ANNEX B

JURISPRUDENCE

IN CONFORMITY WITH REGULATION 23(3) OF THE REGULATIONS OF THE COURT

559 F.3d 1126
United States Court of Appeals,
Tenth Circuit.

UNITED STATES of America, Plaintiff–Appellee,
v.
Randy Lee BALDRIDGE, a/k/a Randy Baldridge, Defendant–Appellant.

No. 07–5121.
|
March 18, 2009.

Synopsis
Background: Defendant, a former elected county commissioner was convicted, in the United States District Court for the Northern District of Oklahoma, Terence C. Kern, J., on eight counts of conspiracy, fraud and misapplication of funds by a local government official, mail fraud, money laundering, and corrupt persuasion of a person to obstruct a federal investigation. Defendant appealed.

Holdings: The Court of Appeals, O'Brien, Circuit Judge, held that:

[1] evidence was sufficient to support conviction for theft or bribery relating to programs receiving federal funds;

[2] payments for work on defendant's sister's house did not fall within bona fide salary exception;

[3] evidence was sufficient to support mail fraud conviction;

[4] evidence was sufficient to support money laundering conviction; and

[5] evidence was sufficient to support witness tampering conviction.

Affirmed.

West Headnotes (20)

[1] **Criminal Law** Review De Novo
Criminal Law Inferences or deductions from evidence
Criminal Law Reasonable doubt
Criminal Law Circumstantial evidence

Court of Appeals reviews criminal convictions de novo, asking only whether, taking the evidence, both direct and circumstantial, together with reasonable inferences to be drawn therefrom in the light most favorable to the government, a reasonable jury could find the defendant guilty beyond a reasonable doubt.

1 Cases that cite this headnote

[2] **Criminal Law** Weight of Evidence in General

Court of Appeals will not reverse a conviction unless no rational trier of fact could have reached the disputed verdict.

1 Cases that cite this headnote

[3] **Criminal Law** Degree of proof

The evidence necessary to support a criminal guilty verdict need not conclusively exclude every other reasonable hypothesis and need not negate all possibilities except guilt.

1 Cases that cite this headnote

[4] **Criminal Law** Presentation of evidence

Prosecutor's questions posed to witness, concerning defendant's visits to witness's home, were reviewable on appeal for plain error, where defense counsel did not object to the questions.

1 Cases that cite this headnote

[5] **Criminal Law** Presentation of evidence

Court of Appeals would review prosecutor's cross-examination of witness as to his relationship with defendant for plain error, where defense counsel did nothing to highlight to the court his concern about the effect of the prosecutor's question after his relevance objection was sustained, and district court did not have notice that defense counsel believed the prosecutor's questioning of witness to be an inappropriate attempt at character assassination or to rise to the level of prosecutorial misconduct.

4 Cases that cite this headnote

[6] **Criminal Law** Necessity of Objections in General

Plain error occurs when there is (1) error, (2) that is plain, which (3) affects the defendant's substantial rights, and which (4) seriously affects the fairness, integrity, or public reputation of judicial proceedings.

3 Cases that cite this headnote

[7] **Criminal Law** Arguments and conduct in general

When evaluating allegedly inappropriate remarks of counsel for plain error, Court of Appeals must view the remarks in the context of the entire trial.

1 Cases that cite this headnote

[8] **Criminal Law** Examination of Witnesses Other Than Accused

Criminal Law Cross-examination

Prosecution's direct and cross-examination of witnesses as to defendant's “very, very close relationship” with friend was permissible to expose friend's potential bias, as a witness, in favor of defendant, and thus did not constitute prosecutorial misconduct, notwithstanding any impact of insinuation of homosexuality in rural Oklahoma.

6 Cases that cite this headnote

[9] **Witnesses** Interest as Ground of Impeachment in General

It is permissible impeachment to expose a witness's bias.

6 Cases that cite this headnote

[10] **Conspiracy** Nature and Elements of Criminal Conspiracy in General

To prove conspiracy, the government must show (1) two or more persons agreed to violate the law, (2) the defendant knew the essential objectives of the conspiracy, (3) the defendant knowingly and voluntarily participated in the conspiracy, and (4) the alleged coconspirators were interdependent.

2 Cases that cite this headnote

[11] **Conspiracy** Combination or Agreement

Interdependence element of conspiracy requires a shared, single criminal objective, not just similar or parallel objectives between similarly situated people.

4 Cases that cite this headnote

[12] **Conspiracy** Larceny, embezzlement, burglary, and robbery; stolen property

Evidence was sufficient to establish existence of a conspiracy between defendant, an elected county commissioner, and two others, a husband and wife, as required to support conviction for conspiracy to commit theft of federal funds, even though evidence did not establish one single conspiracy; at a minimum, evidence clearly indicated that wife knew the false documents she filed totaling $6,400, concerning husband's work performed on defendant's sister's home, pertained to work for which he was not entitled to receive payment from the county. 18 U.S.C.A. §§ 371, 666(a)(1)(A).

1 Cases that cite this headnote

[13] **Embezzlement** Weight and Sufficiency of Evidence

Evidence was sufficient to support conviction of defendant, an elected county commissioner, for theft or bribery relating to programs receiving federal funds; record indicated that, in one-year period after county's receipt of $72,560, defendant had fraudulently executed warrants, for services either not performed or not subject to county's payment, valued at more than $5,000, including work performed on defendant's sister's residence. 18 U.S.C.A. § 666(a)(1)(A).

Cases that cite this headnote

[14] **Embezzlement** Defenses

Payments made for work done on defendant county commissioner's sister's residence, along with payment to an individual for doing no work at all, did not fall within bona fide salary exception of statute governing defendant's theft or bribery relating to programs receiving federal funds, since payments were for work not subject to payment by the county. 18 U.S.C.A. § 666(c).

4 Cases that cite this headnote

[15] Postal Service Nature and elements of offense in general

To establish guilt under mail fraud statute, the government must prove that (1) defendant engaged in a scheme or artifice to defraud or to obtain money by means of false and fraudulent pretenses; (2) he did so with the intent to defraud; and (3) he used the United States mails to facilitate that scheme. 18 U.S.C.A. § 1341.

1 Cases that cite this headnote

[16] Postal Service Use of mails to defraud

Evidence that defendant, an elected county official, intentionally availed himself of the use of the mails, which facilitated an illegal payment from the county which was part of his scheme to defraud, was sufficient to support mail fraud conviction. 18 U.S.C.A. § 1341.

Cases that cite this headnote

[17] Currency Regulation Money laundering

In order to obtain a conviction under Money Laundering Control Act, the government must prove four elements beyond a reasonable doubt; (1) that defendant engaged in a financial transaction, (2) that defendant knew that the property involved in that transaction represented the proceeds of his unlawful activities, (3) that the property involved was in fact the proceeds of that criminal enterprise, and (4) that defendant knew that the transaction was designed in whole or in part to conceal or disguise the nature, the location, the source, the ownership or the control of the proceeds of the specified unlawful activities. 18 U.S.C.A. § 1956(a)(1)(B)(i).

Cases that cite this headnote

[18] Currency Regulation Money laundering

Evidence that defendant, an elected county commissioner, structured payment to worker from county as a way to avoid attention, by specifically requesting that worker find a nominee to whom payment could be made and by using a third party to conceal the real owner of the funds, was sufficient to satisfy design element of conviction under Money Laundering Control Act. 18 U.S.C.A. § 1956(a)(1)(B)(i).

Cases that cite this headnote

[19] Currency Regulation Money laundering

Conduct of defendant, an elected county official, in accepting payment from a county payee that he knew to be unlawful, supported the inference of intent to disguise or conceal illegal funds, as element of money laundering conviction, even though the debt to defendant itself was legitimate, where transaction gave the false impression that payee, and not county, was the source of the funds and created documentary evidence that could mislead an investigator. 18 U.S.C.A. § 1956(a)(1)(B)(i).

Cases that cite this headnote

[20] **Obstructing Justice** Offenses relating to witnesses or potential witnesses

Evidence was sufficient to establish that defendant, an elected county commissioner, attempted to persuade two fraudulent county payees to lie to investigators, as required to support defendant's conviction under witness tampering statute. 18 U.S.C.A. § 1512(b).

2 Cases that cite this headnote

Attorneys and Law Firms

***1128** Jeffrey A. Gallant, Assistant United States Attorney (T. Scott Woodward, Acting United States Attorney and Joseph F. Wilson, Assistant United States Attorney with him on the brief) Tulsa, OK, for Plaintiff–Appellee.

William D. Lunn, Tulsa, OK, for Defendant–Appellant.

Before HARTZ, Circuit Judge, HOLLOWAY, Senior Judge, and O'BRIEN, Circuit Judge.

Opinion

***1129** O'BRIEN, Circuit Judge.

Randy Lee Baldridge appeals from his conviction on eight counts of conspiracy, fraud and misapplication of funds by a local government official, mail fraud, money laundering, and corrupt persuasion of a person to obstruct a federal investigation. We affirm.

I. BACKGROUND

From 2003 through 2006, Baldridge served as an elected county commissioner of Rogers County, Oklahoma (the County). As alleged by the government and found by the jury, Baldridge abused his position as commissioner by engaging in a scheme to file false claims with the County for payment.

A. *County Expenditures*

The County generally made expenditures through a consistent multistep process. An elected official or department head would generate a purchase order (PO), which contained basic information including the vendor, a description of the work to be performed, and the estimated cost. After the work was performed, the vendor would prepare an invoice and a county employee—the receiving agent—would prepare a receiving report. Both the receiving agent and the individual who prepared the PO were responsible for ensuring the accuracy of the invoices and receiving reports.

The PO, invoice and receiving report were then presented to the Board of County Commissions (the Board) for payment. The Board approved payment of POs at its weekly meeting. Approximately 150 to 200 POs were approved in bulk every week. During the period at issue here, all POs were approved unanimously. Once payment was approved, a warrant—essentially the equivalent of a check—was issued for payment. It was the County's policy to mail the warrants to the vendors, but vendors could also pick up their warrants in person. When vendors picked up their warrants in person, they were required to sign a register.

B. *Bruce Long—the Dog Creek Project*

In 2003, Baldridge hired Bruce Long to work as an equipment operator. His duties included cleaning rights-of-way, cutting brush and operating machinery. After approximately six months, Baldridge promoted Long to a first deputy or road foreman. In that role, Long was responsible for overseeing the work of other operators and maintaining the County roads in the district.

In July 2004, work needed to be performed on a section of highway near Dog Creek. Baldridge called two independent contractors to perform the work but one was unavailable and the other gave a quote Baldridge believed was too high. Baldridge asked Long to perform the work. Long expected to be paid approximately $2,090 for the work in addition to his usual salary. Long performed the work using a track hoe rented by the County. After the work was completed, Baldridge instructed Long to find a friend to whom payment could be made to avoid questions regarding favoritism and paying a salaried employee for contract work. Barney Howard, the receiving agent at the time, prepared a PO designating Long's friend, Brad Jones, as the vendor. Baldridge signed the PO on July 26, 2004, though he understood Long, not Jones, performed the work. Relying on information from Baldridge, Cindy Rash [1] prepared ***1130** a false invoice reflecting Jones as the vendor. Howard prepared a receiving report stating Jones had completed 38 hours of work on the Dog Creek project. Long told Baldridge it took him only 24 hours to perform the job but Baldridge insisted it would not look right if he were paid the amount promised for only 24 hours of work.

A warrant in the amount of $2,090.00 was approved by the Board. Baldridge voted to approve the payment without disclosing the hours billed to the County were inflated and it was Long, not Jones, who did the work. The warrant was prepared on August 10, 2004, and mailed to Jones. Jones cashed the warrant and gave the money to Long. Long gave Jones a couple hundred dollars.

C. *Brian Rash*

In the fall of 2004, Baldridge hired Brian Rash, Cindy Rash's husband, to do some contract labor at the residence of his sister, Sue Baldridge. Randy Baldridge was a part owner of this property. Rash agreed to work for Baldridge for $20 per hour, understanding he would be paid with County funds. Baldridge asked Rash to do this work with his personal tractor because it would not look good for county equipment to be on the property.

On November 30, 2004, Baldridge signed a PO for Rash to perform 80 hours of contract labor. Cindy Rash prepared the invoice and signed her husband's name to it. She also prepared a receiving report indicating her husband performed 80 hours of labor between November 30 and December 14. A warrant was issued to Brian Rash on December 20, 2004 in the amount of $1,600. Brian Rash picked the warrant up in person. He testified the only work he did for this money was at Sue Baldridge's residence, though part of the work was on a county easement.

Over the course of the next six months, Cindy Rash prepared three more POs relating to her husband's work. On January 11, 2005, Rash was authorized to perform another 80 hours of contract labor. Cindy Rash again filled out an invoice which she signed on behalf of her husband. The receiving report, which was in Cindy Rash's handwriting, stated Brian Rash performed contract labor on seventeen days between January 11 and January 30, 2005. On February 7, 2005 the County issued a warrant in the amount of $1,600 to Rash. This warrant was picked up by one of Brian Rash's employees and endorsed by both Cindy and Brian Rash. Brian Rash admitted the only work he did for this money was at Sue Baldridge's residence. Cindy Rash testified that after one of these warrants was cashed, she gave Baldridge all the money because he told her he needed to "borrow" the money "to pay a bill off." (R. Vol. III at 85). There was no documentation for the loan and Baldridge never paid the money back. A bank employee testified Baldridge deposited $1300 cash into his bank account around this same period of time. [2]

On April 1, 2005, Baldridge signed another PO for Brian Rash to perform 80 hours of contract labor. Again, Cindy Rash prepared both the invoice and the receiving report showing fifteen days of work from April 2 to April 20, 2005. Baldridge testified he believed Rash was "filling in for one of our contract mowers." (R. Vol. VI at 712.) A warrant was issued for $1,600 on May 2,

2005. The warrant was picked up and endorsed by Cindy Rash. Brian testified the only work he did ***1131** for this warrant was at Sue Baldridge's residence.

On July 19, 2005, Baldridge signed another PO authorizing Brian Rash to perform 80 hours of contract labor for $1,600. Again, Cindy Rash signed an invoice for her husband and filled out a receiving report indicating he had worked every day from July 19 through August 3, 2005, with the exception of July 31. Baldridge testified he thought Brian was "mowing down in the Inola area." (R. Vol. VI at 713.) The warrant for this work was issued to Brian Rash on August 16, 2005, and was picked up by Cindy Rash and endorsed by her. Again, Brian Rash testified the only work he did for this warrant was at Sue Baldridge's residence.

Baldridge voted to approve payment of the Brian Rash POs without disclosing to the Board that Rash performed all the work at Sue Baldridge's residence.

D. *Joseph Bentz*

Baldridge was friends with Joseph Bentz and rented a unit in a triplex owned by Bentz. In the summer of 2005, Baldridge looked after the triplex for Bentz. During this period of time, Bentz experienced financial difficulty. Baldridge was aware of Bentz's financial problems and loaned Bentz money periodically.

At issue here, Baldridge offered to help Bentz financially by having him do concrete work on a bridge near where he was living. On July 22, 2005, Baldridge signed a PO prepared by Cindy Rash authorizing concrete work on the bridge in the amount of $1,700. Cindy Rash prepared an invoice purporting to be from Bentz, which Bentz signed. Rash also prepared a receiving report, dated August 1, 2005, indicating the work had been completed, though she never verified the work was done. Baldridge voted to approve the payment to Bentz without disclosing to the Board that no work was ever performed.

On August 9, 2005, a warrant was issued to Bentz in the amount of $1,700. Because Bentz was in Texas, Baldridge picked up the warrant and deposited it into Bentz's checking account. Several days later, Bentz paid his property taxes to Rogers County in the amount of $649.72 and paid Baldridge $700 for looking after for the triplex. The payment to Baldridge was made by cashier's check with Bentz listed as the remitter. Baldridge picked up the cashier's check in his name and deposited $600 of it into his bank account approximately twelve minutes after the cashier's check was created.

E. *Bruce Long—the Robert Portiss Driveway*

In August 2005, the County made plans to pave Ray Davis Road. The work was to be performed by Bellco Materials. Shortly after a PO was approved, Robert Portiss, who lived on Ray Davis

Road, contacted Baldridge about having his driveway paved at the same time the road was paved. Baldridge agreed and the price was set at $3,000.

Baldridge instructed Long, who was involved in the project, to have Bellco pave Portiss' driveway with asphalt purchased by the County for Ray Davis Road. Long directed a Bellco employee, Carey Bunker, to pave the driveway. Although it was contrary to Bellco's policy, it paved both the road and the driveway using the asphalt paid for by the County. A Bellco employee testified Bellco received $11,762.55 from the County for the entire project, of which approximately $3,900 was for paving the Portiss driveway.

Baldridge asked Long if Brad Jones could “cash a check” like he had earlier on the Dog Creek Project. Long agreed. Baldridge told Cindy Rash that a friend of his was going to do some work for Portiss. Portiss was out of town when the work ***1132** was performed. When he returned home he contacted Baldridge to request an invoice. Baldridge directed Cindy Rash to prepare an invoice in the name of Brad Jones that billed Portiss for $3,000 for his driveway. Baldridge advised Portiss he should make the check out to “Brad Jones” and provided Portiss with the invoice that had been prepared by Cindy Rash.

Portiss' wife made a check out for $3,000 payable to Brad Jones. Baldridge brought the check to Long in order to have Jones cash it. Baldridge told Long to let Jones “keep a couple hundred dollars of it.” (R. Vol. IV at 308.) Long did as instructed and also gave a couple hundred dollars to Carey Bunker. Bunker testified he believed the money was “a tip or hush money.” (R. Vol. VII at 453.) Long gave the rest of the money to Baldridge. Baldridge deposited $500 in cash into his personal bank account on September 27, 2005, the day after Jones withdrew the amount of the check from his account.

Baldridge voted to pay the PO to Bellco without disclosing to the Board that part of the work was done on a private driveway and without disclosing he intended to personally benefit from the project.

F. *The Investigation*

On March 22, 2006, a search warrant was executed at the District 3 warehouse seeking documents relating to the Rashes and the Bentzes. Both Cindy and Brian Rash were interviewed by the FBI and agreed to cooperate with law enforcement and have their calls recorded. During one recorded call, Brian Rash told Baldridge the FBI was coming to talk with him and asked “what do you want me to tell ‘em? ’ ” (Appellant's Addendum Ex. 49 at 2560.) Baldridge replied “tell ‘em that you ... mowed the northwest of Inola.’ ” (*Id.*) When Rash asked whether he should say anything about “working at SUE's house,” Baldridge responded: “No ... you just did that as a friend.” (*Id.* at 2561.) He continued: “[J]ust tell ‘em that, you know, that you did the work, it would be worse otherwise ... just pick different times for different roads.’ ” (*Id.* at 2561–62, 2563.) Later that afternoon, Baldridge called Cindy Rash and asked whether the FBI had been there yet and: “What did they ask?” (*Id.* at 2565.) Cindy told Baldridge she had not yet talked to her husband and would call him back. Baldridge responded: “[T]hank you ... it'll all be fine. Consistency is everything.” (*Id.* at 2566.)

On March 25, Baldridge and Brian Rash spoke again. Rash told Baldridge he had explained to the agent that he did some work “west of town” “and did some ditch cleaning and stuff like that....” (*Id.* at 2568.) Baldridge responded: “[I]t's okay, but that's, that's what they want to know. They want to know that there's a BRIAN RASH and, you know, that you did do the work.” (*Id.* at 2569.) On March 26, Baldridge and Cindy Rash spoke again. Baldridge speculated as to who might be behind the federal investigation.

In late March 2006, shortly after the warrant was served, Baldridge and his friend, Brian Slover, traveled to Texas to visit Joe Bentz and his wife. This trip was not unusual as the two had visited the Bentzes in Texas twice before. Baldridge told Bentz “there was a witch hunt going on, a political witch hunt.” (R. Vol. VII at 492.) While in Texas, Baldridge showed Bentz a copy of the PO that had been submitted authorizing his bridge work. Bentz testified “the story that I was supposed to stick to was that I did do the concrete work, and as long as we kept our stories together, you know, this witch hunt would go away.” (*Id.* at 498.)

After Baldridge returned to Oklahoma, he gave Slover documents to fax to Bentz, even though Baldridge himself had access ***1133** to a fax machine. According to Bentz's wife, the documents appeared to be a sort of deposition or “Q–and–A” with Baldridge apparently supplying answers to questions. (*Id.* at 473.) Bentz's wife “freaked out” after receiving the documents and Bentz destroyed the documents shortly thereafter.

When first interviewed by the FBI, Joe Bentz maintained that he performed work on behalf of the County. After he learned of the seriousness of the matter, he admitted he had not performed any work for the County. Brian Rash told the FBI agent investigating the case that he had done all the contract work reflected on the invoices, including mowing and ditch cleaning. When the FBI agent told him he could be charged if the agent thought he was lying, Rash changed his story and said all the work he did was at Sue Baldridge's residence.

G. *Federal Benefits Received*

Two individuals testified that for the fiscal year ending June 30, 2005, Rogers County received $493,000 and $99,768.19 on projects related to the Port of Catoosa from the Department of Housing and Urban Development; $65,945.78 for the Safe Rooms Rebate Program from the Department of Homeland Security, and $26,751.00 for emergency management from the Federal Emergency Management Agency, a total of $685,464.97. [3] No evidence was presented to indicate that Rogers County received any federal benefits outside the twelvemonth period between July 1, 2004 and June 30, 2005.

H. *Procedural History*

On the basis of the conduct described above, Baldridge was charged with: conspiracy to violate 18 U.S.C. § 666(a)(1)(A), in violation of 18 U.S.C. § 371 (Count One); obtaining money and property by fraud and intentional misapplication by agent or local government that receives benefits under federal programs and aiding and abetting the same, in violation of 18 U.S.C. §§ 666 and 2 (Count Two); mail fraud in violation of 18 U.S.C. §§ 1341, 1346 (Counts Three and Four); money laundering and aiding and abetting the same in violation of 18 U.S.C. §§ 1956(a)(1)(B)(i) and 2 (Counts Five, Six and Seven); and corruptly persuading another and aiding and abetting the same in violation of 18 U.S.C. § 1512(b)(3) and 2 (Counts Eight and Nine).

Following a six-day trial, the jury found Baldridge guilty on all counts except Count Six. Baldridge was sentenced to thirty-seven months imprisonment on each count to run concurrently. Baldridge filed a timely notice of appeal.

II. DISCUSSION

Baldridge raises six allegations of error on appeal. He claims the prosecutor committed misconduct by insinuating Baldridge was a homosexual and the evidence was insufficient to support his conviction for: (a) conspiracy, because the government failed to establish interdependence among the alleged coconspirators; (b) violation of 18 U.S.C. § 666, because the government failed to establish Rogers County received $10,000 or more in federal benefits in the same year the County was defrauded of over $5,000; (c) mail fraud, because use of the mails was not integral to a scheme to defraud; (d) money laundering, because the government did not prove Baldridge attempted to conceal the assets involved in the transactions; and (e) violation of 18 U.S.C. § 1512(b)(3), because the government did not prove Baldridge "corruptly persuaded" his alleged coconspirators to hinder, delay or prevent communication with a law enforcement officer.

***1134 [1] [2] [3]** As discussed in more detail below, we review the claimed prosecutorial misconduct for plain error. We review the remaining allegations de novo, asking "only whether, taking the evidence—both direct and circumstantial, together with reasonable inferences to be drawn therefrom—in the light most favorable to the government, a reasonable jury could find the defendant guilty beyond a reasonable doubt." *United States v. Beers,* 189 F.3d 1297, 1301 (10th Cir.1999) (quotations omitted). "[W]e will not reverse a conviction unless no rational trier of fact could have reached the disputed verdict. The evidence necessary to support a verdict need not conclusively exclude every other reasonable hypothesis and need not negate all possibilities except guilt." *United States v. Serrata,* 425 F.3d 886, 895 (10th Cir.2005) (quotations, citations and ellipses omitted).

A. *Prosecutorial Misconduct*

Baldridge claims the prosecutor committed misconduct during the direct examination of Joseph Bentz and cross-examination of Brian Slover by asking several questions "designed to insinuate that [Baldridge] and [S]lover had a homosexual relationship." (Appellant's Opening Br. at 17.) Baldridge takes issue with the following exchange between the prosecutor and Bentz:

Q: "Now, had the defendant and Mr. Slover previously been to your home in Texas?"

A. "Yes, just for random visits."

Q. "How many would you estimate?"

A. "I think twice they'd been there before."

Q. "Were they always together when they came?"

A. "Yes, sir."

(R. Vol. VII at 491–92.) Defense counsel did not object to any of these questions.

Baldridge also takes issue with an exchange between the prosecutor and Slover. After questioning Slover about the length of time he had lived together with the defendant, the prosecutor asked: "And would you say that you have a very, very close relationship?" (R. Vol. VI at 644.) Slover responded: "Randy Baldridge is like a brother to me." (*Id.*) The prosecutor continued: "Do you love the defendant Randy Baldridge?" (*Id.*) Defense counsel objected on relevance grounds. The court sustained the objection and the witness did not answer the question.

Baldridge contends our standard of review is the two-step process for evaluating claims of prosecutorial misconduct set forth in *United States v. Gabaldon,* 91 F.3d 91, 94 (10th Cir.1996) (asking whether the conduct was improper and, if so, whether it warrants reversal). That is the test we apply to evaluate the merits of a claim for prosecutorial misconduct, not our standard of review. *See United States v. Apperson,* 441 F.3d 1162, 1207 (10th Cir.2006) (applying two-part test to evaluate the merits after determining standard of review was abuse of discretion); *United States v. Oberle,* 136 F.3d 1414, 1421 (10th Cir.1998) (applying two-part test to evaluate the merits after determining standard of review was de novo as to one comment and plain error as to remaining comments).

[4] Defense counsel did not object to the questions posed to Bentz quoted above. Thus, we review those questions for plain error. *See United States v. Sands,* 968 F.2d 1058, 1063 (10th Cir.1992). As noted above, defense counsel did object to one of the questions posed to Slover, but only on relevance grounds. That objection was sustained and counsel did not request a curative instruction or move for a mistrial. In *United States v. Taylor*, we reviewed a defendant's claim of prosecutorial misconduct ***1135** for plain error where defense counsel objected to the prosecutor's remark during opening statement as being "inappropriate" and the court responded with a curative instruction to which counsel did not object. 514 F.3d 1092, 1095 (10th Cir.2008). We explained:

> [T]he gravamen of Mr. Taylor's appeal is that, even after the district court's instructions to the jury, there remained a modicum of uncured prejudice sufficient to imperil his right to a fair trial. Mr. Taylor did not, however, alert the district court to his belief on this score. He neither advanced a contemporaneous objection to the district court's curative instruction, nor moved for a mistrial. Such actions, which would have given the district court the information necessary to evaluate the need for further curative steps, would have properly preserved the claim of error for appeal. Instead, for all that the district court knew, it had addressed Mr. Taylor's complaint to his satisfaction; it had no reason to believe any further issue or concern remained. Where this happens —where a party seeks on appeal to raise an issue not squarely presented to the district court in order to allow it to exercise its judgment in the first instance— we traditionally review only for plain error.

Id. at 1096.

[5] Here, as in *Taylor*, defense counsel did nothing to highlight to the court his concern about the effect of the prosecutor's question after his objection was sustained. Moreover, and unlike in *Taylor*, the district court did not have notice that defense counsel believed the prosecutor's questioning of Slover to be an inappropriate attempt at "character assassination" or to rise to the level of prosecutorial misconduct. (Appellant's Reply Br. at 3.) Thus, we review the prosecutor's cross-examination of Slover for plain error.

[6] **[7]** Plain error occurs when there is (1) error, (2) that is plain, which (3) affects the defendant's substantial rights, and which (4) seriously affects the fairness, integrity, or public reputation of judicial proceedings. *United States v. Ruiz–Terrazas,* 477 F.3d 1196, 1199 (10th Cir.), *cert. denied,* 552 U.S. 850, 128 S.Ct. 113, 169 L.Ed.2d 80 (2007). "When evaluating allegedly inappropriate remarks of counsel for plain error, we must view the remarks in the context of the entire trial." *Oberle*, 136 F.3d at 1421 (quotations and citations omitted).

[8] Baldridge characterizes the prosecutor's questioning of Slover as "treacherously-calculated." (Appellant's Opening Br. at 24.) The government contends the examination of Bentz and the cross-examination of Slover were proper and sought only to establish Slover's "obvious potential bias in favor of [Baldridge]." (Appellee's Br. at 24.) We agree with the government.

[9] It is permissible impeachment to expose a witness's bias. *United States v. Abel,* 469 U.S. 45, 51, 105 S.Ct. 465, 83 L.Ed.2d 450 (1984); *United States v. DeSoto,* 950 F.2d 626, 630 (10th Cir.1991). At common law, bias describes the relationship between a witness and a party which might cause the witness to slant his testimony for or against the party. *Abel,* 469 U.S. at 52, 105 S.Ct. 465. Certainly, if Baldridge and Slover had been having an intimate relationship, Slover's testimony might well have been slanted in favor of Baldridge. And Slover could have been biased in favor of Baldridge even if their relationship was not sexual, but merely close. Baldridge claims this situation is exceptional because an insinuation of homosexuality in rural Oklahoma is incendiary, not likely to be forgotten or forgiven by the jurors. Even if true, it is not a reason to craft a "homosexual exception" ***1136** to a hallowed rule of evidence allowing wide latitude for the jury to assess possible witness bias. At most it would be a factor for the trial judge to consider upon a proper Rule 403 objection, absent here. Viewed in the context of the entire trial, we perceive no error in the prosecutor's questioning of Bentz and Slover.

B. *Conspiracy*

[10] **[11]** The jury found Baldridge guilty of conspiracy to violate 18 U.S.C. § 666(a)(1)(A) in violation of 18 U.S.C. § 371. "To prove conspiracy, the government must show (1) two or more persons agreed to violate the law, (2) the defendant knew the essential objectives of the conspiracy, (3) the defendant knowingly and voluntarily participated in the conspiracy, and (4) the alleged coconspirators were interdependent." *United States v. Yehling,* 456 F.3d 1236, 1240 (10th Cir.2006). As to the last element, interdependence, this Court has explained: "[A] single conspiracy does not exist solely because many individuals deal with a common central player. What is required is a *shared,* single criminal objective, not just similar or parallel objectives between similarly situated people." *United States v. Small,* 423 F.3d 1164, 1182 (10th Cir.2005) (quotations and citation omitted) (emphasis in original); *see also United States v. McCullough,* 457 F.3d 1150, 1161 (10th Cir.2006) ("Interdependence exists where each coconspirators' activities constituted essential and integral steps toward the realization of a common, illicit goal.") (quotations omitted).

Baldridge argues the evidence was insufficient to establish interdependence because "[t]he single conspiracy charged ... was, at best, three, and possibly four, separate conspiracies in which similarly situated people pursued parallel objectives but *shared no single criminal objective tied together by mutual dependence and assistance.*" (Appellant's Opening Br. at 32.) The government contends the co-conspirators had the common goal of creating and submitting to the County numerous false documents involving several different projects and vendors. The government also argues the evidence establishes "[a]t the very minimum, [Baldridge] conspired with Cindy Rash and Brian Rash with respect to the claim that resulted in the County paying for work done at the residence of [Baldridge's] sister." (Appellee's Br. at 34–35.)

