical organizations was small, and questions about membership in such organizations might introduce prejudicial, emotional issue into trial that could distract jury.

[1] WITNESSES ⇐ 344(2)
410k344(2)
District court was justified in forbidding narcotics defendant to ask key government witnesses about one witness' alleged terrorist activities and affiliations with radical political groups, notwithstanding defendant's contentions that such limitation prevented him from developing defense theory--defendant merely "played along" with witness in narcotics transaction in effort to get one group's money back and further revolutionary plot to overthrow foreign government--and that line of questioning would also have helped to impeach witness; defense theory was not clearly developed at time of cross-examination or even during defendant's presentation of evidence, trial court could have determined that impeachment value of membership in radical organizations was small, and questions about membership in such organizations might introduce prejudicial, emotional issue into trial that could distract jury.

[2] WITNESSES ⇐ 267
410k267
Trial judge has wide latitude to impose limits on cross-examination in order to avoid prejudice, confusion, and unnecessary waste of time; however, limits must be reasonable, i.e., limits must not prevent defendant from providing jury with essential information about key events and sufficient information to make discriminating appraisal of witness' motives and possible bias.

[2] WITNESSES ⇐ 363(1)
410k363(1)
Trial judge has wide latitude to impose limits on cross-examination in order to avoid prejudice, confusion, and unnecessary waste of time; however, limits must be reasonable, i.e., limits must not prevent defendant from providing jury with essential information about key events and sufficient information to make discriminating appraisal of witness' motives and possible bias.

[3] CRIMINAL LAW ⇐ 374
110k374
Government agent's testimony about story defendant had told him about his prior involvement in heroin-smuggling scheme was admissible for impeachment purposes as prior inconsistent statement inasmuch as defendant had testified that he had not previously smuggled heroin; therefore, defendant did not have

viable claim that testimony only improperly served to show defendant's bad character. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

[3] WITNESSES ⇐ 379(2)
410k379(2)
Government agent's testimony about story defendant had told him about his prior involvement in heroin-smuggling scheme was admissible for impeachment purposes as prior inconsistent statement inasmuch as defendant had testified that he had not previously smuggled heroin; therefore, defendant did not have viable claim that testimony only improperly served to show defendant's bad character. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

[4] CRIMINAL LAW ⇐ 369.2(1)
110k369.2(1)
Rule forbidding introduction of evidence that is relevant only because it shows bad character permits introduction of evidence that shows bad character when evidence is introduced for other, legitimate reasons. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

[5] CRIMINAL LAW ⇐ 1038.3
110k1038.3
Trial court's failure to provide limiting instruction sua sponte in connection with witness' testimony about defendant's prior inconsistent statement was not plain error.

[6] CRIMINAL LAW ⇐ 419(2.20)
110k419(2.20)
Government agent's testimony that he believed that "black prince" who defendant claimed to be was famous heroin smuggler did not amount to hearsay about what others had told agent, and instead was admissible to throw light on agent's state of mind when defendant asserted that he was "black prince."

[7] WITNESSES ⇐ 386
410k386
Questions of narcotics defendant about conference of law enforcement officers that purportedly involved discussions of defendant's narcotics trafficking, and about defendant's bragging that he knew everything that was said at conference, were proper in that bragging was inconsistent with normal reaction of person who had never been involved in narcotics trafficking as defendant had testified and information about nature of conference was needed to explain questions.

[7] WITNESSES ⇐ 388(5)
410k388(5)
Questions of narcotics defendant about conference of law enforcement officers that purportedly involved discussions of defendant's narcotics trafficking, and about defendant's bragging that he knew everything that was said at conference, were proper in that bragging was inconsistent with normal reaction of person who had never been involved in narcotics trafficking as defendant had testified and information about nature of conference was needed to explain questions.

***18** Dana Alan Curhan, Boston, Mass., by Appointment of the Court, for defendant, appellant.

Kevin O'Regan, Asst. U.S. Atty., with whom Wayne A. Budd, U.S. Atty., was on brief, Boston, Mass., for appellee.

Before BREYER, Chief Judge, ALDRICH and TORRUELLA, Circuit Judges.

BREYER, Chief Judge.

Mushtaq Malik appeals his convictions for conspiring to import, and importing, heroin. 21 U.S.C. §§ 952(a), 963; 18 U.S.C. § 2. He makes several evidence-related claims, the most important of which concerns limitations the trial judge imposed on Malik's counsel's efforts to impeach a key witness through cross-examination about the witness's past activities involving the Palestine Liberation Organization, the Jordanian government, and the FBI. After reading the entire record, we conclude that all Malik's claims are without legal merit, and we affirm the convictions.

I.
Facts

The government's evidence consisted primarily of taped phone conversations between Malik and Malik's coconspirator Samir Houchaimi, the testimony of Samir Houchaimi, and the testimony of Drug Enforcement Administration Agent William Powers. On the basis of those tapes and ***19** that testimony, a jury might reasonably have found facts such as the following:

In late 1986 or early 1987 Malik and Samir Houchaimi met in Karachi, Pakistan, and discussed

heroin trading. In September 1987 they agreed upon a heroin smuggling scheme: Malik was to advance the necessary money and to make eight kilograms of heroin available in Cyprus; Houchaimi was to smuggle the heroin into the United States and sell it. Soon thereafter Malik telephoned his source in Northern Pakistan (named Zahir Shah), identified himself as the "Black Prince," and ordered eight kilograms of heroin. Houchaimi went to Northern Pakistan, met Shah, paid him $6000 and took the heroin (in suitcases with false sides) to Malik's house in Karachi. Malik then had it transferred to the nearby house of his associates, Kassim and Muneera Ghaffar. Muneera Ghaffar then brought seven kilograms of the heroin to Cyprus where she gave it to Houchaimi, who had come to Cyprus separately.

On January 24, 1988, Houchaimi flew to the United States with 2.2 kilograms of heroin hidden in his luggage. He smuggled the heroin through customs in New York, flew on to Chicago, returned the next day to New York, and spent the next two weeks trying to sell the heroin. Eventually, he phoned a man he had met in prison who agreed to buy the heroin and asked Houchaimi to come to Springfield, Massachusetts, to deliver it. On February 6, 1988 Houchaimi went to Springfield, where he was arrested with the 2.2 kilograms of heroin. Houchaimi then confessed all and agreed to co-operate with the government.

At the government's request Houchaimi repeatedly phoned Malik and tried to lure him into meeting with Drug Enforcement Administration Agent Powers who, pretending to be an underworld figure called "Costa," supposedly would pay for Houchaimi's heroin and offer to buy more. The highly incriminating taped phone calls reveal Malik, for example, complaining about Houchaimi's tardiness in paying for the 2.2 kilograms of heroin (Malik said Shah was pressuring him for money), speaking at length about large heroin and hashish shipments (apparently using codewords such as "jackets" to refer to the shipments), and asking Houchaimi to explain his arrest (which Houchaimi said concerned only minor immigration offenses). Malik refused to travel to the United States or to Europe, but he agreed to meet "Costa" in Rio de Janeiro.

Malik met with "Costa" (Agent Powers) and "Costa's bodyguard" (another agent) in Rio on March 29, 1988. "Costa" showed Malik $200,000 in cash. Malik told "Costa" he was the "Black Prince," he talked to "Costa" about the heroin in Cyprus, and he discussed plans for future shipments. After the meeting ended, Brazilian police arrested Malik and sent him to the United States for trial.

II.
Limitations on Cross-Examination

[1] Malik argues that the district court should not have limited his counsel's cross-examination of the government's two key witnesses (Houchaimi and Powers) by forbidding him to ask them about Houchaimi's terrorist activities and related affiliations with the Palestine Liberation Organization and other organizations. He says that the limitation prevented him from developing the theory of his defense. That theory explained his conduct and the tape recordings by arguing that he and Houchaimi were members of a group trying to overthrow the President of Pakistan, that Houchaimi had run off with $500,000 of the group's money, and that he (Malik) was simply playing along with Houchaimi, pretending to agree with his remarks about drug smuggling and bragging in front of "Costa" (following to a script supplied by Houchaimi's son), all in order to get back the group's money and to further the revolutionary plot. Malik adds that the line of questioning would also have helped impeach Houchaimi.

[2] The legal question is whether or not the trial judge exceeded his powers to limit cross-examination in order to avoid prejudice, confusion, and unnecessary waste of time. A trial judge has "wide latitude" to ***20** impose such limits. See United States v. Twomey, 806 F.2d 1136, 1139 (1st Cir.1986) ("a trial judge retains wide latitude to impose reasonable limits [on cross-examination] in order to avoid prejudice to a party or confusion of the issues") (citing Delaware v. Van Arsdall, 475 U.S. 673, 679, 106 S.Ct. 1431, 1435, 89 L.Ed.2d 674 (1986)). But, those limits must be reasonable, which is to say that they must not prevent the defendant from providing the jury with essential information about key events and sufficient information to make a "discriminating appraisal" of a witness's motives and possible bias. See id. at 1140 (stating that a trial judge's imposition of restrictions will be reversed "only if the jury is left

without 'sufficient information concerning formative events to make a "discriminating appraisal" of a witness's motives and bias' ") (quoting United States v. Campbell, 426 F.2d 547, 550 (2d Cir.1970)).

Our reading of the record convinces us that the district court, in this case, acted well within the scope of its lawful powers, for the following reasons. First, in context, at the point Malik's counsel tried to pursue the cross-examination in question, its relevance was not clear. After the event, and particularly in his brief in this court, counsel has argued that Malik's story amounted to a claim that he was playing along with Houchaimi and that he really did not intend to smuggle drugs. At the time of cross-examination, however, and in his offer of proof, he had not developed the theory very clearly. Indeed, he seemed to be saying either that Malik wanted to show that he had engaged in drug smuggling in order to get back the money that Houchaimi allegedly took from the revolutionary group, or perhaps that Houchaimi was lying to get revenge on Malik for reasons arising from some past association.

Counsel's offer of proof consisted of the following:

> MR. FERRARONE [Malik's counsel]: ... My defense is going to be, while my client was in prison, [Houchaimi] made many many representations to him that he would involve himself in the attempt to kill Zia ul Haq, and that is the reason why my client became involved with this man, because my client was particularly interested in that and produced a large amount of money from many people in order to see this particular thing.
>
> That is why I need to involve myself in this PLO business and I am not fishing, Your Honor. I have an actual theory of defense that I need to present and that what happened was he took the money from a lot of people and he used it on drugs, and my client, realizing that he had been involved with this person, thought that the only way he was going to receive any money back and being able to repay the sixteen people who were involved in this thing, was to do anything he could to get the money back.
>
> This is the theory in a nutshell, and if I don't get the opportunity to cross examine him on this, I will never be able to adequately present this defense.

Tr. Vol. III, p. 75. The trial court's response to this offer indicates that the court understood this story merely as a recital of events leading up to the conspiracy to import heroin, rather than a version of events under which Malik never formed an intention to conspire to import heroin. The court stated:

> Why don't you simply ask him one point blank question, as a result of previous relations with Mr. Malik did he attempt to get involved in this particular conspiracy.

Id. If this was a misimpression, counsel for Malik made no attempt to correct it; instead, after one more attempt to ask Houchaimi about a conspiracy to harm Zia ul Haq, to which an objection was sustained, he asked the following question:

> As a result of your previous relations with Mr. Malik did you attempt to get him involved in a conspiracy to bring heroin into the United States so that, if caught, you could seek revenge against him for any previous relationships you may have had with him in the past?

Tr. Vol. III, p. 76. Houchaimi answered "Sir, Your Honor, I swear to God that my relationship with Mr. Malik was pure heroin and that is it." Id. The cross-examination ***21** then went on to other, unrelated matters.

Not only did counsel for Malik not make clear during his cross-examination of Houchaimi that Malik's defense would be that he never intended to smuggle drugs, he did not make it clear later in the trial either. During Malik's presentation of evidence, counsel continued to argue that Malik's defense was that he had smuggled drugs in order to recover the stolen money. He told the jury, for example:

> So that in a nutshell is what Mr. Malik's testimony is going to be about. He is not going to argue to you, ladies and gentlemen, that at some point he didn't--at some point--at any point he never knew there was--that Mr. Colonel Houchaimi was involved in trafficking drugs. Because he did know that, and he's going to say he did know that. But he is going to tell you that he had an absolute necessity, he had absolute justification that he had to seize this opportunity, because this was going to be his one and only opportunity to get out of that country, and to attempt to at least recover some of the enormous funds that they had given to the Pakistan--that they had given to Colonel Houchaimi to effect the

job that Colonel Houchaimi had promised to do. Tr. Vol. IV, p. 74. Moreover, Malik testified as follows:

> Q. At any point while you were in prison with him, did you have a discussion with Mr. Houchaimi regarding the transportation of heroin to the United States for sale?
>
> A. Absolutely not. We don't believe in this thing. We don't believe in heroin because we don't like it. And we don't do it.
>
> Q. But sir, you will admit that you were involved in dealing with heroin in the course of this transaction; is that correct?
>
> A. It didn't leave me any choice. It was a matter of life and death. It was a matter of life and death of those political people. They were being involved because of my poor judgment. And I had no other choice except to talk to get in touch with him.

Tr. Vol. IV, pp. 118-19. Finally, counsel, in his closing statement, added:

> MR. FERRARONE: Finally I just ask you to take a look at the testimony of Mr. Malik himself. You heard him tell me to sit down. No, no, I will explain....
>
> And he addressed you frontly and he said this is why I did it. This is why I did it. I was pressed from both sides. I was pressed by Colonel--pressed by General Zia, and I was pressed by my own people. I had given Colonel Houchaimi half a million dollars to do a job, a political job. That you and I know quite well Colonel Houchaimi is undoubtedly capable of doing.

Tr. Vol. VI, p. 135. Since "motive"--at least a "recovery-of-stolen-funds motive"--is not ordinarily a defense to a drug-smuggling charge, and since counsel did not clearly explain any more direct connection, we believe the district court could reasonably have considered that the proposed line of questioning lacked significant probative value for the defense.

Second, the trial court could reasonably have thought that the added impeachment value of the "terrorist" organization membership questions was small. Malik's counsel had already elicited from Houchaimi the facts that he had often smuggled heroin into the United States; that he had previously been arrested and convicted and obtained a significantly reduced sentence in return for co-operating with the government; that the government had promised him significant leniency in return for his co-operation in the present case; and that he had used aliases and false passports. The defense had caught him lying about a phone call from Chicago to New York; and it showed him to be highly evasive about remembering extensive foreign travel all documented in his passport. As we have noted, the court permitted counsel to ask Houchaimi if he had tried to involve Malik in drug smuggling to "seek revenge" for a "previous relationship," which Houchaimi denied. The court might reasonably conclude ***22** that, say, PLO membership was not obvious proof of significantly worse character or willingness to lie.

Third, at the same time, the court might reasonably conclude that questions about membership in the PLO or other revolutionary groups would introduce a potentially prejudicial, emotional issue into the trial that could distract the jury from the evidence and facts directly related to guilt or innocence of the crime with which Malik was charged.

These three sets of considerations, taken together, lead us to conclude that the trial court's refusal to permit Malik to cross-examine on this issue did not violate Malik's constitutional right to confront witnesses, nor did it exceed the scope of a trial court's lawful trial-management powers. See Delaware v. Van Arsdall, 475 U.S. 673, 679, 106 S.Ct. 1431, 1435, 89 L.Ed.2d 674 (1986) ("trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on ... cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant").