[12] Baldridge is correct that the evidence does not establish one single conspiracy; however, the government is correct that the evidence does establish a conspiracy between Baldridge, Brian Rash, and Cindy Rash sufficient to support Baldridge's conviction.

In *Kotteakos v. United States*, the Supreme Court decided many separate conspiracies do not become one merely because they all included a common defendant. 328 U.S. 750, 769, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946). The Court explained that separate spokes meeting at a common center (a common defendant) constituting a wheel are a single conspiracy only if those spokes are enclosed by a rim (a common illicit goal). *Id.* at 775, 66 S.Ct. 1239. Here, the several spokes (Bentz, Long, and Brian Rash) lack the necessary rim. Though connected via their relationship with Baldridge, these individuals did not have a common, illicit goal, but rather, had similar or parallel objectives—specifically, to receive compensation from the County for work they did not perform,[4] did not fully perform[5] or were not otherwise ***1137** authorized to receive.[6]

In *United States v. Carnagie*, we held the government failed to prove two widespread conspiracies involving the submission of fraudulent loan applications to the Federal Housing Administration because the evidence did not support a finding of interdependence. 533 F.3d 1231, 1240 (10th Cir.2008), *cert. denied*, 555 U.S. 1194, 129 S.Ct. 1366, 173 L.Ed.2d 625 (2009). We distinguished drug conspiracies from financial conspiracies and explained there is a higher standard for proving interdependence in the latter:

> [T]here is a difference in the proof necessary to establish interdependence in a drug conspiracy from that necessary to link parallel financial transactions.... [B]ecause the manufacture, sale, and use of drugs is illegal, essentially every aspect of the drug distribution business is illegal. Each participant is presumptively aware of the illegal nature of the activity and of the existence of the illegal venture.... In contrast, selling real estate and obtaining loans for those sales is generally lawful. Unlawful activity, however, may occur as part of those otherwise lawful transactions.... In this situation, because the underlying transaction is generally lawful, one cannot infer an illegal common purpose in the same way that a common purpose could be found in a drug conspiracy. Instead, interdependence must be proved more precisely. The government must do more than prove that a defendant participated in a real estate transaction involving false documentation to demonstrate interdependence; it must show that each defendant's actions benefitted the common venture.

Id. at 1239 n. 5. We explained: "[T]he [first defendant's] transactions in no way benefitted from or depended upon the success of the [second defendant's] transactions, and vice versa. The different groups engaged in similar transactions for similar reasons, but there was no showing of mutual dependence between them." *Id.* at 1240 (citations omitted). Similarly here, Long's actions did not benefit or depend upon the success of the actions of Brian Rash and Bentz and vice versa.

But that is not the end of the story. Cindy Rash prepared false documents with respect to the false claims made by Long, Brian Rash and Bentz. It is reasonable to infer she knew the documents she prepared for those individuals to receive payment were false. At a very minimum, the evidence clearly establishes she knew the payments to her husband were for work he did at Sue Baldridge's residence, for which he was not entitled to receive payment from the County. The payments to Brian Rash total $6,400 ($1,600 on Dec. 20, 2004, Feb. 7, 2005, May 2, 2005 and Aug. 16, 2005). This exceeds the jurisdictional minimum of $5,000 and is sufficient to support a conviction for conspiracy. [7]

***1138** C. *18 U.S.C. § 666*

Count Two of the indictment charged Baldridge with violating 18 U.S.C. § 666(a)(1)(A), which criminalizes and authorizes federal prosecution of a local government official who "without authority knowingly converts ... or intentionally misapplies, property ... valued at $5,000 or more" if the local government "in any one year period" receives benefits from the federal government "in excess of $10,000." 18 U.S.C. §§ 666(a)(1)(A)(i), (b). The government alleged that between November 30, 2004 and August 9, 2005, Baldridge obtained by fraud and intentionally misapplied property valued at more than $5,000 and, in that same period of time, Rogers County received benefits in excess of $10,000 from the federal government. The fraud which the government alleged formed the basis of this count was: (1) the issuance of four warrants to Brian Rash each in the amount of $1,600 on December 20, 2004; February 7, 2005; May 2, 2005 and August 16, 2005; and (2) the issuance of a warrant to Joseph Bentz in the amount of $1,700 on August 9, 2005. Baldridge contends there was insufficient evidence to support his conviction on this count because the government failed to prove he misapplied property valued at more than $5,000 in the same year the evidence established Rogers County received more than $10,000 in federal benefits.

The evidence introduced at trial showed Rogers County received $685,464.97 in federal benefits during the period from July 1, 2004 to June 30, 2005, while the total amount of fraud alleged during this same period totaled only $4,800 (payments to Rash of $1,600 each on December 20, 2004, February 7, 2005, and May 2, 2005). [8] Baldridge claims this Court found the one-year period encompassed in § 666(a) was the same one-year period referenced in § 666(b) in *United States v. LaHue,* 170 F.3d 1026 (10th Cir.1999). (Appellant's Opening Br. at 36.) The government contends "the statute does not limit the twelve month period to a fiscal or calendar year" and does not require all the illegal conduct occur during the twelve month period in which the benefits were received. (Appellee's Br. at 37.) The government is correct.

[13] The phrase "any one-year period" used in § 666(b) is defined as "a continuous period that commences no earlier than twelve months before the commission of the offense or that ends no later than twelve months after the commission of the offense. Such period may include time both before and after the commission of the offense." 18 U.S.C. § 666(d)(5). As the Fifth Circuit described it, "[t]his is an exact numeric minimum per year that must be supported by record evidence." *United States v. Jackson,* 313 F.3d 231, 235 (5th Cir.2002).[9] The evidence established the County received $72,560 in federal benefits on September 27, 2004. This amount alone provides a jurisdictional basis for Baldridge to be held liable under § 666(a) for any fraud committed from ***1139** September 27, 2004 to September 26, 2005. This time period includes the dates on which all of the warrants which form the basis of Count Two were issued (Dec. 20, 2004; Feb. 7, 2005; May 2, 2005; Aug. 9, 2005; and Aug. 16, 2005).

Baldridge also contends all of the monies paid to Rash and Bentz may be deemed legitimate under the safe harbor provision of 18 U.S.C. § 666(c) which excludes liability for payment of "bona fide salary, wages, fees, or other compensation paid ... in the usual course of business." He relies on *United States v. Harloff,* 815 F.Supp. 618 (W.D.N.Y.1993), but that case is inapposite. In *Harloff,* the court dismissed several counts of an indictment concluding the conduct alleged fell within the safe harbor provision of § 666(c) as a matter of law. The government alleged the defendants violated § 666 by "falsifying payroll records by claiming to have worked 40–hour weeks when in fact they worked substantially fewer hours." *Id.* at 618 (quotations omitted). The court found, however, that "[a] plain reading of [§ 666(c)] ... prohibits a prosecution under § 666 based on an employee's accepting wages for more hours than she actually worked," because Congress did not "intend[ ] to criminalize an employee's early departure from work." *Id.* at 619. "Thus, *Harloff* stands merely for the proposition that § 666(c) is applicable to allegations that an employee worked fewer hours than that for which she was obligated." *United States v. Bryant,* 556 F.Supp.2d 378, 427 (D.N.J.2008).

[14] Brian Rash and Joseph Bentz are not alleged to have merely worked fewer hours than they were obligated. It is undisputed Rash was paid for work he did at Sue Baldridge's residence. Because this was not work for which he could have been paid by the County, the payment was not a bona fide wage paid in the usual course of business. *See United States v. Cornier–Ortiz,* 361 F.3d 29, 36 (1st Cir.2004) (holding jury could have concluded payments were not "bona fide" where the law "prohibited such a scheme" and the defendant "intentionally misapplied" payments to skirt the applicable regulations). And Bentz was paid for doing no work, not fewer hours of work, so his payment likewise could not have been bona fide.

D. *Mail Fraud*

Count Three of the indictment charged Baldridge with mail fraud relating to the warrant sent to Brad Jones as payment for Bruce Long's work on the Dog Creek Project. Count Four charged

Baldridge with mail fraud relating to the warrant that went to Bellco as payment for the Ray Davis Road project, which included payment for the Portiss driveway. The jury convicted Baldridge on both counts. He contends the evidence was insufficient to support his conviction on these counts because use of the mails was not integral to any scheme to defraud.

[15] The mail fraud statute provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises ... for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service ... or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail ... according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both.

***1140** 18 U.S.C. § 1341. "To establish guilt under [this statute], the government had to prove that (1) [Baldridge] engaged in a scheme or artifice to defraud or to obtain money by means of false and fraudulent pretenses; (2) he did so with the intent to defraud; and (3) he used the United States mails to facilitate that scheme." *United States v. Chavis,* 461 F.3d 1201, 1207 (10th Cir.2006) (quotations, citation and ellipses omitted).

Baldridge contends his use of the mails was not an integral part of the scheme to defraud, but that is not a necessary element. The Supreme Court has explained: "To be part of the execution of the fraud ... the use of the mails need not be an essential element of the scheme. It is sufficient for the mailing to be incident to an essential part of the scheme or a step in the plot." *Schmuck v. United States,* 489 U.S. 705, 710–11, 109 S.Ct. 1443, 103 L.Ed.2d 734 (1989) (quotations and citations omitted).

Baldridge incorrectly relies on *United States v. Lynn,* 461 F.2d 759 (10th Cir.1972). In *Lynn,* the defendant used a stolen credit card at two retail establishments. The first business sent the credit card sales draft from the purchase to its accounting office via registered mail. The second business deposited the credit card sales draft in a local bank and it was ultimately sent to a different bank via the United States mail. We held this evidence was insufficient to support a mail fraud conviction because "[u]tilization of the mails after the scheme has been fully consummated and completed in all of its parts cannot supply the essential ingredients for this offense." *Id.* at 762. We noted the defendant did not consciously avail himself of the use of the mails and what the retail establishments chose to do after the defendant used the credit card was "immaterial." *Id.* at 763.

[16] Here, by contrast, Baldridge intentionally availed himself of the use of the mails. While this was not an essential element of the scheme, it facilitated an illegal payment, which was part of his scheme to defraud. That alone is sufficient to support liability. *See, e.g., United States v. Primrose,* 718 F.2d 1484, 1490 (10th Cir.1983) (affirming conviction for mail fraud where "the mailing of invoices and warrants ensured that the vendors got paid, which was an essential part of the scheme").

E. *Money Laundering*

In Count Five, the government alleged Baldridge violated the Money Laundering Control Act, 18 U.S.C. § 1956 (the Act), when the County issued a warrant to Brad Jones in the amount of $2,090, which represented payment for Bruce Long's work on the Dog Creek Project. It is undisputed that the majority of the funds were ultimately received by Long and Baldridge did not intend to and did not receive any of the funds. In Count Seven, the government alleged Baldridge violated the Act when the County issued a warrant to Joseph Bentz in the amount of $1,700 for work he did not do. Bentz cashed the warrant and issued two checks from it—one to pay his property taxes and the other to pay Baldridge for a legitimate debt (to compensate him for his services on Bentz's triplex). Baldridge deposited $600 of the $700 payment into his personal checking account and kept $100 in cash.

[17] The Act provides in pertinent part:

> Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity ... knowing ***1141** that the transaction is designed in whole or in part [ ] to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity ... shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both.

18 U.S.C. § 1956(a)(1)(B)(i). In order to obtain a conviction under the Act, the government must prove four elements beyond a reasonable doubt: "(1) that Defendant engaged in a financial transaction; (2) that Defendant knew that the property involved in that transaction represented the proceeds of his unlawful activities; (3) that the property involved was in fact the proceeds of that criminal enterprise; and (4) that Defendant knew that the transaction was designed in whole or in part to conceal or disguise the nature, the location, the source, the ownership or the control of the proceeds of the specified unlawful activities." *United States v. Garcia–Emanuel,* 14 F.3d 1469, 1473 (10th Cir.1994) (quotations omitted).

Baldridge challenges only the fourth element, which we have referred to as the "design requirement." *See id.* As to the Long/Jones payment, the government contends it satisfies the design requirement because the issuance of the warrant to Jones was designed to conceal the fact the payment was intended for Long. As to the Bentz payment, the government contends it was designed to obscure the fact Baldridge received $700 in County funds.

[18] In *United States v. Shepard*, we explained:

> This court has discussed several types of evidence that may demonstrate an intent to disguise or conceal illegal proceeds: They include, among others, statements by a defendant probative of intent to conceal; unusual secrecy surrounding the transaction; structuring the transaction in a way to avoid attention; depositing illegal profits in the bank account of a legitimate business; highly irregular features of the transaction; using third parties to conceal the real owner; a series of unusual financial moves cumulating [sic] in the transaction; or expert testimony on practices of criminals.

396 F.3d 1116, 1120 (10th Cir.2005) (quotations and citation omitted). Baldridge clearly structured the Long/Jones payment in a way to avoid attention, specifically requesting that Long find a nominee to whom payment could be made, and the use of Jones as a third party concealed the real owner of the funds. This is sufficient to satisfy the design requirement.

[19] As to the Bentz payment, it represents an attempt by Baldridge to use a third party (Bentz) to conceal the real owner of the money (first, the County, then ultimately, Baldridge). In *Shepard*, we explained "[u]sing third parties to conceal the real owner supports the inference of intent to disguise or conceal illegal funds. Under 18 U.S.C. § 1956(a)(1)(B)(i), we may infer a design to conceal or disguise unlawful proceeds when a defendant transfers those proceeds into the control of others with whom the defendant has a very close relationship." *Id.* at 1122 (quotations and citations omitted). Thus, we held "[a] rational jury could reasonably conclude that Mr. Shepard intended to conceal or disguise the unlawfully gained checks when he deposited them in his daughter's account." *Id.* This same reasoning supports the jury's verdict on Count Seven. Baldridge can be held liable for accepting payment from Bentz that he knew to be unlawful, even though the debt itself was legitimate. The transaction gave the false impression Bentz was the source of the funds and created documentary evidence that could mislead an investigator. ***1142** *See Garcia–Emanuel*, 14 F.3d at 1476–77 (reinstating conviction on one count of money laundering where defendant presented a cashier's check on which his restaurant was listed as remitter to pay for land because "[t]he transaction not only creates the false impression that the restaurant was his source of wealth, but it creates documentary evidence in support of that deception that could mislead an investigator").

F. *18 U.S.C. § 1512(b)(3)*
Counts Eight and Nine of the indictment alleged Baldridge knowingly corruptly persuaded Brian Rash and Joseph Bentz to hinder, delay or prevent their communication with the FBI in its investigation of Baldridge in violation of the witness tampering statute, 18 U.S.C. § 1512(b). Baldridge contends the evidence was insufficient to support his conviction on these counts because at no point during his conversations with Rash or Bentz did he ever threaten or intimidate them or tell them to tell a story that they stated was not true. As discussed below, the fact Baldridge did not threaten or intimidate Rash or Bentz is not determinative. Rather, to be found liable under § 1512(b), the evidence must have been sufficient for a reasonable jury to conclude Baldridge persuaded Rash and Bentz to lie to investigators. It was.

18 U.S.C. § 1512(b)(1) provides: "Whoever knowingly uses intimidation, threatens or corruptly persuades another person, or attempts to do so ... with intent to [ ] influence, delay or prevent the testimony of any person in an official proceeding ... shall be fined under this title or imprisoned not more than 20 years, or both." All courts that have considered the issue have found the phrase "corruptly persuades" to be ambiguous. *See, e.g., United States v. Khatami,* 280 F.3d 907, 912 (9th Cir.2002); *United States v. Farrell,* 126 F.3d 484, 487 (3d Cir.1997). The statute does not define the phrase but (rather unhelpfully) explains it "does not include conduct which would be misleading conduct but for a lack of a state of mind." [10] 18 U.S.C. § 1515(a)(6). The phrase cannot simply mean persuade with intent to influence the statements of another person because such an interpretation would render the word "corruptly" meaningless. *See Farrell,* 126 F.3d at 487.

Looking to the plain meaning:

> The word "corruptly" has several different meanings. Its root, the adjective "corrupt," is defined as morally degenerate and perverted and characterized by improper conduct (as bribery or the selling of favors). The verb "corrupt" has both transitive, as to change someone from good to bad in morals, manners, or actions; bribe, and intransitive, as to become oneself morally debased, meanings. Given these definitions, "corruptly" in § 1512(b) may modify "persuades" to require persuasion through some corrupt means, persuasion of someone to engage in some corrupt conduct, and/or persuasion characterized by some "morally debased" purpose.

Id. at 488 n. 2 (quotations, citations, ellipses and alterations omitted). The Farrell court found little assistance in the statute's legislative history but ultimately concluded that a non-coercive attempt to persuade a witness to lie to investigators constitutes a violation of § 1512(b). *See id.* at 488. All circuits that have considered the issue have concluded likewise. *See Khatami,* 280 F.3d at 912–13 (citing cases from the First, Second, Third, Eighth, Eleventh, and D.C. Circuits); *see also United States v. Davis,* 380 F.3d 183, 196 (4th Cir.2004) ***1143** ("As we read the statute, the 'corruptly persuades' language ... encompasses non-coercive attempts by a target of a criminal investigation to tamper with prospective witnesses.") (quotations, alterations and emphasis omitted). Thus, the question presented here is not whether Baldridge's conduct was coercive—it clearly was not—but whether his conduct constituted an attempt to persuade Rash and/or Bentz to lie to investigators.

[20] Baldridge asserts the evidence was insufficient to establish he attempted to persuade Rash or Bentz to lie to investigators because neither ever told Baldridge what he asked them to say was wrong. The government argues "[n]either Bentz nor Brian Rash had to tell defendant the claims were false, because defendant already knew they were false, indeed, he was the major impetus for their falsity." (Appellee's Br. at 48.) We agree with the government.

In *United States v. Burns*, the Sixth Circuit held the defendant "attempted to 'corruptly persuade' [the witness] by urging him to lie about the basis of their relationship, to deny that [the witness] knew Burns as a drug dealer, and to disclaim that Burns was [the witness's] source of crack cocaine." 298 F.3d 523, 540 (6th Cir.2002). The facts here are not nearly as dramatic, but still support liability. We have, on one previous occasion, considered the "corruptly persuaded" language. In *United States v. Stroup*, we concluded a jury could have found beyond a reasonable doubt that the defendant attempted to corruptly persuade a witness, "reject[ing] Defendant's contention that the statutory language requires evidence of threats or a direct request to lie." 291 Fed.Appx. 868, 870 (10th Cir.2008) (unpublished). [11] We held the "corruptly persuades" element "requires the government to prove a defendant's action was done voluntarily and intentionally to bring about false or misleading testimony or to prevent testimony with the hope or expectation of some benefit to the defendant or another person." *Id.* (quotations and ellipses omitted). That standard is clearly satisfied here.

AFFIRMED.

All Citations

559 F.3d 1126

Footnotes

1 In 2003, Baldridge hired Cindy Rash as receiving agent. Cindy Rash was a friend of Baldridge's sister. Rash was not the receiving agent involved in the Dog Creek Project, though she did prepare the invoice.

2 This exchange of funds formed the basis for the money laundering alleged in Count Six. The jury found Baldridge not guilty on this Count. The government does not appeal from that verdict.

3 The record incorrectly states the total is $684,464.97.

4 Bentz received payment in the amount of $1,700 for work he did not perform.

5 Long was paid for 38 hours of work on the Dog Creek Project (in the amount of $2,090) though he worked only 24 hours.

6 Long was not authorized to receive payment from the County for work he performed on the Dog Creek Project or on the Robert Portiss driveway because he was a salaried employee. Brian Rash received payment from the County totaling $6,400 for work he did primarily at Sue Baldridge's residence.

7 Though Baldridge does not argue the point, we note there is a variance between the indictment and the evidence adduced at trial because the evidence established a conspiracy different from that alleged in the indictment. *See United States v. Sells,* 477 F.3d 1226, 1237 (10th Cir.2007) ("A simple variance arises when the evidence adduced at trial establishes facts different from those alleged in the indictment, and triggers harmless error analysis. The defendant bears the burden of proof both to show that a variance occurred and that it was fatal.") (citation omitted). The variance does not require reversal, however, because the narrower scheme is fully included in the indictment. *See United States v. Harrison,* 942 F.2d 751, 758 (10th Cir.1991) ("A variance does not require reversal ... unless the defendant can show that it affected her or his substantial rights. A defendant's substantial rights are not prejudiced merely because the defendant is convicted upon evidence which tends to show a narrower scheme than that contained in the indictment, provided that the narrower scheme is fully included within the indictment.") (quotations and citations omitted).

8 The warrant to Jones for Long's work on the Dog Creek Project was issued on August 10, 2004 and falls within this one year period. However, that warrant was not included as a basis for this count and thus we do not consider it here.

9 In *Jackson,* the court reversed a guilty verdict where "the record reveal[ed] a dearth of evidence to support the essential element that the City received more than $10,000 per year in federal funds." 313 F.3d at 238.

10 The words "corruptly persuade" did not appear in the original version of § 1512, but were added by amendment in 1988. *See Khatami,* 280 F.3d at 912.

11 We cite this unpublished case not as precedent but for its persuasive value. *See* 10th Cir. R. 32.1(A).

End of Document

KeyCite Yellow Flag - Negative Treatment
Distinguished by People v. Moore, Cal.App. 1 Dist., November 6, 2013

298 F.3d 523
United States Court of Appeals,
Sixth Circuit.

UNITED STATES of America, Plaintiff–Appellee/Cross–Appellant,
v.
Antonio BURNS (00–5848), Anthony Harden (00–5846), Jerome Harden, Jr. (00–5851), and Michael Jordon (00–5839), Defendants–Appellants/Cross–Appellees.

Nos. 00–5839, 00–5846, 00–5848, 00–5851 and 00–6020.
|
Argued and Submitted: June 19, 2002.
|
Decided and Filed: July 29, 2002.

Defendants were convicted by jury in the United States District Court for the Eastern District of Kentucky, William O. Bertelsman, Senior District Judge, of crimes related to conspiracy to possess and distribute crack cocaine. Defendants and government cross-appealed. The Court of Appeals, Gilman, Circuit Judge, held that: (1) evidence supported convictions; (2) indictment charging offense of engaging in continuing criminal enterprise (CCE) was not defective; (3) defendant was not entitled to entrapment instruction; (4) searches of automobiles and motel room were valid; (5) any error in allowing government to use slide presentation during opening statement was harmless; (6) sentences did not implicate *Apprendi* rule requiring drug quantity to be proved to jury beyond a reasonable doubt; and (7) defendants were not entitled to sentence reduction for playing minimal role in drug conspiracy.

Affirmed in part, reversed in part, and remanded.

West Headnotes (64)

[1] **Criminal Law** Construction in favor of government, state, or prosecution
Criminal Law Reasonable doubt
In determining whether the evidence presented at trial is sufficient to support a conviction, the relevant question is whether, after viewing the evidence in the light most favorable to

the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

1 Cases that cite this headnote

[2] **Criminal Law** Inferences or deductions from evidence

On review of challenge to sufficiency of evidence to support conviction, all reasonable inferences are to be drawn in the government's favor.

Cases that cite this headnote

[3] **Criminal Law** Credibility of Witnesses

Appeals challenging sufficiency of evidence to support conviction are no place for arguments regarding a government witness' lack of credibility.

4 Cases that cite this headnote

[4] **Controlled Substances** Continuing criminal enterprise; drug organizations

To convict defendant of engaging in a continuing criminal enterprise (CCE), government must prove (1) that defendant committed a felony violation of federal narcotics laws, (2) that the violation was part of a continuing series of three or more drug offenses committed by defendant, (3) that defendant committed the series of offenses in concert with five or more persons, (4) that defendant acted as an organizer, supervisor, or manager with regard to these five or more persons, and (5) that defendant obtained substantial income or resources from this series of violations. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 408(c), 21 U.S.C.A. § 848(c).

6 Cases that cite this headnote

[5] **Controlled Substances** Continuing criminal enterprise; drug organizations

Conviction for engaging in continuing criminal enterprise (CCE) was supported by witness testimony indicating that defendant distributed crack cocaine as part of continuing series of three or more offenses, that four people packaged and sold crack cocaine under defendant's direction and others also sold or delivered crack cocaine for defendant, that witnesses paid defendant large sums of money for crack cocaine they bought from him, and that defendant, although not employed, owned two cars, several cellular telephones, and a pager, bought jewelry and other gifts for girlfriend, and paid cash for associates' bonds.

Comprehensive Drug Abuse Prevention and Control Act of 1970, § 408(c), 21 U.S.C.A. § 848(c).

Cases that cite this headnote

[6] **Controlled Substances** Indictment, Information or Complaint

Indictment charging a continuing criminal enterprise (CCE) is sufficient for constitutional purposes if it articulates in statutory language the elements of the violation. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 408(c), 21 U.S.C.A. § 848(c).

Cases that cite this headnote

[7] **Controlled Substances** Indictment, Information or Complaint

Indictment charging offense of engaging in continuing criminal enterprise (CCE) was not defective when indictment charged all essential elements of offense and made clear that government intended to prove a conspiracy that included at least three drug violations during specified time period, each of uncharged predicate acts occurred during that period, and defendant was given advance notice of the acts and the names of the witnesses who would testify against him. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 408(c), 21 U.S.C.A. § 848(c).

2 Cases that cite this headnote

[8] **Criminal Law** Assent of required number of jurors

Jury deciding charge of engaging in continuing criminal enterprise (CCE) must unanimously agree not only that defendant committed some continuing series of violations, but also that defendant committed each of the individual violations necessary to make up that continuing series. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 408(c), 21 U.S.C.A. § 848(c).

5 Cases that cite this headnote

[9] **Criminal Law** Unanimity as to facts, conduct, methods, or theories

Instruction which required that jury "unanimously agree to at least three related violations" to find defendant guilty of engaging in continuing criminal enterprise (CCE) made it clear to jury that it had to find unanimously that defendant committed the same three, or more, violations. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 408(c), 21 U.S.C.A. § 848(c).

4 Cases that cite this headnote

[10] **Conspiracy** Combination or Agreement

Conspiracy Knowledge and intent

To establish drug conspiracy under federal statute, the government must prove the existence of an agreement to violate the drug laws and that each conspirator knew of, intended to join, and participated in the conspiracy. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 406, 21 U.S.C.A. § 846.

1 Cases that cite this headnote

[11] **Conspiracy** Knowledge and intent

Each defendant need not have had knowledge of every phase of conspiracy to have intended to facilitate the common scheme.

Cases that cite this headnote

[12] **Conspiracy** Narcotics and dangerous drugs

Conspiracy to possess and distribute crack cocaine was supported by witness testimony describing consistent method of operation by which defendants conspired to possess, sell, and package drugs. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 406, 21 U.S.C.A. § 846.

Cases that cite this headnote

[13] **Conspiracy** Narcotics and dangerous drugs

Testimony that defendant, after his eighteenth birthday, drove codefendant to sell crack cocaine to witness, that he possessed crack cocaine in another witness' apartment, assisted codefendant in finding and selling crack cocaine to customers, and sold crack cocaine to witness, and that he was seen possessing crack cocaine at codefendant's residence supported determination that defendant ratified his participation in drug conspiracy after becoming an adult. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 406, 21 U.S.C.A. § 846.

1 Cases that cite this headnote

[14] Infants Effect of age, majority, or emancipation

Defendant who enters a conspiracy prior to his eighteenth birthday can be tried as an adult if he continues in the conspiracy after that time.

2 Cases that cite this headnote

[15] Controlled Substances Possession for sale or distribution

Conviction for possession of crack cocaine with intent to distribute was supported by evidence that defendant supplied crack cocaine sold by another to third party and that codefendant drove seller to site of transaction, knowing that purpose of trip was to consummate drug deal. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(a)(1), 21 U.S.C.A. § 841(a)(1).

2 Cases that cite this headnote

[16] Commerce Offenses involving activity unlawful under state law

Conviction for violation of Travel Act was supported by evidence that defendant distributed drugs to associate in Ohio so that associate could sell drugs to customer in Kentucky, traveled to Kentucky to complete transaction, and waited in vehicle while associate transferred drugs to customer and customer paid associate in return; by his actions, defendant positioned himself to receive immediate payment from Kentucky drug sale, provide surveillance support, and physically aid associate if need arose, and thus acted, in Kentucky, in furtherance of intended unlawful act there. 18 U.S.C.A. § 1952(a)(3).

2 Cases that cite this headnote

[17] Telecommunications Weight and sufficiency

Evidence that defendant used telephone to negotiate his receipt of 30 ounces of crack cocaine as payment for $14,000 debt during recorded telephone calls supported conviction for use of communications facility in commission of federal crime. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 403(b), 404, 21 U.S.C.A. §§ 843(b), 844.

Cases that cite this headnote

[18] Telecommunications Offenses

To prove a violation of statute proscribing use of communications facility in commission of federal crime, government must establish that defendant (1) knowingly and intentionally used a communications facility (2) to facilitate the commission of a federal narcotics crime. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 403(b), 21 U.S.C.A. § 843(b).

Cases that cite this headnote

[19] **Criminal Law** Defenses in general

Defendant is entitled to an entrapment instruction whenever there is sufficient evidence from which a reasonable jury could find entrapment.

Cases that cite this headnote

[20] **Criminal Law** What Constitutes Entrapment

Two elements must be shown to establish a valid entrapment defense: (1) government inducement of the crime, and (2) lack of predisposition on the part of defendant to engage in the criminal activity.

2 Cases that cite this headnote

[21] **Criminal Law** Defenses in general

When evidence clearly and unequivocally establishes that defendant was predisposed to engage in criminal activity, the district court is justified in denying an entrapment instruction.

1 Cases that cite this headnote

[22] **Criminal Law** Defenses in general

Defendant was not entitled to entrapment instruction in connection with charge of use of communications facility in commission of federal crime, given evidence firmly establishing defendant's predisposition to traffic in crack cocaine before telephone call underlying charge, during which defendant negotiated his receipt of 30 ounces of crack cocaine as payment for $14,000 debt. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 403(b), 404, 21 U.S.C.A. §§ 843(b), 844.

Cases that cite this headnote

[23] **Criminal Law** Attempts

For an individual to be convicted of an attempt crime, the government must demonstrate defendant's intent to commit the proscribed criminal conduct, together with the commission of an overt act that constitutes a substantial step towards commission of the proscribed criminal activity.

1 Cases that cite this headnote

[24] **Criminal Law** Attempts

In the context of charge that defendant attempted to commit crime, a "substantial step" toward commission of proscribed criminal activity is defined as conduct strongly corroborative of the firmness of defendant's criminal intent.

1 Cases that cite this headnote

[25] **Controlled Substances** Possession for sale or distribution

Conviction for attempting to possess with intent to distribute 30 ounces of crack cocaine was supported by evidence that, during recorded telephone conversation, defendant expressed desire to accept drugs as payment for caller's debt, by evidence of defendant's extensive drug distribution activities, and by defendant's conduct in negotiating to possess drugs and in going to meeting location 15 minutes before time set for drug transfer, notwithstanding that police presence at that location caused defendant to skip meeting.

Cases that cite this headnote

[26] **Controlled Substances** Elements in general

Controlled Substances Counterfeit or imitation substances

Defendant may be found to have taken a "substantial step" for the purpose of an attempt conviction even though he or she has failed to gain possession of drugs or sham drugs.

1 Cases that cite this headnote

[27] **Obstructing Justice** Offenses relating to witnesses or potential witnesses

Conviction for offense of corruptly attempting to persuade and influence a witness in an official proceeding was supported by evidence that defendant urged witness, when testifying before grand jury, to lie about basis of their relationship, to deny that witness knew defendant as drug dealer, and to disclaim that defendant was witness' source of crack cocaine. 18 U.S.C.A. § 1512(b)(1).

3 Cases that cite this headnote

[28] **Obstructing Justice** Tampering in general

As used in witness tampering statute, term "official proceeding" encompasses both federal criminal trials and grand jury sessions. 18 U.S.C.A. § 1512(b)(1).

Cases that cite this headnote

[29] **Criminal Law** Review De Novo

Criminal Law Evidence wrongfully obtained

In reviewing a district court's ruling on a motion to suppress evidence, Court of Appeals applies the clearly erroneous standard to the district court's factual findings, and reviews its legal conclusions de novo.

1 Cases that cite this headnote

[30] **Criminal Law** Persons entitled to object

Searches and Seizures Expectation of privacy

To succeed on a motion to suppress evidence obtained from search, the movant must show that he manifested a subjective expectation of privacy in the object of the challenged search and that society is prepared to recognize that expectation as legitimate. U.S.C.A. Const.Amend. 4.

Cases that cite this headnote

[31] **Searches and Seizures** Fourth Amendment and reasonableness in general

Searches or seizures that both intrude upon person's legitimate expectations of privacy, and are conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment, subject only to a few specifically established and well-delineated exceptions. U.S.C.A. Const.Amend. 4.

1 Cases that cite this headnote

[32] **Automobiles** License or registration offenses, in general

Officer had probable cause to stop defendant for traffic violation when individual who knew defendant personally had described defendant's vehicle to police and informed them that defendant did not have valid driver's license.

Cases that cite this headnote

[33] **Automobiles** Grounds

Decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred.

1 Cases that cite this headnote

[34] **Searches and Seizures** Waiver and Consent

A search may be conducted without a warrant if a person with a privacy interest in the item to be searched gives free and voluntary consent. U.S.C.A. Const.Amend. 4.

Cases that cite this headnote

[35] **Searches and Seizures** Consent, and validity thereof

It is the government's burden, by a preponderance of the evidence, to show through clear and positive testimony that valid consent to search was obtained. U.S.C.A. Const.Amend. 4.

2 Cases that cite this headnote

[36] **Searches and Seizures** Validity of consent

Finding that defendant had voluntarily consented to allow officers conducting traffic stop to search his vehicle, so as to dissuade them from suspecting that he was dealing drugs, was not clearly erroneous. U.S.C.A. Const.Amend. 4.

2 Cases that cite this headnote

[37] **Criminal Law** Search and arrest

Reviewing court will determine whether consent to search is free and voluntary by examining the totality of the circumstances.

1 Cases that cite this headnote

[38] **Searches and Seizures** Custody, restraint, or detention issues

Defendant's consent to search of his motel room was valid, even though he was handcuffed and under arrest at the time consent was given, inasmuch as tape recording of conversation in which consent was given established that defendant was not coerced in any way, and defendant led officers to his room and permitted them to use his key to open the door. U.S.C.A. Const.Amend. 4.

15 Cases that cite this headnote

[39] **Arrest** Particular cases

Investigatory stop of vehicle was justified by reasonable suspicion where officers observed vehicle leaving area notorious for drug activity, vehicle was carrying passenger who appeared to fit description of individual reported to be juvenile brandishing large revolver, in violation of state law, and dispatcher reported that vehicle had been involved in drug-trafficking. U.S.C.A. Const.Amend. 4; KRS 527.100.

Cases that cite this headnote

[40] **Arrest** Reasonableness; reason or founded suspicion, etc

Arrest Duration of detention and extent or conduct of investigation or frisk

Police can stop and briefly detain a person for investigative purposes if officer has a reasonable suspicion supported by articulable facts that criminal activity may be afoot, even if officer lacks probable cause; such an investigative stop, however, is limited to questioning regarding the suspected criminal activity, and a cursory search for weapons to protect the officer's safety. U.S.C.A. Const.Amend. 4.

1 Cases that cite this headnote

[41] **Arrest** Duration of detention and extent or conduct of investigation

Controlled Substances Plain view

Officers who stopped vehicle carrying passenger believed to be carrying firearm unlawfully had reasonable suspicion that weapon was present, justifying limited *Terry* search for weapons and permitting warrantless seizure of bag of drugs that was partially concealed by passenger's hand, pursuant to plain view doctrine. U.S.C.A. Const.Amend. 4.

2 Cases that cite this headnote

[42] **Arrest** Duration of detention and extent or conduct of investigation

If the police discover contraband in plain view during a legitimate *Terry* search of an automobile, the Fourth Amendment does not require them to ignore it; instead, such an item may be seized without a warrant. U.S.C.A. Const.Amend. 4.

Cases that cite this headnote

[43] **Searches and Seizures** Scope; trunk, compartments, containers, and luggage

An officer may conduct a warrantless search of every part of a legitimately stopped vehicle, including the trunk and all containers, if there is probable cause to believe that the vehicle contains contraband. U.S.C.A. Const.Amend. 4.

7 Cases that cite this headnote

[44] **Controlled Substances** Scope of search; compartments and containers

Once bag of crack cocaine was found in plain view in passenger compartment of stopped vehicle, officers had probable cause to believe that other contraband might be in vehicle, justifying warrantless search of car beyond passenger compartment, including trunk. U.S.C.A. Const.Amend. 4.

8 Cases that cite this headnote

[45] **Searches and Seizures** Hotels and motels

Codefendant had common authority or control over motel room which allowed him to consent to search of room, regardless of defendant's presence there, given that codefendant rented room, had a key, and was room's sole registered occupant. U.S.C.A. Const.Amend. 4.

4 Cases that cite this headnote

[46] **Searches and Seizures** Joint occupants

The concept of “common authority or control” enables a co-occupant of premises to consent to a search of those premises if that party has the right to use or possess the property. U.S.C.A. Const.Amend. 4.

5 Cases that cite this headnote

[47] **Criminal Law** Opening statement

Any error in allowing government to use slide presentation during opening statement was harmless, inasmuch as instructions that jury not view opening statements as evidence cured any harm which might have been caused by photographs depicting large amounts of crack cocaine and fistfuls of money, and evidence of defendants' guilt presented during subsequent nine days of trial was overwhelming.

3 Cases that cite this headnote

[48] **Criminal Law** Scope and Effect of Opening Statement

Criminal Law For prosecution

An opening statement is designed to allow each party to present an objective overview of the evidence intended to be introduced at trial, and it is not appropriate for a prosecutor to use the opening statement to poison the jury's mind against defendant or to recite items of highly questionable evidence.

4 Cases that cite this headnote

[49] **Criminal Law** Conduct of Trial in General

Criminal Law Arguments and statements by counsel

Criminal Law Reception of Evidence

Appellate courts review a district judge's conduct of a trial, including the conduct of opening statement, for abuse of discretion.

4 Cases that cite this headnote

[50] **Criminal Law** Discretion of Lower Court

Court of Appeals will find an “abuse of discretion” only upon a definite and firm conviction that the trial court committed a clear error of judgment.

1 Cases that cite this headnote

[51] **Criminal Law** Opening statement

Even if district court erred in allowing prosecution to use slide presentation during opening statements, reversal was warranted only if the presentation's effect on defendants was prejudicial, in that it affected defendants' substantial rights. Fed.Rules Cr.Proc.Rule 52(a), 18 U.S.C.A.

Cases that cite this headnote

[52] Criminal Law Custody and conduct of jury

The presumption that jury will follow trial court's clear instruction is overcome only where evidence has been admitted that is so prejudicial that, even with a limiting instruction, defendant's right to a fair trial is compromised.

2 Cases that cite this headnote

[53] Jury Sentencing Matters

Sentencing and Punishment Factors enhancing sentence

Apprendi rule requiring that, other than fact of prior conviction, any fact increasing penalty for crime beyond prescribed statutory maximum be proved to jury beyond a reasonable doubt is not triggered where defendant receives a term of imprisonment within the statutory maximum that would have applied even without the enhancing factor.

8 Cases that cite this headnote

[54] Jury Sentencing Matters

Sentencing and Punishment Factors enhancing sentence

Apprendi rule requiring that, other than fact of prior conviction, any fact increasing penalty for crime beyond prescribed statutory maximum be proved to jury beyond a reasonable doubt does not apply where a fact not found by the jury increases the lower limit of the sentencing range, as long as the sentence actually imposed is less than the upper limit of the range.

2 Cases that cite this headnote

[55] Jury Drug offenses

Sentencing and Punishment Factors enhancing sentence

Sentences for drug offenses did not implicate *Apprendi* rule requiring that, other than fact of prior conviction, any fact increasing penalty for crime beyond prescribed statutory maximum be proved to jury beyond a reasonable doubt when sentences were within maximum sentences that defendants faced without regard to amount of crack cocaine for which they were held responsible. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(b)(1)(C), 406, 408(a), 21 U.S.C.A. §§ 841(b)(1)(C), 846, 848(a); 21 C.F.R. § 1308.12.

1 Cases that cite this headnote

[56] **Criminal Law** Right to jury determination

Any error committed by district court in determining for sentencing purposes amount of drugs applicable to drug-related offense, rather than submitting issue to jury, was harmless when sentence for such offense was to run concurrently with other, permissible sentence and did not add any length to overall terms of imprisonment. 18 U.S.C.A. § 1952(a)(3); Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a)(1), (b)(1)(C), 406, 21 U.S.C.A. §§ 841(a)(1), (b)(1)(C), 846.

5 Cases that cite this headnote

[57] **Criminal Law** Sentencing

Court of Appeals will reverse a sentencing court's drug-quantity determination only if it concludes that the determination is clearly erroneous.

1 Cases that cite this headnote

[58] **Criminal Law** Questions of Fact and Findings

A finding is "clearly erroneous" when the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed; the test is whether there is evidence in the record to support the lower court's finding, and whether its construction of that evidence is a reasonable one.

2 Cases that cite this headnote

[59] **Sentencing and Punishment** Conduct in furtherance of jointly undertaken activity

Determination that defendants convicted of drug conspiracy were responsible for at least 1.5 kilograms of crack cocaine, for sentencing purposes, was supported by evidence that defendants were involved on daily basis in conspiracy involving more than two dozen kilograms of crack cocaine, and that defendants drove coconspirator to his drug deals, assisted in processing and selling crack cocaine, and carried money back and forth to his customers. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(b), 406, 21 U.S.C.A. §§ 841(b), 846; U.S.S.G. § 1B1.3 comment. (n. 2), 18 U.S.C.A.

1 Cases that cite this headnote

[60] Criminal Law Requisites and sufficiency of judgment or sentence

A district court's decision not to grant a downward departure from Sentencing Guidelines range is generally not reviewable. U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.

Cases that cite this headnote

[61] Criminal Law Requisites and sufficiency of judgment or sentence

District court's consideration, on its merits, of defendant's request for downward departure from Sentencing Guidelines range precluded appellate review of decision not to grant departure. U.S.S.G. § 2D1.1, 18 U.S.C.A.

Cases that cite this headnote

[62] Sentencing and Punishment Minor or minimal participation

Defendants were not entitled to offense level reduction, under Sentencing Guidelines, for playing minimal role in drug conspiracy when defendants carried, delivered, packaged, and sold crack cocaine in partnership with coconspirator for more than a year. U.S.S.G. § 3B1.2, 18 U.S.C.A.

1 Cases that cite this headnote

[63] Sentencing and Punishment Degree of Proof

Defendant seeking offense level reduction under Sentencing Guidelines on ground that he played minimal role in criminal activity has the burden of providing mitigating factors by a preponderance of the evidence. U.S.S.G. § 3B1.2, 18 U.S.C.A.

1 Cases that cite this headnote

[64] Criminal Law Sentencing

Court of Appeals will reverse a district court's finding regarding defendant's role in an offense, for Sentencing Guidelines purposes, only if court determines that the finding is clearly erroneous. U.S.S.G. § 3B1.2, 18 U.S.C.A.

Cases that cite this headnote

Attorneys and Law Firms

***530** Charles P. Wisdom, Jr., Assistant United States Attorney (briefed), Lexington, KY, Laura K. Voorhees, Assistant United States Attorney (argued and briefed), Covington, KY, for U.S.

Patrick F. Nash (briefed), Lexington, KY, for Michael Jordan.

Anthony Harden, Beaver, WV, pro se.

Melynda W. Cook Reich (briefed), Schad & Cook, Indian Springs, OH, for Anthony Harden.

Antonio Burns, Atlanta, GA, pro se.

Michael L. Boylan (argued and briefed), Louisville, KY, for Antonio Burns.

Ed W. Tranter (briefed), Tranter & Meier, Fort Thomas, KY, for Jerome Harden.

Before COLE and GILMAN, Circuit Judges; MILLS, District Judge. [*]

OPINION

GILMAN, Circuit Judge.

In March of 2000, a federal-court jury found Antonio Burns, Anthony Harden, Jerome Harden, Jr., and Michael Jordon guilty of crimes related to a conspiracy to possess and distribute cocaine base (crack cocaine). The defendants now appeal their convictions and sentences. All four defendants argue that the evidence at trial was insufficient to support the jury's verdict, that the district court abused its discretion in permitting the government to use a computer-generated “Power Point” presentation during its opening statement, and that they were sentenced in violation of ***531** *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). Burns and J. Harden claim that the district court erred in denying their motions to suppress evidence gathered during searches of Burns's car and motel room. A. Harden, J. Harden, and Jordon argue that the district court erred in its determination of the amount of drugs for which they were held responsible. Jordon also claims that the district court failed to consider his motion for a downward departure based upon his qualification for a mitigating-role adjustment. In addition, the government cross-appeals the district court's decision to grant A. Harden, J. Harden, and Jordon four-level sentence reductions for having played a minimal role in the drug conspiracy. For the reasons set forth below, we **AFFIRM** the judgment of the district court with respect to the convictions of all four defendants and the sentence of Burns, **REVERSE** the minimal-role reductions for A. Harden,

J. Harden, and Jordon, and **REMAND** the case for the purpose of resentencing these three defendants.

I. BACKGROUND

A. Convictions and sentences

Burns, the central figure in the alleged conspiracy, was convicted on Count 1 (engaging in a continuing criminal enterprise in violation of 21 U.S.C. § 848), Count 2 (participating in a conspiracy to distribute 20 kilograms of cocaine base in violation of 21 U.S.C. § 846), Counts 5, 6, and 7 (using a communications facility in the commission of a federal crime in violation of 21 U.S.C. § 843(b)), Count 8 (attempting to possess with the intent to distribute 30 ounces of cocaine base in violation of 21 U.S.C. § 846), and Count 9 (corruptly attempting to persuade and influence a witness in an official proceeding in violation of 18 U.S.C. § 1512(b)(1)). A. Harden, J. Harden, and Jordon were each found guilty on Count 2, and A. Harden and Jordon were also convicted on Count 3 (possessing with the intent to distribute one-half ounce of cocaine base in violation of 21 U.S.C. § 841(a)(1)) and Count 4 (traveling in interstate commerce to commit an unlawful activity, or aiding and abetting the same, in violation of 18 U.S.C. § 1952(a)(3)).

In June of 2000, Burns was sentenced to concurrent terms of life in prison on Counts 1 and 8, as well as to 48 concurrent months on Counts 5, 6, and 7, and 120 concurrent months on Count 9. Count 2 was dismissed against Burns after the jury verdict because it was considered as a lesser-included offense within the continuing criminal enterprise count. A. Harden received a sentence of 188 concurrent months in prison on Counts 2 and 3, and 60 concurrent months on Count 4. J. Harden received a sentence of 168 months in prison on Count 2. Jordon was sentenced to 151 concurrent months in prison on Counts 2 and 3, and 60 concurrent months on Count 4. A. Harden, J. Harden, and Jordon also received five years of supervised release. In calculating their offense levels, the district court granted A. Harden, J. Harden, and Jordon four-level reductions for having played a minimal role in the conspiracy pursuant to United States Sentencing Guidelines § 3B1.2(a). These appeals followed.

B. Facts relating to Counts 1 and 2

Most of the evidence against Burns and his codefendants came from the testimony of witnesses who, after their arrests on drug charges, cooperated with the government in its investigation into Burns's suspected drug-trafficking activities. Each of these witnesses, including Mary Baker, Carol Baldwin, Paul Green, Lee Keene, Chris Porter, Larry Trujillo, and Jamie Walker, testified at trial that Burns supplied ***532** crack cocaine to themselves or others, and that A. Harden, J. Harden, or Jordon drove or otherwise assisted Burns. Between November of 1997 and January of 1999, Burns distributed multiple kilograms of crack cocaine per week with the help of his codefendants, as well as Paul Green, Lee Keene, Eugene West, Tio West, and Burns's then-girlfriend "Tia." Burns, A. Harden, and Jordon were adults at all times during this period, but J. Harden did not turn 18 years old until March 25, 1998.

During the summer of 1998, A. Harden, J. Harden, Jordon, and, on occasion, Eugene West weighed and packaged crack cocaine at Baker's Covington, Kentucky apartment. The usual practice was for A. Harden, J. Harden, and Jordon to process the crack cocaine while Burns watched. At times, A. Harden processed it alone. After the drugs were packaged, Burns sent J. Harden or Jordon to bring buyers to Baker's apartment to make purchases. A. Harden, J. Harden, and Jordon, as well as Eugene and Tio West, sold crack cocaine under Burns's direction. Baker also purchased crack cocaine from Burns through J. Harden, and carried crack cocaine for Burns, J. Harden, Jordon, and Eugene West until her arrest on drug charges in September of 1998. During a visit to Burns in Cincinnati in December of 1998, Baker observed Burns, A. Harden, J. Harden, Eugene West, and Tio West buy and process crack cocaine, as well as discuss crack cocaine sales.

Baldwin met Burns in January of 1998, when Burns delivered crack cocaine to the apartment of Porter, Baldwin's boyfriend. She was present on several subsequent occasions when Burns, accompanied by J. Harden, delivered crack cocaine to Porter. J. Harden sometimes delivered the crack cocaine alone, as did Burns's girlfriend "Tia." After Baldwin was arrested in March of 1998 for distributing crack cocaine that her boyfriend Porter had purchased from Burns, Burns posted Baldwin's bond.

Porter was also arrested in March of 1998 for the possession of crack cocaine. He began buying crack cocaine from Burns in December of 1997, and did so approximately every other day until his arrest. Porter, like Baldwin, testified that J. Harden usually accompanied Burns when Burns delivered the crack cocaine. The three grams of crack cocaine that Porter sold to an undercover police officer when he was arrested came from Burns. After Porter was subpoenaed to testify in the federal grand jury investigation, Burns told him to deny purchasing crack cocaine from him, and to tell the grand jury that they knew each other only because they played basketball together.

Green purchased crack cocaine from Burns, which he would then resell, from October of 1997 until the spring of 1998. J. Harden and Jordon were observed by Green carrying and selling crack cocaine during this period of time. In the spring of 1998, Green paid A. Harden $200 for selling two grams of crack cocaine on Green's behalf.

Keene, one of Burns's largest distributors, purchased five to six ounces of crack cocaine from Burns on a daily basis, or approximately one kilogram of crack cocaine each week, from April of 1998 until his arrest on drug charges in September of that year. In total, Keene bought at least 24 kilograms of crack cocaine from Burns, for which Keene paid between $20,000 and $24,000 per kilogram. Keene also saw Jordon sell crack cocaine at least a dozen times. Burns, who lived in Clifton, Ohio, typically traveled with A. Harden, J. Harden, Jordon, or Green to make crack cocaine deliveries to Keene's residence in Covington, Kentucky. Burns rarely possessed ***533** the drugs himself; instead, he had either A. Harden, J. Harden, or Jordon carry them on his behalf.

Trujillo bought, in total, approximately two kilograms of crack cocaine from Burns between May and August of 1998. He observed that J. Harden or Jordon typically delivered the crack cocaine to him on Burns's behalf.

Walker received deliveries of crack cocaine once or twice a week, for which Burns received $700 per ounce, from 1997 until Walker's arrest in May of 1998 for possessing crack cocaine that he had bought from Burns. According to Walker, these deliveries were made by either Burns, J. Harden, or Jordon.

C. Facts relating to Counts 5, 6, 7, and 8

While incarcerated and awaiting the trial of his case, Keene agreed to cooperate with the government by contacting Burns in an attempt to dispose of an amount of crack cocaine that Keene had hidden at his residence. Keene called Burns from the detention center on January 22, 1999. During the recorded conversation, Keene agreed to return to Burns 30 ounces of crack cocaine that Burns had provided him prior to Keene's arrest. Burns told Keene that he would pick up the drugs from Keene's associate, an undercover agent, that evening, as payment for a $14,000 debt that Keene owed Burns.

During a second recorded telephone call, Officer Steve Ellison posed as Keene's brother-in-law, Charles. Ellison agreed to deliver the 30 ounces of crack cocaine to Burns near a Taco Bell restaurant in Covington. Burns arrived at the meeting place 15 minutes early, where the police who were stationed nearby observed him conducting counter-surveillance. When Burns spotted the police presence, he left the area and skipped the meeting. After the meeting time had passed, Ellison called Burns again. Burns accused Keene of “tryin' to set me up.” Ellison told Burns that he was going to “throw the s—— in the river,” to which Burns responded, “throw the s——,” but then claimed that he did not know what Ellison was talking about. Burns also denied knowing anyone named Charles, and abruptly hung up after saying, “tell your buddies I said hi.”

D. Facts relating to Count 9

Walker called Burns on February 9, 1999, after Walker had been served with a subpoena to testify before the grand jury investigating Burns and had agreed to cooperate with the government. During the recorded conversation, Walker asked Burns what he should say if he was asked about his suppliers before the grand jury. Burns told him to say, falsely: “You wasn't getting none from me.... Me and Antonio Burns just grew up together, we-we play sports together and he don't deal no drugs. I never knew him to deal no drugs. That what you tell them.” Burns also told Walker to tell the grand jury that Keene, not Burns, was Walker's source of crack cocaine. Walker later assured Burns that he had lied to the grand jury as Burns had urged.

E. Facts relating to Counts 3 and 4: the "Newport bar incident"

In an incident involving two of Burns's codefendants, but not Burns himself, Ryan Lloyd, who was cooperating with the local police, contacted Green in January of 1999 in order to buy crack cocaine. Although Green did not have any crack cocaine at the time, he negotiated a deal on Jordon's behalf for $400, with the drugs to be delivered at the Saratoga Bar in Newport, Kentucky later that day. Green told A. Harden that he needed to go to the bar to consummate a drug deal. A. Harden agreed to ***534** drive Jordon, Green, and Eugene West to the bar. When they arrived at the bar, A. Harden and Jordon stayed in the car while Green and West went in to complete the sale. Green sold Lloyd the crack cocaine for $400, but moments later West robbed Lloyd at gunpoint. Lloyd escaped to a police surveillance vehicle, and Green and West ran to their car. The police stopped the car as A. Harden attempted to drive away. In the car, officers found $4,000 in cash and a firearm under A. Harden's seat, and $5,000 in additional cash in the glove compartment. A. Harden told Tony Wall, one of the arresting officers, that he had been paid to drive the others to do a drug deal, and that he had driven on other such deals.

F. Facts relating to Burns's and J. Harden's motions to suppress evidence

On March 20, 1998, the Newport, Kentucky police stopped Burns's car after Baldwin informed them that Burns was driving without a valid driver's license. When Burns, who was driving alone, produced a fake Ohio driver's license, the officers arrested him for possessing a forged instrument. Burns was handcuffed and read his *Miranda* rights. Following his arrest, the officers searched Burns's car. The magistrate judge found that Burns had consented to the search, based upon the testimony of the officers on the scene. In the passenger compartment, the officers found two of J. Harden's paychecks and a piece of paper showing eight names paired with dollar amounts. The officers also confiscated $1,780 that they found on Burns's person. Burns, in an effort to dissuade the officers from suspecting that he was dealing drugs, invited them to search the hotel room where he and Jordon were staying. After knocking and announcing their presence, the officers used the key that Burns had provided to enter the room, where they found J. Harden lying on the bed. In the room, the officers found two plastic bags with cocaine residue.

On July 2, 1998, two Covington, Kentucky police officers responded to a report of seeing a juvenile "male black ... wearing all red clothes ... armed with a large revolver" in an area notorious for drug-trafficking activity. Upon arriving at the scene, one of the officers noticed a person appearing to fit this description. Burns, J. Harden, Jordon (dressed in a red shirt), and Green, upon seeing the officers, got into a car that was registered to Burns under a fictitious name and identified by the police dispatcher as a vehicle previously associated with drug activity. The officers stopped the car and, as they approached, recognized J. Harden as the driver. J. Harden did not have a driver's license, which the dispatcher confirmed while the officers were on the scene. The officers then arrested J. Harden for driving without a license, and ordered everyone in the car to keep their hands on the seats in front of them as the officers looked for weapons. Green, however, kept his hand on the back seat so as to partially cover a plastic bag, which upon inspection contained 16.8 grams of crack cocaine. The officers proceeded to conduct a full search of the car and its occupants. They found $5,080 in the glove compartment, a handgun and ammunition in the trunk, and $402 and a pager on J. Harden's person.

II. ANALYSIS

A. Sufficiency of the evidence

[1] **[2]** **[3]** In determining whether the evidence presented at trial is sufficient to support a conviction, "[t]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have ***535** found the essential elements of the crime beyond a reasonable doubt." *United States v. Kelly,* 204 F.3d 652, 656 (6th Cir.2000) (emphasis in original) (internal quotation marks and citation omitted). All reasonable inferences are to be drawn in the government's favor. *Id.* Moreover, "[s]ufficiency-of-the-evidence appeals are 'no place ... for arguments regarding a government witness's lack of credibility.' " *United States v. Hernandez,* 227 F.3d 686, 694 (6th Cir.2000) (citations omitted).

1. Count 1: continuing criminal enterprise

[4] **[5]** "In order to convict a defendant of engaging in a continuing criminal enterprise, the United States must prove: (1) that the defendant committed a felony violation of federal narcotics laws; (2) that the violation was part of a continuing series of three or more drug offenses committed by the defendant; (3) that the defendant committed the series of offenses in concert with five or more persons; (4) that the defendant acted as an organizer, supervisor, or manager with regard to these five or more persons; and (5) that the defendant obtained substantial income or resources from this series of violations." *United States v. Avery,* 128 F.3d 966, 973 (6th Cir.1997); 21 U.S.C. § 848(c). Burns argues that the government failed to offer sufficient evidence to establish any of these elements.

Regarding the first two elements, the testimony of Baker, Baldwin, Green, Keene, Porter, Trujillo, and Walker provided overwhelming evidence that Burns distributed crack cocaine as part of a continuing series of three or more offenses. From Keene's testimony alone, the jury heard that Burns sold crack cocaine to him on a daily basis from April of 1998 through September of that year, amounting to approximately one kilogram of crack cocaine per week. The jury also heard that Burns sold crack cocaine to Baldwin, Green, Porter, Trujillo, and Walker from late 1997 until early 1999. Each of these dozens of transactions constituted a separate violation of 21 U.S.C. § 846.

[6] **[7]** Faced with this volume of evidence, Burns argues that the indictment was constitutionally defective because it did not allege three specific drug transactions as forming the basis for the "continuing series" element. But "[a]n indictment charging a [continuing criminal enterprise] is sufficient for constitutional purposes if it articulates in statutory language the elements of the violation." *United States v. Lehder–Rivas,* 955 F.2d 1510, 1519 (11th Cir.1992) (internal quotation marks and citation omitted) (alteration in original). The indictment charged all of the essential elements of the continuing-criminal-enterprise offense and made clear that the government intended to prove a conspiracy that included at least three drug violations from November of 1997 to January of 1999. Each of the uncharged predicate acts occurred during the period specified in the charge. Burns was given advance notice of the acts and the names of the witnesses who would testify against him. As a result, the indictment was not defective.

[8] **[9]** Burns also claims that the jury was not properly instructed regarding the continuing-criminal-enterprise charge. "[A] jury in a federal criminal case brought under § 848 must unanimously agree not only that the defendant committed some 'continuing series of violations' but also that the defendant committed each of the individual 'violations' necessary to make up that 'continuing series.' " *Richardson v. United States,* 526 U.S. 813, 815–16, 119 S.Ct. 1707, 143 L.Ed.2d 985 (1999) (holding that the district court erred in instructing the jury that "[y]ou do not ***536** ... have to agree as to the particular three or more federal narcotics offenses committed by the defendant").

In the present case, the jury was instructed that it must "unanimously agree to at least three related violations underlying this continuing criminal enterprise charge." The instruction thus stands in contrast to the incorrect language in *Richardson* to the effect that the jury need not agree as to the particular three offenses. Rather, by requiring the jury to unanimously agree to "at least three related violations," the instruction at issue properly made clear to the jury that it must unanimously find that Burns committed the same three (or more) violations.

Regarding elements three and four, the evidence at trial was, again, overwhelming. Baker's testimony alone provided evidence that four people—A. Harden, J. Harden, Jordon, and Eugene West—packaged and sold crack cocaine under Burns's direction, and that a fifth, Tio West, also sold crack for Burns. She further testified that Burns supervised A. Harden, J. Harden, Jordon, and Eugene West while they weighed and packaged crack cocaine at Baker's apartment during the summer of 1998. Baldwin testified that a sixth individual, Burns's girlfriend "Tia," also delivered crack on Burns's behalf. Keene stated that, in addition to A. Harden, J. Harden, and Jordon, Burns traveled with a seventh coconspirator, Green, to make crack cocaine deliveries. From this evidence and the testimony of all the other witnesses, the jury could reasonably conclude that Burns committed the series of offenses in concert with five or more individuals that he organized, supervised, or managed.

The fifth element of the continuing-criminal-enterprise offense is supported by the testimony of Keene and Walker, among others. Keene paid Burns between $20,000 and $24,000 for each kilogram of crack cocaine that he bought from Burns over a period of five months. In total, Keene bought at least 24 kilograms of crack cocaine from Burns. When Burns posted Walker's bond, Burns showed Walker $24,000 in cash. Walker paid Burns $700 per ounce for crack cocaine delivered to Walker at least once a week from late 1997 until May of 1998. Baker testified that Burns wore nice clothing and jewelry and, even though he did not have a job, owned two cars, several cell phones, and a pager. Burns bought jewelry and other gifts for one of his girlfriends, Cassie McKnight, and paid cash for the bonds of Baldwin and Walker. The jury could have found, based on this evidence, that Burns derived substantial income from his continuing criminal activity.

2. Count 2: conspiracy

[10] **[11]** **[12]** In order to establish a conspiracy under 21 U.S.C. § 846, "the government must prove the existence of an agreement to violate the drug laws and that each conspirator knew of, intended to join, and participated in the conspiracy." *United States v. Gaitan–Acevedo,* 148 F.3d 577, 586 (6th Cir.1998) (citation omitted). Each defendant "need not have had knowledge of every phase of the conspiracy to have intended to facilitate the common scheme." *Id.* (holding that the evidence of conspiracy against the defendant was sufficient because he knew that his criminal conduct was connected in some way to the success of the collective venture).