III.
Other Issues

[3] 1. After Malik testified, the government called back Agent Powers, who said, among other things, that Malik (during the Rio meeting) had told him the following story about his (Malik's) previous involvement in a heroin-smuggling scheme with two men named Reaz Rage and Ahmed Abass:

> ... Mr. Rage double-crossed Mr. Malik and Mr. Abass and sold the heroin without their knowledge to a foreign buyer, then told them that the heroin had been seized by the Pakistani authorities.

> However, Mr. Malik found out about this, and he and Mr. Abass decided that Mr. Rage should be killed. And Mr. Abass in fact asked Mr. Malik if he could have permission to kill Mr. Rage. As a result of that, with Mr. Malik's permission, according to Mr. Malik, Mr. Abass went to the hotel that Mr. Rage was staying and attempted to enter the room. But was not let in. He then fired, using a rifle, fired shots through the door, severely wounded Mr. Rage.
>
> When Mr. Malik found out about this and found out Mr. Rage had not died as a result of the attack, he immediately contacted an associate of his in the military, and got Mr. Rage to a military hospital so that he couldn't be interviewed by the local authorities. And when Mr. Rage recovered, he advised Mr. Rage that if he ever returned to Pakistan, he would have Mr. Abass finish the job.

Tr. Vol. VI, pp. 6-7. Malik argues that the government used this "admission" to Powers to show that he (Malik) had previously participated in a bad act, which in turn helped to show his bad character; and that Fed.R.Evid. 404(b) forbids the government's introduction of evidence for this purpose.

[4] The short conclusive answer to this claim is that Rule 404(b) forbids the introduction of evidence that is "relevant only because it shows bad character;" it permits the introduction of evidence that shows bad character when a party introduces that evidence for other, legitimate reasons. United States v. Ferrer-Cruz, 899 F.2d 135, 137 (1st Cir.1990) (citing numerous cases). Here, the government introduced the evidence for a legitimate purpose. Malik had testified that he was a kind of "freedom fighter" who had not previously smuggled heroin. He specifically testified, "We don't believe in heroin because we don't like it. And we don't do it." Tr. Vol. IV, p. 119. Malik's statement to Powers is inconsistent with his previous testimony; it amounts to a "prior inconsistent statement," admissible for impeachment purposes. See United States v. Barrett, 539 F.2d 244, 254 (1st Cir.1976) ("To be received as a prior inconsistent statement, the contradiction need not be 'in plain terms. It is enough if the proffered testimony, taken as a whole, either by what it says or by what it omits to say, affords some indication that the fact was different from the testimony of the ***23** witness whom it is sought to contradict.' ") (quoting Commonwealth v. West, 312 Mass. 438, 440, 45 N.E.2d 260, 262 (1942)). Therefore, it overcomes the hurdle of Fed.R.Evid. 404(b). Moreover, the inconsistency was an important one in the context of the trial, for it showed that Malik had told Powers a story close to the polar opposite of his trial testimony; and, for that reason, we believe the trial court could reasonably conclude that the statement's "probative value" outweighed its potential "prejudicial effect." See United States v. Griffin, 818 F.2d 97, 101 (1st Cir.) (an appellate court will reverse a trial court's Rule 403 determination only in "exceptional circumstances"), cert. denied, 484 U.S. 844, 108 S.Ct. 137, 98 L.Ed.2d 94 (1987).

[5] Finally, as Malik now points out, he was entitled to a limiting instruction, making clear how the jury should use the testimony. However, Malik did not ask for such an instruction. Counsel might well have concluded that, in the context of the trial, such an instruction would not prove very helpful. In any event, whether a party wishes such an instruction, or wishes to forego the instruction (thereby calling less attention to the statement) is primarily a matter for counsel to decide at trial. And, we do not find the circumstances here so special that the court's failure to provide such an instruction sua sponte amounted to "plain error." The circumstances present in the two cases cited by Malik were quite different. See United States v. DeGeratto, 876 F.2d 576, 584 (7th Cir.1989) (suggesting in dictum that even had certain evidence been admissible under Rule 404(b), the trial court's failure to give a limiting instruction would have been plain error); Dawson v. Cowan, 531 F.2d 1374, 1377 (6th Cir.1976) (finding plain error in the failure to give a limiting instruction regarding evidence of a prior conviction for attempted rape where the defendant was facing both a principal charge of attempted rape and a habitual offender charge).

[6] 2. During the Rio meeting (a tape recording of which the government played for the jury) Powers said to Malik: "Your friend says you are the Black Prince." Malik said he was. The government then asked Powers (testifying live before the jury) what he understood the "Black Prince" to be. Over objection the district court ruled that Powers "may testify what he believes it to be." And, Powers said "I believe the black prince to be a very famous heroin smuggler." Tr. Vol. III, p. 144.

Malik argues that Powers's answer is inadmissible hearsay, for it is not based on Powers's previous personal acquaintance with a famous drug smuggler named the Black Prince, but reflects only what other persons told Powers out of court about the activities of someone called the Black Prince. However, the conclusive answer to this claim is that the court did not admit the statement for its truth (i.e. that Malik was the drug smuggler called the Black Prince). Rather, the court admitted the statement in order to show what Powers understood the words "black prince" to mean, as Malik used them. In other words, the statement was admitted to throw light on Powers's state of mind when Malik asserted that he was the Black Prince. See, e.g., United States v. DeVincent, 632 F.2d 147, 151 (1st Cir.) (holding that certain out-of-court statements were not hearsay because they were admissible "for their effect on the hearer"), cert. denied, 449 U.S. 986, 101 S.Ct. 405, 66 L.Ed.2d 249 (1980); J. Weinstein & M. Berger, 4 Weinstein's Evidence ¶ 801(c)(1), at 801-94 to 801-96 (1990) (utterances offered to show effect on state of mind are not hearsay).

Nor did the district court have to suppress Powers's answer under Fed.R.Evid. 403. Powers's state of mind was relevant because the jury could not fully understand the conversation at the Rio meeting without knowing that Powers wanted to apprehend a heroin smuggler believed to be calling himself the Black Prince, and therefore wanted to see whether Malik identified himself by that name. Nor could it fully appreciate Powers's subsequent statements and actions during the conversation without knowing that, once Malik had identified himself as the Black Prince, Powers believed himself to be dealing with a "very ***24** famous heroin smuggler." Of course, Malik's counsel could have cross-examined Powers at trial about his understanding of the meaning of those words. Given this legitimate use of the evidence, the court could reasonably have concluded that the probative value of the evidence outweighed any prejudicial effect. See, e.g., United States v. Simon, 842 F.2d 552, 555 (1st Cir.1988) (district courts have "considerable leeway" in conducting Rule 403 balancing).

[7] 3. Malik also objects to the district court's having permitted the following questions and answers during the government's cross-examination of Malik.

> Q. In 1982, sir, a conference of law enforcement officers was held in Wiesbaden, Germany, and the subject of that meeting was your narcotics trafficking; isn't that right?
> MR. FERRARONE: Objection, Your Honor.
> THE WITNESS: Please. Let him. Please, sit down. He's in dark, doesn't know. I want to help this gentleman. Repeat your question, sir.
> [Question repeated.]
> A. I'm not a reporter that I should know, that I had to cover that conference. I'm not in the government to cover.
> ....
> Q. Wasn't it true, sir, you bragged to a member of British Customs Service that two hours later, you knew everything that was said in that conference?
> A. I think it's baseless. You are trying to put me on the spot.

Tr. Vol. V., p. 159-60 (brackets in original). Malik says that the references to the Wiesbaden conference, tending to show that Malik is a famous heroin smuggler, were prejudicial or otherwise improper.

The short answer to Malik's claim is that no one objected to the question about Wiesbaden (as repeated); and, given Malik's own instruction to his counsel, the trial court could reasonably conclude that counsel did not intend to object. In any event, the questions were proper (assuming that the government had good reason to believe that the facts the questions assumed were true, see, e.g., United States v. Silverstein, 737 F.2d 864, 868 (10th Cir.1984)). Malik's reaction to news of the conference--bragging about his knowledge--is inconsistent with the normal reaction of a person who had never been involved in heroin smuggling, as he had previously testified. It was therefore admissible to impeach him. See p. 22, supra. The information about the nature of the conference is needed to explain the question and to show why the bragging reaction is inconsistent with his previous testimony. Whether or not the "prejudice" involved outweighs "probative value" under Fed.R.Evid. 403 is, as we have said, a matter primarily for the trial court, not this court; and, given the nature of the defense (the "freedom fighter/no previous connection with heroin" claim), we cannot overturn the district court's judgment in this respect.

For these reasons the judgment of the district

court is

Affirmed.

END OF DOCUMENT

INSTA-CITE

CITATION: 928 F.2d 17

Direct History

=> 1 **U.S. v. Malik,** 928 F.2d 17 (1st Cir.(Mass.), Mar 18, 1991)
(NO. 90-1549)

Negative Indirect History

Declined to Follow by
2 State v. Rodriguez, 136 N.H. 505, 618 A.2d 810 (N.H., Dec 23, 1992)
(NO. 91-280)

UNITED STATES of America, Plaintiff-Appellee,
v.
Victor PLESCIA, Frank Bonavolante, Camillio Grossi a/k/a Canillo Grossi a/k/a Camillo Grossi a/k/a Gam, Anthony Grossi, and Norman Demma, Defendants-Appellants.

Nos. 92-1222, 92-1223, 92-1224, 92-1225, 92-1226 and 93-3405.

United States Court of Appeals,
Seventh Circuit.

Argued Oct. 3, 1994.

Decided March 8, 1995.
Rehearing and Suggestion for Rehearing En Banc Denied April 19, 1995.

Defendants were convicted of drug conspiracy offenses by the District Court for the Northern District of Illinois, Charles R. Norgle, Sr., J., and they appealed. The Court of Appeals, Engel, Circuit Judge, sitting by designation, held that: (1) denial of defendants' request for disclosure of tapes regarding their participation in separate gambling conspiracy was not abuse of discretion; (2) conspirator was properly charged, for sentencing purposes, with entire volume of drugs involved in overall conspiracy, based on his frequent large purchases over long period of time; and (3) forfeiture of conspirator's house was not excessive fine.

Affirmed.

[1] CRIMINAL LAW ⇐ 627.6(3)
110k627.6(3)
Denial of narcotics defendants' request for disclosure of tapes relating to their participation in separate gambling conspiracy, to assist them in arguing that they were not involved in drug ring but only in separate gambling conspiracy, was not abuse of district court's discretion, where defendants did receive and offered into evidence several tapes made during drug investigation of conversations limited to gambling, disclosure of additional tapes would allegedly jeopardize ongoing gambling investigation, and other tapes would not undermine evidence regarding defendants' participation in narcotics activity and no reasonable probability existed that disclosure would have changed outcome of trial.

[2] CRIMINAL LAW ⇐ 1152(1)
110k1152(1)
Court of Appeals reviews district court's ruling on motion for disclosure of alleged Brady material, which district court makes after in camera review of material, under abuse-of-discretion standard.

[3] CRIMINAL LAW ⇐ 627.10(1)
110k627.10(1)
When criminal defendant seeks access to confidential informant files, Court of Appeals relies particularly heavily on sound discretion of trial judge to protect rights of accused as well as government.

[4] CRIMINAL LAW ⇐ 919(1)
110k919(1)
To be entitled to new trial based on government's nondisclosure of alleged Brady material, defendant must prove that there is reasonable probability that disclosure of evidence would have changed outcome of trial.

[5] CRIMINAL LAW ⇐ 919(1)
110k919(1)
Reasonable probability exists that disclosure of alleged Brady material would have changed outcome of trial, so as to require that new trial be granted, if evidence undermines confidence in outcome.

[6] CONSPIRACY ⇐ 51
91k51
Drug conspirator is accountable at sentencing for all drug transactions that he was aware of or that he should have reasonably foreseen. U.S.S.G. § 2D1.1, 18 U.S.C.A.

[7] CRIMINAL LAW ⇐ 1158(1)
110k1158(1)
Court of Appeals will not reverse sentencing determination in drug conspiracy case, unless it is based on clearly erroneous drug volume. U.S.S.G. § 2D1.1, 18 U.S.C.A.

[8] CONSPIRACY ⇐ 51
91k51
Defendant, as head of drug ring, was properly held

accountable for drug volume of entire conspiracy for sentencing purposes. U.S.S.G. § 2D1.1, 18 U.S.C.A.

[9] CONSPIRACY ⇦ 51
91k51
Financier with whom head of drug ring agreed to split profits was properly held accountable, for sentencing purposes, for all of the cocaine picked up by courier after financier joined conspiracy, which supported his sentence, without regard to whether financier could also be held accountable for drugs handled by conspirators before he joined conspiracy. U.S.S.G. § 2D1.1, 18 U.S.C.A.

[10] CONSPIRACY ⇦ 51
91k51
At least 20 kilograms of cocaine were reasonably foreseeable to participant in narcotics conspiracy which involved more than 50 kilograms of cocaine, where conspirator in question played active role as regular transporter and distributor of cocaine. U.S.S.G. § 2D1.1, 18 U.S.C.A.

[11] CONSPIRACY ⇦ 47(12)
91k47(12)
Finding that defendant was not merely a casual buyer of drugs from conspirator, but active participant in drug ring, was sufficiently supported by evidence of defendant's long-term relationship with conspirator, of his attempts to warn conspirator after another member of conspiracy was stopped by law enforcement agents, of his frequent purchase of cocaine in distribution quantities, and of other conspirator's selling him cocaine on credit.

[12] CONSPIRACY ⇦ 24(1)
91k24(1)
Buyer-seller transaction alone cannot support conviction for conspiracy to distribute narcotics.

[13] CONSPIRACY ⇦ 47(12)
91k47(12)
Evidence of frequent and repeated narcotics transactions, especially when credit arrangements are made, can support drug conspiracy conviction.

[14] CONSPIRACY ⇦ 40
91k40
Purchaser of drugs for redistribution need not be accountable as employee of seller for jury to find that purchaser has joined in and furthered conspiracy to distribute narcotics.

[15] CONSPIRACY ⇦ 23.1
91k23.1
Evidence that parties must negotiate terms of every transaction, seek to maximize their gains at expense of others, or engage in other forms of opportunistic behavior at expense of group, suggest that transaction costs among group are high and counsels against a finding of conspiracy between members.

[16] CONSPIRACY ⇦ 51
91k51
Drug conspirator's sentence was properly calculated with reference to volume of drugs involved in conspiracy as whole, where conspirator's frequent large purchases over a long period of time for resale to third parties made his venture dependent to a considerable extent upon success of conspiracy, and there was not divergence between his aims and those of conspiracy. U.S.S.G. § 2D1.1, 18 U.S.C.A.

[17] CONSPIRACY ⇦ 24(1)
91k24(1)
Scope of drug conspirators' liability is determined by scope of agreement they actually entered, not necessarily by total volume of larger conspiracy. U.S.S.G. § 2D1.1, 18 U.S.C.A.

[18] CONSPIRACY ⇦ 24(1)
91k24(1)
District court must scrutinize agreement that individual drug conspirator entered into to determine whether he actually agreed to become involved in conspiracy to distribute a given quantity of drugs. U.S.S.G. § 2D1.1, 18 U.S.C.A.

[19] CONSPIRACY ⇦ 24(1)
91k24(1)
Conspiracy liability cannot exceed scope of narcotics defendant's agreement to further illegal narcotics activity. U.S.S.G. § 2D1.1, 18 U.S.C.A.