From the testimony of Baker, Baldwin, Green, Keene, Porter, Trujillo, and Walker, the jury was presented with ample evidence that A. Harden, J. Harden, and Jordon possessed and distributed crack cocaine in concert with Burns and one another. These witnesses described, as set forth above in Part I.B., a consistent method ***537** of operation, whereby Burns and his codefendants conspired to possess, sell, and package the drugs. The claims of A. Harden, J. Harden, and Jordon that they were innocently associated with Burns are thus contradicted by substantial evidence at trial.

[13] **[14]** J. Harden, who became an adult on March 25, 1998, also argues that the government failed to prove that he ratified his membership in the conspiracy after he became an adult. "A defendant who enters a conspiracy prior to his eighteenth birthday can be tried as an adult if he continues in the conspiracy after that time." *United States v. Odom,* 13 F.3d 949, 957 (6th Cir.1994). The conspiracy allegedly existed from November of 1997 through January 4, 1999. J. Harden argues that the only evidence of his participation in the alleged conspiracy after he became an adult was as a result of the July 2, 1998 stop of Burns's car, which J. Harden argues was without probable cause and therefore in violation of the Fourth Amendment.

The admissibility of the evidence arising from the July 2, 1998 incident is discussed below in Part II.B.1. Even if J. Harden's motion to suppress were granted, however, the evidence of his participation in the conspiracy after he became an adult is as plentiful as that of his conduct as a minor. Trujillo observed that J. Harden drove Burns to sell crack cocaine to Trujillo, and J. Harden also made deliveries to Trujillo on his own. Baker said that after March of 1998, J. Harden possessed crack cocaine in her apartment, assisted Burns in finding and selling crack cocaine to customers, and sold crack cocaine to Baker until she was arrested in September of 1998. She also saw J. Harden possess crack cocaine at Burns's residence in November of 1998, as did Green. On the basis of the above evidence, the jury could reasonably have concluded that J. Harden ratified his participation in the conspiracy after he became an adult.

3. Count 3: possessing with the intent to distribute one-half ounce of crack cocaine

[15] A. Harden's and Jordon's argument that the evidence was insufficient to prove the elements of a violation of 21 U.S.C. § 841(a)(1)—that they (1) knowingly possessed one-half ounce of crack cocaine (2) with the intent to distribute the same—is refuted by the record set forth above in Part I.E. concerning the Newport bar incident. Jordon supplied the crack cocaine that Green sold to Ryan Lloyd. With drugs in the car, A. Harden drove Green to the site of the deal. A. Harden's prior knowledge of the trip's purpose was shown by the fact that Green told him that he needed to go to the bar to consummate a drug deal, as well as A. Harden's admission that he had been paid to drive to the Newport bar from Cincinnati for that purpose.

4. Count 4: traveling in interstate commerce to commit an unlawful act, or aiding and abetting the same

[16] Count 4 of the indictment charged that A. Harden and Jordon violated the Travel Act, 18 U.S.C. § 1952(a)(3). The Travel Act has three elements: (1) that the defendant "travels in interstate or foreign commerce" (2) "with intent to ... promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity" and (3) that the defendant "thereafter performs or attempts to perform" an act of promotion, management, establishment, or carrying on of any unlawful activity. 18 U.S.C. § 1952(a)(3). Jordon argues that the government failed ***538** to offer proof of the third element-that an overt act occurred after he had traveled across state lines from Ohio to Kentucky.

In support of this argument, Jordon contends that his conduct was similar to that of the defendant in *United States v. Zolicoffer,* 869 F.2d 771, 775 (3d Cir.1989), who was held not to have violated the Travel Act when he traveled from Florida to Pennsylvania in order to collect a drug debt. Zolicoffer was arrested upon entering the Harrisburg airport terminal, before he had committed an overt act in Pennsylvania. Jordon similarly argues that he did not violate the Travel Act because his failure to receive payment from the drug sale in the Newport bar prevented the intended unlawful act from being consummated. But *Zolicoffer* does not stand for the proposition that the intended illegal act must be consummated after arrival in the second state. To the contrary, the *Zolicoffer* court made clear that its holding should not be interpreted "to say that the government must prove that the defendant committed an illegal act after the travel," but only that "a plain reading of the statute shows that it must prove *some conduct after the travel in furtherance of the unlawful activity*." *Id.* (emphasis added) (internal citation omitted).

Unlike the defendant in *Zolicoffer,* who was arrested before he met with any associates in Pennsylvania or did anything else there in relation to his intended crime, Jordon committed an overt act after his travel to Kentucky in furtherance of the unlawful activity. Green's testimony provided evidence that Jordon, with full knowledge of Green's purpose, distributed the drugs to Green in Ohio so that he could sell them to Lloyd in Kentucky. Jordon then traveled to Kentucky in order to complete the deal. In Kentucky, with Jordon waiting in the car, Green transferred the drugs to Lloyd in the Saratoga Bar, and Lloyd paid Green in return, before the police stepped in. By associating with Green in Kentucky and by remaining in the car that Green intended to use to leave the scene of the drug sale at the Newport bar, Jordon placed himself in the position to (1) receive immediate payment from Green after the sale in Kentucky, (2) provide surveillance support, and (3) physically aid Green should any danger arise. Thus Jordon acted, while in Kentucky, in furtherance of the intended unlawful act there. As a result, the jury had before it sufficient evidence to convict Jordon under the Travel Act.

5. Counts 5, 6, and 7: using a communications facility in the commission of a federal crime

[17] **[18]** Burns's claim that the evidence was insufficient to support his convictions on Counts 5, 6, and 7 also fails in light of the facts set forth above in Part I.C. To prove a violation of 21 U.S.C. § 843(b), the government must establish that Burns (1) "knowingly and intentionally used a communications facility" (2) "to facilitate the commission of a [federal] narcotics crime." *United States v. Mertilus,* 111 F.3d 870, 872 (11th Cir.1997).

Burns used the telephone to negotiate his receipt of 30 ounces of crack cocaine as payment for a $14,000 debt during the recorded call with Keene and the first recorded call with undercover agent Ellison on January 22, 1998. Because Burns obviously knew that he was using the telephone, and because the knowing or intentional possession of crack cocaine is a federal crime under 21 U.S.C. § 844, both elements of the government's case were sufficiently established to enable the jury to convict.

[19] **[20]** **[21]** **[22]** But Burns argues that even if the evidence was otherwise sufficient on ***539** this count, his conviction should be vacated because the district court denied his request for a jury instruction on his entrapment defense. A defendant "is entitled to an entrapment instruction whenever there is sufficient evidence from which a reasonable jury could find entrapment." *United States v. Khalil,* 279 F.3d 358, 364 (6th Cir.2002) (internal quotation marks omitted). Two elements must be shown to establish a valid entrapment defense: "(1) government inducement of the crime, and (2) lack of predisposition on the part of the defendant to engage in the criminal activity." *Id.* "Where the evidence clearly and unequivocally establishes that [the defendant] was predisposed, the district court is justified in denying an entrapment instruction." *Id.* at 365 (internal quotation marks omitted) (alteration in original). Because the evidence recited above in Part I.B. regarding Burns's activities in 1998 firmly establishes his predisposition to traffic in crack cocaine before the recorded call from Keene in January of 1999, the district court did not err in denying Burns's request for the entrapment instruction.

6. Count 8: attempting to possess with the intent to distribute 30 ounces of crack cocaine

[23] **[24]** **[25]** "For an individual to be convicted of an attempt crime, the government must demonstrate a defendant's intent to commit the proscribed criminal conduct together with the commission of an overt act that constitutes a substantial step towards commission of the proscribed criminal activity." *United States v. Bilderbeck,* 163 F.3d 971, 975 (6th Cir.1999). A "substantial step" is defined as "conduct strongly corroborative of the firmness of the defendant's criminal intent." *Id.* (citation omitted).

The government provided the jury with substantial evidence of Burns's specific intent to possess the 30 ounces of crack cocaine through the recorded conversation with Keene. In that conversation, Burns clearly expressed his desire to accept the drugs as payment for Keene's debt to Burns. Based on the large quantity involved in this transaction, as well as the testimony regarding Burns's extensive drug distribution activities, the jury could also reasonably have concluded that Burns intended not only to possess the 30 ounces of crack cocaine, but also to distribute them.

[26] Burns's negotiations to possess the drugs during the recorded conversation with Keene and the first recorded conversation with undercover agent Ellison also constituted a substantial step toward the completion of the offense. *Id.* ("[W]e hold that when a defendant engages in active negotiations to purchase drugs, he has committed the 'substantial step' towards the crime of possession required to convict him of attempted possession."). The act of going to the Taco Bell restaurant 15 minutes ahead of the agreed-upon meeting time for the drug transfer was a second substantial step toward the completion of the offense, even though the police presence in the vicinity led him to skip the meeting. "A defendant may be found to have taken a 'substantial step' for the purpose of an attempt conviction even though he or she has failed to gain possession of drugs or 'sham' drugs." *Id.* By going to the restaurant at the time that the transfer was to occur, Burns acted in a manner that manifested a firm intent to complete the crime.

7. Count 9: corruptly attempting to persuade and influence a witness in an official proceeding

[27] **[28]** Burns's challenge of his conviction for attempting to persuade Walker to lie before the grand jury is also without ***540** merit. In order to prove this charge, the government must establish that Burns attempted to (1) corruptly persuade (2) a witness in an official federal proceeding (3) with the intent to influence that witness's testimony. 18 U.S.C. § 1512(b)(1). The facts fully support the jury's verdict on this count. Burns attempted to "corruptly persuade" Walker by urging him to lie about the basis of their relationship, to deny that Walker knew Burns as a drug dealer, and to disclaim that Burns was Walker's source of crack cocaine. Walker was a witness in an "official proceeding," because that term "encompasses both federal criminal trials and grand jury sessions." *United States v. Lara,* 181 F.3d 183, 200 (1st Cir.1999). That Burns intended to influence Walker's testimony is shown by the fact that the idea for Walker to lie came solely from Burns, and they discussed the fact that Walker would soon be testifying before the grand jury.

B. Evidentiary issues

1. Burns's and J. Harden's motions to suppress

[29] Burns sought to suppress the evidence found in his car and motel room on March 20, 1998. J. Harden sought to suppress the evidence found in Burns's motel room, where he was staying at the time of the March 20 search, as well as the items taken from Burns's car on July 2, 1998, which J. Harden was driving at the time it was stopped and searched. In reviewing a district court's ruling on a motion to suppress evidence, we apply the "clearly erroneous" standard to the district court's factual findings, and review its legal conclusions de novo. *United States v. Roberts,* 986 F.2d 1026, 1029 (6th Cir.1993). Accordingly, we review de novo the district court's legal conclusion that neither Burns's nor J. Harden's Fourth Amendment rights were violated in the searches.

[30] **[31]** The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. In order to succeed on a motion to suppress, the movant must show that "he manifested a subjective expectation of privacy in the object of the challenged search" and that "society is prepared to recognize that expectation as legitimate." *United States v. Sangineto–Miranda,* 859 F.2d 1501, 1510 (6th Cir.1988) (citation omitted). Searches or seizures that both intrude upon such legitimate expectations of privacy, and are "conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment-subject only to a few specifically established and well delineated exceptions." *Thompson v. Louisiana,* 469 U.S. 17, 19–20, 105 S.Ct. 409, 83 L.Ed.2d 246 (1984) (citation omitted). None of the searches or seizures at issue were done with prior judicial permission. As a result, they must be justified under one of the exceptions to the presumption of *per se* unreasonableness in order to be sustainable.

[32] **[33]** Turning first to Burns's motion, "the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred." *Whren v. United States,* 517 U.S. 806, 810, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996). The officer who stopped Burns had the necessary probable cause on March 20, 1998 because Baldwin, who knew Burns personally, had described Burns's car to the police and had informed them that Burns did not have a valid driver's license.

[34] [35] [36] Burns's consent justified the subsequent search of his car. "A search may be conducted without a warrant if a ***541** person with a privacy interest in the item to be searched gives free and voluntary consent." *United States v. Riascos–Suarez,* 73 F.3d 616, 625 (6th Cir.1996). "It is the Government's burden, by a preponderance of the evidence, to show through 'clear and positive testimony' that valid consent was obtained." *Id.* The magistrate judge weighed the testimony of the officers on the scene against the testimony of Burns, and found that the consistency of the officers' recollection of Burns's consent was more credible than Burns's "more argumentative than earnest" statements to the contrary, and concluded that Burns had in fact allowed the officers to search his car in an effort to dissuade them from suspecting that he was dealing drugs. Burns has provided us no reason to conclude that the magistrate's factual finding in this regard was clearly erroneous.

[37] The remaining issue is whether the consent was given voluntarily, or whether it was the result of coercion. We "will determine whether consent is free and voluntary by examining the totality of the circumstances." *Id.* The testimony of the officers regarding the calm and cordial nature of the interaction with Burns is uncontroverted, and the taped portions of the conversation in which Burns consented to the later motel search supports that testimony. As a result, the government met its burden of proving by a preponderance of the evidence that voluntary consent was obtained from Burns.

[38] The further search of Burns's motel room was also justified by his consent. A recording was made, with Burns's approval, by one of the arresting officers of the portion of the conversation in which Burns gave his consent to search the motel room. In that exchange, Burns engaged in a friendly conversation, and there is no hint that he was coerced in any way. Although Burns was handcuffed (because of his arrest for the fake driver's license) when he led the officers to the room and permitted them to use his key to open the door, Burns's consent was not invalidated simply because he was in custody at the time that he gave it. *United States v. Watson,* 423 U.S. 411, 424, 96 S.Ct. 820, 46 L.Ed.2d 598 (1976) (holding that the defendant had not been coerced into consenting to a search, even though he had been arrested and was in police custody at the time). Burns was not confined in the police station when he gave his consent, and he was not physically threatened. As a result, there is no reason to believe that Burns's consent was involuntary. The two plastic bags found in the motel room were therefore seized pursuant to a valid search.

[39] [40] Turning next to J. Harden's motion to suppress the evidence found in the car that he was driving on July 2, 1998, this stop differs from the March 20, 1998 incident because it was not based upon probable cause to believe that a traffic violation had occurred. Instead, the stop was made to investigate a non-traffic-related crime. "[T]he police can stop and briefly detain a person for investigative purposes if the officer has a reasonable suspicion supported by articulable facts that criminal activity 'may be afoot,' even if the officer lacks probable cause." *United States v.*

Sokolow, 490 U.S. 1, 7, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989) (quoting *Terry v. Ohio,* 392 U.S. 1, 30, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)). Such an investigative stop, however, is limited to questioning regarding the suspected criminal activity, and a cursory search for weapons to protect the officer's safety. *Terry,* 392 U.S. at 30–31, 88 S.Ct. 1868.

In the present case, the car that J. Harden was driving (owned by Burns) was pulled over because the officers observed it leaving an area notorious for drug activity, and because it was carrying a black ***542** male dressed in red who appeared to fit the description of an individual reported to be a juvenile brandishing a large revolver. It is illegal in Kentucky for a juvenile to brandish a firearm. Ky.Rev.Stat. Ann. § 527.100 (Michie 1999). This information, combined with the dispatcher's report that the car had been involved in drug trafficking and was in an area known for such activity, provided the officers with a reasonable suspicion of criminal activity sufficient to justify the stop.

[41] [42] Once the car was stopped, the fact that one of the passengers was thought to have a gun provided the officers with a reasonable suspicion to believe that a weapon might be present. The officers were therefore entitled to conduct a limited search for weapons under *Terry.* The seizure ofthe bag of crack cocaine that was partially concealed by Green's hand in the back seat was justified because the bag was seen in plain view. If the police discover contraband in plain view during a legitimate *Terry* search of an automobile, the Fourth Amendment does not require them to ignore it. *United States v. Walker,* 181 F.3d 774, 778 (6th Cir.1999). Instead, such an item may be seized without a warrant. *Id.* at 778–79.

[43] [44] The firearm and ammunition found in the trunk of the car were also properly seized. An officer may conduct a warrantless search of every part of a legitimately stopped vehicle, including the trunk and all containers, if there is probable cause to believe that the vehicle contains contraband. *United States v. Ross,* 456 U.S. 798, 825, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982). Once the bag of crack cocaine was found in plain view, the officers had probable cause to believe that other contraband might be in the car. They were therefore justified in searching the car beyond the passenger compartment.

[45] [46] J. Harden's motion to suppress the evidence found in Burns's motel room on March 20, 1998 was likewise properly denied, because Burns had "common authority or control" over the room that allowed him to consent to a search. The Supreme Court has defined "common authority or control" as

> [the] mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their members might permit the common area to be searched.

United States v. Matlock, 415 U.S. 164, 171 n. 7, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974). The concept of "common authority or control" enables a cooccupant such as Burns to consent to a search if that party has the right to use or possess the property. Burns rented the room, had a key, and was the sole registered occupant. He therefore had the right to use or possess the room and the ability to consent to a search regardless of J. Harden's presence there.

2. The Power Point presentation

[47] The defendants next argue that the district court erred in permitting the government, over the their objection, to use a Power Point slide presentation in the government's opening statement. While the U.S. Attorney spoke, various drawings, photographs, icons, and text appeared on a screen. Some of the images depicted items that were not intended to become evidence in the case, most notably photographs of a large amount of crack cocaine and fistfuls of money. Prior to trial, the government had advised the defendants of its intention to use this presentation during its opening statement and provided ***543** them with copies of each slide. After viewing the presentation, the district court ruled that as long as there would be evidence about each image that appeared with the text, the presentation was permissible. The jury was instructed before the opening statements that the statements were not evidence, a point that the court reiterated in its final instructions.

[48] An opening statement is designed to allow each party to present an objective overview of the evidence intended to be introduced at trial. *United States v. Brockington,* 849 F.2d 872, 875 (4th Cir.1988). It is not appropriate for a prosecutor to "use the opening statement to poison the jury's mind against the defendant or to recite items of highly questionable evidence." *Id.* (internal quotation marks and citations omitted).

[49] **[50]** **[51]** "Appellate courts review a district judge's conduct of a trial, including the conduct of opening statement, for abuse of discretion." *Cox v. Treadway,* 75 F.3d 230, 237 (6th Cir.1996). We will find an abuse of discretion only upon a "definite and firm conviction that the trial court committed a clear error of judgment." *Cincinnati Ins. Co. v. Byers,* 151 F.3d 574, 578 (6th Cir.1998) (quoting *Logan v. Dayton Hudson Corp.,* 865 F.2d 789, 790 (6th Cir.1989)). Furthermore, even if the district court erred in allowing the Power Point presentation, reversal would be warranted only if the presentation's effect on the defendants was prejudicial. Fed.R.Crim.P. 52(a). That is, the opening statement presentation must have affected the defendants' substantial rights. *Id.*

[52] Although the photographs of large amounts of crack cocaine and the fistfuls of money might have confused the jury as to the actual amounts of drugs or money at issue in the case, we presume that the district court's instructions against viewing the opening statements as evidence cured any harm that might have been caused. *United States v. Neuhausser,* 241 F.3d 460, 469 (6th Cir.2001) (explaining that a jury is presumed to have followed a clear instruction). The presumption is overcome only where evidence has been admitted that is so prejudicial that, even with a limiting instruction, the defendant's right to a fair trial is compromised. *United States v. Haywood,* 280 F.3d 715, 724, 725 (6th Cir.2002), citing *United States v. Garcia–Rosa,* 876 F.2d 209, 222 (1st Cir.1989) (vacated in part on other grounds) (holding that the prejudicial effect of the admission of the defendant's prior bad acts was so severe that it could not "be remedied merely through a limiting instruction").

In the present case, however, the potential prejudicial effect of the slides was not so great as to overwhelm the jury's ability to follow the court's instructions not to consider the opening statements as evidence. Moreover, given the overwhelming evidence of the defendants' guilt presented during the subsequent nine days of trial, any error in permitting the slides to be shown during the government's opening statement was harmless.

C. Sentencing

1. Apprendi

All four of the defendants argue that the district court violated their rights under the Sixth and Fourteenth Amendments by not requiring the jury determine, beyond a reasonable doubt, the amount of crack cocaine for which they were being held responsible, with the judge instead making that determination at sentencing using a preponderance of the evidence standard. They contend that the case of *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), supports their position. In *Apprendi,* the Supreme Court held that, "[o]ther than the fact of a prior ***544** conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490. *Apprendi* further held that "[i]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed." *Id.* (internal quotation marks and citation omitted).

[53] **[54]** But *Apprendi* "is not triggered" where the defendant receives a term of imprisonment within the statutory maximum that would have applied even without the enhancing factor (such as the drug amount). *United States v. Corrado,* 227 F.3d 528, 542 (6th Cir.2000) (holding that *Apprendi* did not apply where the defendants' sentences were enhanced based on a fact that the judge found by a preponderance of the evidence, because even with the enhancement, the sentences imposed were below the statutory maximum for the convictions established by the jury's verdict). Nor does *Apprendi* apply where a fact not found by the jury increases the lower limit of the sentencing range, as long as the sentence actually imposed is less than the upper limit of the range. *Harris v. United States,* 536 U.S. 545, 122 S.Ct. 2406, 2418, 153 L.Ed.2d 524 (2002) (holding that a fact that increases the lower limit of the sentencing range, but not the upper limit, need not be found by the jury under *Apprendi* because [t]he Fifth and Sixth Amendments ensure that the defendant "will never get *more* punishment than he bargained for when he did the crime, but they do not promise that he will receive anything less than that") (internal quotation marks and citation omitted) (emphasis in original).

[55] A. Harden, J. Harden, and Jordon were each convicted on Count 2 (conspiracy to possess with the intent to distribute cocaine base in violation of 21 U.S.C. § 846). The penalties for a violation of § 846 are determined pursuant to 21 U.S.C. § 841, which provides, in pertinent part, that "[i]n the case of a controlled substance in schedule I or II, ... such person shall be sentenced to a term of imprisonment of not more than 20 years." 21 U.S.C. § 841(b)(1)(C). Schedule II includes crack cocaine. 21 C.F.R. § 1308.12. As a result, a defendant convicted of conspiring to distribute any quantity of crack cocaine, no matter how low, is subject to a maximum sentence of 20 years in prison. 21 U.S.C. § 841(b)(1)(C).

Of the three defendants sentenced on Count 2, A. Harden received the longest sentence—188 months—which is less than 16 years. A. Harden, J. Harden, and Jordon were thus sentenced to terms of imprisonment that are less than the 20 year maximum sentence they faced without regard to the amount of crack cocaine for which they were held responsible. Their sentences on Count 2 are therefore valid under the pre-*Apprendi* case of *McMillan v. Pennsylvania,* 477 U.S. 79, 84, 91, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986) (holding that a state need not prove beyond a reasonable doubt facts that, while unnecessary to prove the elements of the charged offense, do affect the degree of culpability to be considered in determining the severity of the punishment); *Apprendi,* 530 U.S. at 487 n. 13, 120 S.Ct. 2348 ("We do not overrule *McMillan.* We limit its holding to cases that do not involve the imposition of a sentence more severe than the statutory maximum for the offense established by the jury's verdict....").

[56] The sentences that A. Harden, J. Harden, and Jordon received on Counts 3 and 4 run concurrently with their sentences on Count 2, and do not add any length to the overall terms of imprisonment. Any *Apprendi* error that the district ***545** court might have committed in determining the amount of drugs applicable to Counts 3 and 4 is therefore harmless, because it would not affect the defendants' substantial rights. *United States v. Rivera,* 282 F.3d 74, 77–78 (2d Cir.2002) (per curiam) (holding that because the defendant's life sentence for having engaged in a continuing criminal enterprise was within the statutory maximum for that offense, any *Apprendi* error in the imposition of concurrent sentences on other counts would be harmless).

Burns's *Apprendi* argument suffers from the same deficiency as those of his codefendants. The life sentence that Burns received on Count 1 (engaging in a continuing criminal enterprise) is within the statutory maximum for that offense without regard to the amount of drugs involved. 21 U.S.C. § 848(a). As a result, Burns's sentence on Count 1 does not violate *Apprendi. Rivera,* 282 F.3d at 77–78. Furthermore, because the life sentence that Burns received on Count 8 (attempting to possess with the intent to distribute 30 ounces of crack cocaine) runs concurrently with the sentence that he received on Count 1, any *Apprendi* error by the district court in determining the amount of drugs for which Burns was responsible with regard to Count 8 is also harmless. *Id.*

2. Amount of drugs for which A. Harden, J. Harden, and Jordon were responsible on Count 2

[57] **[58]** **[59]** A. Harden, J. Harden, and Jordon each challenge the district court's finding that their role in the conspiracy involved responsibility for at least 1.5 kilograms of crack cocaine. We will reverse a sentencing court's drug-quantity determination only if we conclude that the determination is clearly erroneous. *United States v. Owusu,* 199 F.3d 329, 338 (6th Cir.2000). “A finding is clearly erroneous when the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.” *Heights Community Congress v. Hilltop Realty, Inc.,* 774 F.2d 135, 140 (6th Cir.1985). “[T]he test is whether there is evidence in the record to support the lower court's finding, and whether its construction of that evidence is a reasonable one.” *Id.*

“A coconspirator is not necessarily responsible for the total amount of cocaine involved in the conspiracy for the purposes of establishing his base offense level. Rather, a participant is responsible for other conspirators' conduct only if that conduct was reasonably foreseeable to him and in furtherance of the execution of the jointly undertaken criminal activity.” *United States v. Jenkins,* 4 F.3d 1338, 1346 (6th Cir.1993); U.S. Sentencing Guidelines Manual § 1B1.3, cmt. n. 2. As set forth above in Part I.B., there was ample evidence at trial that A. Harden, J. Harden, and Jordon were involved on a daily basis in a conspiracy involving over two dozen kilograms of crack cocaine. They drove Burns to his drug deals, assisted in processing and selling the crack cocaine, and carried money back and forth between Burns and his customers. Keene testified that, over a five-month period, each of these defendants assisted with more than one transaction involving the weekly sale of a kilogram of crack cocaine. With such an extensive involvement in Burns's drug operation, it was reasonably foreseeable to these defendants both that the conspiracy involved over 1.5 kilograms of crack cocaine and that their actions were furthering that jointly undertaken criminal activity. The district court therefore did not clearly err in determining that these defendants were responsible for at least 1.5 kilograms of crack cocaine.

546** ***3. Denial of Jordon's motion for a downward departure

[60] **[61]** A district court's decision not to grant a downward departure is generally not reviewable. *United States v. Pickett,* 941 F.2d 411, 417–18 (6th Cir.1991). Contrary to Jordon's contention, the district court considered and rejected Jordon's motion for a downward departure pursuant to United States Sentencing Guidelines § 2D1.1. Jordon's counsel raised the issue in the sentencing colloquy by asking the district court to consider facts that allegedly showed Jordon's lesser culpability. Rather than grant the downward departure, the court replied that it had already taken those facts into account when it gave Jordon a four-level reduction for “minimal participation" in the conspiracy. Because this ruling is not reviewable in light of the district court's consideration of the request on the merits, Jordon's appeal of this issue is to no avail.

D. The government's cross-appeal of the four-level minimal-role reduction for A. Harden, J. Harden, and Jordon

[62] **[63]** **[64]** The government contends in its cross-appeal that the district court erred in granting A. Harden, J. Harden, and Jordon a sentencing reduction based upon their allegedly "minimal role" in the drug-trafficking conspiracy. A minimal-role reduction "is intended to cover defendants who are plainly among the least culpable of those involved in the conduct of a group." U.S. Sentencing Guidelines Manual § 3B1.2 cmt. n. 4. In determining a defendant's level of culpability, "the defendant's lack of knowledge or understanding of the scope and structure of the enterprise and of the activities of others is indicative of a role as a minimal participant." *Id.* "The culpability determination is heavily dependent upon the facts, and the defendant has the burden of providing mitigating factors by a preponderance of the evidence." *United States v. Perry,* 908 F.2d 56, 58 (6th Cir.1990) (internal quotation marks and citations omitted). We will reverse a district court's finding regarding a defendant's role in an offense only if we determine that the finding is clearly erroneous. *Id.*

In concluding that A. Harden, J. Harden, and Jordon were minimal participants, the district court focused on the fact that several of the coconspirators who testified at trial appeared to have greater roles in the conspiracy. Burns, Keene, Porter, Trujillo, and Walker, for example, each bought and sold multiple kilogram amounts of crack cocaine, something that the three defendants receiving the minimal-role reduction did not do on their own. But the district court's conclusion that A. Harden, J. Harden, and Jordon had minimal roles discounts the significant body of evidence that all three were aware of the full scope of Burns's enterprise and regularly assisted Burns in processing and selling crack cocaine on a daily basis.

The Application Notes to § 3B1.2 provide two examples of the type of conspirator for whom a four-level minimal role reduction would be appropriate: "someone who played no other role in a very large drug smuggling operation than to offload part of a single marihuana shipment, or in a case where an individual was recruited as a courier for a single smuggling transaction involving a small amount of drugs." U.S. Sentencing Guidelines Manual § 3B1.2 cmt. n. 2. In contrast to these examples of minimal roles, A. Harden, J. Harden, and Jordon each carried, delivered, packaged, and sold crack cocaine in partnership with Burns for over a year. The activities of these three defendants are so much greater in scope and duration than the one-time functionary duties posited ***547** in the Application Notes that the district court committed clear error when it granted the four-level reductions. As a result, we reverse the minimal-role reductions and remand the case for the purpose of resentencing A. Harden, J. Harden, and Jordon without such a reduction. This is not to say, however, that a two or three level reduction for a minor role under Sentencing Guidelines

§ 3B1.2 would necessarily be inappropriate on remand. Whether the conduct of these defendants fits within the "minor role" criteria of the Sentencing Guidelines is not presently before us.

III. CONCLUSION

For all of the reasons set forth above, we **AFFIRM** the judgment of the district court with respect to the convictions of all four defendants and the sentence of Burns, **REVERSE** the minimal-role reductions for A. Harden, J. Harden, and Jordon, and **REMAND** the case for the purpose of resentencing these three defendants in a manner consistent with this opinion.

All Citations

298 F.3d 523, 59 Fed. R. Evid. Serv. 715, 2002 Fed.App. 0255P

Footnotes

* The Honorable Richard Mills, United States District Judge for the Central District of Illinois, sitting by designation.

881 So.2d 1087
Supreme Court of Florida.

John CHAMBERLAIN, Appellant,
v.
STATE of Florida, Appellee.

No. SC02–1150.
|
June 17, 2004.
|
Rehearing Denied Sept. 1, 2004.

Synopsis
Background: Defendant was convicted in the Circuit Court, Palm Beach County, Marvin Mounts, J., of three counts of first-degree murder and sentenced to death. Defendant appealed.

Holdings: The Supreme Court held that:

[1] trial court did not abuse its discretion by permitting voir dire concerning death penalty even though defendant waived his right to a penalty-phase jury before guilt phase of the trial;

[2] State did not violate the rule of sequestration;

[3] statements made by codefendant during taped telephone conversation codefendant had with his mother at police station four days after murders occurred was admissible as prior consistent statements;

[4] evidence was sufficient to support first-degree murder convictions;

[5] competent substantial evidence supported finding of cold, calculated, and premeditated (CCP) aggravating factor in regard to second and third victims; and

[6] sentence of death imposed on defendant convicted of three counts of first-degree murder was a proportional penalty.

Affirmed.

Lewis, J., concurred in result only as to sentence.

West Headnotes (33)

[1] **Jury** Personal opinions and conscientious scruples

Trial court did not abuse its discretion in capital murder trial by permitting voir dire concerning death penalty even though defendant waived his right to a penalty-phase jury before guilt phase of the trial; it was defendant's position that he could have withdrawn his waiver after return of the guilty verdict, and had such happened, jurors would not have been death qualified and trial court would have been placed in a position of either refusing to allow defendant to withdraw his waiver or having to impanel a different death-qualified jury to hear penalty phase.

Cases that cite this headnote

[2] **Judges** Statements and expressions of opinion by judge

Defendant was not entitled to motion to disqualify trial judge from defendant's sentencing in capital murder trial, even though defendant claimed statements judge made in codefendant's sentencing order concerning defendant caused defendant to believe he could not receive fair and impartial sentencing; all of trial court's findings in codefendant's sentencing order concerning defendant were supported by codefendant's statement in anticipation of his guilty plea, same facts were also elicited from codefendant when he testified at defendant's trial, and judge's conclusions in codefendant's sentencing order as to defendant's participation in the murders were consistent with codefendant's statement and the facts heard by judge during defendant's trial. West's F.S.A. § 38.10.

Cases that cite this headnote

[3] **Judges** Bias and Prejudice

The test a trial court must use in determining whether a motion to disqualify the trial judge is legally sufficient is whether the facts alleged would place a reasonably prudent person in fear of not receiving a fair and impartial trial. West's F.S.A. § 38.10.

9 Cases that cite this headnote

[4] **Judges** Sufficiency of objection, affidavit, or motion

The motion to disqualify a trial judge must be well-founded and contain facts germane to the judge's undue bias, prejudice, or sympathy. West's F.S.A. § 38.10.

1 Cases that cite this headnote

[5] **Criminal Law** Review De Novo

Whether the motion to disqualify a trial judge is legally sufficient is a question of law, and the proper standard of review is de novo. West's F.S.A. § 38.10.

13 Cases that cite this headnote

[6] **Judges** Bias and Prejudice

The fact that a trial judge has made adverse rulings in the past against the defendant, or that the judge has previously heard the evidence, or allegations that the trial judge had formed a fixed opinion of the defendant's guilt, even where it is alleged that the judge discussed his opinion with others, are generally considered legally insufficient reasons to warrant the judge's disqualification. West's F.S.A. § 38.10.

2 Cases that cite this headnote

[7] **Sentencing and Punishment** Extent of offender's personal participation

Relative culpability is one of the factors a court must evaluate in deciding whether to impose the death penalty in any capital case involving multiple perpetrators.

Cases that cite this headnote

[8] **Criminal Law** Opinions

Criminal Law Particular evidence or prosecutions

Trial court did not abuse its discretion by failing to declare a mistrial in capital murder trial after detective testified that, after hearing defendant's taped interview with police in which defendant was heard crying, he did not believe crying was genuine; instruction to disregard statement was sufficient to ameliorate prejudice that resulted, as defense counsel cut off detective's statement with an objection, and brief comments were not repeated by other witnesses or in closing argument.

1 Cases that cite this headnote

[9] **Criminal Law** Discretion of court

Criminal Law 🔑 Fairness and justice in general

A ruling on a motion for a mistrial is within the sound discretion of the trial court and should be granted only when necessary to ensure that the defendant receives a fair trial.

Cases that cite this headnote

[10] **Criminal Law** 🔑 Issues related to jury trial

Criminal Law 🔑 Conduct and Deliberations of Jury

The use of a harmless error analysis is not necessary where the trial court recognized the error, sustained the objection and gave a curative instruction; rather, the correct appellate standard of review is abuse of discretion regarding the denial of a mistrial.

3 Cases that cite this headnote

[11] **Criminal Law** 🔑 Identification evidence

Defendant failed to preserve for appellate review his claim that trial court erred in capital murder trial by admitting witness's out-of-court identification of defendant from photopack, where defendant did not object when State introduced photopack into evidence.

Cases that cite this headnote

[12] **Criminal Law** 🔑 Arrest and identification, evidence relating to

Trial court's error, if any, in allowing detective to testify as to the out-of-court identification witness made of defendant when she observed photopack, was harmless in capital murder prosecution; identification did not involve defendant's actions or involvement in the murders but rather related to defendant's whereabouts the morning after the murders, and witness was only one of four witnesses who identified defendant as being at her house the morning after the murders.

Cases that cite this headnote

[13] **Criminal Law** 🔑 What constitutes violation of rule

State did not violate the rule of sequestration in capital murder trial by speaking with detective during a break in his testimony; while detective testified after defense counsel invoked rule of sequestration, no indication or allegation existed that detective remained in the courtroom during the testimony of another witness, or that detective discussed his testimony with another witness. West's F.S.A. § 90.616(1).

Cases that cite this headnote

[14] **Criminal Law** Power and duty of court

The rule of sequestration is designed to aid in ensuring a fair trial by avoiding the coloring of a witness's testimony by that which he has heard from other witnesses who have preceded him on the stand, thereby discouraging fabrication, inaccuracy and collusion. West's F.S.A. § 90.616(1).

Cases that cite this headnote

[15] **Witnesses** Former statements corresponding with testimony

Statements made by codefendant during taped telephone conversation codefendant had with his mother at police station four days after murders occurred was admissible in capital murder prosecution as prior consistent statements; codefendant's statements were consistent with his trial testimony, State's use of statements was to rehabilitate codefendant, as one of defense theories at trial was that codefendant had conspired to portray defendant as the instigator in the murders, and taped conversation occurred before plea negotiations or State's requests for testimony. West's F.S.A. § 90.801(2)(b).

2 Cases that cite this headnote

[16] **Criminal Law** Witnesses

Capital murder defendant failed to preserve for appellate review his claim that trial court committed reversible error in allowing the State to recall codefendant to testify about a taped telephone conversation he had with his mother while at police station four days after murders occurred because it did not fall within hearsay exception for prior consistent statements, where defense counsel never argued to the trial court that the tape did not fall within the evidentiary rule providing that prior consistent statements are not hearsay. West's F.S.A. § 90.801(2)(b).

2 Cases that cite this headnote

[17] **Criminal Law** Necessity of specific objection

Criminal Law Adding to or changing grounds of objection

To be preserved for appeal, the specific legal ground upon which a claim is based must be raised at trial and a claim different than that will not be heard on appeal.

6 Cases that cite this headnote

[18] **Criminal Law** Introduction of documentary and demonstrative evidence

Trial court did not abuse its discretion in capital murder trial by allowing plainclothes police officer to display an asp to witness to aid her in describing the weapon she had seen defendant holding on night murders occurred; defendant's possession of a weapon on the evening of the murders was relevant, as it tended to show his level of involvement in the crimes, demonstrative aid was not admitted into evidence, and State did not claim that as was the same weapon used in the murders, but rather only that it was similar.

4 Cases that cite this headnote

[19] **Criminal Law** Demonstrative Evidence

The determination as to whether to allow the use of a demonstrative exhibit is a matter within the trial court's discretion.

1 Cases that cite this headnote

[20] **Criminal Law** Demonstrative evidence

Trial court did not abuse its discretion by not granting a mistrial in capital murder trial after State introduced into evidence a seven-and-a-half-inch friction-lock baton, or asp, that was recovered three days after murders, when State's witness had used a smaller asp as a demonstrative aid for her testimony describing the weapon she had seen defendant holding on night murders occurred; witness had previously testified that asp used as demonstrative aid was larger than what she had seen defendant holding, and both codefendants subsequently identified the smaller weapon as identical to what defendant had possessed on night murders occurred.

3 Cases that cite this headnote

[21] **Criminal Law** Points and authorities

Capital murder defendant abandoned for appellate review his claim that trial court erred in giving two portions of felony murder instruction, where defendant failed to advance any argument to appellate court as to how the instruction was in error.

Cases that cite this headnote

[22] **Criminal Law** Necessity of specific objection

Capital murder defendant failed to preserve for appellate review his claim that it was error to pursue a conviction of defendant through felony murder when the indictment charged only premeditation, where defendant failed to raise at trial specific legal ground on which claim was based.

2 Cases that cite this headnote

[23] **Homicide** Multiple perpetrators

Evidence was sufficient to support first-degree murder convictions based on theory of felony murder, of which underlying felony was armed robbery; codefendants testified that defendant supplied a gun to codefendant, codefendants testified that defendant participated in planning of a robbery, codefendant testified that it was defendant's idea to use the gun, codefendants all verified that defendant had an asp with him the night of the murders, codefendant stated that defendant used the asp on first victim, evidence indicated that defendant actively began looting victims' house and put items in his car, and after codefendant killed one of victims, testimony from codefendants revealed that it was defendant who first encouraged codefendant to kill other victims.

Cases that cite this headnote

[24] **Criminal Law** Substantial evidence

The trial court's finding denying a motion for judgment of acquittal will not be reversed on appeal if there is competent substantial evidence to support the jury's verdict.

4 Cases that cite this headnote

[25] **Homicide** Deliberation and premeditation

Premeditation, as required for first-degree murder, is more than a mere intent to kill; it is a fully formed conscious purpose to kill, and such purpose to kill must exist for a sufficient time before the homicide to permit reflection as to the nature of the act to be committed and the probable result of that act.

1 Cases that cite this headnote

[26] **Homicide** Deliberation and premeditation

Evidence was sufficient to support first-degree murder convictions based on theory of premeditation; testimony of codefendants established that defendant encouraged codefendant to kill others after codefendant stated he had killed first victim, that defendant stood beside codefendant while he executed others, that defendant calmly picked up the shell casings, and that defendant finally went to the car to retrieve more bullets after it was discovered that first victim was not dead.

Cases that cite this headnote

[27] **Sentencing and Punishment** Planning, premeditation, and calculation

Competent substantial evidence supported finding of cold, calculated, and premeditated (CCP) aggravating factor in regard to second and third victims during penalty phase of capital murder trial; evidence indicated defendant and codefendants had a calculated plan to murder victims, and that defendant and codefendant acted in concert, in that defendant provided transportation and the gun, initiated the idea of killing victims, and directed and encouraged codefendant to commit the killings.

1 Cases that cite this headnote

[28] **Sentencing and Punishment** Dual use of evidence or aggravating factor

Generally, when a homicide occurs during the course of a robbery, it is improper for the trial court to find as aggravation both that the homicide was committed during the course of a robbery and that the homicide was committed for pecuniary gain.

2 Cases that cite this headnote

[29] **Criminal Law** Sentencing

Criminal Law Sentencing

The trial judge's ruling on an aggravating circumstance will be sustained on review as long as the court applied the right rule of law and its ruling is supported by competent, substantial evidence in the record.

Cases that cite this headnote

[30] **Sentencing and Punishment** Planning, premeditation, and calculation

For a trial court to find cold, calculated and premeditated (CCP) aggravating factor in prosecution for capital murder, four factors must be established by the evidence: (1) the jury must first determine that the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage, (2) that the defendant had a careful plan or prearranged design to commit murder before the fatal incident; (3) that the defendant exhibited heightened premeditation; and (4) that the defendant had no pretense of moral or legal justification.

3 Cases that cite this headnote

[31] **Sentencing and Punishment** Planning, premeditation, and calculation

Competent substantial evidence did not support finding of cold, calculated, and premeditated (CCP) aggravating factor in regard to first victim during penalty phase of capital murder trial; no evidence existed that before defendant and codefendant placed victim in the bathroom, that codefendant and defendant formulated a calculated plan to murder victim, and it was undisputed that victim's death occurred during a struggle in the bathroom after victim rushed codefendant.

Cases that cite this headnote

[32] **Sentencing and Punishment** Harmless and reversible error

Trial court's error, in finding during penalty phase of capital murder trial that murder of first alleged victim was committed in a cold, calculated, and premeditated (CCP), was harmless, where four other valid aggravators existed that consisted of defendant being previously convicted of a felony and on probation, defendant having a previous violent felony conviction, defendant's commission of murder while engaged in a robbery, and defendant's commission of murder to avoid arrest.

7 Cases that cite this headnote

[33] **Sentencing and Punishment** Extent of offender's personal participation

Sentencing and Punishment Killing while committing other offense or in course of criminal conduct

Sentencing and Punishment Escape or other obstruction of justice

Sentence of death imposed on defendant convicted of three counts of first-degree murder was a proportional penalty, where defendant personally committed the robbery that occurred during the course of murders committed by codefendant, defendant supplied the gun used in murder offenses, and defendant instigated elimination of witnesses who were present at scene after believing codefendant had killed first victim.

Cases that cite this headnote

Attorneys and Law Firms

***1092** Gregg S. Lerman, West Palm Beach, FL, for Appellant.

Charles J. Crist, Jr., Attorney General, and Debra Rescigno, Assistant Attorney General, West Palm Beach, FL, for Appellee.

Opinion

PER CURIAM.

Chamberlain appeals his convictions and sentences of death after a jury found him guilty of three counts of first-degree murder and one count of armed robbery for participating in a 1998 West Palm Beach triple homicide. [1]

FACTS

Four persons—Chamberlain, Thomas Thibault, Jason Dascott, and Amanda Ingman—took part in this triple homicide. Thibault, the admitted triggerman, pled guilty to first-degree murder and was sentenced to death. Dascott pled guilty to second-degree murder. Ingman was not charged. Thibault, Dascott, and Ingman all testified against Chamberlain at trial. The relevant facts are as follows.

Sometime in October or November of 1998, Ingman began trying to locate Thibault, her drug supplier and "occasional pimp," to purchase some cocaine. After hearing that Ingman was looking for him, Thibault telephoned Ingman at a house on Norton Avenue in West Palm Beach, where she lived with the victims in this case—Bryan Harrison, Charlotte Kenyan, and Daniel Ketchum. Harrison, who was Ingman's boyfriend, became angry at Thibault for calling Ingman. In the early morning hours of November 26, 1998, which was Thanksgiving Day, Thibault enlisted Dascott and Chamberlain to go with him to the Norton Avenue house to deliver some cocaine to Ingman and to attempt to resolve the argument with Harrison. Thibault told Chamberlain that there might be a confrontation. Although Chamberlain did not personally know anyone at the Norton Avenue house, Thibault testified that Chamberlain responded that he "had [Thibault's] back and he was down to go." Chamberlain drove Thibault and Dascott in a car belonging to Chamberlain's father. A .45 caliber handgun and ammunition belonging to Chamberlain's father were in the trunk of the car. En route, the men stopped at a gas station, where Chamberlain showed Thibault the gun.

***1093** The argument between Thibault and Harrison was resolved quickly after Thibault, Chamberlain, and Dascott arrived at the Norton Avenue house. Chamberlain, Thibault, Dascott, Ingman, and Harrison then snorted cocaine together in Ingman's bedroom. At some point, Ketchum, another resident of the Norton Avenue house, entered the room and mentioned to Thibault that he had some electronic equipment to sell for cocaine. Harrison and Ingman also said they wanted more cocaine. Thereafter, Chamberlain, Thibault, Dascott, Ingman, and Harrison drove to the house of a drug dealer for more cocaine and to offer to sell Ketchum's electronic equipment. Thibault went inside alone and obtained more cocaine. Thibault testified that the supplier was not interested in buying the electronic equipment, and at that point Thibault began thinking about just “taking” the equipment.

Upon returning to the Norton Avenue house, Harrison and Ingman went inside while Thibault, Chamberlain, and Dascott remained outside and discussed robbing the residents of the house. The three then went inside. At some point, while in Ingman's bedroom, Thibault, Chamberlain, Dascott, and Ingman devised a robbery plan in which either Ingman or Dascott would persuade Ketchum to open a safe that was located in the living room. Thibault testified that Chamberlain then suggested that Thibault use the gun to announce the robbery and put Harrison and Ketchum in the bathroom because Thibault was physically the largest. Ingman, Dascott, and Chamberlain would then loot the house.

Either Ingman or Dascott persuaded Ketchum to open the safe. Thibault then ordered Ketchum and Harrison into the bathroom. Chamberlain helped move Ketchum and Harrison into the bathroom by striking Ketchum on the leg [2] with a baton-like weapon, later identified as an asp. [3] While Thibault held Ketchum and Harrison at gunpoint in the bathroom, Ingman, Dascott, and Chamberlain began removing electronic items such as televisions and radios from the house and putting the items in Chamberlain's car. Meanwhile in the bathroom, Ketchum rushed Thibault. Thibault shot and killed Ketchum during the ensuing struggle.

Thibault left the bathroom and told the others that he had killed Ketchum. Thibault and Ingman testified that Chamberlain then said “no more witnesses,” and encouraged Thibault to kill Harrison or else they were “all going to die,” and were “all going to the electric chair.” Thibault also testified that he left the decision up to Ingman, who said to “go ahead and get rid of the other witnesses.” Ingman and Thibault then awakened Charlotte Kenyan, who had been sleeping in a back bedroom, and placed her in the bathroom with Harrison. Thibault testified that he “emptied the gun” into Harrison and Kenyan while Chamberlain stood by his side. Chamberlain then picked up the shell casings because they had his fingerprints on them. Chamberlain and Thibault noticed that Harrison was not dead, so Chamberlain went to the car, retrieved more bullets, and reloaded the gun. Thibault again “emptied the gun” into Harrison and Kenyan.

After the killings, Chamberlain drove Ingman and Dascott to Chamberlain's parents' ***1094** house. The three unloaded the car, and went into the house. Subsequently, Thibault arrived at Chamberlain's house in a taxi. Chamberlain, Thibault, and Dascott then took the stolen items to the house of Donna Garrett. Shortly thereafter, Chamberlain and Dascott separated from Thibault.

Ingman testified that she sneaked out of a window of Chamberlain's house, went to the house of Harrison's father, and told him of the murders. She returned with Harrison's father to the Norton Avenue house, where they called the police. Alerted to Chamberlain's involvement by Ingman, the police searched Chamberlain's house in the early evening of November 26 pursuant to a search warrant. Chamberlain was not present at that time. He later surrendered to the police on Sunday, November 29, 1998.

At trial, the theory of the State's case was that Chamberlain was instrumental in instigating the murders. The State specifically relied on Chamberlain's use of the asp to push the victims into the bathroom and his statement, “no more witnesses,” to support its theory of Chamberlain's involvement. Chamberlain's defense was that the other participants conspired to place the blame on Chamberlain, and their motive to blame Chamberlain increased when the State offered them plea agreements. The jury found Chamberlain guilty of three counts of first-degree murder.

Chamberlain waived a penalty phase jury prior to trial. The penalty phase hearing was therefore held in front of the trial judge. In the sentencing order, the trial judge found six aggravating factors: (1) the murder was committed while Chamberlain was under the supervision of the Department of Corrections; (2) Chamberlain had prior violent felony convictions (the contemporaneous murders and robbery); (3) the murders were committed while Chamberlain was engaged in a robbery; (4) the murders were committed to avoid arrest; (5) the murders were committed for pecuniary gain; and (6) the murders were cold, calculated, and premeditated (CCP). The trial judge found in mitigation that Chamberlain had the ability to form loving relationships and other factors in the defendant's past, including the fact that Chamberlain had some parental neglect and he was teased by older cousins who lived with Chamberlain's family for a while.[4] The trial court gave the mitigators slight weight. Determining that the aggravators outweighed the mitigators, the trial judge sentenced Chamberlain to death for each murder.

In this appeal, Chamberlain raises eleven issues for review: (1) death qualification of the jury; (2) denial of Chamberlain's motion to disqualify the trial judge; (3) comments on Chamberlain's credibility; (4) an out-of-court identification of Chamberlain; (5) an alleged violation of the rule of sequestration; (6) use of prior consistent statements; (7) use of a demonstrative aid; (8) constitutionality of the felony-murder jury instruction; (9) sufficiency of the evidence of first-degree murder; (10) constitutionality of the murder in the course of a felony aggravator; and (11) sufficiency of the evidence supporting the finding of aggravating factors and the rejection of mitigating factors. We address ***1095** each of these issues, and also address whether the death penalty is proportional in this case.

GUILT PHASE

Death Qualified Jury Voir Dire

[1] The first issue arises from Chamberlain's waiver of the penalty-phase jury. Unlike *Thibault v. State,* 850 So.2d 485 (Fla.2003), in which we reversed the death sentence of Chamberlain's codefendant because of the absence of an affirmative waiver of a penalty-phase jury, *see id.* at 487, Chamberlain does not contest the validity of the waiver itself. Rather, Chamberlain argues that because he waived his right to a penalty-phase jury before the guilt phase of the trial, the trial court abused its discretion in allowing the State to question the potential jurors regarding their feelings on the death penalty.

During jury selection, the jurors were informed over defense objection that although the judge alone would decide on the sentence, death was an option. The questioning permitted by the trial court was more limited than if the voir dire had been conducted to death qualify the jury to participate in both the guilt and penalty phases. The trial court then granted nine challenges for cause against jurors who stated that they would have difficulty finding a defendant guilty of first-degree murder if their verdict might lead to the death penalty. [5]

This Court has repeatedly held that "[t]he scope of voir dire questioning rests in the sound discretion of the court and will not be interfered with unless that discretion is clearly abused." *Darling v. State,* 808 So.2d 145, 160 (Fla.2002) (quoting *Franqui v. State,* 699 So.2d 1312, 1322 (Fla.1997), *cert. denied,* 537 U.S. 848, 123 S.Ct. 190, 154 L.Ed.2d 78 (2002)). In *Darling,* a capital case, this Court held that the trial court did not abuse its discretion in precluding questioning of jurors concerning the death penalty. The trial court did not allow the defense to ask potential jurors whether they had seen stories of prisoners released from death row, and whether their "drive" to impose death would be lessened by the availability of an alternative of life without parole. However, the court permitted defense counsel to explore jurors' concerns over the length of capital proceedings and their understanding of alternative penalties that applied. This Court found no error. *See* 808 So.2d at 160.

On the other hand, in *Lavado v. State,* 492 So.2d 1322, 1323 (Fla.1986), this Court held that the trial court abused its discretion by precluding defense counsel from questioning potential jurors about their willingness to accept the defense of voluntary intoxication. The Court adopted the dissenting opinion below, in which Judge Pearson stated that "where a juror's attitude about a particular legal doctrine (in the words of the trial court, 'the law') is essential to a determination of whether challenges for cause or peremptory challenges are to be made, it is well settled that the scope of the voir dire properly includes questions about and references to that legal doctrine." *Lavado v. State,* 469 So.2d 917, 919–20 (Fla. 3d DCA 1985) (Pearson, J., dissenting).

Florida Rule of Criminal Procedure 3.390(a) provides in pertinent part that "[*e]xcept in capital cases*, the judge shall not instruct the jury on the sentence that may be imposed for the offense for which ***1096** the accused is on trial." (Emphasis supplied.) The United States Supreme Court has held that in capital cases, if a juror's views of the death penalty will prevent or substantially impair the performance of the juror's duties at the sentencing phase, the juror may be excused for cause. *See Lockhart v. McCree,* 476 U.S. 162, 173, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986); *Wainwright v. Witt,* 469 U.S. 412, 433, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985). This Court has similarly recognized that there is no constitutional infirmity in the "death qualification" of a jury in a capital case. *See San Martin v. State,* 705 So.2d 1337, 1343 (Fla.1997). Thus, the question is whether, in a first-degree murder case in which the State is seeking the death penalty and the defendant has waived a penalty-phase jury, the jury should be told that a conviction may result in imposition of the death penalty.

On this issue as on many others, death is different. The transcript of voir dire in this case illustrates that at least some potential jurors were aware before voir dire that death was a potential penalty for first-degree murder. [6] For example, when defense counsel asked potential juror Williams whether she could serve in a criminal case if she did not know the potential penalties, she stated she would know the death penalty was possible once she was told it was a first-degree murder case. Juror Williams' response demonstrates that some persons called for jury duty are generally aware that their decision in a first-degree murder case may result in a sentence of death. In contrast to the available penalties of either life imprisonment or death for first-degree murder, the array of sentencing laws for noncapital crimes in Florida Statutes, including several different recidivist schemes, makes general awareness of the potential penalty for another particular crime far less likely.

In recognition of the fact that at least some potential jurors know that a verdict of guilty in a first-degree murder case may lead to the defendant's execution, we decline to impose a per se rule preventing any questioning of jurors on the death penalty when death remains a potential sentence. To conclude otherwise would create an unacceptable risk that jurors who cannot fulfill their oaths will serve in the guilt phase of capital proceedings. An additional concern is that in this case, it is Chamberlain's position that he could have withdrawn his waiver after the return of the guilty verdict. Had this happened, the jurors would not have been death qualified and the trial court would have been placed in a position of either refusing to allow Chamberlain to withdraw his waiver or having to impanel a different death-qualified jury to hear the penalty phase. Nevertheless, we urge the cautious exercise of judicial discretion in allowing questioning on this sensitive subject in cases in which jurors will not actually render an advisory sentence.

Under the circumstances of this case, the trial court struck a proper balance between the rights of the accused and the ***1097** State. In light of the limited nature of the questioning, we conclude that the trial court did not abuse its discretion in permitting the voir dire concerning the death penalty. Chamberlain is not entitled to reversal on this issue.

Motion to Disqualify Trial Judge

[2] The next issue involves the denial by Judge Mounts, the trial judge, of a request that he disqualify himself from Chamberlain's sentencing. Although Thibault pled guilty before Chamberlain's trial, Judge Mounts deferred sentencing of Thibault until after he testified at Chamberlain's trial. Thibault was sentenced before Chamberlain. After the trial court entered its order sentencing Thibault to death, Chamberlain filed a motion to disqualify Judge Mounts pursuant to section 38.10, Florida Statutes (2001). Chamberlain alleged that, based on factual findings in Thibault's sentencing order concerning Chamberlain's level of culpability, Chamberlain had a "well grounded fear that he [would] not receive a fair sentencing hearing at the hands of the judge." Judge Mounts denied Chamberlain's motion to disqualify. It is Chamberlain's position on appeal that this denial created reversible error. We disagree.

[3] **[4]** **[5]** The test a trial court must use in determining "whether a motion to disqualify is legally sufficient is 'whether the facts alleged would place a reasonably prudent person in fear of not receiving a fair and impartial trial.' " *Barnhill v. State,* 834 So.2d 836, 843 (Fla.2002) (quoting *MacKenzie v. Super Kids Bargain Store, Inc.,* 565 So.2d 1332, 1335 (Fla.1990)), *cert. denied,* 539 U.S. 917, 123 S.Ct. 2281, 156 L.Ed.2d 134 (2003). The motion to disqualify "must be well-founded and contain facts germane to the judge's undue bias, prejudice, or sympathy." *Wright v. State,* 857 So.2d 861, 873 (Fla.2003) (quoting *Jackson v. State,* 599 So.2d 103, 107 (Fla.1992)), *cert. denied,* 541 U.S. 961, 124 S.Ct. 1715, 158 L.Ed.2d 402 (2004). Whether the motion is "legally sufficient" is a question of law, and the proper standard of review is de novo. *See Barnhill,* 834 So.2d at 843.

[6] In this case, Chamberlain alleged that the statements Judge Mounts made in Thibault's sentencing order concerning Chamberlain's culpability caused Chamberlain to fear that he could not receive a fair and impartial sentencing by Judge Mounts. However, "[t]he fact that the judge has made adverse rulings in the past against the defendant, or that the judge has previously heard the evidence, or 'allegations that the trial judge had formed a fixed opinion of the defendant's guilt, even where it is alleged that the judge discussed his opinion with others,' are generally considered legally insufficient reasons to warrant the judge's disqualification." *Rivera v. State,* 717 So.2d 477, 481 (Fla.1998) (quoting *Jackson,* 599 So.2d at 107).

[7] We conclude that the findings made by Judge Mounts in sentencing Thibault were necessary to support Thibault's death sentence and did not indicate a fixed intention to sentence Chamberlain to death. Relative culpability is one of the factors the court must evaluate in deciding whether to impose the death penalty in any case involving multiple perpetrators. *See Evans v. State,* 808 So.2d 92, 108 (Fla.2001) (recognizing that a death sentence may be disproportionate if an equally culpable codefendant is sentenced to life imprisonment). In this case, all the trial court's findings in Thibault's sentencing order concerning Chamberlain were supported by Thibault's statement in anticipation of his guilty plea. The same facts were also elicited from Thibault when he testified at Chamberlain's trial, which took place seven months before Thibault was ***1098** sentenced. Judge Mounts' conclusions in Thibault's sentencing order as to Chamberlain's participation in the murders were consistent with Thibault's statement and the facts heard by Judge Mounts during Chamberlain's trial.

Thus, because the statements by Judge Mounts relied on by Chamberlain in his motion to disqualify were neither germane to nor indicative of any bias or prejudice, Judge Mounts did not err in denying the motion to recuse. Chamberlain is not entitled to reversal on this issue.

Credibility Comments

[8] The next issue concerns comments made by one of the detectives in this case regarding Chamberlain's credibility. During the direct examination of Detective Fraser, the State played a tape of Chamberlain's police interview in which Chamberlain could be heard crying. Asked by the State for his opinion on Chamberlain's crying, Detective Fraser indicated that he did not think it was genuine. Chamberlain objected and moved for a mistrial. The trial court denied the motion for mistrial, but sustained the objection and instructed the jury to disregard "the conclusion of the officer as to his observation." Chamberlain argues that the instruction to disregard was insufficient to ameliorate the prejudice caused by the improper opinion testimony.

[9] **[10]** A ruling on a motion for a mistrial is within the sound discretion of the trial court and should be granted only when necessary to ensure that the defendant receives a fair trial. *See Rivera v. State,* 859 So.2d 495, 512 (Fla.2003). "The use of a harmless error analysis under *State v. DiGuilio,* 491 So.2d 1129 (Fla.1986), is not necessary where the trial court recognized the error, sustained the objection and gave a curative instruction. Instead, the correct appellate standard of review is abuse of discretion." *Id.* (quoting *Smithers v. State,* 826 So.2d 916, 930 (Fla.2002)) (internal quotation marks and citation omitted).

Although "there [is no] legal principle more firmly established in our system of jurisprudence than that which makes the jury the sole arbiter of the credibility of the witnesses," *Barnes v. State,* 93

So.2d 863, 864 (Fla.1957), we are not persuaded by Chamberlain's argument that the instruction to disregard was insufficient in this case. First, defense counsel cut off Detective Fraser's statement with an objection, so that the comments regarding Chamberlain's credibility heard by the jury were limited.[7] Second, the brief comments were not repeated by other witnesses or in closing argument. Under these circumstances, the trial court's actions of sustaining the objection and giving the instruction to disregard were sufficient. No abuse of discretion has been demonstrated and therefore Chamberlain is not entitled to relief.

Out of Court Identification

[11] This issue concerns an out-of-court photographic lineup identification of Chamberlain made by State witness Donna Garrett. At trial, Garrett testified that on Thanksgiving morning, November 26, 1998, three men came to her house carrying electronic equipment. Without objection, the State introduced into evidence a photopack from which, two years after the incident, Garrett had identified with eighty percent certainty a picture of Chamberlain as depicting one of the men at her house on Thanksgiving morning. However, when asked at trial to identify which picture ***1099** she had previously selected, Garrett misidentified the picture of Chamberlain.