[20] CONSPIRACY ⇦ 24(2)
91k24(2)
Separate conspiracies exist when each of conspirators' agreements has its own end, and each constitutes an end in itself.

[21] DRUGS AND NARCOTICS ⇦ 190
138k190
Forfeiture of real estate is appropriate where

property is used, in any way, to facilitate any drug-related offense, unless connection between offense and property is incidental and fortuitous.

[22] DRUGS AND NARCOTICS ⚿ 195
138k195
Drug conspirator's home was subject to forfeiture, given evidence that conspirator used home to conduct drug-related business over the telephone and apparently gave his home number to other conspirator to facilitate contacts between them.

[23] CRIMINAL LAW ⚿ 1214
110k1214
Forfeiture of home that drug conspirator used to conduct drug-related business was not excessive fine, where confiscated property had close relationship to narcotics activity, and conspirator's $30,000 equity in property was considerably less than value of cocaine which he arranged to sell by telephone call from property.

[23] DRUGS AND NARCOTICS ⚿ 191
138k191
Forfeiture of home that drug conspirator used to conduct drug-related business was not excessive fine, where confiscated property had close relationship to narcotics activity, and conspirator's $30,000 equity in property was considerably less than value of cocaine which he arranged to sell by telephone call from property.

[24] CRIMINAL LAW ⚿ 394.3
110k394.3
Government provided "good cause" for its delay in sealing surveillance tapes which it had made of drug conspirator's telephone conversations, so that tapes did not have to be suppressed based on government's failure to seal them in timely manner, where second surveillance period prevented any need for sealing between periods, government explained its delay between periods as necessary to draft surveillance request affidavit and to get request processed by federal bureaucracy. 18 U.S.C.A. § 2518(8)(a).

[24] TELECOMMUNICATIONS ⚿ 527
372k527
Government provided "good cause" for its delay in sealing surveillance tapes which it had made of drug conspirator's telephone conversations, so that tapes did not have to be suppressed based on government's failure to seal them in timely manner, where second surveillance period prevented any need for sealing between periods, government explained its delay between periods as necessary to draft surveillance request affidavit and to get request processed by federal bureaucracy. 18 U.S.C.A. § 2518(8)(a).

[25] CRIMINAL LAW ⚿ 394.3
110k394.3
To determine whether surveillance tapes should be suppressed based on government's failure to seal them in timely manner, Court of Appeals had to determine whether government established "good cause" for sealing delays. 18 U.S.C.A. § 2518(8)(a).

[26] TELECOMMUNICATIONS ⚿ 527
372k527
Government's burden of establishing its compliance with statutory prerequisites for Title III electronic surveillance is not great, and requirement that government exhaust normal investigative procedures must be viewed in practical and commonsense fashion. 18 U.S.C.A. § 2518(1)(c).

[27] TELECOMMUNICATIONS ⚿ 527
372k527
Government sufficiently established necessity for electronic surveillance of drug conspirator's telephone and pager, even assuming that government could have prosecuted conspirator without electronic surveillance tapes, where wiretaps both allowed government to ascertain extent and structure of conspiracy and provide enough evidence to convict defendant and other key players in drug ring. 18 U.S.C.A. § 2518(1)(c).

[28] WITNESSES ⚿ 344(2)
410k344(2)
Defendants were properly precluded from cross-examining government's chief witness as to the details of his prior lies under oath, where witness freely admitted his criminal activity while a police officer, his drug use, and the lies he told to conceal his illegal acts, and jury found his frequently corroborated testimony credible regardless.

[28] WITNESSES ⚿ 345(2)
410k345(2)
Defendants were properly precluded from cross-examining government's chief witness as to the

details of his prior lies under oath, where witness freely admitted his criminal activity while a police officer, his drug use, and the lies he told to conceal his illegal acts, and jury found his frequently corroborated testimony credible regardless.

[29] WITNESSES ⇐ 267
410k267
Trial judges retain wide discretion to impose reasonable limits on cross- examination based on concerns about, among other things, harassment, prejudice, confusion of issues, witness' safety, or interrogation that is repetitive or only marginally relevant.

[30] WITNESSES ⇐ 328
410k328
Defendants were properly precluded from cross-examining government's chief witness regarding antidepressive and antianxiety medication, including Prozac, which he was taking at time of trial and when events he described had occurred, notwithstanding defendants' contention that drugs could have affected witness' perception and memory, where defendants did not offer any expert testimony regarding effects of drugs either generally or on witness; cross-examination would be more prejudicial and confusing than useful for impeachment.

[31] WITNESSES ⇐ 282.5
410k282.5
Formerly 410k2821/2
Follow-up questions were improper where government's witness, during cross-examination, stated that he did not remember statement about which defendant wanted to question him.

[32] WITNESSES ⇐ 309
410k309
District court properly refused to allow witness to testify, where witness' invocation of right against self-incrimination precluded effective cross-examination. U.S.C.A. Const.Amend. 5.

[33] CRIMINAL LAW ⇐ 867
110k867
Narcotics defendant was not entitled to mistrial after law enforcement officer, mistaking him for another officer, asked him a question about cocaine presented as an exhibit, where defendant did not respond in any way, no evidence was presented that any juror overheard interaction, and trial judge properly instructed jury to consider only the evidence formally presented in trial.

[34] CRIMINAL LAW ⇐ 921
110k921
Defendant is entitled to new trial only if there is reasonable possibility that jury's verdict has been affected by material not properly admitted into evidence.

[35] CRIMINAL LAW ⇐ 1155
110k1155
Court of Appeals reviews district court's ruling on defendant's motion for mistrial under abuse-of-discretion standard, and will reverse district court's decision only if it has very strong conviction of error.

***1455** Barry Rand Elden, Asst. U.S. Atty., Bennett E. Kaplan (argued), Office of U.S. Atty., Criminal Receiving, Appellate Div., Helen B. Greenwald, Asst. U.S. Atty., Criminal Div., Jack O'Malley, Office of State's Atty. of Cook County, Chicago, IL, for U.S.

Michael B. Mann (argued), Zavislak & Mann, Oakbrook, IL, for defendant-appellant Victor Plescia.

James R. Meltreger, Peter A. Regulski (argued), Anthony J. Onesto, Onesto, Giglio, Meltreger & Associates, Chicago, IL, for defendant-appellant Frank Bonavolante.

Alexander M. Salerno, Berwyn, IL, argued, for defendant-appellant Camillio Grossi.

Cheryl I. Niro, Oak Park, IL, argued, for defendant-appellant Anthony Grossi.

Robert A. Korenkiewicz, Chicago, IL, argued, for defendant-appellant Norman Demma.

Before POSNER, Chief Judge, CUMMINGS and ENGEL, [FN*] Circuit Judges.

FN* Honorable Albert J. Engel, of the United States Court of Appeals for the Sixth Circuit, sitting by designation.

***1456** ENGEL, Circuit Judge.

The five defendants in this case appeal the convictions and sentences arising out of a sizeable Chicago-based cocaine conspiracy spanning several years. Because we feel that the vast weight of the evidence supports the convictions and the sentences and that any possible error was harmless, we affirm.

Victor Plescia headed the conspiracy, which began during or before 1986. He sent couriers, including chief prosecution witness Nickalos Rizzato and defendant Anthony Grossi, and he went himself many times to Miami, where he had a cocaine supplier. Rizzato made at least ten trips over several years to pick up over 50 kilograms of cocaine, and as many trips carrying cash to pay the Miami supplier. In 1988, with an initial investment of $40,000, Frank Bonavolante began to finance cocaine purchases in return for a share of the resale profits. After Plescia or a courier brought the cocaine to Chicago, Camillio Grossi and his son, Anthony Grossi, or others distributed it in street-use quantities. When Bonavolante or Plescia wanted cocaine for their own use, Plescia got it from one of the Grossis. Plescia also set up deals between the Grossis and others, including Norman Demma, who regularly bought quantities of cocaine for redistribution, sometimes on credit.

Federal officials began to investigate the drug ring in 1989. With the aid of a confidential informant, the officers identified Plescia as the leader of the conspiracy. An undercover agent met with Plescia to arrange a drug purchase, and Plescia told the agent a considerable amount of detail about the operation. With the accumulating evidence against Plescia, federal agents applied for and received permission for Title III electronic surveillance of Plescia's mobile phone and pager. Surveillance agents recorded many conversations between the defendants in which Plescia coordinated the activity of the conspiracy. The wiretap in place, officers stopped a coconspirator named Kevin Geiger after he met with Plescia. The police then recorded the activity as Plescia called and paged the other four defendants, warning them that Geiger had been stopped with narcotics and telling them to lay low for a while. Plescia did not then reach Demma, despite calling his residence numerous times. In paging Bonavolante, Plescia used the code number 8, which Rizzato testified indicated drug-related activity.

Once the conspiracy resumed normal operations, the federal agents recorded a series of phone conversations in which Demma told Plescia he wanted to purchase more cocaine, Plescia called Anthony Grossi to check availability, then Plescia called back Demma at his residence and set up the drug transaction. The transaction, observed by federal agents, occurred in a parking lot where Plescia and Demma parked before entering a cafe. Afterward, federal agents pursued and caught Demma, who had thrown the cocaine out of his car during the chase. Then they let him go and monitored the burst of communications among the defendants. Demma immediately called Plescia to warn him that the agents followed them and may have bugged Plescia's phone or pager. Plescia again called Bonavolante and the Grossis to warn them of the attention from drug enforcement officers, and Plescia agreed to replace Demma's lost cocaine. When the U.S. had established the roles and identities of the people involved in the conspiracy and had sufficient evidence against them, all five were arrested, indicted, and tried.

The five defendants were tried in one proceeding with two juries, one for Plescia, Anthony Grossi, and Demma and one for Bonavolante and Camillio Grossi. Each defendant had separate counsel. The juries returned verdicts of guilty against all defendants, on most counts. All five were convicted of conspiring to traffic in narcotics and of various counts of using a telephone or pager to facilitate their drug business. All of the defendants now appeal, claiming that numerous reversible errors occurred.

We have considered all the arguments offered by the defendants, and we find sufficient merit for discussion in only a few. We will briefly mention and dismiss some other claims in Section IV of this opinion.

I. The Gambling Tapes

[1] Bonavolante and Camillio Grossi argue that the trial judge committed reversible ***1457** error in denying them access to and use of certain evidence which they believe to be exculpatory. During and preceding the drug conspiracy, Bonavolante directed an illegal gambling conspiracy in which Camillio Grossi and Plescia were involved. Federal agents separately investigated the gambling conspiracy,

again using Title III electronic surveillance, and recorded twelve conversations between Bonavolante and others not involved in the drug ring. One of the tapes mentioned Camillio Grossi's role in the gambling operation. Bonavolante and Grossi defended in the drug prosecution by claiming that their activities, while illegal and conspiratorial, were limited to gambling, not drugs. They wished to offer the twelve tapes of gambling conversations as evidence to counter the government's tapes in which the defendants allegedly held drug-related conversations; in both sets of conversations, the speakers primarily used general language such as "thing," "the stuff," "that guy," and "anything" as well as a euphemism about "groceries" and "a quarter of salami." However, the gambling investigation had not been completed at the time of this trial, and disclosure of the tapes would have jeopardized the separate investigation and prosecution. The trial judge ruled that the U.S. need not disclose the tapes to the defendants. The U.S. disclosed the tapes to the defendants on appeal, after disclosure posed no danger to the other investigation.

Bonavolante and Camillio Grossi claim that the tapes tended to exculpate them, and that therefore they had a right to them under Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). They cite as support for their claim a Ninth Circuit case, United States v. Abascal, 564 F.2d 821 (9th Cir.1977). The government in that case argued that real estate language used in a taped conversation referred to LSD, and the defendant wanted to present other taped conversations using similar language which actually concerned real estate deals. The Abascal court held that suppression of the defense's tapes represented prejudicial error as to the charges of use of a telephone to further illegal activity. 564 F.2d at 830. That case is easily distinguishable, however, because the district court in Abascal had improperly suppressed the evidence as hearsay (564 F.2d at 830), whereas here, the court balanced the defendants' interests against the government's very real interest in keeping the tapes confidential. Thus, Bonavolante and Grossi must make a stronger case than did the defendant in Abascal to justify reversal of the ruling.

[2][3][4][5] We review the district court's ruling, made after an in camera review of the material, for an abuse of discretion. "When a criminal defendant seeks access to confidential informant files, we rely particularly heavily on the sound discretion of the trial judge to protect the rights of the accused as well as the government." United States v. Phillips, 854 F.2d 273, 277 (7th Cir.1988). To win a new trial, defendants must prove that there is a reasonable probability that disclosure of the evidence would have changed the outcome of the trial. United States v. Bagley, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481 (1985). Such a reasonable probability exists if the evidence undermines confidence in the outcome. Phillips, 854 F.2d at 277.

The defendants characterize the suppressed tapes as groundbreaking, likely to have convinced the jury that Grossi and Bonavolante limited their criminal activity to gambling and that they were simply swept up with the others, admittedly their friends and associates, who were the real cocaine conspirators. Yet the defendants did receive, and did admit into evidence several tapes made during the drug investigation of conversations limited to gambling. Bonavolante and Grossi fail to explain how the suppressed tapes differed significantly from these, or how the suppressed tapes could have augmented the admitted tapes except by volume. Thus the defendants were able to present their gambling defense without the suppressed tapes. The government admitted that both had been involved in a gambling conspiracy, and it admitted freely that several of the tapes from the drug investigation exclusively concerned gambling. The defendants presented their gambling defense using these and the "substitution theory" described below, and the jury rejected it. Moreover, the suppressed tapes were too ***1458** obscure and confusing to be effectual. Almost all of the so-called "code" words used in the suppressed tapes are generalities, and the taped conversations are vague and rambling in the extreme. Bonavolante and Grossi would have had to stage a miniature gambling trial simply to explain the suppressed tapes. We find it difficult to see how the tapes could have improved the defendants' case perceptibly, much less how they might have changed the outcome in the face of the government's evidence.

Further, even if the defendants had not had similar evidence to present, we do not believe that the gambling tapes are effectively exculpatory. Despite the defendants' characterizations, the drug tapes

primarily involve not code words, which require a prior agreement to acquire their secret meaning, but non-specific words like "thing," "anything," "stuff," "friend," and "guy." These words were given meaning by the speakers' conspiracy, as the government demonstrated by their actions before and after the calls. As such, their meaning cannot be refuted by a demonstration that at another time, the words had been used to mean something else; that is the very nature of such generalities, that they mean different things at different times. If someone says "that thing" and points at something, then the act of pointing provides a context for the generic word, which then means the object pointed at--until someone points at something else.

When "code" words rather than generalities appeared on the government's tapes, the government did not claim to have broken the code; rather, it demonstrated by the defendants' observed actions before and immediately after the calls that the "code" words must have referred to drugs. The probative value of the government's tapes lay not in the actual words, but in the way the conversations interacted with drug activity observed by the agents. For example, the U.S. introduced a taped conversation in which Demma spoke with Plescia and asked for "a quarter." As defense counsel points out, "a quarter" could refer to gambling paraphernalia or orders. In this case, however, Plescia told Demma he would make some inquiries, hung up, immediately called Camillio Grossi and asked for "a quarter of salami." Grossi replied, "Groceries like last time." Later that afternoon, Grossi delivered 125 grams of cocaine to Plescia, who delivered it in turn to Demma. These actions strongly indicate that the three defendants had just set up a drug transaction, and that "a quarter of salami" meant a quantity of cocaine. Tapes on which Bonavolante and gambling conspirators used the word "groceries" in other contexts, even about Grossi, would not undermine a jury's conclusion that in the Demma-Plescia-Grossi conversations, the defendants were talking about drugs, particularly because the suppressed conversations were all held with other people, several months before the taped drug conversations. Sometimes the word "groceries" means food, even to a drug conspirator.