Chamberlain alleges that the photopack identification was unreliable and unduly prejudicial and should not have been admitted because Garrett was only eighty percent certain of her identification of Chamberlain. This Court has set forth a two-pronged test to determine whether suppression of an out-of-court identification is warranted: "(1) did the police use an unnecessarily suggestive procedure to obtain the out-of-court identification; (2) and if so, considering all the circumstances, did the suggestive procedure give rise to a substantial likelihood of irreparable misidentification." *Dennis v. State,* 817 So.2d 741, 760 (Fla.2002) (quoting *Thomas v. State,* 748 So.2d 970, 981 (Fla.1999)). Not only was this issue not preserved for appeal but, other than generally asserting that the photopack was prejudicial, Chamberlain fails to advance any argument regarding the two-pronged test or address the factors to be considered when determining whether suppression of an out-of-court identification is warranted. We conclude that Chamberlain is not entitled to reversal on this issue both because it was not preserved and because the argument on appeal is insufficiently pled.

[12] Also regarding Garrett's identification, Chamberlain alleges that the trial court erred in subsequently allowing Detective Fraser to testify as to the identification Garrett made of Chamberlain when she observed the photopack. Chamberlain argues that Detective Fraser's testimony was inadmissible hearsay. We do not reach the issue of whether it was error to allow Fraser to testify to the identification because we conclude that if error occurred, it was harmless beyond a reasonable doubt for several reasons.

First, the identification did not involve Chamberlain's actions or involvement in the murder. Rather, the identification related to Chamberlain's whereabouts the morning after the murder. Second, Garrett was only one of four witnesses who identified Chamberlain as being at her house the morning of November 26, 1998. Garrett's mother, her brother, and her boyfriend all identified Chamberlain with 100 percent certainty as one of the men at Garrett's house that morning. These witnesses all testified at trial and confirmed their previous identifications. Thus, Chamberlain's presence at Garrett's house on the morning of the killings was collateral to Chamberlain's culpability, several witnesses other than Garrett identified him as being present, and Garrett herself testified to, and was cross-examined on, her identification. Chamberlain is not entitled to reversal on this issue.

Rule of Sequestration

[13] In this issue, Chamberlain argues that the State violated the rule of sequestration by speaking with Detective Fraser during a break in his testimony. Detective Fraser testified after defense counsel invoked the rule of sequestration. At the conclusion of his testimony, the court excused the jury, but asked Detective Fraser to remain in the courtroom during a bench conference. Thereafter, the prosecutor briefly discussed with Detective Fraser that he was going to be recalled to testify about a July 26, 1999, bond hearing in which Chamberlain was a witness. Defense counsel objected to Fraser being recalled on the grounds that the State had violated the rule by discussing with Fraser his potential testimony on recall during a break in the proceedings and while the he was still under oath. The court overruled the objection. Chamberlain argues that this ruling was reversible error. We disagree.

***1100** **[14]** The rule of sequestration provides:

> At the request of a party the court shall order, or upon its own motion the court may order, witnesses excluded from a proceeding so that they cannot hear the testimony of other witnesses....

§ 90.616(1), Fla. Stat. (2003). The rule is designed to aid in ensuring a fair trial "by avoiding 'the coloring of a witness's testimony by that which he has heard from other witnesses who have preceded him on the stand,' " *Gore v. State*, 599 So.2d 978, 986 (Fla.1992) (quoting *Spencer v. State*, 133 So.2d 729, 731 (Fla.1961)), thereby discouraging "fabrication, inaccuracy and collusion." *Knight v. State*, 746 So.2d 423, 430 (Fla.1998) (quoting Charles W. Ehrhardt, *Florida Evidence* § 616.1, at 506 (1998 ed.)).

In this case, there is no indication or allegation that Detective Fraser remained in the courtroom during the testimony of another witness, or that Detective Fraser discussed his testimony with another witness. *Cf. Lott v. State,* 695 So.2d 1239, 1243 (Fla.1997) (violation of rule for three state crime-scene witnesses, two of whom had yet to testify, to discuss certain aspects of a murder investigation while they were in witness room during presentation of State's case). Chamberlain has not demonstrated error and therefore is not entitled to relief on this issue.

Prior Consistent Statements

[15] This issue concerns the State's attempt to rehabilitate Thibault through prior consistent statements after he was cross-examined. At trial, the State recalled and questioned Thibault about a taped telephone conversation that he had with his mother while he was at the police station on November 30, 1998, four days after the murders. Thibault's statements during the phone conversation corroborated his testimony at trial. Chamberlain argues that the trial court committed reversible error in allowing the State to recall Thibault to testify about the conversation because the statements did not fall within the hearsay exception for prior consistent statements. We conclude that Chamberlain is not entitled to reversal on this issue.

[16] **[17]** First, this issue is not preserved for appeal. At trial, Chamberlain objected to the tape being introduced at trial on grounds that it was hearsay on hearsay and cumulative. [8] Chamberlain's counsel never argued to the trial court that the tape did not fall within the evidentiary rule providing that prior consistent statements are not hearsay. It is well-settled in Florida that "[t]o be preserved for appeal, 'the specific legal ground upon which a claim is based must be raised at trial and a claim different than that will not be heard on appeal.' " *Spann v. State,* 857 So.2d 845, 852 (Fla.2003) (quoting *Rodriguez v. State,* 609 So.2d 493, 499 (Fla.1992)).

Second, even if Chamberlain had properly preserved this issue, it has no merit. One of the defense theories at trial was that Thibault had conspired to portray Chamberlain as the instigator in the murders either to secure a favorable plea and merciful sentence or out of loyalty to Dascott. During cross-examination, defense counsel elicited testimony from Thibault regarding his initial plea, his decision to reject the plea and request mercy from the court in exchange for testifying, and the letters he exchanged with Dascott in jail. The State's purpose in introducing Thibault's conversation with his mother, which ***1101** was recorded four days after the murders and presumably before any motive to lie arose, was to rehabilitate Thibault through prior consistent statements.

Section 90.801, Florida Statutes (2003), which excludes some prior consistent statements from the definition of hearsay, provides in pertinent part:

> (2) A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is:

> ....
>
> (b) Consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of improper influence, motive, or recent fabrication....

Chamberlain does not challenge the State's assertion that Thibault's conversation with his mother was consistent with his trial testimony. Nor does he contest the fact that one of the defense strategies was to argue that Thibault was fabricating Chamberlain's role in the murders. Chamberlain's sole argument against the admissibility of the tape under section 90.801(2)(b) is that Thibault's motive to lie arose *before* the conversation with his mother. According to Chamberlain, Thibault and Dascott began conspiring late on Thanksgiving Day 1998, the day of the murders. Thus, Chamberlain argues that the tape was useless to rebut the charge of fabrication.

Regardless of the veracity of Chamberlain's timeline of when Thibault and Dascott allegedly began conspiring, it is clear from the record that the taped conversation occurred *before* plea negotiations or the State's requests for testimony. Thus, we are guided by this Court's decision in *Chandler v. State*, 702 So.2d 186 (Fla.1997). In that case, a witness testified that the defendant admitted the murder to her in November 1989. On cross-examination, defense counsel elicited two motives for the witness to lie, one arising in October 1990 and one arising in 1994. On redirect, the State rehabilitated the witness with a prior consistent statement given in October 1992, before the 1994 motive to lie arose. Despite the fact that the prior consistent statement was made *after* the first motive to lie advanced by defense counsel arose, this Court concluded that the statement was nonetheless properly admitted. *See id.* at 197–98. We stated that

> [t]he October 1992 statement was undisputedly made after the October 1990 ... incident. However, by directly suggesting that the [1994 incident] motivated [the witness's] testimony, *Chandler could not thereafter prevent the State from rehabilitating her testimony by urging that another motive to fabricate existed earlier*. That was a choice that the defendant made in urging more than one reason to fabricate at trial. Having made this choice, he must suffer its natural consequences.

Id. at 198. Similarly, in this case, having advanced the plea negotiations and requests for testimony as a motive for Thibault to fabricate testimony, Chamberlain cannot thereafter prevent the State from rehabilitating Thibault with statements made before the negotiations and requests by urging that the alleged conspiracy with Dascott existed earlier. The trial court did not err in admitting the prior consistent statement and we therefore reject Chamberlain's claim of error on this issue.

Use of Demonstrative Aid

[18] In this next issue, Chamberlain attacks the State's use of a demonstrative aid during Amanda Ingman's direct examination. At trial, Ingman testified that on the night of the murders she witnessed the defendant holding a weapon with a flat ***1102** black handle. At the State's request and over defense objection, the trial court allowed a plainclothes police officer to display an asp to Ingman to aid her in describing the weapon she had seen to the jury. Ingman testified that the weapon she saw the defendant hold on the evening of the murders was smaller than the one displayed to her by the police officer.

[19] The standard for allowing demonstrative evidence at trial was recently reiterated by this Court in *Harris v. State,* 843 So.2d 856, 863 (Fla.2003), wherein we stated:

> Demonstrative evidence is admissible only when it is relevant to the issues in the case.... [I]t is essential, in every case where demonstrative evidence is offered, that the object or thing offered for the jury to see be first shown to be the object in issue and that it is in substantially the same condition as at the pertinent time, or that it is such a reasonably exact reproduction or replica of the object involved that when viewed by the jury it causes them to see substantially the same object as the original.
>
> The person offering such evidence should be required to give a good reason for its acceptance into evidence, and this is particularly true if the object be not the original, but only a replica or a facsimile.

Id. (quoting *Alston v. Shiver,* 105 So.2d 785, 791 (Fla.1958)). "The determination as to whether to allow the use of a demonstrative exhibit is a matter within the trial court's discretion." *Brown v. State,* 550 So.2d 527, 528 (Fla. 1st DCA 1989); *see also Heath v. State,* 648 So.2d 660, 664 (Fla.1994) (stating that trial court has broad discretion to determine relevance of evidence).

We conclude that the trial court did not abuse its discretion in allowing the demonstration in this case. Chamberlain's possession of a weapon on the evening of the murders was relevant, as it tended to show his level of involvement in the crimes. Moreover, the demonstrative aid was not admitted into evidence, and the State did not claim that it was the same weapon used in the murders. The State claimed only that it was similar. *See Wade v. State,* 204 So.2d 235, 238–39 (Fla. 2d DCA 1967) (approving admission of object similar but not identical to object used in crime). Further, Ingman was subject to cross-examination on the extent to which the weapon resembled the object she had seen in Chamberlain's possession the night of the murders.

[20] However, Chamberlain points out that later in the trial, the State actually introduced into evidence a seven-and-a-half-inch friction-lock baton, or asp, that was recovered three days after the murder. At a bench conference, defense counsel renewed his objection to the prior demonstration, arguing:

> Apparently, it's going to be the State's position now that if Mr. Chamberlain had a baton or anything in his hand that Exhibit 154 is going to be the item that he had.
>
> Based on that and that this exhibit has been placed into evidence and based on the demonstration that I objected to yesterday and the demonstration which was performed, which is an item substantially larger than this Exhibit 154, I renew my objection at this time and am moving for a mistrial.
>
> ....
>
> It's substantially smaller in width, length, and weight than what was shown yesterday and looks substantially less ominous than what—

The trial court denied the motion for mistrial. Chamberlain argues on appeal that ***1103** the trial court's ruling was erroneous because, by comparison with the smaller asp, the larger asp used as a demonstrative aid had a shocking impact on the jury which prejudiced him. We disagree.

"A ruling on a motion for a mistrial is within the sound discretion of the trial court and should be granted only when it is necessary to ensure that the defendant receives a fair trial." *Rivera,* 859 So.2d at 512 (internal quotation marks omitted). Although we question the State's approach in using the larger sized asp as a demonstrative aid instead of the original weapon that was available during Ingman's testimony, the fact that the jury saw the larger weapon in this case did not deprive Chamberlain of a fair trial. We reach this conclusion because, notwithstanding the fact that the weapon introduced into evidence was actually smaller than the demonstrative aid, the jury was not misled or confused in any way. *See Robinson v. State,* 145 So.2d 561, 562 (Fla. 3d DCA 1962) (finding no error in admission of model of murder weapon that did not appear to confuse or mislead the jury). Ingman had previously testified that the asp used as the demonstrative aid was larger than what she had seen Chamberlain holding, and both Thibault and Dascott subsequently identified the smaller weapon as identical to what Chamberlain had possessed. Moreover, the State never made use of the demonstrative aid other than during Ingman's testimony. Thus, in this case, the trial court did not abuse its discretion in denying the motion for mistrial.

Felony Murder Jury Instruction

Chamberlain's specific argument on this issue is unclear. In his brief, Chamberlain quotes portions of the trial transcript in which he argued unsuccessfully that two portions of the felony murder jury instruction should not be given.[9] However, he fails to advance any argument in this Court as to how the instruction was in error. Instead, Chamberlain urges this Court to recede from *Knight v. State,* 338 So.2d 201, 204 (Fla.1976), and "hold that it is improper, as in the case at bar, for the State to pursue conviction through felony murder when the indictment charges only [premeditated murder]." We conclude that Chamberlain is not entitled to relief on his challenge to the jury instruction or his request that we recede from precedent.

[21] **[22]** First, because Chamberlain fails to advance any argument to this Court regarding the jury instruction issue he raised at trial, we conclude that he has abandoned that issue. *See Shere v. State,* 742 So.2d 215, 217 n. 6 (Fla.1999) (finding that issues raised in appellate brief which contain no argument are deemed abandoned). Second, Chamberlain's argument that it is error to pursue conviction through felony murder when the indictment charges only premeditation is not ***1104** preserved for appeal. *See Spann,* 857 So.2d at 852 ("To be preserved for appeal, the specific legal ground upon which a claim is based must be raised at trial and a claim different than that will not be heard on appeal."). Finally, even if the issue were preserved, we are not inclined to recede from this well-established precedent. *See Anderson v. State,* 841 So.2d 390, 404 (Fla.), *cert. denied,* 540 U.S. 956, 124 S.Ct. 408, 157 L.Ed.2d 292 (2003); *Kearse v. State,* 662 So.2d 677, 682 (Fla.1995); *Knight,* 338 So.2d at 204.

Sufficiency of the Evidence

[23] Chamberlain argues that the trial court erred in denying his motion for judgment of acquittal based on legal insufficiency of the evidence. This issue is wholly without merit.

[24] This Court recently reaffirmed the standard for ruling on a motion for judgment of acquittal. In *Darling v. State,* 808 So.2d 145, 155 (Fla.), *cert denied,* 537 U.S. 848, 123 S.Ct. 190, 154 L.Ed.2d 78 (2002), we stated:

> In moving for a judgment of acquittal, a defendant "admits not only the facts stated in the evidence adduced, but also admits every conclusion favorable to the adverse party that a jury might fairly and reasonably infer from the evidence." *Lynch v. State,* 293 So.2d 44, 45 (Fla.1974). As explained in *Lynch:*
>
>> The courts should not grant a motion for judgment of acquittal unless the evidence is such that no view which the jury may lawfully take of it favorable to the opposite party can be sustained under the law. Where there is room for a difference of opinion between reasonable men as to the proof of facts from which the ultimate fact is sought to be established, or where there is room for such differences as to the inference which might be drawn from conceded facts, the Court should submit the case to the jury for their finding, as it is their conclusion, in such cases, that should prevail and not primarily the views of the judge.

Id. "The trial court's finding denying a motion for judgment of acquittal will not be reversed on appeal if there is competent substantial evidence to support the jury's verdict." *Rogers v. State*, 783 So.2d 980, 988 (Fla.2001). Because the jury was instructed on both premeditated and felony murder and found Chamberlain guilty on a general verdict form, the evidence must support either premeditated or felony murder. *See Jones v. State*, 748 So.2d 1012, 1024 (Fla.1999) (citing *Mungin v. State*, 689 So.2d 1026, 1029–30 (Fla.1995)).

Here, there is sufficient evidence of both theories of first-degree murder. Three witnesses testified against Chamberlain regarding his involvement in the triple homicide and robbery. Dascott and Thibault both testified that Chamberlain supplied the gun to Thibault. Dascott, Thibault, and Ingman testified that Chamberlain participated in the planning of the robbery. Thibault testified that it was Chamberlain's idea to use the gun and that Chamberlain gave the gun to Thibault only because Thibault was physically larger. Dascott, Thibault, and Ingman all verified that Chamberlain had an asp with him the night of the murders, and Thibault stated that Chamberlain used the asp on Harrison. The medical examiner testified that Harrison had a bruise on his knee consistent with being struck by a blunt object.

Once Ketchum and Harrison were in the bathroom, Chamberlain actively began looting the house and putting items in his car. After Thibault killed Ketchum, testimony from Ingman and Thibault revealed that it was Chamberlain who first encouraged Thibault to kill the other witnesses. Thibault stated that Chamberlain stood beside him while Thibault emptied the gun into Kenyan and Harrison. Chamberlain ***1105** then picked up the bullet casings to avoid leaving incriminating evidence. Thibault testified that after Chamberlain and Thibault discovered Harrison was still alive, it was Chamberlain who went to the car, retrieved more bullets, and reloaded the gun. Dascott's testimony supported Thibault's version of the killings.

[25] **[26]** Thus, in this case there is competent, substantial evidence to support the jury's verdict on either theory of first-degree murder, as well as armed robbery. First, all three murders indisputably occurred in the course of a robbery for which Chamberlain both possessed and supplied a weapon. Therefore, the evidence supports verdicts of guilt of armed robbery and felony murder. Second, regarding premeditated murder, "[p]remeditation is defined as 'more than a mere intent to kill; it is a fully formed conscious purpose to kill.' " *Green v. State*, 715 So.2d 940, 943 (Fla.1998) (quoting *Coolen v. State*, 696 So.2d 738, 741 (Fla.1997)). This purpose to kill must exist for a sufficient time before the homicide "to permit reflection as to the nature of the act to be committed and the probable result of that act." *Id.* at 944, (quoting *Coolen*, 696 So.2d at 741). At a minimum, ample evidence supports the jury's verdict of guilt of the premeditated murders of Harrison and Kenyan.[10] The testimony of Ingman, Thibault, and Dascott established that Chamberlain encouraged Thibault to eliminate the witnesses, stood beside Thibault while he executed the witnesses, calmly picked up the shell casings, and finally went to the car to retrieve more bullets after it was discovered that Harrison was not dead. Although Chamberlain did not actually pull the trigger, the evidence supports the conclusion that he played an integral part in the executions of Harrison and Kenyan, and is guilty as a principal. *See Ferrell v. State,* 686 So.2d 1324, 1329 (Fla.1996) ("While [the defendant] may not have actually pulled the trigger, the evidence establishes that he played a[n] integral part in these crimes and in actually luring the victim to his death. Thus, at a minimum, he is guilty as a principal under the statute."); *Hall v. State,* 403 So.2d 1319, 1320 (Fla.1981) (evidence, including fact that defendant and his companion planned robbery of victim together and were together at site of victim's assault and death, supported conclusion that, even if defendant did not pull trigger, he was a principal to crime of murder). [11] Therefore, the trial court properly denied the motion for judgment of acquittal. There is sufficient evidence of the first-degree murder of all three victims and Chamberlain is not entitled to relief on this issue.

PENALTY PHASE

Course of a Felony Aggravator

Chamberlain argues that the murder in the course of a felony aggravator in ***1106** section 921.141(5)(d), Florida Statutes, violates the Florida and United States Constitutions because it neither performs a narrowing function nor reasonably justifies the imposition of a more severe sentence. This Court has repeatedly rejected this claim. *See, e.g., Owen v. State,* 862 So.2d 687, 704 (Fla.2003), *petition for cert. filed,* No. 03–9345 (U.S. Mar. 3, 2004); *Johnson v. Moore,* 837 So.2d 343, 348 (Fla.2002); *Blanco v. State,* 706 So.2d 7, 11 (Fla.1997). Further, as noted below, the course of a felony aggravator is merged with, and subsumed within, the pecuniary gain aggravator.

Sufficient Evidence of Aggravation and Mitigation

[27] In this issue, Chamberlain attacks the trial court's findings on aggravation and mitigation. Regarding the aggravators, Chamberlain generally alleges that "the evidence submitted in the instant case did not support any of the aggravating factors found by the trial court." However, he specifically challenges only the finding of CCP.

[28] Although not raised by Chamberlain, we first address the improper doubling of aggravators. We note that the trial court found that Chamberlain committed the murder both (1) for pecuniary gain, and (2) during the course of a felony (robbery). Generally, when a homicide occurs during the course of a robbery, it is improper for the trial court to find as aggravation both that the homicide was committed during the course of a robbery and that the homicide was committed for pecuniary gain. *See Barnhill,* 834 So.2d at 836, 851; *Provence v. State,* 337 So.2d 783, 786 (Fla.1976). Therefore, we conclude that the trial court erred in finding both commission for pecuniary gain and commission during the course of a robbery as aggravating factors. Accordingly, we merge these aggravators.

[29] **[30]** We next address CCP. "[T]he trial judge's ruling on an aggravating circumstance will be sustained on review as long as the court applied the right rule of law and its ruling is supported by competent, substantial evidence in the record." *Barnhill,* 834 So.2d at 850–51. For the trial court to find CCP, four factors must be established by the evidence:

> [T]he jury must first determine that the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold); and that the defendant had a careful plan or prearranged design to commit murder before the fatal incident (calculated); and that the defendant exhibited heightened premeditation (premeditated); and that the defendant had no pretense of moral or legal justification.

Id. at 851 (quoting *Jackson v. State,* 648 So.2d 85, 89 (Fla.1994)).

It is clear that Chamberlain's claim that the evidence does not support the trial court's finding of the CCP aggravator for the murders of Harrison and Kenyan is without merit. The trial court stated in its sentencing order:

> The final two homicides are remarkable because they are methodical. They are performed in a systematic way. The decision to take life is clearly present in the minds of all three (Thibault, Chamberlain, and Ingman) at the time of the killings.
>
> ... What is revealed here is a calculated plan to eliminate that begins with debate, consumes appreciable time and is conducted with the two men (Thibault and Chamberlain) acting in concert. It is concrete and heightened, and it all takes place during a continuing robbery that is a virtual marathon of taking.
>
> ....
>
> ***1107** Chamberlain provides transportation and the gun. He initiates the idea of witness elimination, and it is he who directs, prods and encourages Thibault in the final executions.

These findings are supported by competent, substantial evidence. Regarding the applicability of the criteria for CCP to these facts, we also conclude that the execution-style nature of the killings is particularly compelling in this case. These wholly unnecessary, execution-style murders are prime examples of the "deliberate ruthlessness" for which application of the CCP aggravating factor is reserved. *See Zack v. State,* 753 So.2d 9, 21 (Fla.2000); *see also McCoy v. State,* 853 So.2d 396, 408 (Fla.2003) (affirming CCP where evidence established that there were no signs of physical struggle at the crime scene, the appellant had ample opportunity to leave after completing the robbery, and he unnecessarily executed a compliant hostage *execution style*); *Looney v. State*, 803 So.2d 656, 678 (Fla.2001) (applying CCP where “the defendants had ample opportunity to reflect upon their actions, following which they mutually decided to shoot the victims *execution-style* ”), *cert. denied*, 536 U.S. 966, 122 S.Ct. 2678, 153 L.Ed.2d 850 (2002); *Alston v. State*, 723 So.2d 148, 162 (Fla.1998) (sustaining the CCP aggravator where the “appellant had ample opportunity to release [the victim] after the robbery,” but chose to kill him); *Eutzy v. State*, 458 So.2d 755, 757 (Fla.1984) (sustaining CCP where there was no sign of struggle, and the victim was shot *execution-style*).

[31] **[32]** However, we agree with Chamberlain that the evidence is insufficient to support the trial court's finding that the murder of Ketchum was cold, calculated, and premeditated. There is no evidence that before they placed Ketchum and Harrison in the bathroom, Thibault and Chamberlain formulated a calculated plan to murder the victims. Moreover, it is undisputed that Ketchum's death occurred during a struggle in the bathroom after Ketchum rushed Thibault. Although Thibault may have formulated an intent to kill Ketchum during the attack, the totality of the circumstances indicate an absence of the heightened premeditation by Chamberlain necessary for application of this aggravator. However, as four other valid aggravators exist in this case—(1) previously convicted of a felony and on probation; (2) previous violent felony conviction (the contemporaneous murder convictions); (3) murder committed while engaged in a robbery/pecuniary gain (merged); and (4) murder committed to avoid arrest—any error is harmless beyond a reasonable doubt. This Court has determined that errors in finding aggravators were harmless in analogous cases. *See, e.g., Sireci v. Moore*, 825 So.2d 882, 887 (Fla.2002) (even assuming that insufficient evidence existed to support the trial court's finding of CCP, any error was harmless because four other valid aggravators existed); *Zack v. State*, 753 So.2d 9, 20 (Fla.2000) (finding wrongful application of the avoiding a lawful arrest aggravator harmless error where four other valid aggravators—prior violent felonies, pecuniary gain, HAC, and CCP—existed); *Guzman v. State*, 721 So.2d 1155, 1162 (Fla.1998) (upholding imposition of the death penalty where the CCP aggravator was overturned but the remaining four other aggravators—prior violent felony, committed in the course of a robbery, HAC, and avoiding arrest—existed).

Finally, we address the trial court's findings regarding mitigation. As mitigation Chamberlain presented the testimony of six witnesses, including two mental health counselors. The trial court stated in its sentencing order:

> ***1108** There are some factors in the defendant's background that are mitigating in nature. There was some abuse by his cousins and the testimony is that they introduced him to criminal conduct. On the other hand he sought their company. He wanted to be with them and did not appear to have other friends. At some point their relationship became brotherly and currently it is described as loving and affectionate. This is mitigation of some weight which I rank as slight.

And he was neglected by his parents....

The parental neglect in this case, while serious, is not as devastating as many within my experience.

Dr. Eugene Herman testified that Mr. Chamberlain's full scale IQ was in the high average range....

[His employers] reported that he was a good employee, a good kid, always respectful; never showed any signs of behavioral problems.... He had started to turn his life around. He obtained his GED and enrolled in the community college.

The turbulence and trauma in his life took place for a few years starting when he was 8 years old.

Our independent review of the record leads us to conclude that these findings on mitigation are supported by competent, substantial evidence.

Proportionality

[33] This Court has an independent obligation to perform a proportionality review of all death sentences. To this end, we have stated:

> Due to the uniqueness and finality of death, this Court addresses the propriety of all death sentences in a proportionality review. This review is a unique and highly serious function of this Court, the purpose of which is to foster uniformity in death-penalty law. It is not a comparison between the number of aggravating and mitigating circumstances; rather, it is a thoughtful, deliberate proportionality review to consider the totality of the circumstances in a case, and to compare it with other capital cases.

McCoy, 853 So.2d at 408 (quotation marks and citations omitted). We conclude that the death sentence is proportionate in this case.

We have previously affirmed death sentences where the defendant is a principal in a felony or premeditated murder. *See Stephens v. State,* 787 So.2d 747, 760 (Fla.2001) (finding death sentence proportionate in case where defendant did not actually commit murder, but personally committed crimes of burglary and robbery and actions displayed reckless disregard for human life); *Van Poyck v. State*, 564 So.2d 1066, 1070–71 (Fla.1990) (finding the death sentence proportionate where the defendant was the instigator and primary participant in the underlying crimes, came to the scene "armed to the teeth," and knew lethal force could be used). [12] Moreover, ***1109** CCP and prior violent felony conviction are considered among the more serious aggravating circumstances. *See Anderson v. State,* 863 So.2d 169, 188 (Fla.2003), *cert. denied,* 541 U.S. 940, 124 S.Ct. 1662, 158 L.Ed.2d 363 (2004). Finally, we have affirmed death sentences under circumstances similar to those in this case. *See Philmore v. State,* 820 So.2d 919, 940 (Fla.) (affirming death sentence where trial court found five aggravating circumstances including prior violent felony, CCP, and pecuniary gain, no statutory mitigators, and eight nonstatutory mitigating circumstances), *cert. denied,* 537 U.S. 895, 123 S.Ct. 179, 154 L.Ed.2d 162 (2002); *Franqui v. State,* 804 So.2d 1185, 1198 (Fla.2001) (affirming death sentence where defendant murdered a law enforcement officer during a bank robbery and trial court found three aggravators—pecuniary gain, prior violent felony, and avoid arrest—and minor nonstatutory mitigation); *Farina v. State,* 801 So.2d 44, 56 (Fla.2001) (holding death penalty was proportionate where defendant was a major participant in an armed robbery, had cold, calculated, and premeditated plan to eliminate any witnesses, but did not have a significant prior criminal history), *cert. denied,* 536 U.S. 910, 122 S.Ct. 2369, 153 L.Ed.2d 189 (2002).

CONCLUSION

Based on the foregoing, we affirm Chamberlain's convictions and sentences of death.

It is so ordered.

ANSTEAD, C.J., and WELLS, PARIENTE, QUINCE, CANTERO, and BELL, JJ., concur.

LEWIS, J., concurs as to the conviction, and concurs in result only as to the sentence.

All Citations

881 So.2d 1087, 29 Fla. L. Weekly S305

Footnotes

1 We have jurisdiction. *See* art. V, § 3(b)(1), Fla. Const.

2 The medical examiner, Jacquelin Martin, testified that Harrison had a bruise on his knee consistent with being struck by a blunt object.

3 The asp was described at trial as an extendable police baton.

4 The trial judge rejected the following mitigating circumstances: (1) that Chamberlain was an accomplice in a capital felony committed by another person; (2) that he acted under extreme duress or substantial domination; (3) that he had no significant criminal history; (4) that his ability to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was substantially impaired; and (5) the age of the defendant.

5 Chamberlain does not allege error in the trial court granting the challenges for cause. Rather, as noted above, Chamberlain's argument on this issue is the trial judge's decision to allow *any* questioning on the death penalty.

6 If the State has affirmatively waived the death penalty, potential jurors may be told that death is not an option. *See, e.g., Sirianni v. State,* 411 So.2d 198, 200 (Fla. 5th DCA 1981). Like the limited death qualification in this case, instructing jurors that death is not an option prevents the impaneling of jurors whose views on the death penalty would improperly influence their verdicts as to guilt. In all other first-degree murder cases, death remains a potential penalty. *See* § 775.082(1), Fla. Stat. (2003) (capital felony is punishable by death or by life imprisonment); § 782.04(1)(a) (first-degree murder constitutes capital felony). Under rule 3.390(a), jurors in such cases are instructed that death may be imposed.

7 Specifically, Detective Fraser stated that he did not "go along with it" and did not "believe that his—", referring to the crying.

8 The hearsay on hearsay objection presumably stemmed from the fact that, before recalling Thibault, the State initially tried to introduce the tape through Detective Fraser.

9 The standard felony murder jury instruction reads in pertinent part:

> To prove the crime of First Degree Felony Murder, the State must prove the following three elements beyond a reasonable doubt:
>
> 1. (Victim) is dead.
>
> 2. a. [The death occurred as a consequence of and while (defendant) was engaged in the commission of (crime alleged).]
>
> b. [The death occurred as a consequence of and while (defendant) was attempting to commit (crime alleged).]
>
> c. [The death occurred as a consequence of and while (defendant), or an accomplice, was escaping from the immediate scene of (crime alleged).]
>
> 3. a. [(Defendant) was the person who actually killed (victim).]
>
> b. [(Victim) was killed by a person other than (defendant); but both (defendant) and the person who killed (victim) were principals in the commission of (crime alleged).]