The other tapes do not offer another context for the drug conversations, but are distinguishable precisely because they are set in another context. Even if the tapes were exculpatory, they would not suffice to undermine our confidence in the verdict. The trial judge had discretion to admit or suppress the gambling tapes, and we hold that he did not abuse that discretion.

II. Sentencing

[6][7] All five defendants challenge their sentences. All except Camillio Grossi were sentenced according to U.S. Sentencing Guideline § 2D1.1, which holds a drug conspirator accountable in sentencing "for all drug transactions that he was aware of or that he should have reasonably foreseen." United States v. Edwards, 945 F.2d 1387, 1394 (7th Cir.1991). The defendants claim that the trial judge attributed excessive quantities of cocaine to the conspiracy and to each conspirator. This court will not reverse a sentence unless it is based on a clearly erroneous drug volume. United States v. Mojica, 984 F.2d 1426, 1443 (7th Cir.1993).

Rizzato, the chief prosecution witness and one of the drug couriers, provided most of the information regarding the quantity of cocaine handled by the drug ring. He testified that he made at least ten trips to Florida to pick up cocaine, and that while most trips he carried 5 kilograms, on one occasion he ***1459** picked up 10 kilograms. He also testified that he was not the only courier, that Anthony Grossi made at least one trip to pick up cocaine, and that another courier made several trips. He also testified that Plescia often went to Florida to pay for or pick up cocaine. Accordingly, the trial court held that the conspiracy was responsible for more than 50, but less than 150, kilograms of cocaine.

[8] Plescia, as head of the drug ring, was held responsible for the drug volume of the entire conspiracy, and was sentenced in the 50 to 150 kilogram sentencing range. He argues on appeal that the record only supports a finding of 45 kilograms, but his rationale is flawed. He points out that Rizzato admitted to having lied in the past, concludes that Rizzato's word alone is untrustworthy, and concedes that motel slips and mileage records corroborate eight trips to pick up 5 kilograms of cocaine and one to pick up 10 kilograms for a total of 45 kilograms. However, it is not for us to judge the credibility of witnesses. The defendants did their best to impeach Rizzato,

including gaining his admission of previous lies, but the jury still found Rizzato credible, as did the trial court. The jury and the trial judge are best qualified to judge the credibility of witnesses appearing before them. Rizzato testified to having brought at least 55 kilograms from Florida to Chicago, and other couriers transported indefinite quantities beyond that amount. We affirm Plescia's sentence.

[9] Bonavolante argues that since he did not join the conspiracy until 1988, he should not be held accountable for the entire volume handled by the conspiracy. We have earlier held that "The judge may sentence a late entrant on the basis of all the drugs distributed only if the earlier distributions occurred as part of the conspiracy to which the defendant agreed." Edwards, 945 F.2d at 1397. That seems to be the case here. In any event, we need not reexamine the question whether a conspirator may be held accountable for drug distributions before the conspirator joined the ring, for there is evidence of more than ten trips by different couriers to Florida to purchase cocaine after Bonavolante joined the conspiracy. Since Rizzato testified that he never picked up less than 5 kilograms of cocaine per trip, it is reasonable to infer that different conspirators picked up over 50 kilograms of cocaine after Bonavolante joined the conspiracy. Given Bonavolante's status as financier with whom Plescia split the profits, the quantity was reasonably foreseeable to him.

[10] The trial court found that more than 20 kilograms of cocaine were reasonably foreseeable to Anthony Grossi. Since Rizzato, the Title III tapes, and the DEA agents' observation of Anthony's activities all indicate that he was an active participant in both the transportation and the distribution of cocaine and that he and Camillio Grossi worked together in holding and distributing the drugs, we find the trial court's conclusion amply supported by the record.

Unlike his codefendants, Camillio Grossi incurred his sentence under 21 U.S.C. § 841(b)(1)(A), because he had a prior conviction for a felony drug offense. That statute imposes a minimum sentence of 240 months if any previously convicted felon commits another offense involving more than 5 kilograms of cocaine. Since this mandatory minimum sentence exceeds the Guidelines range (188-235 months) for conviction for a felony drug offense involving more than 50 kilograms, the evidence need indicate only that over five kilograms of cocaine were reasonably foreseeable to Camillio Grossi. The evidence demonstrates Grossi's active role as a regular distributor of cocaine and easily supports his sentence.

For the reasons given, we affirm the sentences of these four defendants. We consider Demma's sentence below.

III. Demma's Conspiracy Conviction and Sentence

[11][12] Norman Demma argues on appeal, as he did at trial, that he was never a member of the conspiracy but merely in a buyer-seller relationship with Plescia. Demma correctly states that a buyer-seller transaction alone cannot support a conviction for conspiracy to distribute narcotics. United States v. Townsend, 924 F.2d 1385, 1394 (7th Cir.1991). Demma argues that his transactions ***1460** with Plescia were isolated, and that neither had an interest in the other's drug activities beyond each purchase. However, the evidence against Demma indicates a significantly greater relationship between Demma and Plescia than Demma argues now.

[13][14][15] Our circuit has held numerous times that "Evidence of frequent and repeated transactions, especially when credit arrangements are made, can support a conspiracy conviction. United States v. Dortch, 5 F.3d 1056 (7th Cir.1993), cert. denied, ---- U.S. ----, 114 S.Ct. 1077, 127 L.Ed.2d 394 (1994); United States v. Fort, 998 F.2d 542, 546 (7th Cir.1993); United States v. Edwards, 945 F.2d 1387, 1398, cert. denied, 503 U.S. 973, 112 S.Ct. 1590, 118 L.Ed.2d 308 (1992); [United States v. Sergio, 934 F.2d 875, 869 (7th Cir.1991)]." United States v. Fagan, 35 F.3d 1203, 1206 (7th Cir.1994). A purchaser of drugs for redistribution need not be accountable as an employee to the seller for a jury to find that the purchaser had joined in and furthered a conspiracy to distribute narcotics.

> It was up to the jury to determine whether [the defendant] had an ongoing relationship with other members of the conspiracy which would support the conclusion that he joined the agreement to distribute cocaine to the Windtramps. The jury was given a buyer-seller instruction; its verdict demonstrates that it rejected that interpretation of the facts. We cannot agree that the jury's conclusion was irrational or unsupported by

> probative evidence. Indeed, the evidence of an ongoing relationship in this case is even stronger than the evidence held to be sufficient in Fort. In Fort, there was only one completed transaction and a promise of future deals. [998 F.2d] at 543. Here, [the defendant] completed three transactions, and trial testimony established that a fourth would have occurred if the Windtramps had been able to locate him. This evidence suggests prolonged cooperation, indicating trust and "implying something more than a series of spot dealings at arm's length between dealers who have no interest in the success of each other's enterprise."

Dortch, 5 F.3d at 1066, quoting United States v. Lechuga, 994 F.2d 346, 349 (7th Cir.1993) (en banc). The Townsend court adds, "Evidence that the parties must negotiate the terms of every transaction, seek to maximize their gains at the expense of others, or engage in other forms of opportunistic behavior at the expense of the group, suggests that the transaction costs among the group are high and counsel against a finding of conspiracy between the members." Townsend, 924 F.2d at 1395.

In this case, Demma had bought cocaine from Plescia for years, ending only when the government broke up the drug ring. Demma bought in distribution quantities, not merely for personal use, and he arranged another purchase every three weeks to a month. On two occasions during the investigation, Plescia gave Demma cocaine on credit. Moreover, agents found Demma's home telephone number on a sheet of paper in Plescia's bedroom when they searched it. When Geiger, who was involved in the drug ring but apparently had no other connection with Demma, was stopped by DEA agents, Plescia called Demma's home six times in an attempt to warn him. Plescia also called Demma later at his home to set up a drug deal involving cocaine with a street value of $50,000. Nor was the relationship one-sided; after being chased and stopped by DEA agents, Demma called Plescia to warn him that DEA agents might be following him or might have wiretapped Plescia's phone or pager. Demma's long-term relationship with Plescia and his drug ring contradicts the claim that Demma was merely a casual buyer. Rather, the evidence supports the jury's conclusion that Demma was a conspirator with an interest in the success of the ring, who acted in furtherance of its illegal goals.

Moreover, this court established in Townsend that "limited participation can be probative of limited agreement" (924 F.2d at 1402) which nonetheless constitutes conspiracy, even if it is a more limited conspiracy than that charged by the government. Plainly, Demma's interaction with Plescia individually rises to the level of an ongoing agreement sufficient to constitute a conspiracy to distribute the drugs actually sold to and distributed by Demma. Townsend held that even if ***1461** the evidence supported conviction for a different conspiracy than the one with which the defendant was charged and indicted, this court will affirm the conviction. 924 F.2d at 1402. Whether the Demma-Plescia agreement was a separate conspiracy or a part of the larger conspiracy run by Plescia is relevant to Demma's sentence, but the evidence fully justifies his conviction for conspiracy.

[16] Demma's sentencing challenge, however, merits a closer examination. The judge sentenced Demma, like Plescia and Bonavolante, according to the entire volume of cocaine, more than 50 kilograms. Demma argues on appeal that he should not be held responsible for the entire volume of cocaine turned over by the larger conspiracy run by Plescia. Demma was involved in the conspiracy from its early days, making monthly or more frequent transactions over a period of years. He knew Plescia well, and since Plescia was willing to describe the scope of the drug ring to an undercover agent trying to buy cocaine, it is more likely than not that Demma knew the approximate volume of drugs Plescia bought and sold. Demma also knew Rizzato, the courier, and Camillio Grossi. However, Demma distributed relatively small quantities, and the government does not claim that he handled 50 kilograms himself.

[17][18][19] The scope of conspirators' liability is determined by the scope of the agreement they actually entered, not necessarily by the total volume of a larger conspiracy. "Townsend requires a trial court to scrutinize the agreement that an individual defendant entered into to determine whether he actually agreed to become involved in a conspiracy to distribute a given quantity of drugs.... Townsend makes clear that conspiracy law contains an important limiting principle--namely, that conspiracy liability cannot exceed the scope of a defendant's agreement to further criminal activity." Edwards, 945 F.2d at 1396. While Demma clearly

conspired to distribute illegal narcotics, his relative independence suggests that he may have conspired with Plescia to distribute some lesser amount than that distributed by the larger drug ring.

Our past decisions offer some guidance. In Townsend, an independent marijuana purchaser-dealer was held to be a conspirator in the overall marijuana conspiracy, but not the related cocaine and heroin conspiracies involving many of the same coconspirators. 924 F.2d at 1402. We see a closer parallel to Demma in United States v. Auerbach, 913 F.2d 407 (7th Cir.1990). The defendant in Auerbach claimed, like Demma, that as one of several purchasers from a drug ring, he did not take part in the larger conspiracy. This court disagreed.

> The evidence established that Helish dealt continuously with [his supplier] throughout the spring and summer of 1985. His purchases were not discrete transactions requiring limited contact with the conspiracy; rather, they required an ongoing relationship that soured only when Helish failed to move the marijuana fast enough.... "[I]f each [defendant retailer] knew, or had reason to know, that other retailers were involved ... in a broad project for the smuggling, distribution and retail sale of narcotics, and had reason to believe that their own benefits derived from the operation were probably dependent upon the success of the entire venture, the jury could find that each had, in effect, agreed to participate in the overall scheme." United States v. Grier, 866 F.2d 908, 924 (7th Cir.1989).... "While the parties to the agreement must know that others are participating in the conspiracy, they neither have to personally know the individuals involved nor do they have to participate in every facet of the conspiracy scheme."

Auerbach, 913 F.2d at 415, quoting United States v. Adamo, 882 F.2d 1218, 1224 (7th Cir.1989). In Edwards, 945 F.2d at 1400, this court affirmed the conspiracy conviction of "an insubstantial supplier who made a late entrance into the conspiracy," reversing his sentence only in consideration of the short period of his participation.

[20] Here, Demma's frequent large purchases over a long time made his venture dependent to a considerable extent upon the success of Plescia's operation. As the Auerbach court noted, " 'Separate conspiracies exist when each of the conspirators' agreements ***1462** has its own end, and each constitutes an end in itself.' ... Here, there was no divergence between [the defendant]'s aims and those of the conspiracy; both sought to get the same [narcotics] into the hands of users on the street." 913 F.2d at 416. We affirm Demma's sentence, determined with reference to the volume of drugs involved in the overall Plescia conspiracy.

[21][22] Finally, Demma challenges the forfeiture of his house, calling it inappropriate under forfeiture law and an excessive fine in violation of the Excessive Fines Clause of the Constitution. We find without extended discussion that the forfeiture was proper. Forfeiture of real estate is appropriate where the property is used in any way to facilitate any drug-related offense, unless the connection between the offense and the property is "incidental and fortuitous." United States v. 916 Douglas Ave., 903 F.2d 490, 493 (7th Cir.1990). The government claimed the house primarily on the basis of one phone call made by Plescia to Demma at his house in which the two set up a large cocaine transaction. There is no doubt that Demma used the privacy of his home to conduct drug-related business over the telephone, and he apparently gave his home number to Plescia so that he and others could contact Demma. The connection in this case is not incidental and fortuitous, but a fitting situation for forfeiture.

[23] Because Demma did not make his Excessive Fines argument until this appeal, we review only for plain error. United States v. Olano, ---U.S. ----, ----, 113 S.Ct. 1770, 1777, 123 L.Ed.2d 508 (1993). No such error appears in this case. Although the Supreme Court has not articulated a clear standard by which to judge claims of excessive fines, Justice Scalia in a concurrence wrote, "the question is not how much the confiscated property is worth, but whether the confiscated property has a close relationship to the offense." Austin v. United States, --- U.S. ----, ----, 113 S.Ct. 2801, 2815, 125 L.Ed.2d 488 (1993) (Scalia, J., concurring). See also Alexander v. United States, --- U.S. ----, 113 S.Ct. 2766, 125 L.Ed.2d 441 (1993). We have already found such a connection, and even if we consider how much the property was worth, Demma's claim fails. While Demma attacks the forfeiture of the house for one lone phone call, the government replies that Demma's equity in his one-half interest in the house was worth around $30,000, while the drug deal arranged in the phone call

concerned $50,000 worth of cocaine. Nor is there any reason to believe that this was most likely the only drug deal made from Demma's home. The government's power of forfeiture over the property used in illegal drug transactions is one of its harsher powers, but the fine levied on Norman Demma in this case is far from an extreme example of its use.

IV. Other Contentions

The remainder of the defendants' arguments merit little discussion, so we briefly mention only a few. Several of the issues which defendants raise now were not properly preserved for appeal. An important example involves the defendants' expert witness on tapes and tape recordings. Plescia claims now that the expert testimony was crucial to Plescia's argument that the Title III surveillance tapes recorded by the government had been tampered with and should not be trusted. However, the pre-trial hearing on this issue revealed that the witness did not then intend to testify that he believed the tapes had been changed. His testimony regarding the technical aspects of the tapes was specialized and confusing, and the inferences Plescia wished to draw were speculative. Nonetheless, the district court did not then exclude the testimony. Instead, he invited the defendants to bring the witness to the stand during trial, so the judge could hear the questions and the government's objections before ruling on admissibility. The defendants never called their expert to the stand, and thus they waived their claim that his testimony should have been permitted. United States v. Addo, 989 F.2d 238, 242 (7th Cir.1993).

Similarly, Demma claims now that the court improperly refused to re-open the proofs at the end of the trial to allow him to testify. However, just after his lawyer made the motion, in the judge's chambers with only his own counsel and the judge, Demma refused ***1463** to testify. Several times during the trial, Demma had been informed of his right to testify, he had discussed the issue with his lawyer at some length, and he always refused, thereby waiving the right.

[24][25] Only Anthony Grossi preserved the argument for suppression of the Title III tapes. He argues that the district court should have suppressed the tapes because the government failed to seal them in a timely manner upon expiration of the permitted surveillance period as required by 18 U.S.C. § 2518(8)(a). That section provides:

> Immediately upon the expiration of the period of the order [authorizing the surveillance], or extensions thereof, ... recordings [made of the electronic surveillance] shall be made available to the judge issuing such order and sealed under his directions.

To determine whether the tapes should have been suppressed, "we must consider whether the Government established good cause for the sealing delays that occurred in this case." United States v. Ojeda Rios, 495 U.S. 257, 265, 110 S.Ct. 1845, 1850, 109 L.Ed.2d 224 (1990). The government notes first that because a second surveillance period followed the first, it was treated as an extension of the first, preventing any need for sealing between the periods. United States v. Carson, 969 F.2d 1480, 1488 (3d Cir.1992). Second, the government reasonably explains the delay between the periods as necessary to draft the Title III surveillance request affidavit and to get the request processed by the federal bureaucracy. Third, the government points out that it did seal the tapes two weeks after the end of the first period in a good-faith effort to comply with the statute in the face of an innocent delay in processing the request for a second surveillance period. We believe that the government has provided good cause for the delay and has fulfilled the demands of the sealing statute.

[26][27] Other of the defendants' contentions are simply unsuccessful. Defendants argue that the Title III electronic surveillance was improper under 18 U.S.C. § 2518(1)(c) because investigators had enough evidence without it and/or could have obtained sufficient evidence through ordinary investigative techniques. However, "[o]ur Circuit recognizes that 'the government's burden of establishing its compliance with [subsection 2518(1)(c)] is not great,' and that the requirement that the government exhaust 'normal investigative procedures' be reviewed in a 'practical and common-sense fashion.' " United States v. Zambrana, 841 F.2d 1320, 1329 (7th Cir.1988) (citations omitted). From a practical perspective, the defendants' claim fails. Even if it were true that the government could have prosecuted Plescia without the tapes, the wiretaps both allowed the government to ascertain the extent and structure of the conspiracy and provided enough evidence to convict these five, the key players in the drug ring.

It would have been far more difficult or impossible to determine the extent of their involvement, such as Bonavolante's role as financier, by merely observing transactions from a distance.

Plescia argues that tapes of his conversations with an informant, who did not testify at trial, should have been suppressed as hearsay. The informant's statements, however, were not offered for their truth, but only to give context to Plescia's own self-incriminating words. See United States v. Davis, 890 F.2d 1373, 1380 (7th Cir.1989).

[28] The chief witness for the prosecution was the courier Rizzato, a Chicago police officer on disability who had been involved in the conspiracy from the beginning, with a brief hiatus from 1988 to 1989. The defendants claim that they were improperly limited in their attempts to impeach him several ways. First, they cross-examined him regarding several lies he had told while under oath in the past, lies with considerable detail and specificity. He admitted that he had in the past lied while under oath, and he admitted that his lies had been creative and detailed. However, the trial court refused to allow cross-examination into the details of the lies because their prejudicial effect would outweigh any probative value. Fed.R.Evid. 403. In fact, Rizzato had lied several times in telling people that he had killed African-American gang members in retaliation for the murder of his brother, also a Chicago police officer, by African-American gang ***1464** members. Rizzato had also lied while under oath at a hearing in the Chicago Police Department regarding his positive drug test for cocaine. Rizzato had claimed that a woman he had met when feeling lonely and depressed had slipped him the drug, which he had thought was something else.

[29] "[T]rial judges retain wide latitude ... to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." Delaware v. Van Arsdall, 475 U.S. 673, 679, 106 S.Ct. 1431, 1435, 89 L.Ed.2d 674 (1986). Given that Rizzato freely admitted on the stand that he had lied in detailed ways while under oath, and given the prejudicial effect a claim of the murder of African-American gang members would have, we feel that further cross-examination into the details was unnecessary, probably prejudicial, and properly precluded. Rizzato willingly admitted his criminal activity while a police officer, his drug use, and the lies he told to conceal his illegal acts, and the jury found his frequently corroborated testimony credible regardless.

[30] The trial judge also prevented the defendants from cross-examining Rizzato regarding certain anti-depressive and anti-anxiety medication, including Prozac, which he was taking at the time of trial and when the events he described had occurred. The defendants argue that these drugs could have affected Rizzato's perception and memory, but they did not offer any expert testimony regarding the effects of the medications either generally or on Rizzato. The trial judge correctly ruled that line of cross-examination more prejudicial and confusing than useful for impeachment, particularly because Prozac had often been mentioned negatively in popular media at that time.

[31] Camillio Grossi and Bonavolante further attack the trial judge's decision not to allow their follow-up questions regarding Rizzato's brother-in-law, Carlo Plescia, in support of his defense theory that Rizzato had replaced Carlo Plescia, the real financier of the drug ring, with Grossi and Bonavolante, leader of a gambling ring, in an attempt to protect his sister's husband. Since Rizzato had testified that he did not remember the statement about which Bonavolante wanted to question him, follow-up questions were improper. Bonavolante and Grossi were not prejudiced, because Rizzato fully described his relationship with Carlo Plescia and implicated him in the drug conspiracy and because the defendants were able to present their substitution theory elsewhere.

[32] Camillio Grossi and Bonavolante also wished to call a witness to testify that Rizzato told him he intended to substitute them for Carlo Plescia. However, the witness, who was also involved in the conspiracy, stated that he would plead the Fifth Amendment right against self-incrimination on cross-examination. The government demonstrated in a hearing that the witness would effectively preclude its impeachment of him for considerable bias and previous inconsistent statements by claiming the Fifth. The district court may refuse to permit a witness to testify when that witness' right

against self-incrimination precludes effective cross-examination. United States v. Herrera-Medina, 853 F.2d 564, 567-68 (7th Cir.1988). The trial judge therefore properly refused to allow the witness to testify. Further, the defendants were not greatly disadvantaged. The witness could only have tried further to impeach Rizzato, but he could not have proven the substitution theory, because Rizzato's statements to the witness would represent impermissible hearsay if offered for their truth.

[33][34][35] Plescia argues that the judge should have declared a mistrial because a DEA officer, mistaking him for another officer, asked him a question about the cocaine present as an exhibit. Plescia did not respond in any way. The judge questioned the jurors and determined that there is no indication that any juror overheard the very brief interaction. The judge properly instructed the jury immediately thereafter to consider only the evidence formally presented in the trial. A defendant is entitled to a new trial only if there is a "reasonable possibility" that the jury's verdict has been affected by material not properly admitted into ***1465** evidence. United States v. Davis, 15 F.3d 1393, 1413 (7th Cir.1994). We review the district court's ruling for an abuse of discretion, "and, as an appellate court sitting one step removed from the trial, we shall reverse the district court's decision only if we have a very strong conviction of error." United States v. Sanders, 962 F.2d 660, 669 (7th Cir.1992) (citations omitted). We find that the district court committed no error, because there is no reasonable possibility that the jury was affected by the exchange.

This was a long and complex trial. In such a trial it is almost inevitable that some error or at least questionable ruling may occur during the course of it. It is equally true, however, that the adverse impact upon a jury of such rulings, where otherwise isolated, is diminished in proportion to the length of the trial so that "while every additional day of trial increases the possibility of error, it correspondingly reduces the risk that any single error may have prejudicial effect upon the result." Cf. In re Beverly Hills Fire Litigation, 695 F.2d 207, 227 (6th Cir.1982). That observation is particularly true here. As a whole, the trial was conducted in an orderly fashion and with conscientious regard for the defendants' rights. Nothing we have seen in the record here undermines our belief that the defendants received a fair trial, were properly found guilty and were sentenced appropriately. Accordingly, we AFFIRM.

END OF DOCUMENT

INSTA-CITE

CITATION: 48 F.3d 1452

Direct History

1 U.S. v. Plescia, 773 F.Supp. 1068 (N.D.Ill., 1991) (NO. 90 CR 463)
Affirmed by
=> 2 **U.S. v. Plescia,** 48 F.3d 1452, 41 Fed. R. Evid. Serv. 892 (7th Cir.(Ill.), Mar 08, 1995) (NO. 92-1222, 92-1225, 92-1223, 92-1226, 92-1224, 93-3405), rehearing and suggestion for rehearing en banc denied (Apr 19, 1995)
Certiorari Dismissed by
3 Grossi v. U.S., 116 S.Ct. 32, 132 L.Ed.2d 914, 64 USLW 3167 (U.S., Sep 08, 1995) (NO. 95-276)
AND Certiorari Denied by
4 Demma v. U.S., 116 S.Ct. 114, 133 L.Ed.2d 66, 64 USLW 3242 (U.S., Oct 02, 1995) (NO. 95-5053)
AND Certiorari Denied by
5 Grossi v. U.S., 116 S.Ct. 114, 133 L.Ed.2d 66, 64 USLW 3242 (U.S., Oct 02, 1995) (NO. 95-5264)
AND Certiorari Denied by
6 Plescia v. U.S., 116 S.Ct. 114, 133 L.Ed.2d 66, 64 USLW 3242 (U.S., Oct 02, 1995) (NO. 94-9447)
AND Certiorari Denied by
7 Grossi v. U.S., 116 S.Ct. 329, 133 L.Ed.2d 230, 64 USLW 3270 (U.S., Oct 10, 1995) (NO. 95-5925)
Rehearing Denied by
8 Grossi v. U.S., 116 S.Ct. 556, 133 L.Ed.2d 457, 64 USLW 3379 (U.S., Nov 27, 1995) (NO. 95-5925)

=> 9 **U.S. v. Plescia,** 48 F.3d 1452, 41 Fed. R. Evid. Serv. 892 (7th Cir.(Ill.), Mar 08, 1995) (NO. 92-1222, 92-1225, 92-1223, 92-1226, 92-1224, 93-3405), rehearing and suggestion for rehearing en banc denied (Apr 19, 1995)
Certiorari Denied by
10 Bonavolante v. U.S., 116 S.Ct. 351, 133 L.Ed.2d 247, 64 USLW 3286 (U.S., Oct 16, 1995) (NO. 95-6034)

Related References

11 U.S. v. Geiger, 847 F.Supp. 613 (N.D.Ill., Mar 24, 1994) (NO. 92 C 4750, 90 CR 463)

UNITED STATES of America, Plaintiff-Appellee,
v.
David J. TOWNSEND, Defendant-Appellant.

No. 93-2463.

United States Court of Appeals,
Fifth Circuit.

Aug. 25, 1994.

Defendant was convicted in the United States District Court for the Southern District of Texas, Melinda Harmon, J., of evading excise taxes on gasoline. Defendant appealed. The Court of Appeals, Reynaldo G. Garza, Circuit Judge, held that: (1) evidence was sufficient to support finding that defendant took affirmative acts of tax evasion; (2) evidence was sufficient to support finding that defendant acted willfully in evading payment of excise taxes; and (3) district court did not abuse its discretion by restricting cross-examination, for purpose of impeaching credibility, of employee of defendant's company concerning employee's conduct in allegedly falsifying company's corporate records.

Affirmed.

[1] CRIMINAL LAW ⇐ 1159.2(7)
110k1159.2(7)
Standard of review for sufficiency of evidence appeals is whether rational fact finder could find essential elements constituting crime beyond a reasonable doubt.

[2] CRIMINAL LAW ⇐ 1144.13(5)
110k1144.13(5)
In viewing evidence under rational fact finder standard, Court of Appeals is obliged to take all inferences reasonably drawn from the evidence in the light most favorable to verdict.

[3] INTERNAL REVENUE ⇐ 5263.10
220k5263.10
To prove offense of tax evasion, government must prove: (1) existence of tax deficiency; (2) affirmative act constituting evasion or attempted evasion of tax; and (3) that defendant acted willfully. 26 U.S.C.A. § 7201.

[4] INTERNAL REVENUE ⇐ 5263.10
220k5263.10
Statute prohibiting tax evasion is not limited to prosecutions of those who evade taxes that they may owe themselves, but rather it encompasses prosecutions of any person who attempts to evade tax of anyone. 26 U.S.C.A. § 7201.

[5] INTERNAL REVENUE ⇐ 5299
220k5299
Evidence was sufficient to support finding that defendant took affirmative acts of tax evasion; defendant prepared fraudulent registration for tax-free transactions, presented fraudulent form to gasoline sellers, arranged for sale of gasoline to unregistered retailer, and signed exemption certificate certifying that he was registered to purchase tax-free gasoline. 26 U.S.C.A. § 7201.

[6] INTERNAL REVENUE ⇐ 5300
220k5300
Evidence was sufficient to support finding that defendant acted willfully in evading payment of excise taxes on gasoline sales; defendant was experienced in motor fuels industry and demonstrated familiarity with legal duties imposed by federal tax scheme, obtained and fraudulently completed registration for tax-free transactions and presented it to distributors, manifested knowledge that his actions were unlawful by attempting to hide them from distributor and Internal Revenue Service (IRS) agents, and attempted to conceal transactions by conducting them through bank account which was not maintained by his company. 26 U.S.C.A. § 7201.

[7] CRIMINAL LAW ⇐ 1153(4)
110k1153(4)
District Court's ruling restricting defendant's cross-examination of witnesses would be reviewed under abuse of discretion standard.

[8] CRIMINAL LAW ⇐ 1170.5(5)
110k1170.5(5)
Formerly 110k11701/2(5)
If Court of Appeals finds abuse of discretion in district court's ruling restricting defendant's cross-examination of witnesses, it views error under harmless error doctrine.

[9] CRIMINAL LAW ⇐ 662.7

110k662.7
Right and opportunity to cross-examine adverse witness is guaranteed by Sixth Amendment. U.S.C.A. Const.Amend. 6.

[10] WITNESSES ⇐ 267
410k267
Trial court is given wide latitude in imposing reasonable restraints upon defendant's right to cross-examination of witnesses.

[11] WITNESSES ⇐ 349
410k349
Trial court may not place witness' character or reputation for veracity outside scope of inquiry on cross-examination.

[12] WITNESSES ⇐ 344(5)
410k344(5)
District Court did not abuse its discretion in tax evasion case against defendant chief executive officer of gasohol blending company by restricting cross-examination, for purpose of impeaching credibility, of employee of company concerning employee's conduct in allegedly falsifying company's corporate records; district court disputed defendant's contention that records were falsified, and held that admitting the evidence would only mislead and confuse jury, and prolong trial. Fed.Rules Evid.Rules 403, 608(b), 28 U.S.C.A.

[13] CRIMINAL LAW ⇐ 1153(1)
110k1153(1)
Court of Appeals will reverse decision of trial court in excluding or admitting evidence only upon showing that trial court abused its discretion in weighing probative value of evidence against its prejudicial effect. Fed.Rules Evid.Rule 403, 28 U.S.C.A.