Fla. Std. Jury Instr. (Crim) 7.3.

10 Chamberlain does not specifically question whether the evidence supports premeditated murder regarding Ketchum. The State argues that Chamberlain is guilty as a principal. However, prior to Ketchum's murder, which occurred when Ketchum rushed Thibault in the bathroom, it does not appear that there was a preconceived plan to murder the occupants of the house. Nonetheless any error is harmless beyond a reasonable doubt, as there was sufficient evidence to convict Chamberlain of the first-degree felony murder of all three victims.

11 Section 777.011, Florida Statutes (2003), provides:

> Whoever commits any criminal offense against the state, whether felony or misdemeanor, or aids, abets, counsels, hires, or otherwise procures such offense to be committed, and such offense is committed or is attempted to be committed, is a principal in the first degree and may be charged, convicted, and punished as such, whether he or she is or is not actually or constructively present at the commission of such offense.

12 Although Chamberlain does not specifically raise the issue that the trial court failed to make a factual determination concerning his participation in the murders as prescribed by the United States Supreme Court's decisions in *Tison v. Arizona,* 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987), and *Enmund v. Florida,* 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), our independent obligation to perform a proportionality review compels us to address this issue in this case. In *Enmund* and *Tison,* the United States Supreme Court held that a sentence of death must be proportional to the defendant's culpability. Thus, in *Enmund* the Supreme Court indicated that in the felony murder context a sentence of death is not permissible if the defendant only aids and abets a felony during the course of which a murder is committed by another and defendant himself did not kill, attempt to kill, or intend that a killing take place or that lethal force be used. *See* 458 U.S. at 797, 102 S.Ct. 3368. Later, in *Tison* the Court said a sentence of death in the felony murder context can be proportional if the defendant is a major participant in the felony and the defendant's state of mind amounts to a reckless indifference to human life. *See* 481 U.S. at 157, 107 S.Ct. 1676

In the present case, Chamberlain was not merely an aider or abettor in a felony where a murder was committed by others; Chamberlain personally committed the crime of robbery. He also supplied the gun, instigated the witness elimination, retrieved more bullets and reloaded the gun. This record demonstrates that Chamberlain was not only recklessly indifferent to the taking of human life, but actively pursued and encouraged it. Under these circumstances the death penalty is proportionate. *See Stephens,* 787 So.2d at 759–60; *Van Poyck,* 564 So.2d at 1070.

End of Document

KeyCite Yellow Flag - Negative Treatment
Abrogation Recognized by U.S. v. Rouhani, 11th Cir.(Fla.), January 13, 2015

113 S.Ct. 1111
Supreme Court of the United States

UNITED STATES, Petitioner
v.
Sharon DUNNIGAN.

No. 91-1300.
|
Argued Dec. 2, 1992.
|
Decided Feb. 23, 1993.

Defendant was convicted in the United States District Court for the Southern District of West Virginia, John T. Copenhaver, Jr., J., of conspiracy to distribute cocaine, and she appealed. The Court of Appeals for the Fourth Circuit, 944 F.2d 178,rehearing denied950 F.2d 149, affirmed defendant's conviction, but vacated her sentence. Certiorari was granted. The Supreme Court, Justice Kennedy, held that: (1) evidence supported determination that defendant committed perjury at trial, and (2) obstruction of justice enhancement to defendant's sentence for her perjury at trial did not undermine defendant's right to testify.

Court of Appeals reversed.

West Headnotes (12)

[1] **Sentencing and Punishment** Perjury or Other Untruthfulness
Sentencing and Punishment Obstruction of Justice
Sentencing and Punishment Perjury or Other Untruthfulness

Commission of perjury is of obvious relevance to determining appropriate type and extent of punishment after issue of guilt has been resolved, because it reflects on defendant's criminal history, on her willingness to accept commands of law and authority of court, and on her character in general. U.S.S.G. § 3C1.1 (1990).

12 Cases that cite this headnote

[2] **Sentencing and Punishment** Obstruction of Justice

Even assuming Sentencing Guideline could be construed in manner inconsistent with its accompanying commentary, the fact that meaning ascribed to phrase "obstruction of justice" differed in contempt and sentencing context would not be reason for rejecting Sentencing Commission's interpretation of that phrase for purposes of enhancing sentence. U.S.S.G. §§ 3C1.1, 3C1.1, comment. (n.3), 18 U.S.C.A.App.; § 3C1.1, comment. (n.1) (1990).

2 Cases that cite this headnote

[3] **Perjury** Nature and Elements of Offenses in General

Witness testifying under oath or affirmation violates perjury statute if he gives false testimony concerning material matter with willful intent to provide false testimony, rather than as result of confusion, mistake, or faulty memory. 18 U.S.C.A. § 1621(1).

714 Cases that cite this headnote

[4] **Sentencing and Punishment** Necessity

Sentencing and Punishment Sufficiency

If defendant objects to sentence enhancement for obstruction of justice resulting from her trial testimony, district court must review evidence and make independent findings necessary to establish willful impediment to or obstruction of justice, or attempt to do same, under accepted definition of perjury; when doing so, it is preferable for district court to address each element of alleged perjury in separate and clear finding. U.S.S.G. § 3C1.1 (1990); U.S.S.G. § 6A1.3, p.s., 18 U.S.C.A.App.; § 3C1.1 (1990); Fed.Rules Cr.Proc.Rule 32(c)(3)(D), 18 U.S.C.A.

674 Cases that cite this headnote

[5] **Sentencing and Punishment** Sufficiency

District court's determination that obstruction of justice sentence enhancement is required is sufficient if district court makes finding of obstruction or impediment of justice that encompasses all of the factual predicates for finding of perjury. U.S.S.G. § 3C1.1 (1990).

221 Cases that cite this headnote

[6] **Sentencing and Punishment** Obstruction of Justice

There was ample support for district court's finding that defendant committed perjury during drug prosecution, for purposes of obstruction of justice enhancement under guidelines, given numerous witnesses who contradicted defendant regarding so many facts on which she could not have been mistaken. U.S.S.G. § 3C1.1 (1990).

238 Cases that cite this headnote

[7] **Witnesses** Defendants in Criminal Prosecutions

Right to testify on one's own behalf in criminal proceeding is made explicit by federal statute, and is implicit in the Constitution. 18 U.S.C.A. § 3481.

17 Cases that cite this headnote

[8] **Sentencing and Punishment** Obstruction of Justice

Witnesses Defendants in Criminal Prosecutions

Assessing obstruction of justice sentence enhancement for defendant's perjury at trial would not interfere with defendant's right to testify, for defendant's right to testify does not include right to commit perjury. U.S.S.G. § 3C1.1 (1990); 18 U.S.C.A. § 3481.

71 Cases that cite this headnote

[9] **Sentencing and Punishment** Obstruction of Justice

Obstruction of justice sentence enhancement for defendant's perjury at trial is not unconstitutional to extent it distorts defendant's decision whether to testify or remain silent. U.S.S.G. § 3C1.1 (1990); 18 U.S.C.A. § 3481.

56 Cases that cite this headnote

[10] **Sentencing and Punishment** Obstruction of Justice

Obstruction of justice sentence enhancement for defendant's perjury at trial does not create risk that courts will enhance sentences as a matter of course whenever accused takes stand and is found guilty, and thereby undermine defendant's right to testify, in view of requirement that trial court make findings to support all elements of perjury violation in case where defendant challenges enhancement for perjured testimony. U.S.S.G. § 3C1.1 (1990).

555 Cases that cite this headnote

[11] Sentencing and Punishment Obstruction of Justice

Obstruction of justice sentence enhancement for defendant's perjury at trial does not undermine defendant's right to testify to extent there is risk of incorrect findings of perjury by district courts, which risk is inherent in system which insists on value of testimony under oath; requirement of sworn testimony, backed by punishment for perjury, is as much a protection for accused as it is a threat. U.S.S.G. § 3C1.1 (1990).

225 Cases that cite this headnote

[12] Sentencing and Punishment Obstruction of Justice

Obstruction of justice sentence enhancement for defendant's trial testimony was more than more mere surrogate for perjury prosecution; it furthered legitimate sentencing goals related to principal crime, including goals for retribution and incapacitation. U.S.S.G. § 3C1.1 (1990); 18 U.S.C.A. § 3553(a)(2).

6 Cases that cite this headnote

****1112 *87** Syllabus *

At respondent's federal trial for conspiracy to distribute cocaine, the Government's case in chief consisted of five witnesses who took part in, or observed, her cocaine trafficking. As the sole witness in her own defense, respondent denied the witnesses' inculpatory statements and claimed she had never possessed or distributed cocaine. In rebuttal, the Government called an additional witness and recalled one of its earlier witnesses, both of whom testified that respondent sold crack cocaine to them. Respondent was convicted and sentenced pursuant to the United States Sentencing Guidelines. Finding that she had committed perjury, the District Court enhanced her sentence, which is required under § 3C1.1 of the Guidelines when a “defendant willfully impeded or obstructed, or attempted to impede or obstruct the administration of justice during the investigation or prosecution of the instant offense.” In reversing the sentence, the Court of Appeals found that a § 3C1.1 enhancement based on a defendant's alleged perjury would be unconstitutional. It also distinguished the precedent of *United States v. Grayson,* 438 U.S. 41, 98 S.Ct. 2610, 57 L.Ed.2d 582-in which this Court upheld a sentence increase stemming from an accused's ****1113** false testimony at trial-on the grounds that § 3C1.1's goal is punishment for obstruction of justice rather than rehabilitation, and that, in contravention of the admonition in *Grayson,* § 3C1.1 is applied in a wooden or reflex fashion to enhance the sentences of all defendants whose testimony is deemed false.

Held: Upon a proper determination that the accused has committed perjury at trial, a court may enhance the accused's sentence under § 3C1.1. Pp. 1115-1119.

(a) The parties agree, and the commentary to § 3C1.1 is explicit, that the phrase “impede or obstruct the administration of justice” includes perjury. Perjury is committed when a witness testifying under oath or affirmation gives false testimony concerning a material matter with the willful intent to provide false testimony. Because a defendant can testify at trial and be convicted, yet not have committed perjury-for example, the accused may give inaccurate testimony as a result of confusion, mistake, or faulty memory or give truthful testimony that a jury finds insufficient to excuse criminal liability or prove lack of intent-not every testifying defendant who is convicted qualifies for a § 3C1.1 ***88** enhancement. If a defendant objects to such an enhancement resulting from her trial testimony, a district court must review the evidence and make independent findings necessary to establish that the defendant committed perjury. While a court should address each element of the alleged perjury in a clear and distinct finding, its enhancement decision is sufficient where, as here, it makes a determination of an obstruction or impediment of justice that encompasses all of the factual predicates for a perjury finding. Pp. 1115-1117.

(b) An enhanced sentence for the willful presentation of false testimony does not undermine the right to testify. The concern that a court will enhance a sentence as a matter of course whenever the accused takes the stand and is found guilty is dispelled by the requirement that a district court make findings to support all the elements of a perjury violation in a specific case. Any risk from a district court's incorrect perjury findings is inherent in a system which insists on the value of testimony under oath. A § 3C1.1 enhancement is also more than a mere surrogate for a separate and subsequent perjury prosecution. It furthers legitimate sentencing goals relating to the principal crime, including retribution and incapacitation. The enhancement may not serve the additional goal of rehabilitation, which was the justification for enhancement in *Grayson,* but rehabilitation is not the only permissible justification for increasing a sentence based on perjury. Finally, the enhancement under § 3C1.1 is far from automatic-when contested, the elements of perjury must be found by the district court with specificity-and the fact that the enhancement stems from a congressional mandate rather than from a court's discretionary judgment cannot be grounds for its invalidation. Pp. 1117-1119.

944 F.2d 178 (CA4 1991), reversed.

KENNEDY, J., delivered the opinion for a unanimous Court.

Attorneys and Law Firms

Paul J. Larkin, Jr., Washington, DC, for petitioner.

Brent E. Beveridge, Fairmont, WV, appointed by this Court, for respondent.

Opinion

Justice KENNEDY delivered the opinion of the Court.

The question presented is whether the Constitution permits a court to enhance a defendant's sentence under ***89** United States Sentencing Commission, Guidelines Manual § 3C1.1 (Nov.1989), if the court finds the defendant committed perjury at trial. We answer in the affirmative.

I

Respondent, Sharon Dunnigan, was charged in a single count indictment with conspiracy to distribute cocaine in violation ****1114** of 21 U.S.C. § 846. After entering a plea of not guilty, she stood trial.

The case in chief for the United States consisted of five witnesses who took part in, or observed, respondent's cocaine trafficking during the summer of 1988. The first witness was Freddie Harris, a cocaine dealer in Charleston, West Virginia. Harris testified that respondent traveled between Charleston and Cleveland, Ohio, numerous times during the summer in question to purchase cocaine for him. He further stated that either he or his associate John Dean accompanied respondent on several of these trips. Dean was the second witness, and he recounted his trips to Cleveland with respondent during the same period to purchase cocaine. He also described meetings with both respondent and Harris for the purpose of delivering cocaine.

Three more Government witnesses followed. Andre Charlton testified that respondent, at her own apartment, delivered several ounces of cocaine to Charlton and Harris. Charlton also attested to receiving cocaine from Dean which Dean said he and respondent had bought in Cleveland. Tammy Moore testified next. She described conversations during which respondent vouched for the high quality of the cocaine in Cleveland and suggested Moore accompany her on a trip to Cleveland. Then came the testimony of Wynema Brown, who repeated respondent's admissions of trips to Cleveland to purchase cocaine for Harris. Brown also stated she saw cocaine powder at respondent's apartment and witnessed respondent and her daughter convert the ***90** powder into crack cocaine for the daughter to sell. This ended the Government's case in chief.

Respondent elected to take the stand and was the sole witness in her own defense. She denied all criminal acts attributed to her. She admitted going to Cleveland with Harris once but claimed it was for an innocent purpose, not to buy or sell cocaine. She admitted knowing John Dean but denied traveling with him to Cleveland. Last, she denied knowing that cocaine was brought into or sold from her apartment. On cross-examination, the Government questioned respondent regarding the testimony of the five prosecution witnesses. Respondent denied their inculpatory statements and said she had not possessed or distributed cocaine during the summer in question or at any other time. The Government also asked whether Edward Dickerson had been in her apartment or bought crack cocaine from her. Respondent answered no.

The defense rested, and the Government began its rebuttal with the testimony of Dickerson. He testified to purchasing crack cocaine from respondent on July 12, 1988, in a transaction monitored by law enforcement authorities. The Government also recalled Moore, who claimed respondent sold her crack cocaine about five times and provided cocaine powder to her and respondent's daughter to convert into crack cocaine for resale. According to Moore, the money from the resale was paid over to respondent. The jury returned a verdict of guilty.

Respondent was sentenced pursuant to the United States Sentencing Guidelines. See United States Sentencing Commission, Guidelines Manual (Nov.1989). Her base offense level was set at 22, and the Government requested that the base be increased by two offense levels under U.S.S.G. § 3C1.1, entitled "willfully obstructing or impeding proceedings," because respondent perjured herself at trial. After arguments from both sides, the District Court ruled on the request:

> ***91** "The court finds that the defendant was untruthful at trial with respect to material matters in this case. The defendant denied her involvement when it is clear from the evidence in the case as the jury found beyond a reasonable doubt that she was involved in the conspiracy alleged in the indictment, and by virtue of her failure to give truthful testimony on material matters that were designed to substantially affect the outcome of the case, the court ****1115** concludes that the false testimony at trial warrants an upward adjustment by two levels." App. 29.

Based upon the enhanced offense level 24 and a criminal history category I, the District Court sentenced respondent to 51 months' incarceration, which was at the low end of the Guidelines range.

Respondent appealed her sentence, and the Court of Appeals reversed the District Court's decision to increase respondent's offense level under U.S.S.G. § 3C1.1. 944 F.2d 178 (CA4 1991). The Court of Appeals did not take issue with the District Court's factual findings or rule that further findings were necessary to support a § 3C1.1 enhancement. Instead, the court held that a § 3C1.1 enhancement based on a defendant's alleged perjury at trial would be unconstitutional. The court reasoned that "every defendant who takes the stand and is convicted [would] be given the obstruction of justice enhancement." *Id.,* at 183. Citing some of the incentives for an accused to elect not to testify, including the risk of impeachment by prior convictions, the court ruled that a mechanical sentencing enhancement for testifying was unconstitutional: "With an automatic §

3C1.1 enhancement added to the ante, the defendant may not think testifying worth the risk." *Id.*, at 184.

Referring to *United States v. Grayson,* 438 U.S. 41, 98 S.Ct. 2610, 57 L.Ed.2d 582 (1978), where we upheld a sentence increase based on an accused's false testimony at trial, the Court of Appeals found that precedent distinguishable on two grounds. First, in *Grayson* we justified the sentence increase as based on the ***92** District Court's assessment of the defendant's greater need for rehabilitation. *Id.,* at 51-53, 98 S.Ct. at 2616-2617. The Court of Appeals thought this justification was inapplicable, viewing the § 3C1.1 enhancement as a punishment for obstructing justice without the time and expense of a separate perjury prosecution. 944 F.2d, at 184. Second, the *Grayson* Court cautioned that "[n]othing we say today requires a sentencing judge to enhance, in some wooden or reflex fashion, the sentences of all defendants whose testimony is deemed false." 438 U.S., at 55, 98 S.Ct., at 2618. According to the Court of Appeals, "[t]he guidelines supply precisely the 'wooden or reflex' enhancement disclaimed by the Court," 944 F.2d, at 184, and this rigidity "makes the § 3C1.1 enhancement for a disbelieved denial of guilt under oath an intolerable burden upon the defendant's right to testify in his own behalf," *id.,* at 185.

Over a dissent by four of its judges, the Court of Appeals declined to rehear the case en banc. 950 F.2d 149 (CA4 1991). We granted certiorari. 504 U.S. 940, 112 S.Ct. 2272, 119 L.Ed.2d 199 (1992).

II

A

Sentencing Guideline § 3C1.1 states in full: "If the defendant willfully impeded or obstructed, or attempted to impede or obstruct the administration of justice during the investigation or prosecution of the instant offense, increase the [defendant's] offense level by 2 levels." U.S.S.G. § 3C1.1 (Nov.1989). See also U.S.S.G. § 3C1.1 (Nov.1992). Both parties assume the phrase "impede or obstruct the administration of justice" includes perjury, and the commentary to § 3C1.1 is explicit in so providing. In pertinent part, the commentary states:

> "This section provides a sentence enhancement for a defendant who engages in conduct calculated to mislead or deceive authorities or those involved in a judicial proceeding, or otherwise to willfully interfere with the disposition ***93** of criminal charges, in respect to the instant offense.

. . . . .

"1. The following conduct, while not exclusive, may provide a basis for applying this adjustment:

. . . . .

****1116** "(c) testifying untruthfully or suborning untruthful testimony concerning a material fact, ... during a preliminary or grand jury proceeding, trial, sentencing proceeding, or any other judicial proceeding."

U.S.S.G. § 3C1.1, comment., n. 1(c) (Nov.1989). See also U.S.S.G. § 3C1.1, comment., n. 3(b) (Nov.1992) ("The following is a non-exhaustive list of examples of the types of conduct to which this enhancement applies: ... (b) committing, suborning, or attempting to suborn perjury").

Were we to have the question before us without reference to this commentary, we would have to acknowledge that some of our precedents do not interpret perjury to constitute an obstruction of justice unless the perjury is part of some greater design to interfere with judicial proceedings. *In re Michael,* 326 U.S. 224, 228, 66 S.Ct. 78, 80, 90 L.Ed. 30 (1945); *Ex parte Hudgings,* 249 U.S. 378, 383, 39 S.Ct. 337, 339, 63 L.Ed. 656 (1919). Those cases arose in the context of interpreting early versions of the federal criminal contempt statute, which defined contempt, in part, as "misbehavior of any person ... as to obstruct the administration of justice." 28 U.S.C. § 385 (1940 ed.) (Judicial Code § 268), derived from the Act of Mar. 2, 1831, Rev.Stat. § 725. See also 18 U.S.C. § 401(1) (same).

[1] **[2]** In *Hudgings* and *Michael,* we indicated that the ordinary task of trial courts is to sift true from false testimony, so the problem caused by simple perjury was not so much an obstruction of justice as an expected part of its administration. See *Michael,* 326 U.S., at 227-228, 66 S.Ct., at 79-80. Those cases, however, were decided against the background rule that the contempt power was to be confined to " 'the least possible power adequate' " to protect "the administration of justice ***94** against immediate interruption of its business." *Id.,* at 227, 66 S.Ct., at 79 (quoting *Anderson v. Dunn,* 6 Wheat. 204, 231, 5 L.Ed. 242 (1821)). In the present context, on the other hand, the enhancement provision is part of a sentencing scheme designed to determine the appropriate type and extent of punishment after the issue of guilt has been resolved. The commission of perjury is of obvious relevance in this regard, because it reflects on a defendant's criminal history, on her willingness to accept the commands of the law and the authority of the court, and on her character in general. Even on the assumption that we could construe a sentencing guideline in a manner inconsistent with its accompanying commentary, the fact that the meaning ascribed to the phrase "obstruction of justice" differs in the contempt and sentencing contexts would not be a reason for rejecting the Sentencing Commission's interpretation of that phrase. In all events, the Commission's interpretation is contested by neither party to this case.

[3] In determining what constitutes perjury, we rely upon the definition that has gained general acceptance and common understanding under the federal criminal perjury statute, 18 U.S.C. § 1621. A witness testifying under oath or affirmation violates this statute if she gives false testimony concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion, mistake, or faulty memory. See § 1621(1); *United States v. Debrow,* 346 U.S. 374, 376, 74 S.Ct. 113, 114, 98 L.Ed. 92 (1953); *United States v. Norris,* 300 U.S. 564, 574, 576, 57 S.Ct. 535, 539, 540, 81 L.Ed. 808 (1937). This federal definition of perjury by a witness has remained unchanged in its material respects for over a century. See *United States v. Smull,* 236 U.S. 405, 408, and n. 1, 35 S.Ct. 349, and n. 1, 59 L.Ed. 641 (1915) (tracing history of § 1621's predecessor, Act of Mar. 4, 1909, ch. 321, § 125, 35 Stat. 1111). It parallels typical state-law definitions of perjury, see American Law Institute, Model Penal Code § 241.1 (1985); 4 C. Torcia, Wharton's Criminal Law § 601 (14th ed. 1981), and has roots in the law dating back to at least the Perjury Statute of 1563, 5 Eliz. I, ch. 9, see Gordon, The Invention of a Common Law ***95** Crime: Perjury and the Elizabethan Courts, 24 Am.J. Legal Hist. 145 (1980). See also 1 Colonial Laws of New ****1117** York, 1664-1719, ch. 8, pp. 129-130 (reprinting "An Act to prevent wilfull Perjury," enacted Nov. 1, 1683).

[4] **[5]** **[6]** Of course, not every accused who testifies at trial and is convicted will incur an enhanced sentence under § 3C1.1 for committing perjury. As we have just observed, an accused may give inaccurate testimony due to confusion, mistake, or faulty memory. In other instances, an accused may testify to matters such as lack of capacity, insanity, duress, or self-defense. Her testimony may be truthful, but the jury may nonetheless find the testimony insufficient to excuse criminal liability or prove lack of intent. For these reasons, if a defendant objects to a sentence enhancement resulting from her trial testimony, a district court must review the evidence and make independent findings necessary to establish a willful impediment to or obstruction of justice, or an attempt to do the same, under the perjury definition we have set out. See U.S.S.G. § 6A1.3 (Nov.1989); Fed.Rule Crim.Proc. 32(c)(3)(D). See also *Burns v. United States,* 501 U.S. 129, 134, 111 S.Ct. 2182, 2185, 115 L.Ed.2d 123 (1991). When doing so, it is preferable for a district court to address each element of the alleged perjury in a separate and clear finding. The district court's determination that enhancement is required is sufficient, however, if, as was the case here, the court makes a finding of an obstruction of, or impediment to, justice that encompasses all of the factual predicates for a finding of perjury. See App. 29 ("The court finds that *the defendant was untruthful at trial with respect to material matters* in this case. [B]y virtue of her failure to give truthful testimony on material matters *that were designed to substantially affect the outcome of the case,* the court concludes that the false testimony at trial warrants an upward adjustment by two levels" (emphasis added)). Given the numerous witnesses who contradicted respondent regarding so many facts on which she could not ***96** have been mistaken, there is ample support for the District Court's finding.

B

[7] We turn next to the contention that an enhanced sentence for the willful presentation of false testimony undermines the right to testify. The right to testify on one's own behalf in a criminal proceeding is made explicit by federal statute, 18 U.S.C. § 3481, and, we have said, it is also a right implicit in the Constitution; see *Rock v. Arkansas,* 483 U.S. 44, 51-53, 107 S.Ct. 2704, 2709, 97 L.Ed.2d 37 (1987); *Nix v. Whiteside,* 475 U.S. 157, 164, 106 S.Ct. 988, 992-993, 89 L.Ed.2d 123 (1986).

[8] **[9]** Respondent cannot contend that increasing her sentence because of her perjury interferes with her right to testify, for we have held on a number of occasions that a defendant's right to testify does not include a right to commit perjury. *Id.,* at 173, 106 S.Ct., at 997; *United States v. Havens,* 446 U.S. 620, 626, 100 S.Ct. 1912, 1916, 64 L.Ed.2d 559 (1980); *Grayson,* 438 U.S., at 54, 98 S.Ct. at 2617. Nor can respondent contend § 3C1.1 is unconstitutional on the simple basis that it distorts her decision whether to testify or remain silent. Our authorities do not impose a categorical ban on every governmental action affecting the strategic decisions of an accused, including decisions whether or not to exercise constitutional rights. See *Bordenkircher v. Hayes,* 434 U.S. 357, 365, 98 S.Ct. 663, 669, 54 L.Ed.2d 604 (1978); *McGautha v. California,* 402 U.S. 183, 216-217, 91 S.Ct. 1454, 1471-1472, 28 L.Ed.2d 711 (1971); *United States v. Knox,* 396 U.S. 77, 82-83, 90 S.Ct. 363, 366-367, 24 L.Ed.2d 275 (1969).

[10] **[11]** No doubt to avoid these difficulties, respondent's argument comes to us in a different form. It is that § 3C1.1 carries a risk that a district court will order enhancement even when a defendant's testimony is truthful, either because the court acts without regard to the truth or makes an erroneous finding of falsity. That § 3C1.1 creates ****1118** such a risk, respondent claims, makes the enhancement unconstitutional. This argument does not survive scrutiny.

The concern that courts will enhance sentences as a matter of course whenever the accused takes the stand and is found guilty is dispelled by our earlier explanation that if an accused challenges a sentence increase based on perjured testimony, ***97** the trial court must make findings to support all the elements of a perjury violation in the specific case. And as to the risk of incorrect findings of perjury by district courts, that risk is inherent in a system which insists on the value of testimony under oath. To uphold the integrity of our trial system, we have said that the constitutionality of perjury statutes is unquestioned. *Grayson, supra,* 438 U.S., at 54, 98 S.Ct., at 2617. See also *Nix, supra,* 475 U.S., at 173-174, 106 S.Ct., at 997-998; *Havens, supra,* 446 U.S., at 626-627, 100 S.Ct., at 1916-1917. The requirement of sworn testimony, backed by punishment for perjury, is as much a protection for the accused as it is a threat. All testimony, from third-party witnesses and the accused, has greater value because of the witness' oath and the obligations or penalties attendant to it. Cf. G. Neilson, Trial By Combat 5 (1891) ("A means of ensuring the truth in human testimony has been a thing desired in every age").

[12] Neither can we accept respondent's argument that the § 3C1.1 sentence enhancement advances only "the impermissible sentencing practice of incarcerating for the purpose of saving the Government the burden of bringing a separate and subsequent perjury prosecution." *Grayson, supra,* 438 U.S., at 53, 98 S.Ct., at 2617. A sentence enhancement based on perjury does deter false testimony in much the same way as a separate prosecution for perjury. But the enhancement is more than a mere surrogate for a perjury prosecution. It furthers legitimate sentencing goals relating to the principal crime, including the goals of retribution and incapacitation. See 18 U.S.C. § 3553(a)(2); *Mistretta v. United States,* 488 U.S. 361, 367, 109 S.Ct. 647, 652, 102 L.Ed.2d 714 (1989). It is rational for a sentencing authority to conclude that a defendant who commits a crime and then perjures herself in an unlawful attempt to avoid responsibility is more threatening to society and less deserving of leniency than a defendant who does not so defy the trial process. The perjuring defendant's willingness to frustrate judicial proceedings to avoid criminal liability suggests that the need for incapacitation and retribution is heightened as compared ***98** with the defendant charged with the same crime who allows judicial proceedings to progress without resorting to perjury.

Weighed against these considerations, the arguments made by the Court of Appeals to distinguish *Grayson* are wide of the mark. The court is correct that rehabilitation is no longer a goal of sentencing under the Guidelines. 28 U.S.C. § 994(k); *Mistretta, supra,* at 367, 109 S.Ct., at 652. Our lengthy discussion in *Grayson* of how a defendant's perjury was relevant to the potential for rehabilitation, however, was not meant to imply that rehabilitation was the only permissible justification for an increased sentence based on perjury. As we have said, the § 3C1.1 enhancement serves other legitimate sentencing goals. Neither does our cautionary remark that the enhancement in *Grayson* need not be imposed "in some wooden or reflex fashion" compel invalidation of § 3C1.1, as the Court of Appeals believed. When contested, the elements of perjury must be found by the district court with the specificity we have stated, so the enhancement is far from automatic. And that the enhancement stems from a congressional mandate rather than from a court's discretionary judgment cannot be grounds, in these circumstances, for its invalidation. See *Chapman v. United States,* 500 U.S. 453, 467, 111 S.Ct. 1919, 1928, 114 L.Ed.2d 524 (1991); ****1119** *McMillan v. Pennsylvania,* 477 U.S. 79, 92, 106 S.Ct. 2411, 2419, 91 L.Ed.2d 67 (1986).

Upon a proper determination that the accused has committed perjury at trial, an enhancement of sentence is required by the Sentencing Guidelines. That requirement is consistent with our precedents and is not in contravention of the privilege of an accused to testify in her own behalf. The judgment of the Court of Appeals is reversed.

It is so ordered.

All Citations

507 U.S. 87, 113 S.Ct. 1111, 122 L.Ed.2d 445, 61 USLW 4180

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

End of Document

KeyCite Yellow Flag - Negative Treatment
Distinguished by Hammonds v. State, Fla.App. 1 Dist., September 21, 1989

523 So.2d 1199
District Court of Appeal of Florida,
First District.

John Lee KINGERY, Appellant,
v.
STATE of Florida, Appellee.

No. BT–23.
|
March 30, 1988.

Defendant was convicted in the Circuit Court, Duval County, John D. Southwood, J., of second-degree murder and defendant appealed. The District Court of Appeal held that: (1) victim's statements, reflecting his peaceful state of mind earlier in evening while he was sober, were inadmissible in prosecution for murder; (2) erroneously declaring State's witness partially adverse and allowing witness' deposition testimony without limiting instructions was reversible error; and (3) trial court's instructions to jury on excusable homicide and justifiable homicide were misleading and confusing and required reversal.