[14] WITNESSES ⇐ 344(5)
410k344(5)
District court did not abuse its discretion in tax evasion case against defendant chief executive officer of gasohol blending company by restricting cross-examination of two employees of company concerning their conduct in allegedly falsifying company's corporate records, for purpose of demonstrating their propensity, motive, and opportunity to falsify excise tax forms; evidence of conduct was introduced to show conformity rather than motive or intent, in contravention to rule governing evidence of similar bad acts, crimes, or wrongs. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

[15] WITNESSES ⇐ 352
410k352
District court did not abuse its discretion in tax evasion case against defendant chief executive officer of gasohol blending company by restricting cross-examination of gasoline buyer regarding buyer's alleged bad business practices, for purposes of revealing evidence of bad acts admissible to prove intent or opportunity; district court found no evidence that buyer knew of or aided defendant in tax evasion scheme. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

[16] WITNESSES ⇐ 344(1)
410k344(1)
District court did not abuse its discretion in tax evasion case against defendant chief executive officer of gasohol blending company by restricting cross-examination of gasoline buyer regarding buyer's alleged bad business practices, for purpose of impeaching buyer's credibility; district court did not find that buyer participated in any tax evasion scheme, and admission of evidence of trivial acts such as untimely payment, absent evidence of fraudulent scheme, could confuse issues and mislead jury. Fed.Rules Evid.Rule 608(b), 28 U.S.C.A.

[17] WITNESSES ⇐ 374(1)
410k374(1)
District court did not abuse its discretion in tax evasion case against defendant chief executive officer of gasohol blending company by prohibiting cross-examination into letter from company official expressing official's desire to align himself with Internal Revenue Service's (IRS) position in order to avoid company's tax liability; defendant failed to show any evidence that official would receive any benefit from cooperating with government. Fed.Rules Evid.Rule 403, 28 U.S.C.A.

[18] CRIMINAL LAW ⇐ 1170(1)
110k1170(1)
In tax evasion case against defendant chief executive officer of gasohol blending company, exclusion of testimony that defendant was not personally liable for excise tax was harmless error, since anyone who willfully evaded tax would be in violation of statute regardless of who owed tax. Fed.Rules Evid.Rule 403, 28 U.S.C.A.; 26 U.S.C.A. § 7201.

[19] CRIMINAL LAW ⇐ 469.2
110k469.2
Admissibility of expert testimony rests within sound discretion of district court and will be reversed only upon clear showing of abuse of discretion.

[19] CRIMINAL LAW ⇐ 1153(1)
110k1153(1)
Admissibility of expert testimony rests within sound discretion of district court and will be reversed only upon clear showing of abuse of discretion.

[20] CRIMINAL LAW ⇐ 478(1)
110k478(1)
To qualify as expert, witness must have specialized knowledge or training such that his or her testimony will assist fact finder in determination of fact issue.

[21] CRIMINAL LAW ⇐ 470(2)
110k470(2)
Expert's testimony in tax evasion case did not concern mental state of defendant so as to usurp jury's role; expert did not opine that defendant intended to file fraudulent form, but rather that form was invalid, and expert did not express opinion about defendant's state of mind. Fed.Rules Evid.Rule 704(b), 28 U.S.C.A.

[22] CRIMINAL LAW ⇐ 338(7)
110k338(7)
In tax evasion case, probative value of expert's opinion as to existence of tax deficiency and defendant's personal liability for tax outweighed its prejudicial effect; testimony presented by government would invariably be prejudicial to criminal defendant, expert's testimony as to existence of tax deficiency was probative of element required for successful prosecution of tax evasion, and testimony that defendant was personally liable arguably had probative value in that someone would be more likely to evade their own tax than another's. Fed.Rules Evid.Rule 403, 28 U.S.C.A; 26 U.S.C.A. § 7201.

[23] INTERNAL REVENUE ⇐ 5317
220k5317
In tax evasion case, district court did not abuse its discretion in refusing to instruct jury that it could find defendant liable for evading taxes only if he personally owed taxes; instruction traced tax evasion statute and informed jury that it could convict defendant for evading his company's tax liability, and proposed instruction was not substantively correct. 26 U.S.C.A. § 7201.

[24] CRIMINAL LAW ⇐ 1152(1)
110k1152(1)
Standard of review for district court's refusal to give proffered jury instruction is abuse of discretion.

[25] CRIMINAL LAW ⇐ 1172.1(1)
110k1172.1(1)
Conviction will not be reversed for improper jury instructions unless instructions failed to correctly state the law.

[26] CRIMINAL LAW ⇐ 835
110k835
Refusal to deliver requested jury instruction is reversible error only if proposed instruction was: (1) substantively correct; (2) not substantively covered in jury charge; and (3) concerned important issue in trial, such that failure to give requested instruction seriously impaired defendant from presenting defense.

[26] CRIMINAL LAW ⇐ 1173.2(1)
110k1173.2(1)
Refusal to deliver requested jury instruction is reversible error only if proposed instruction was: (1) substantively correct; (2) not substantively covered in jury charge; and (3) concerned important issue in trial, such that failure to give requested instruction seriously impaired defendant from presenting defense.

***264** H. Michael Sokolow, Asst. Federal Public Defender, Roland E. Dahlin, Federal Public Defender, Houston, TX, for appellant.

Paula C. Offenhauser, Asst. U.S. Atty., Lawrence Finder, U.S. Atty., Houston, TX, Karen M. Quesnel, Robert E. Lindsay, Chief, Alan Hechtkopf and Gail Brodfuehrer, Crim. Appeals & Tax Enforcement Policy Section, Tax Div., Dept. of Justice, Washington, DC, for appellee.

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

Before REYNALDO G. GARZA, SMITH and PARKER, Circuit Judges.

REYNALDO G. GARZA, Circuit Judge:

Defendant was convicted under I.R.C. § 7201 for evasion of excise tax. The district court found a tax deficiency, affirmative acts constituting tax evasion, and that defendant acted willfully. For the reasons discussed below we affirm.

I. Introduction

This case involves the use of a fraudulent Form 637 in an attempt to circumvent federally imposed excise tax. In 1987 federal law imposed an excise tax of nine cents on each gallon of gasoline sold for highway use. A ***265** wholesale distributor of gasoline holding a valid "Registration for Tax-Free Transactions," or Form 637, could purchase gasoline free of the excise tax. A Form 637 enables a distributor to purchase gas tax-free and sell it tax-free to a registered wholesaler or retailer. The distributor becomes liable for the excise tax if it sells to an unregistered buyer. In this case Appellant fraudulently presented a Form 637 to several distributors, purchased the gas, and then promptly sold the gas to an unregistered buyer.

II. Background

David Townsend, the inventor of a gasoline oxygenating product, moved his California-based fuel blending business (Anafuel) to Houston, Texas in 1986. Townsend, with Lloyd Maxwell, Lamar Maxwell, David Maxwell, Don Maxwell, and Arthur Maxwell formed Petrolife, Inc. (Petrolife), a gasohol blending company. Appellant Townsend was named chief executive officer, Lloyd Maxwell was named the secretary-treasurer and chief financial officer, and Lamar Maxwell was named president.

In November of 1986 Petrolife decided to apply for a Form 637. Signed by Lloyd Maxwell as chief financial officer and dated November 20, 1986, the form was submitted to the IRS. IRS Agent Mike Grayson met with Lloyd Maxwell and Charles Crockett, a Petrolife employee, to discuss the application. Agent Grayson explained the requirements of the Form 637 and told them that it could take several months to obtain approval. Petrolife decided that they were not prepared to disclose all the necessary financial information required for approval at that time. Consequently, the application was deferred. Mr. Crockett was to retain Petrolife's copies of the application until the corporation was ready to reapply. Petrolife never reapplied for the Form 637.

Subsequently, Appellant asked Mr. Crockett for the application. Mr. Crockett handed the application to him under the assumption that he was seeking to reapply for approval. Later that day Townsend showed Mr. Crockett the Form 637 and said that he had obtained a registration number and the signature of the IRS district director. [FN1]

> FN1. Mr. Crockett testified that he was surprised that Townsend was able to procure approval of the Form 637 so quickly and seemingly without leaving the building. It was his understanding that it could take several months to obtain approval.

In July of 1987 Townsend contacted Jetero, a gasoline distributor, and expressed interest in making a purchase. Jetero met with Townsend and discussed forms Jetero required before fuel could be supplied. Townsend provided the necessary forms, including the fraudulent Form 637. These forms listed Petrolife as a manufacturer selling gasohol and listed Petrolife/Anafuel as the purchaser. Upon receipt of the required forms Jetero commenced supplying the fuel tax-free. The Jetero invoices were addressed to "Petrolife, Attn: David J. Townsend."

A total of 264,030 gallons of gasoline were purchased from Jetero in August of 1987.

Townsend also contacted Crown, another gasoline distributor, expressing his desire to purchase gasoline. After he provided the requested documentation, including the fraudulent Form 637, Crown began supplying gasoline. The checks used to pay for the gas listed Petrolife/Anafuel as purchaser. A total of 161,679 gallons of gasoline were purchased from Crown in August of 1987.

The gasoline supplied by Jetero and Crown was shipped to Mr. Chehade Boulos, a service station operator. The funds used by Townsend were drawn from an account opened in the name of Anafuel at the Lone Star Bank. Mr. Boulos would make deposits to this account in exchange for the gasoline shipments. The bank would then issue cashier checks, which were used to pay Crown and Jetero. Basically, Townsend used the funds prepaid by Mr. Boulos to make the payments to Crown and Jetero.

No taxes were paid by Townsend or Petrolife on the gasoline sold to Mr. Boulos. [FN2] By using the fraudulent Form 637 and purchasing gas through an Anafuel account, Townsend acted without the knowledge or ***266** consent of the other officers of Petrolife. When Mr. Crockett became aware of Appellant's transactions he informed Mr. Lloyd Maxwell of his intention to inform the IRS. Mr. Maxwell approved.

FN2. Mr. Boulos testified that he thought the taxes were included in the purchase price of the gasoline.

IRS Agent Grayson became aware of the fraudulent Form 637 during a routine inspection of Jetero's records. Agent Grayson immediately knew the form was invalid. First, he knew that Petrolife's Form 637 had never been approved. Second, the registration number did not correspond to the numbers issued by the Houston office. Third, the signatures on the form were not signed properly. Agent Grayson spoke with Mr. Gonzales, the owner of Jetero, concerning the problem. Mr. Gonzales told Appellant that the registration number was invalid. Townsend responded rather angrily that the number was correct. Later he told Mr. Gonzales that he had a new temporary number. Notwithstanding the temporary number, Mr. Gonzales refused to sell any more gasoline to Townsend on advice of the IRS.

IRS Agent Vitz took over the investigation. Agent Vitz observed the same inconsistencies in the Petrolife Form 637 and therefore contacted Townsend. On September 5, 1987 Agent Vitz requested more information regarding the application. Townsend promised that the information would be forthcoming. After receiving no new information, Agent Vitz paid a visit to his office. Townsend again stated that the registration number was a temporary number issued by the Houston office. But no temporary numbers had issued in 1987.

Agent Taylor met with Townsend and showed him the fraudulent Form 637 and asked if he had ever seen this form. Townsend replied that Mr. Crockett had presented this form to him but that he, Townsend, had never given it to anyone.

On May 20, 1992 a grand jury indicted Townsend for attempting to evade federal excise taxes in violation of I.R.C. § 7201. Townsend was convicted by a jury before Honorable Melinda Harmon in March of 1993. He was sentenced to 14 months in prison and three years supervised release; he was fined $10,000 and specially assessed $50.

Townsend appeals the district court's rulings on four bases. The first basis asserted is whether there was sufficient evidence to support a conviction. Second is whether the district court abused its discretion in limiting Appellant's cross-examination of certain witnesses. The third basis is whether the district court abused its discretion in allowing opinion testimony concerning Appellant's liability on federal excise tax. The fourth basis Appellant urges is whether the district court erred in failing to include a proposed jury instruction in the charge. For reasons discussed below, we affirm the decision of the district court.

III. Discussion

1. Sufficiency of the Evidence to Support the Conviction

[1][2] The standard of review for sufficiency of evidence appeals is whether a rational fact finder could find the essential elements constituting the crime beyond a reasonable doubt. United States v. Nixon, 816 F.2d 1022, 1029 (5th Cir.1987), cert. denied, 484 U.S. 1026, 108 S.Ct. 749, 98 L.Ed.2d 762 (1988). In viewing the evidence under the rational fact finder standard, this Court is obliged to take all inferences reasonably drawn from the evidence in the light most favorable to the verdict. United States v. Molinar-Apodaca, 889 F.2d 1417, 1423 (5th Cir.1989).

[3][4] To prove a violation of I.R.C. § 7201 the government must prove (1) the existence of a tax deficiency, (2) an affirmative act constituting an evasion or attempted evasion of the tax, and (3) that the defendant acted willfully. Sansone v. United States, 380 U.S. 343, 351, 85 S.Ct. 1004, 1010, 13 L.Ed.2d 882 (1965); United States v. Wisenbaker, 14 F.3d 1022, 1024 (5th Cir.1994). The first issue that must be addressed is whether there was a tax deficiency. Wisenbaker, 14 F.3d at 1024. Excise taxes for the quarter ending September 30, 1987 were due and owing in the amount of $38,313.81 [FN3] on ***267** the gasoline bought from Crown and Jetero and resold to Mr. Boulos. The existence of a

tax deficiency was not contested by Appellant. However, Appellant did take issue as to who owed the tax. He claims that Petrolife owed the tax and he therefore could not be convicted of evading tax of another. This is clearly wrong. I.R.C. § 7201 provides that it is a violation for "any person" to willfully attempt to evade or defeat "any tax." I.R.C. § 7201 is not limited to prosecutions of those who evade taxes that they may owe themselves, but rather it encompasses prosecutions of any person who attempts to evade the tax of anyone. See id. at 1024-25. It is the act of evasion that is proscribed; adopting the limited reading Appellant asserts would severely restrict if not defeat the purpose of the statute.

FN3. A total of 425,709 gallons of gasoline was bought and resold: 264,030 gallons from Jetero and 161,679 gallons from Crown. The deficiency arose automatically when the tax became due at the end of the quarter and no excise tax return was filed.

[5] The second issue that must be determined is whether Appellant committed an affirmative act of tax evasion. Id. at 1024. Townsend contends that the government failed to prove this element. Taken in the light most favorable to the verdict, the evidence reveals that Townsend committed numerous affirmative acts. Townsend prepared a fraudulent Form 637 that contained two forged signatures and a fabricated registration number. He presented the fraudulent Form 637 to Crown and Jetero in furtherance of his tax-free transaction. He also arranged for the purchase and subsequent sale of gasoline to Mr. Boulos, an unregistered retailer. Townsend signed a customer card agreement enabling him to purchase tax-free gasoline from Crown and signed a federal excise tax exemption certificate required by Jetero, certifying that he was registered to purchase tax-free gasoline. He arranged for the purchase to be made with cashiers checks that were paid from funds deposited by Mr. Boulos into an account opened in the name of Anafuel over which Townsend's son had signature authority. Subsequent to the purchase and sale, Townsend told Agent Taylor that he had never presented the Form 637 to anyone when in fact he had. Finally, he told Agent Vitz that he had obtained a temporary registration number, which turned out to be fabricated. Taking this evidence as true establishes beyond a reasonable doubt that Townsend took affirmative acts of tax evasion.

[6] The final issue in which this Court must inquire is whether Appellant acted willfully. Id. at 1024. The U.S. Supreme Court has recognized that the term "willfully" connotes a voluntary, intentional violation of a known legal duty. United States v. Pomponio, 429 U.S. 10, 12, 97 S.Ct. 22, 23, 50 L.Ed.2d 12 (1976). I.R.C. § 7201 imposes that duty and the evidence taken in the light most favorable to the verdict establishes that Appellant acted willfully in violation of this duty. Townsend was experienced in the motor fuels industry and demonstrated familiarity with legal duties imposed by the federal tax scheme. He was no proverbial babe in the woods. He obtained and fraudulently completed a Form 637 and presented it to distributors. Townsend manifested knowledge that his actions were unlawful by attempting to hide them from both Jetero and the IRS agents. Finally he attempted to conceal the gasoline transactions by conducting them through a non-Petrolife bank account. Therefore, the evidence established a tax deficiency, revealed affirmative acts constituting an attempt to evade the excise tax, and demonstrated that Townsend acted willfully.

2. Cross-Examination of Government Witnesses

[7][8][9][10][11] Appellant argues that the district court erred in restricting his cross-examination of various government witnesses regarding (a) falsification of corporate records, (b) bad business practices, and (c) testimony that Townsend was personally liable for excise tax. The applicable Federal Rules of Evidence are 403, 404(b), and 608(b). [FN4] "The admission or exclusion of evidence at trial is a matter committed to the discretion of the trial court." United States v. Moody, 903 ***268** F.2d 321, 326 (5th Cir.1990). We review the trial court's ruling under the abuse of discretion standard. Id. If we find that an abuse of discretion has occurred we view the error under the harmless error doctrine. Id. The right and opportunity to cross-examine an adverse witness is guaranteed by the sixth amendment. Delaware v. Van Arsdall, 475 U.S. 673, 678-79, 106 S.Ct. 1431, 1435, 89 L.Ed.2d 674; Moody, 903 F.2d at 329. However, the trial court is given "wide latitude" in imposing reasonable restraints upon defendant's right to cross-examination. Moody, 903 F.2d at 329. [FN5]

FN4. Appellant asserts due process violations yet

cites only evidentiary authority. Accordingly, we will address each issue under the Federal Rules of Evidence.

FN5. The trial court may not place the witness's character or reputation for veracity outside the scope of inquiry. Moody, 903 F.2d at 329; See generally United States v. Garza, 754 F.2d 1202, 1206 (5th Cir.1985).

A. Falsification of Corporate Records

[12] Townsend contends that the district court abused its discretion in overly restricting the cross-examination of Mr. Crockett and Mr. Maxwell concerning their conduct in allegedly falsifying Petrolife's corporate records. Townsend claims that Mr. Crockett's deposition indicated that the records were falsified in anticipation of bankruptcy and the IRS investigation. Appellant sought to introduce this evidence in hopes of impeaching their testimony. Rule 608(b) of the Federal Rules of Evidence provides that a witness may be questioned about specific instances of conduct, in the discretion of the trial court, to attack the witness's reputation for truthfulness. Rule 403 requires the trial court to balance the dangers of unfair prejudice, confusion of the issues, misleading the jury, or waste of time against the probative value of the evidence.

[13] The district court found that Mr. Crockett's deposition did not support Appellant's assertion that the corporate minutes were falsified. The district court disputed Appellant's contention of falsification finding a lack of evidence to support this line of questioning. [FN6] Furthermore, the district court held that admitting the evidence would only serve to mislead and confuse the jury, and prolong the trial. This Court will reverse a decision of the trial court in excluding or admitting evidence only upon a showing that the trial court abused its discretion in weighing the probative value of the evidence against its prejudicial effect. United States v. York, 888 F.2d 1050, 1056 (5th Cir.1989). Because Appellant cannot show an abuse of discretion we affirm the district court's decision to exclude this evidence.

FN6. The district court found that the corporate minutes had not been kept up to date and it was unclear from the deposition what, if any, part of the minutes were not true. Based on Mr. Crockett's explanation of the deposition, the court found insufficient evidence of fraud.

[14] Appellant also contends that the evidence of falsification demonstrates Mr. Crockett's and Mr. Maxwell's propensity, motive, and opportunity to falsify the Form 637. The motives for falsification, Townsend asserts, were for personal and corporate gain and self-vindication. He claims that these motives were the same as those that allegedly led Mr. Maxwell and Mr. Crockett to apply for the Form 637 and to testify against Townsend. Further, Townsend contends that the scheme to falsify the corporate records was "sufficiently similar if not identical to the offense of falsifying a Form 637."

Rule 404(b) provides that a defendant may offer through extrinsic evidence or by cross-examination similar bad acts, crimes, or wrongs to show motive, opportunity, intent, and the like. [FN7] However, under Rule 404(b), evidence of crimes, wrongs, or acts is not admissible if offered to prove the character of a witness in order to show that the witness acted in conformity therewith on a particular occasion. As discussed above, the district court did not find a scheme or plan to falsify the corporate records, thereby refuting the reasons Appellant proffered for introducing the evidence. Furthermore, Appellant's brief indicates that the evidence was introduced for purposes of showing conformity rather than motive or intent in direct contravention to Rule 404(b). Appellant alleged ***269** that the "scheme to falsify documents to mislead or defraud the bankruptcy court and the IRS was sufficiently similar if not identical to the offense of falsifying a Form 637." Therefore, this Court affirms the district court's decision in excluding the evidence. Because the district court did not commit error, we do not reach application of the harmless error doctrine.

FN7. See also United States v. Luffred, 911 F.2d 1011, 1015 (5th Cir.1990) (holding that prior bad acts may be relevant under Fed.R.Evid. 404(b) to prove that a witness had the opportunity and ability to concoct a fraudulent or deceitful scheme).

B. Bad Business Practices

[15] Townsend also contends that the district court erred in curtailing his cross-examination of Mr. Boulos. Appellant asserts that Mr. Boulos's alleged bad business practices would reveal his motive and

intent to use Townsend's son to set up a bank account. Mr. Boulos, Appellant contends, failed to timely pay his bills, "bounced" checks, and sold substandard gasoline. The unauthorized use of the bank account circumvented a credit check by Crown and Jetero in furtherance of the tax evasion scheme. Under 404(b) evidence of crimes, bad acts, or wrongs are admissible to prove intent or opportunity. However, the district court found no evidence showing that Mr. Boulos knew of or aided Townsend in the tax evasion scheme.

[16] Townsend asserts that Mr. Boulos was also guilty of tax evasion if he knowingly carried out the scheme to buy gas tax-free. These facts would serve to impeach Mr. Boulos under 608(b). Rule 608(b) provides that specific acts of misconduct, though they cannot be proved by extrinsic evidence, may be elicited on cross-examination to impeach the credibility of a witness. But again Rule 403 serves to temper the otherwise unreigned use of 608(b). The district court did not find that Mr. Boulos participated in any scheme of tax evasion and therefore excluded this testimony. The district court did not abuse its discretion because trivial acts, such as untimely payment, should be excluded, absent evidence of a fraudulent scheme, because the dangers of confusing the issues and misleading the jury substantially outweigh any minor probative value the testimony would have.

C. Evidence of Townsend's liability for the excise tax

[17] Townsend contends that the district court abused its discretion in prohibiting cross-examination into areas of the Comptroller's decision and Mr. Maxwell's letter, dated March 27, 1989. The Comptroller held that Petrolife rather than Townsend was liable for state excise tax. In the Maxwell letter Mr. Maxwell allegedly expressed the desire to align himself with the IRS's position in order to avoid Petrolife's tax liability. Appellant contends that he had a right to impeach the witness and reveal the motivation and bias of Mr. Maxwell's adversarial testimony. Appellant has failed to show any evidence in the record indicating an arrangement under which Mr. Maxwell would receive any benefit for cooperating with the government. The district court found, under Rule 403, that the probative value of the testimony was substantially outweighed by the danger of confusion of the issues. Because Appellant has failed to show that the district court abused its discretion, we affirm the district court on this point. York, 888 F.2d at 1056; see also United States v. Sutherland, 929 F.2d 765, 777 (1st Cir.) cert. denied, --- U.S. ----, 112 S.Ct. 83, 116 L.Ed.2d 56 (1991) (holding that appellant failed to demonstrate a basis for suspecting bias other than a conclusory allegation).

[18] Agent Vitz testified that Townsend was liable for the excise tax. Appellant contends that he had a right to cross-examine Agent Vitz concerning the Maxwell letter and the Comptroller's decision holding Petrolife liable for state excise tax. The district court excluded this testimony under Rule 403. We find no error requiring reversal. Anyone who willfully evades a tax is in violation of I.R.C. § 7201 regardless of who owed the tax. [FN8] Thus, exclusion of testimony that Townsend was not personally liable was harmless error.

FN8. As discussed supra all that is required to establish a violation of I.R.C. § 7201 is proof beyond a reasonable doubt of a tax deficiency, affirmative acts of evasion, and willfulness.

3. Expert Testimony

The government called Agent Vitz as a summary witness and an expert on excise ***270** tax. Agent Vitz testified that Townsend became liable for the excise tax when he sold it to Mr. Boulos. Agent Vitz also calculated the tax deficiency owed on the gas sold to Mr. Boulos. Appellant contends that the district court erred in admitting this testimony because it interfered with the jury's function, it was inadmissible under Fed.R.Evid. 704(b), and it was inadmissible under Fed.R.Evid. 403.

[19][20] The admissibility of expert testimony rests within the sound discretion of the district court and will be reversed only upon a clear showing of abuse of discretion. United States v. Charroux, 3 F.3d 827, 833 (5th Cir.1993). Rule 703 provides that a qualified expert may testify in the form of an opinion if scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence. To qualify as an expert, the witness must have specialized knowledge or training such that his or her testimony will assist the fact finder in the determination of a fact issue. United States v. Bourgeois, 950 F.2d 980, 987 (5th

Cir.1992). Agent Vitz's training in accounting and experience in tax prosecutions qualifies him as an expert. There is no evidence that the district court abused its discretion in accepting Agent Vitz as an expert as Townsend failed to object to Agent Vitz's qualifications. Accordingly, we will address the substance of his testimony rather than his qualifications.

[21] Appellant contends that Agent Vitz's testimony was an usurpation of the jury's role in violation of Rule 704(b). Rule 704(b) states that an expert shall not testify with respect to the mental state of a defendant in a criminal trial. Agent Vitz did not opine that Townsend intended to file a fraudulent Form 637, rather he testified that the form was invalid. Agent Vitz did not express an opinion about Appellant's state of mind. Accordingly, his testimony was not excludable under Rule 704(b). United States v. Webster, 960 F.2d 1301, 1308-09 (5th Cir.) cert. denied, --- U.S. ----, 113 S.Ct. 355, 121 L.Ed.2d 269 (1992).

[22] Rule 403 operates to exclude otherwise admissible evidence if the probative value is substantially outweighed by its prejudicial effects. Appellant contends that Agent Vitz's testimony was prejudicial. Testimony presented by the government will invariably be prejudicial to a criminal defendant. But Rule 403 only excludes evidence that would be unfairly prejudicial to the defendant. Here, the probative value of the evidence was not substantially outweighed by its prejudicial effects. Agent Vitz testified as to the existence of a tax deficiency, an element required for a successful prosecution under I.R.C. § 7201. He also opined that Townsend was personally liable on the excise tax. This arguably has probative value. Someone would be more likely to evade their own tax rather than another's. Because this testimony was probative and not unfairly prejudicial, we find no error.

4. Jury Instructions

[23] Appellant requested the district judge to instruct the jury that it could find him liable for a violation of I.R.C. § 7201 only if he personally owed the taxes. The district court refused, instructing the jury that it could convict the defendant for attempting to evade taxes owed by another. Appellant cries foul.

[24][25][26] The standard of review is abuse of discretion. United States v. Chaney, 964 F.2d 437, 444 (5th Cir.1992). A conviction will not be reversed unless the instructions failed to correctly state the law. United States v. Coleman, 997 F.2d 1101, 1105 (5th Cir.1993), cert. denied, --- U.S. ---, 114 S.Ct. 893, 127 L.Ed.2d 86 (1994). The issue this Court must decide is whether the district court abused its discretion by refusing the proposed instruction. A refusal to deliver a requested jury instruction is reversible error only if the proposed instruction was (1) substantively correct, (2) not substantively covered in the jury charge, and (3) concerned an important issue in the trial, such that failure to give the requested instruction seriously impaired the defendant from presenting a defense. United States v. Mollier, 853 F.2d 1169, 1174 (5th Cir.1988).

The actual jury charge correctly stated the law. The instruction traced I.R.C. § 7201 and informed the jury that they could convict ***271** Townsend for evading Petrolife's tax liability. See United States v. Troy, 293 U.S. 58, 55 S.Ct. 23, 79 L.Ed. 197 (1934); United States v. Wisenbaker, 14 F.3d 1022, 1026-27 (5th Cir.1994). Appellant's proposed instruction was not substantively correct. Appellant contends that the jury should have been instructed to find Townsend guilty only if he personally owed the tax. Because I.R.C. § 7201 proscribes evasion of any tax, this instruction fails the first prong of the test. Accordingly, we affirm the district court's ruling.

For the above stated reasons the defendant's conviction is AFFIRMED.

END OF DOCUMENT

INSTA-CITE

CITATION: 31 F.3d 262

Direct History

=> 1 **U.S. v. Townsend,** 31 F.3d 262, 74 A.F.T.R.2d 94-6198, 74 A.F.T.R.2d 94-7548 (5th Cir.(Tex.), Aug 25, 1994) (NO. 93-2463)
Certiorari Denied by
2 Townsend v. U.S., 115 S.Ct. 773, 130 L.Ed.2d 668, 63 USLW 3516 (U.S., Jan 09, 1995) (NO. 94-7024)

Secondary Sources

Corpus Juris Secundum (C.J.S.) References
47B C.J.S. Internal Revenue Sec.1256 Note 62

Christopher Stacy POOL, Petitioner/Appellant,
v.
Earl B. DOWDLE, Respondent/Appellee.

No. 86-2172.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted April 13, 1987.

Decided Dec. 15, 1987.

Defendant who had previously been convicted of aggravated assault on police officer petitioned for habeas relief. The United States District Court for the District of Arizona, Earl H. Carroll, J., accepted magistrate's recommendation and dismissed petition without evidentiary hearing. Defendant appealed. The Court of Appeals, Noonan, Circuit Judge, held that: (1) exclusion of police detective's expert testimony, regarding proper procedure to be used by undercover officer in identifying himself to suspect, did not deprive defendant charged with aggravated assault of Sixth Amendment right to present defense, and (2) exclusion of evidence regarding police department's discipline of officer did not deprive defendant of constitutional right to cross-examine witnesses against him.

Affirmed.

Nelson, Circuit Judge, concurred in part and dissented in part and filed opinion.

[1] CRIMINAL LAW ⚿ 675
110k675
Formerly 110k469
Exclusion of police detective's expert testimony, regarding proper procedure to be used by undercover officer in identifying himself to suspect, did not deny habeas petitioner charged with aggravated assault of Sixth Amendment right to present defense; jurors could have decided whether habeas petitioner knew victim was police officer without expert's testimony, which was merely cumulative of other evidence and not major part of attempted defense. U.S.C.A. Const.Amend. 6.

[2] CRIMINAL LAW ⚿ 662.1
110k662.1
Evidence regarding police department's discipline of officer for improperly using police vehicle on off-duty job was only peripherally relevant to officer's credibility as witness; accordingly, trial court's decision to exclude evidence did not deprive defendant of constitutional right to confront witnesses against him. U.S.C.A. Const.Amend. 6.

[2] WITNESSES ⚿ 344(2)
410k344(2)
Evidence regarding police department's discipline of officer for improperly using police vehicle on off-duty job was only peripherally relevant to officer's credibility as witness; accordingly, trial court's decision to exclude evidence did not deprive defendant of constitutional right to confront witnesses against him. U.S.C.A. Const.Amend. 6.

***778** Ron Kilgard, Phoenix, Ariz., for petitioner-appellant.

Barbara A. Jarrett, Phoenix, Ariz., for respondent-appellee.

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

Before HUG, NELSON and NOONAN, Circuit Judges.

NOONAN, Circuit Judge:

Christopher Stacy Pool appeals the denial of his petition for habeas corpus. His case has been ably argued on appeal, but we affirm the decision of the district court.

FACTS AND PROCEEDINGS

In 1982 Pool was a thirty-year-old produce salesman. He was out on bail pending trial for assault. He had been convicted in 1977 of possessing marijuana and had served a three year sentence of probation.

On the evening of February 19, 1982, Pool was driving his father's Toyota in a deserted part of Yuma County, accompanied by his friend Brian Twist. Twist had invited Pool to go rabbit-hunting and Pool had brought a gun with him; but Twist suggested that Pool first aid him in planting two marijuana plants and as they drove they looked for a place to plant the plants.

Paul Connolly, a deputy sheriff of Yuma County, was working that night for a private employer, Camille Allec, patrolling for pay to catch thieves in Allec's citrus groves. Connolly had worked in this capacity for two years and had made about thirty stops or arrests. He drove a "beat up" Yuma County Sheriff Department's 1969 Ford pickup truck, not readily identifiable as a police vehicle. He himself was wearing levis, boots, and his uniform shirt with gold letters and gold circles on the arms and his police badge and name plate; he was also wearing a gun and gunbelt.

Connolly passed Pool in the Toyota and made a U-turn to follow him, eventually finding the Toyota parked on a rural road. Connolly parked head-on with the Toyota. There was no street lighting. Connolly's own lights lit up the car, and he saw two people in the front seat and the plants in the rear. Connolly radioed his number, his location, the license number of the Toyota and the fact that it had marijuana in it to the Sheriff's Department. He then turned on the red grill lights of his truck, walked in front of these lights and approached the driver's side of the Toyota.

According to his testimony at the trial, Connolly had his flashlight in his right hand and shined the light into the truck. He saw the driver reach for his midsection and noticed a bulge on his right side. He ordered both driver and passenger to put their hands on the dashboard. He heard the driver say "fucking pig." He saw the top two inches of an automatic pistol. With his right hand--his shooting hand--occupied with the flashlight, Connolly believes he threw the light into the car. He yelled and dove into the bushes, down a bank. As he dove, or just before, he heard the pop of a shot. He rolled twice, then turned, and fired back twice at headlights that turned out to be his own. One bullet was later found to have damaged the truck's radiator, the other to have ricocheted off, leaving a dent. After his two shots, he crawled into a small hole. About 20 minutes later, Deputy Will Brooks drove up. The Toyota had gone. Connolly came out of the hole and told Brooks that "two Indians just took a shot at me and are armed with a .45 or .9 mm."

At the trial, Pool and Twist testified that they were blinded by Connolly's lights. ***779** When Connolly told them to place their hands on the dashboard, Pool was scared and reached for the gun. As he pulled up the gun he was hit in the face with the flashlight. To this extent, Pool and Twist's testimony was not contrary to Connolly's. Pool, however, denied saying anything to Connolly except "Get back" as he, Pool, put his hands on his gun, and both Pool and Twist maintained that they did not recognize Connolly as a police officer. On the critical issue of the shooting, Pool testified that before he fired he heard "a cannon blast" in his car and thought, "This man is trying to kill me." He then "cocked the gun and stuck it out the window and fired a shot at the same time trying to start the car." As he drove off, Pool heard "at least two shots." Twist's testimony as to the events was vague and not such as to inspire confidence in his memory or veracity. In his own words, he was "in total confusion."

Pool was charged with the crime of aggravated assault with a deadly weapon. His defense was that he acted with justification. His first trial ended in a hung jury. In the second trial, the judge charged the jury that Pool was justified if two conditions were satisfied: that a reasonable person in his situation would have believed that physical force was immediately necessary to protect against another's use or attempted use of unlawful physical force; and that he used or threatened no more physical force than would have appeared necessary to a reasonable person in his situation. No objection was made to this standard instruction. The case was sent to the jury at 6:12 p.m. and at 7:26 p.m. the jury returned a verdict of guilty.

Douglas W. Keddie, the trial judge, denied a motion for a new trial on July 13, 1982. He sentenced Pool to nine years in prison. Pool appealed to the Arizona Court of Appeals, attacking the admission of the marijuana and evidence of his bail status. He also challenged a limitation put on the cross-examination of Connolly and Brooks and the exclusion of expert testimony on proper procedures for a police stop. Other errors assigned were the denial of a directed verdict; denial of a motion to change the judge who was accused by Pool of prejudice; error in the jury instruction on Pool's bail status; and error in rejecting Pool's proffered instructions on retreat. The Court of Appeals affirmed the conviction; the Supreme Court of Arizona refused to review.

Pool, represented by new counsel, applied for

habeas corpus. A magistrate recommended that his petition be dismissed without an evidentiary hearing. The district court accepted this recommendation and on March 10, 1986 denied the petition. Pool appealed to this court.

ISSUES

Pool presses two claims:

First, Pool maintains he was denied his rights under the Sixth Amendment "to present a defense." Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 1923, 18 L.Ed.2d 1019 (1967). He sought to put on the stand a detective from the City of Yuma Police Department who as an expert would testify as to the proper police procedure to be used by an undercover officer identifying himself. The detective had testified at the first trial which ended in a deadlocked jury; Judge Keddie, who presided at both trials, stated that by the time of the second trial he had been persuaded by the prosecutor's objections that the testimony was irrelevant and that the jury did not need it to understand the situation. Pool contends that the detective's testimony "directly rebutted the theory of the government's case that a reasonable person would have identified Mr. Connolly as a police officer."

Second, Pool points to matter that Judge Keddie's rulings precluded both juries from hearing: Five days after the encounter with Pool, Connolly was reprimanded for not reporting that he had been working for two years for pay for a private employer and using the county's truck and gas; also for not giving "an adequate answer" to the Sheriff's inquiry as to why the Sheriff had not been informed. Connolly was docked "100 hours of comp time" to compensate for the gas and wear and tear on the truck. ***780** The reprimand was to stay in his file one year.

The reprimand became an issue when defense counsel wanted to show that Connolly had lied to defense counsel in his pretrial statements. As part of that proof, defense counsel sought to introduce the reprimand. Judge Keddie interpreted the pretrial statements made by Connolly to defense counsel as ambiguous and did not believe the reprimand relevant to Connolly's credibility. Accordingly, he refused to allow examination on either the reprimand or the statements to counsel.

On appeal to this court, Pool urges that cross-examination on the reprimand was necessary to bring out bias against Pool on Connolly's part. As expressed by Pool's brief:

> Connolly had a motive and bias to testify falsely, not only to ingratiate himself with his superiors, but also to put a good face on his activities on the evening of the alleged crime, and ultimately, to get back at Mr. Pool .... [He] may reasonably have hoped that his reprimand would be suspended if he cooperated in the prosecution.

Pool argues further that Connolly's reprimand could be interpreted as a reprimand for equivocating when questioned by the Sheriff and in this way would also have a bearing on his credibility. Denial of the opportunity to attack Connolly's credibility is, Pool maintains, a violation of the right "to be confronted with witnesses against him." United States Constitution, Amendment VI; Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974).

ANALYSIS

We review anew the legal issues presented to the district court. Chatman v. Marquez, 754 F.2d 1531 (9th Cir.1985).

[1] First. The admissibility of expert testimony is normally in Arizona as elsewhere a matter of discretion for the trial judge. State v. Williams, 132 Ariz. 153, 160, 644 P.2d 889 (1982). Expert testimony is unnecessary if the jury is qualified without such testimony to determine the issue intelligently. State v. Chapple, 135 Ariz. 281, 292-93, 660 P.2d 1208 (1983). We do not find Arizona's application of these standard doctrines to have violated the Sixth Amendment. If the jury believed Connolly, the jury would have found that Pool knew he was police because he used the opprobrious street term for a policeman. If the jury believed Pool himself, the jury would have found that Pool fired after being shot at by Connolly. Without expert testimony the jury would have known that such an approach by Connolly would not constitute proper police procedure. If the jury did not believe Pool, the expert's testimony would not have helped him. No constitutional error was committed in excluding the testimony. In any event, the expert testimony would have been cumulative and was not "a major part of the attempted defense." Perry v. Rushen, 713 F.2d 1447, 1453 (9th Cir.1983).

[2] Second, as to the reprimand: the observation in it that Connolly's answer was "inadequate" does not show that he was a liar; the observation merely means that he did not have a good explanation. That the Sheriff's Department already had a good idea of Connolly's practice is evident from the arrests he had made in the past and the police communications he used; it is a reasonable inference that the reprimand came about because of the publicity. In ruling on peripheral evidence, a trial court must have a range of discretion within which a mistake, if there is one, is not automatically constitutional error. Police discipline of a police witness may be the only evidence of possible bias and so severe in degree that a motive to lie may be created. Cf. United States v. Garrett, 542 F.2d 23 (6th Cir.1976). In Pool's case, the existence of the reprimand in Connolly's file would not have significantly increased his desire to ingratiate himself with his superiors. He had already lost "the comp time." The reprimand was to be removed from the file within nine months of the trial. Every police officer, it may be supposed, looks better with a certain kind of superior if his testimony leads to a conviction. This possible reason for discounting police testimony is not materially enhanced ***781** by the presence of a mild, soon-to-be extinguished censure. Finally, that the encounter with Connolly had led to the reprimand would not have shown that Connolly had a different degree of bias against Pool than the jury already knew that he had. The jury knew from Connolly's own lips that Pool had put him to flight, driven him into a hole, and led him to shoot up his own vehicle. If the jury did not infer from this story that Connolly could have little love for the defendant, a bureaucratic censure would not have changed the jury's view of Connolly's animus. No constitutional right was denied in limiting the cross-examination in this regard. Unlike Davis v. Alaska where a traditional method of impeaching a witness was denied by the trial court, there was here only a remote and peripheral challenge to Connolly's credibility.

AFFIRMED.

NELSON, Circuit Judge, concurring in part and dissenting in part.

Pool sought to introduce expert testimony relevant to whether he recognized Connolly as an officer. The expert witness would have explained the standard police procedures used by officers to identify themselves to frightened suspects. From this evidence, the jury might have inferred that reasonable people do not always recognize police officers. This insight might have led the jury to conclude that Pool did not recognize Connolly as an officer because Connolly failed to use the standard procedure to identify himself.

Excluding the relevant expert testimony was constitutionally valid. The sixth amendment does not require the admission of all relevant evidence. Rather, courts may constitutionally exclude evidence if society's interest in fair and efficient trials outweighs the defendant's interest in presenting the evidence. Perry v. Rushen, 713 F.2d 1447, 1451-52 (9th Cir.1983), cert. denied, 469 U.S. 838, 105 S.Ct. 137, 83 L.Ed.2d 77 (1984). In this case, the state's interest in excluding evidence on collateral issues was legitimate. The trial court could reasonably have feared that the expert testimony would divert the jury's attention from the issue of Pool's guilt to the collateral issue of Connolly's improper method of identifying himself.

Against the State's interest in preventing jury confusion we must weigh Pool's interest in presenting the evidence. This was quite small. The jury could have concluded that Pool did not recognize Connolly as an officer from other much more direct evidence, such as the darkness, the shining headlights, Connolly's clothes, and Connolly's failure verbally to identify himself. The inference from the expert testimony to the conclusion that Pool did not recognize Connolly as a police officer was indirect and problematic. I therefore conclude that the trial court reasonably excluded the relevant expert testimony. I agree that no sixth amendment violation occurred.

I disagree, however, that excluding evidence and cross-examination on Connolly's reprimand was constitutionally permissible. The confrontation clause secures a defendant's right to cross-examine witnesses in order to expose their motivation for testifying. Davis v. Alaska, 415 U.S. 308, 316-17, 94 S.Ct. 1105, 1110-11, 39 L.Ed.2d 347 (1974). Although this right does not preclude trial judges from imposing "limits on defense counsel's inquiry into the potential bias of a prosecution witness," Delaware v. Van Arsdall, 475 U.S. 673, 106 S.Ct. 1431, 1435, 89 L.Ed.2d 674 (1986), neither does it

allow the trial court to prohibit all inquiry into the possibility that an event might have furnished the witness with a motive for favoring the prosecution. See id.

In this case, Pool sought to cross-examine Connolly on evidence "about an event that the State conceded had taken place and that a jury might reasonably have found furnished the witness a motive for favoring the prosecution in his testimony." Van Arsdall, 106 S.Ct. at 1435. The jury might have found that the reprimand gave Connolly a motive to lie based on any one of several reasonable inferences. Having learned that officer Connolly was punished for his moonlighting, the jury might have concluded that Connolly sought to regain his lost comp. time, or to avoid more severe action by helping the prosecution to obtain ***782** a conviction. The jury might also have realized that the officer would have reason to make his infraction seem less serious to his superiors by avoiding the further charge that in addition to moonlighting and using state property without permission, he handled the arrest inappropriately. Finally, learning that Connolly had been sanctioned, and presumably that the department would no longer permit Connolly to earn the extra income using department property, the jury might have developed further reason to suspect that Connolly disliked Pool and had reason to seek revenge. Because a jury might have found that the reprimand gave Connolly an incentive to lie, excluding the evidence and precluding all cross-examination on the issue violated Pool's confrontation clause rights. See United States v. Garrett, 542 F.2d 23 (6th Cir.1976).

Although trial courts may exclude cumulative evidence of bias, see, e.g., United States v. Jackson, 756 F.2d 703 (9th Cir.1985) (allowing limitation of cross-examination regarding a witness's paid cooperation with law enforcement officials because evidence had already been admitted regarding the witness's payment in exchange for cooperation), the evidence of bias excluded in this case was not cumulative. Other facts might have suggested that Connolly had reason to dislike Pool. But these other facts are not cumulative of the additional and independent motive for lying created by the reprimand. To the contrary, the reprimand constitutes an independent incentive for Connolly to lie. Pool had a constitutional right to expose this incentive for the jury.

I would reverse Pool's conviction based on this constitutional error. I cannot conclude beyond a reasonable doubt that the error was harmless. See Van Arsdall, 106 S.Ct. at 1438. The case was based largely on Connolly's testimony, and therefore on his credibility. Because his testimony was important, not cumulative, and uncorroborated, and because the prior trial ended in deadlock, indicating that the prosecution's case was not overwhelmingly strong, even a small increase in the evidence of Connolly's bias might have altered the outcome of this case.

END OF DOCUMENT

INSTA-CITE

CITATION: 834 F.2d 777
=> 1 **Pool v. Dowdle,** 834 F.2d 777 (9th Cir.(Ariz.), Dec 15, 1987)
(NO. 86-2172)