Reversed and remanded.

Joanos, J., concurred and dissented and filed opinion.

West Headnotes (16)

[1] **Criminal Law** Then-existing state of mind or body

Out-of-court statements are admissible under state of mind exception to hearsay rule if statement shows declarant's future intent to perform act that is at issue in case, or statement shows declarant's state of mind when statement was made or at any time other than when that state is issue in case and this is particularly true when purported statements to third party were made by homicide victim.

Cases that cite this headnote

[2] **Criminal Law** Statements of persons since deceased

Homicide victim's purported statements to third party are admissible in only three instances in which need for statements appear to overcome possible prejudice: when defendant claims self-defense, which can be rebutted by victim's statement that he feared defendant; when defendant claims victim committed suicide, which can be rebutted by statements of victim that are inconsistent with suicide; and when defendant claims victim's death was accident, which can be rebutted by victim's statement that he feared whatever instrument of death proved to be.

4 Cases that cite this headnote

[3] **Criminal Law** Evidence calculated to create prejudice against or sympathy for accused

If evidence of homicide victim's purported statements to third parties is highly prejudicial, it will be excluded even if it has high degree of relevance.

Cases that cite this headnote

[4] **Homicide** Declarations of victim

Victim's statements, reflecting his peaceful state of mind earlier in evening while he was sober, were inadmissible in prosecution of defendant for murder as irrelevant to any issue in case, especially in light of testimony of State's own witnesses that victim was aggressor in each confrontation.

2 Cases that cite this headnote

[5] **Witnesses** Right to Impeach One's Own Witness

Impeachment of one's own witness is proper only in very limited circumstances. West's F.S.A. § 90.608(2).

1 Cases that cite this headnote

[6] **Criminal Law** Substantive use of statements corroborating or impeaching testimony

Witnesses Inconsistent Statements of One's Own Witness

In event witness' statements meet criteria for adverseness, his prior inconsistent statements are admissible for impeachment purposes only, but may not be used as substantive evidence.

4 Cases that cite this headnote

[7] **Criminal Law** Effect of Admission

Criminal Law Purpose and effect of evidence

When evidence is inadmissible for one purpose, but admissible for another, court, upon request, is required to instruct jury as to limited purpose for which evidence is received. West's F.S.A. § 90.107.

Cases that cite this headnote

[8] **Criminal Law** Limiting effect of impeaching evidence

Criminal Law Reception of evidence

Witness' trial testimony was not inconsistent with her deposition testimony in any essential respect, nor did testimony prejudice State's case, so that declaring witness partially adverse and allowing admission of witness' deposition testimony, without instruction to jury as to limited purpose for which evidence was being received, despite request by defendant, was reversible error in murder prosecution; witness testified at trial that she thought time between two shots fired was four to five seconds, and that at time of second shot, victim was not helpless, while deposition testimony introduced showed that she formerly estimated time between shots as five to ten seconds and stated she didn't know why defendant shot victim again as “the guy was going to be helpless.”

Cases that cite this headnote

[9] **Criminal Law** Consultation between accused or counsel and witnesses

Witnesses Grounds of credibility in general

It is undisputed that attorney may talk to witness about testimony witness will give, and that witness' credibility should not be challenged on basis of discussion.

1 Cases that cite this headnote

[10] **Criminal Law** Consultation with counsel; privacy

Criminal defendant's right to counsel encompasses right to consult with his attorney during any recess, even if recess occurs in middle of defendant's testimony. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[11] **Criminal Law** Conduct of trial

Criminal Law Consultation between accused or counsel and witnesses

Trial court did not abuse its discretion in allowing prosecutor to talk to and consult with state witness during recess which occurred during defense counsel's cross-examination of state witness; defendant's right to confront adverse witness did not preclude consultation between state witness and prosecutor during recess in cross-examination.

1 Cases that cite this headnote

[12] **Criminal Law** Matters of defense in general

Trial court's instructions to jury on "sudden combat" portion of excusable homicide instruction and introductory definition of excusable homicide, despite trial counsel's request that only heat of passion instruction on excusable homicide be given, were misleading and confusing in that they did not pertain to evidence produced at trial of defendant for second-degree murder.

7 Cases that cite this headnote

[13] **Homicide** Excuses and Justifications

Jury instruction must not suggest that excusable homicide defense is unavailable if dangerous weapon was used.

6 Cases that cite this headnote

[14] **Criminal Law** Photographs and Other Pictures

Test for admissibility of photographic evidence is whether photograph is relevant to any issue required to be proven in given case.

Cases that cite this headnote

[15] **Criminal Law** Purpose of admission

Criminal Law Documentary and demonstrative evidence

Although photograph depicting victim's body at scene of shooting was only marginally relevant, if that, to show how victim was dressed at time of his death, as victim's manner of dress was not issue in murder prosecution, admission of photograph was not sufficient, without more, to warrant reversal.

Cases that cite this headnote

[16] **Criminal Law** Character or reputation of accused

Homicide Accused

While detective's comment contrasting defendant's neat courtroom appearance with his appearance at time of his arrest for murder could be construed as improper attempt to attack defendant's character, comment, without more, was insufficient to warrant reversal of murder conviction.

Cases that cite this headnote

Attorneys and Law Firms

***1200** Louis O. Frost, Jr., Public Defender, Alan Chipperfield, and James T. Miller, Asst. Public Defenders, Jacksonville, for appellant.

Robert A. Butterworth, Atty. Gen., John W. Tiedemann, and Edward C. Hill, Jr., Asst. Attys. Gen., Tallahassee, for appellee.

Opinion

PER CURIAM.

Appellant John Lee Kingery seeks review of his conviction and sentence for second degree murder. The issues raised on appeal concern: (1) the admission of testimony regarding the victim's state of mind the evening before his death, (2) the ruling designating a state witness partially adverse, (3) the prosecutor's consultation with a state witness during a recess in her cross examination, (4) the jury instructions on excusable homicide and justifiable homicide, (5) the admission of a photograph of the victim and the prosecutor's use of the photograph in closing argument, (6) the denial of a motion for mistrial after a detective's comment on appellant's courtroom appearance, and (7) the imposition of a sentence exceeding the recommended guideline sentence. We reverse and remand for a new trial.

The tragic events leading up to appellant's arrest and subsequent conviction occurred in the early morning hours of November ***1201** 2, 1986, in the parking lot of a Jacksonville bar. On November 2, 1986, appellant was arrested and charged with the shooting death of Arthur Max Davis (Davis).

Appellant admitted the shooting, but stated he acted in self defense. Initially, the state filed a two-count information charging appellant with second degree murder and use of a firearm in commission of a felony. After plea negotiations proved unsuccessful, the state sought and obtained an indictment charging appellant with first degree murder.

Some background information is helpful for an understanding of the events which form the subject of this appeal. The record reflects that appellant and Davis, both 27 years old, attended the same high school, but were not friends. Davis developed an interest in a young woman who was employed as a bartender at a local bar, but she refused his attentions. On the night of the shooting, Davis learned that the young woman was romantically involved with appellant.

The state presented four witnesses during its case-in-chief. The testimony of these four witnesses established that from 12:30 until 2:30 a.m. of November 2, 1986, appellant and Davis engaged in four confrontations. Appellant was alone during all but the second confrontation, but Davis was accompanied throughout by two friends, a male and a female. Davis was intoxicated, and was described by one witness as belligerent, obnoxious, and obscene. Conversely, witnesses described appellant as appearing nervous and intimidated, and stated that appellant repeatedly told Davis to leave him alone. The first and second confrontations were limited to oral exchanges. However, when appellant walked away from the second confrontation with Davis, he opened his truck door to get in the driver's seat, and deliberately damaged the door of Davis's truck by bumping it with the door of his own truck.

During the third confrontation, more obscenities were exchanged. In addition, Davis made inappropriate references to appellant's girl friend, and appellant responded in kind with respect to the woman accompanying Davis. At that point, the woman reached in appellant's truck window and slapped him. As Davis continued to harangue, appellant displayed a gun that had been under his truck seat, and again told Davis to leave him alone.

Between the third and fourth confrontation, Davis got in the back of his pick-up truck and removed his shirt and shoes, saying he wanted to be prepared—“in case the guy want[s] to fight.” The fourth confrontation took place in front of the bar where appellant's girl friend worked. Appellant was seated in his truck in the parking lot, talking with his girl friend who stood beside the truck. Davis's truck pulled into the parking lot and came to a quick stop. Davis, clad only in blue jeans, jumped from the back of the truck and moved toward appellant, calling him obscene names. Appellant's girl friend attempted to stay between the two men, but Davis reached around her and struck appellant about the head and shoulders.

As appellant's girl friend went into the bar to call the police, Davis rushed appellant a second time. Appellant went down on the truck seat. When he came up, he shot Davis in the chest. Davis turned and caught the side of his truck. Davis's left knee touched the ground briefly, then he pulled himself back up, keeping one hand on the truck. Appellant got out of his truck, and as Davis reached toward him with his right hand, appellant shot a second time. The second shot struck Davis in the head.

The jury found appellant guilty of second degree murder. The trial court departed from the recommended 12 to 17 year sentencing range, and sentenced appellant to a 25–year term of incarceration, providing as reasons (1) the flagrant disregard for the life and safety of others, and (2) the use of excessive force.

The first issue for our consideration concerns statements purportedly made by the victim Max Davis some five hours before the shooting. These statements were introduced into evidence through the testimony of two rebuttal witnesses. These witnesses saw Davis at approximately 9:00 ***1202** p.m. of the night of the shooting. Over objection, the witnesses testified that Davis was in a happy mood and said he might go to a bar to see a "girl [that] he liked or she liked him." One of the witnesses said Davis asked how he could get the girl to go out with him. The witness advised Davis to take the girl a single rose. According to both witnesses, Davis said the girl's "ex-boyfriend or some guy" might be jealous, but that he [Davis] would not fight the "guy." The witnesses stated that Davis did not appear to have been drinking when they saw him.

It is well settled that hearsay is inadmissible unless it falls within one of the exceptions to the hearsay rule. § 90.802, Fla.Stat. (1985); *Correll v. State*, 13 F.L.W. 34, 35 (Fla. Jan. 14, 1988). In this case, the testimony of the rebuttal witnesses was admitted on the basis of the state of mind exception provided at section 90.803(3)(a), which states:

> The provision of s. 90.802 to the contrary notwithstanding, the following are not inadmissible as evidence, even though the declarant is available as a witness:
>
> ---
>
> (3) Then existing mental, emotional, or physical condition.
>
> (a) A statement of the declarant's then existing state of mind, emotion, or physical sensation, including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health, when such evidence is offered to:
>
> (1) Prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time *when such state is an issue in the action.*
>
> (2) Prove or explain acts of subsequent conduct of the declarant. (Emphasis supplied.)

[1] **[2]** **[3]** Out of court statements are admissible under the state of mind exception if (1) the statement shows the declarant's future intent to perform an act that is at issue in the case, or (2) the statement shows the declarant's state of mind when the statement was made or at any other time when that state is an issue in the case. *Correll,* 13 F.L.W. at 35; *Wells v. State,* 492 So.2d 712, 716 (Fla. 1st DCA) *review denied,* 501 So.2d 1283 (Fla.1986); *Morris v. State,* 456 So.2d 471, 474–476 (Fla. 3d DCA 1984), *rev'd,* 487 So.2d 291 (Fla.1986); Ehrhardt, *Florida Evidence* § 803.3a (2d Ed.1984); Dobson, *Evidence,* 11 Nova L.J. 1291, 1391 (1987). This is particularly true when the purported statements to a third party were made by a homicide victim. *Correll v. State,* 13 F.L.W. at 35; *Bailey v. State,* 419 So.2d 721 (Fla. 1st DCA 1982); *Fleming v. State,* 457 So.2d 499 (Fla. 2d DCA 1984), *petition for review denied,* 467 So.2d 1000 (Fla.1985); *Hunt v. State,* 429 So.2d 811 (Fla. 2d DCA 1983); Ehrhardt, § 803.3a, pp. 476–477, f.n. 3. Indeed, a homicide victim's purported statements to a third party have been deemed admissible only in three general categories in which the need for the statements appears to overcome the possible prejudice. These categories are: (1) the defendant claims self defense, which can be rebutted by the victim's statements that he feared the defendant; (2) the defendant claims the victim committed suicide, which can be rebutted by statements of the victim that are inconsistent with suicide; and (3) the defendant claims the victim's death was accidental, which can be rebutted by the victim's statements that he feared whatever the instrument of death proved to be. However, if the evidence is highly prejudicial, it will be excluded even if it has a high degree of relevance. *Kennedy v. State,* 385 So.2d 1020, 1021 (Fla. 5th DCA 1980), citing *United States v. Brown,* 490 F.2d 758, 767 (D.C.Cir.1973); Ehrhardt, § 803.3a, at pp. 476–477, f.n. 3.

[4] The sole issue at trial was appellant's claim that he acted in self defense. The testimony of the state's witnesses established that Davis was the aggressor. The record does not reflect, nor does the state suggest, that Davis feared appellant in any way. Although a claim of self defense will provide the vehicle for admission into evidence of otherwise inadmissible hearsay if the statement is offered to show that the victim feared the accused, the hearsay testimony in this case does not satisfy that test. While purportedly admitted ***1203** to show Davis's peaceful and happy state of mind on the night of the shooting, to show that appellant was actually the aggressor, Davis's state of mind some five hours before the shooting was not at issue. Testimony of the state's own witnesses clearly established that Davis was the aggressor in each confrontation. Therefore, Davis's statements, reflecting his peaceful state of mind earlier in the evening while he was sober, were inadmissible because not relevant to any issue in the case. In effect, the state used this inadmissible rebuttal testimony in closing argument to contradict the testimony of the witnesses it presented during its case-in-chief, thereby effectively negating appellant's claim of self defense.

The second issue concerns the ruling which declared one of the state's witnesses partially adverse, and allowed the witness to be impeached by purportedly prior inconsistent statements. The first of these statements pertained to the time between the two shots. On direct examination, this witness testified that she thought the time between the two shots was four to five seconds. Over objection, after being declared an adverse witness, the witness's deposition testimony was introduced to show that formerly she estimated the time between shots as five to ten seconds.

The second statement pertained to Davis's physical condition immediately after the first shot. In response to a question on cross examination, the witness stated that at the time of the second shot, Davis was not helpless. The state was permitted to impeach the witness by reading the following paragraph from her deposition:

> The shot hit him, I think, about right in here, I think, ... something like that, around the chest area. I don't know if John, you know, wasn't sure where he hit him, but you could see the blood and I've asked myself, I often ask myself, I don't know why he shot him again, the guy was going to be helpless.

Before declaring the witness partially adverse, the trial court noted that her trial testimony was generally consistent with her deposition testimony. Nevertheless, the trial court admitted the deposition statement, but denied the defense request for a limiting instruction.

[5] Florida still adheres to the common law principle that impeachment of one's own witness is proper only in very limited circumstances. Section 90.608(2), Florida Statutes, provides in part that "[a] party calling a witness shall not be allowed to impeach his character ... [unless] the witness proves adverse." The criteria for adverseness have been long-standing. In *Jackson v. State,* 451 So.2d 458, 462 (Fla.1984), the court quoted *Adams v. State,* 34 Fla. 185, 195–196, 15 So. 905, 908 (1894), as the seminal case on this point. In *Adams,* the court held:

> It is very erroneous to suppose that, under this statute [§ 1101 Rev.Stat.Fla. (1892), precursor to § 90.608(2), Fla.Stat. (1979)], a party producing a witness is at liberty to impeach him whenever such witness simply fails to testify as he was expected to do, without giving any evidence that is at all prejudicial to the party producing him. The impeachment permitted by the statute is only in cases where the witness proves adverse to the party producing him. He must not only fail to give the beneficial evidence expected of him but he must become adverse by giving evidence that is prejudicial to the cause of the party producing him. When a party's witness surprises him by not only failing to testify to the facts expected of him, but by giving harmful evidence that is contrary to what was expected, then, as is the purpose of this law, he is permitted to counteract the prejudicial effect of the adverse testimony of such witness, by proving that he has made statements on other occasions that are inconsistent with his present adverse evidence. *It never was the purpose of this statute to allow a party to put up a witness for the purpose of endeavoring to get from him beneficial evidence, and upon his simple failure to testify to the desired facts, to permit him to get the benefit of those expected facts, as substantive evidence through the mouth of another* ***1204** *witness, under the guise of impeachment.* Evidence adduced in this manner is nothing more than the veriest hearsay, and is inadmissible.

> *Even where a witness is properly impeached by proof of conflicting statements made on other occasions, the conflicting statements as made to and detailed by the impeaching witness should not be considered as substantive evidence in sustenance of the party's cause who produced the impeached witness;* but has weight only for the purpose of counteracting or annulling the harmful effects of the adverse testimony in the cause given by the impeached witness that is inconsistent with his statements testified to have been made on other occasions. (Emphasis supplied.)

[6] **[7]** In the event a witness's statement meets the criteria for adverseness, his prior inconsistent statements are admissible for impeachment purposes, but may not be used as substantive evidence. *Jackson v. State,* 451 So.2d at 463; *Austin v. State,* 461 So.2d 1380 at 1383 (Fla. 1st DCA 1984); *Mazzara v. State,* 437 So.2d 716 at 719 (Fla. 1st DCA 1983), Judge Nimmons, specially concurring. When evidence is inadmissible for one purpose, but admissible for another, the court, "upon request, is required to instruct the jury as to the limited purpose for which the evidence is received." § 90.107, Fla.Stat. (1985); *Mazzara v. State,* 437 So.2d at 719.

[8] In the instant case, the witness's trial testimony was not inconsistent with her deposition testimony in any essential respect, nor do we find the testimony prejudicial to the state's case under the stringent criteria set forth in *Jackson v. State* and cases cited therein. After declaring the state's witness partially adverse, the trial court improperly denied defense counsel's request for a limiting instruction. The admission of the witness's deposition testimony, without an instruction to the jury as to the limited purpose for which the evidence was being received, permitted the state to use what could fairly be termed affirmatively prejudicial testimony as substantive evidence in closing argument. Since we are unable to say, beyond a reasonable doubt, that the state's subsequent use of this testimony as substantive evidence did not affect the verdict, the trial court's ruling on this point must be considered harmful. *State v. DiGuilio,* 491 So.2d 1129, 1139 (Fla.1986). *See also Pitts v. State,* 333 So.2d 109 (Fla. 1st DCA 1976).

The third issue pertains to a lunch recess which occurred during defense counsel's cross examination of the state's first witness. This witness was the female friend who was with Davis on the night of the shooting. The trial court denied a defense request to instruct the prosecutor not to talk or consult with the witness during the recess. In lieu of a complete bar, the trial court permitted the state to consult with its witness in defense counsel's presence.

The actual consultation took place in the State Attorney's office. When defense counsel arrived, this witness and another state's witness were already seated in the office. Defense counsel protested to the trial court that the matters discussed by the prosecutor did not pertain to redirect examination, as contemplated by the court. Counsel argued the prosecutor's discussion related to the cross examination, and was, in effect, an attempt to calm the witness and change her combative demeanor in response to defense counsel's questions.

[9] **[10]** It is undisputed that an attorney may talk to a witness about the testimony the witness will give, and that the witness's credibility should not be challenged on the basis of the discussion. Fla.Std.Jury Instr. (Crim.) 2.05–7. It is also undisputed that a criminal defendant's right to counsel encompasses the right to consult with his attorney during any recess, even if the recess occurs in the middle of the defendant's testimony. *Thompson v. State,* 507 So.2d 1074, 1075 (Fla.1987); *Bova v. State,* 410 So.2d 1343, 1344 (Fla.1982).

[11] Nevertheless, we are not prepared to say that a defendant's right to confront adverse witnesses includes the right to preclude consultation between a state's witness and the prosecutor during a recess in cross examination. In making this determination, ***1205** we are cognizant that a witness's demeanor is a primary factor in an evaluation of that witness's credibility. Furthermore, we recognize that permitting the state to consult with a crucial witness during a break in rigorous cross examination affords the prosecutor an opportunity to calm a combative witness, and thus may have a chilling effect on the resumed cross examination.

Our research has disclosed no authority expressly addressing this rather novel question, nor have respective counsel directed our attention to such authority. Our reasoning on this point attempts to give due weight to the broad discretion accorded a trial court in the conduct of a trial, *see* § 90.612, Fla.Stat. (1985); *Smith v. State,* 404 So.2d 167, 169 (Fla. 1st DCA 1981), and the right of an accused to a full and fair cross examination of the state's witnesses. *See Davis v. Alaska,* 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974); *Steinhorst v. State,* 412 So.2d 332, 337 (Fla.1982); *Rivera v. State,* 462 So.2d 540, 543 (Fla. 1st DCA) *review denied,* 469 So.2d 750 (Fla.1985). While the trial court's ruling on this point conceivably had some impact on defense counsel's cross examination, we conclude that the ruling was consistent with "judicial discretion in controlling the mode, order, and scope of cross-examination." *Smith v. State,* 404 So.2d at 169.

[12] The fourth issue concerns the trial court's instructions to the jury on excusable homicide and justifiable homicide. The jury instructions at issue are the following instructions from the *Florida Standard Jury Instructions in Criminal Cases:* (1) Introduction to Homicide at page 61, [1] (2) Justifiable Use of Deadly Force at pages 40–43, and (3) Excusable Homicide at page 76. [2] Defense counsel requested only the paragraph two "heat of passion" instruction on excusable homicide. Counsel also asked the court not to give the paragraph three instruction dealing with "sudden combat" and use of a weapon in combat, which appears at page 76, and also asked the court not to give the short introductory definition of excusable homicide which appears at page 61. Over objection, the trial court gave the short introduction in full, and paragraphs two and three of the instruction on excusable homicide. Appellant maintains the introduction to excusable homicide and paragraph three of the excusable homicide instruction are inherently misleading, because they suggest that a killing committed with a deadly weapon is never excusable. We agree that the instruction is misleading.

***1206 [13]** It is well settled that "[j]ury instructions must relate to issues concerning evidence received at trial (citations omitted), [and] the court should not give instructions which are confusing, contradicting, or misleading." *Butler v. State,* 493 So.2d 451 (Fla.1986). Furthermore, a jury instruction must not suggest that the excusable homicide defense is unavailable if a dangerous weapon was used. *Young v. State,* 509 So.2d 1339 (Fla. 1st DCA 1987); *Ortagus v. State,* 500 So.2d 1367 (Fla. 1st DCA 1987); *Clark v. State,* 461 So.2d 131 (Fla. 1st DCA 1984); *Bowes v. State,* 500 So.2d 290 (Fla. 3d DCA 1986), *review denied,* 506 So.2d 1043 (Fla.1987); *Parker v. State,* 495 So.2d 1204 (Fla. 3d DCA 1986) *review denied,* 504 So.2d 768 (Fla.1987); *Blitch v. State,* 427 So.2d 785 (Fla. 2d DCA 1983).

In *Young,* the trial court did not give the standard jury instruction on excusable homicide. Instead, the court recited the excusable homicide statute, which provides:

> Homicide is excusable when committed by accident and misfortune in doing any lawful act by lawful means with usual ordinary caution, and without any unlawful intent, or by accident and misfortune in the heat of passion, upon any sudden and sufficient provocation, or upon a sudden combat, without any dangerous weapon being used and not done in a cruel or unusual manner.

§ 782.03, Fla.Stat. (1985); *Young,* 509 So.2d at 1340–1341. Young was convicted of second degree murder in the death of his wife, who was killed by a single shotgun blast fired at close range. The defense theory was accidental death. Defense counsel in *Young,* as did counsel in the instant case, objected to the second part of the instruction as inapplicable. The prosecutor in *Young* argued that a killing is excusable only if a dangerous weapon is not used or the killing is not done in a cruel or unusual manner. During closing argument, the prosecutor repeated the assertion; and the trial court overruled the defense objection that the argument was a misstatement of the law. This court reversed, finding the *Blitch* rationale applicable, that is, "that the instruction might have misled the jury by inaccurately appearing to suggest that a killing can never be excusable if committed with a dangerous weapon." 509 So.2d at 1341.

The *Bowes* case concerns two counts of first-degree murder and one count of third-degree murder occurring during a sale or delivery of marijuana. Bowes and two codefendants were to deliver a bale of marijuana to three men from Tennessee. Apparently everyone who arrived at the transfer site was armed; the evidence at trial was conflicting with respect to the shootout which ensued. Defense counsel requested an instruction on sudden provocation, and also asked that the court not include the final portion of the instruction relating to sudden combat, "since that was not a claimed defense and might mislead the jury." 500 So.2d 291. The prosecution asked the court to give the entire instruction, since the jury might find any part of it applicable to any of the charges. The trial court gave the instruction in its entirety, and Bowes was found guilty on all three murder counts. The Third District reversed, finding the instruction as given may have led the jury to conclude the homicides were inexcusable because they were committed with handguns.

In the instant case, over objection, the trial court instructed the jury twice on the "sudden combat" portion of the excusable homicide instruction. The first reference occurred in the introduction to homicide instructions, and the second reference was within the context of the complete excusable homicide instruction. Similarly, the trial court read, over objection, the justifiable homicide instruction. This instruction states that "[t]he killing of a human being is justifiable homicide and lawful if necessarily done while resisting an attempt to murder or commit a felony upon the defendant, or to commit a felony in any dwelling house in which the defendant was at the time of the killing." Although agreeing that the instruction did not relate to appellant's theory of defense, the trial court concluded it could not be omitted.

We find that the disputed instructions were misleading and confusing, in that ***1207** they did not pertain to the evidence produced at trial. Thus, in this case, as in *Butler,* the misleading jury instructions "gave the state the benefit of a situation which was disavowed by its own witnesses." 493 So.2d at 452. Although the prosecutor in this case pressed vigorously for the sudden combat instruction, the instruction did not comport with the evidence presented by the state. The testimony of the state's witnesses established that the altercation which led to Davis's death was made up of a series of haranguing confrontations in which Davis was the aggressor. There was no sudden combat. Consequently, in the circumstances of this case, it was error to give the sudden combat instruction, since, "there is a reasonable possibility that the error affected the verdict." *State v. DiGuilio,* 491 So.2d at 1139.

[14] **[15]** The fifth issue for our review pertains to the admission of a photograph of Davis's body, and the subsequent use of that photograph in closing argument. The test for admissibility of photographic evidence is whether the photograph is "relevant to any issue required to be proven in a given case." *Adams v. State,* 412 So.2d 850, 853 (Fla.1982), *cert. denied,* 459 U.S. 882, 103 S.Ct. 182, 74 L.Ed.2d 148 (1982), quoting *State v. Wright,* 265 So.2d 361, 362 (Fla.1972). *See also Henderson v. State,* 463 So.2d 196, 200 (Fla.), *cert. denied,* 473 U.S. 916, 105 S.Ct. 3542, 87 L.Ed.2d 665 (1985); *Mazzara v. State,* 437 So.2d at 718–719. The photograph at issue in this case depicts Davis's body at the scene of the shooting. Though purportedly admitted to show how Davis was dressed at the time of his death, Davis's manner of dress was not an issue in the case. We find, therefore, that the photograph was marginally relevant, if that.

[16] The sixth issue concerns Detective Warren's comment contrasting appellant's neat courtroom appearance with his appearance at the time of his arrest. While this comment could be construed as an improper attempt to attack appellant's character, *see Proctor v. State,* 447 So.2d 448, 449 (Fla. 3d DCA 1984), neither the comment nor the admission of the photograph would be sufficient, without more, to warrant reversal. Since we find we must reverse on other grounds, we find it unnecessary to consider the cumulative effect of these two errors.

In summary, since we are unable to say that the errors set forth in issues one, two, and four did not affect the verdict, the errors are harmful within the contemplation of *DiGuilio.* Therefore, we reverse appellant's conviction and remand the case for a new trial. In light of our decision, we find it unnecessary to address the seventh issue concerning sentencing.

Accordingly, appellant's conviction is reversed and this case is remanded for a new trial.

SMITH, C.J., and WENTWORTH, J., concur.

JOANOS, J., concurs and dissents with written opinion.

JOANOS, Judge, concurring and dissenting.
I concur with the majority except in what has been labeled as the first and second issues in the majority opinion.

As to the first issue, I agree that the evidence presented through the testimony of two rebuttal witnesses as to statements purportedly made by the victim some five hours before the shooting was inadmissible hearsay. However, in the context of this case, I would not consider that error as constituting reversible error.

In addition, I dissent from the majority view as to the second issue. I disagree that it was error to declare the specified state's witness as partially adverse and allow the witness to be impeached as to the prior inconsistent statements. Under the circumstances, it was reasonable to view that testimony as affirmatively prejudicial to the State as required by *Adams v. State,* 34 Fla. 185, 195–196, 15 So. 905, 908 (1894) and *Jackson v. State,* 451 So.2d 458, 462 (Fla.1984). The situation that existed at the time of the two shots was at the very core of the fact determinations to be made in this case. Whether the victim was helpless ***1208** between the two shots was of extreme importance in the State's case. However, I would agree with the majority view that upon his request, the defendant should have been given an instruction as to the limited purpose for which the evidence was received. § 90.107, Fla.Stat. (1985).

All Citations

523 So.2d 1199, 13 Fla. L. Weekly 820

Footnotes

1 The Introduction to homicide section of the standard jury instructions provides in relevant part:

JUSTIFIABLE HOMICIDE

The killing of a human being is justifiable homicide and lawful if necessarily done while resisting an attempt to murder or commit a felony upon the defendant, or to commit a felony in any dwelling house in which the defendant was at the time of the killing.

EXCUSABLE HOMICIDE

The killing of a human being is excusable, and therefore lawful, when committed by accident and misfortune in doing any lawful act by lawful means with usual ordinary caution and without any unlawful intent, or by accident or misfortune in the heat of passion, upon any sudden and sufficient provocation, or upon a sudden combat, without any dangerous weapon being used and not done in a cruel or unusual manner.

2 The complete excusable homicide instruction provides:

EXCUSABLE HOMICIDE

An issue in this case is whether the killing of (victim) was excusable.

The killing of a human being is excusable if committed by accident and misfortune.

In order to find the killing was committed by accident and misfortune, you must find the defendant was:

1. a. doing a lawful act by lawful means and with usual care and

b. acting without any unlawful intent.

2. in the heat of passion brought on by a sudden provocation sufficient to produce in the mind of an ordinary person the highest degree of anger, rage or resentment that is so intense as to overcome the use of ordinary judgment, thereby rendering a normal person incapable of reflection.

3. engaged in sudden combat. However, if a dangerous weapon was used in the combat or the killing was done in a cruel or unusual manner, the killing is not excusable.

Definition: A “dangerous weapon” is any weapon that, taking into account the manner in which it is used, is likely to produce death or great bodily harm.

End of Document

KeyCite Yellow Flag - Negative Treatment
Not Followed as Dicta U.S. v. Gaudin, U.S.Mont., June 19, 1995

108 S.Ct. 1537
Supreme Court of the United States

Juozas KUNGYS, Petitioner
v.
UNITED STATES.

No. 86–228.
|
Argued April 27, 1987.
|
Reargued Oct. 13, 1987.
|
Decided May 2, 1988.

The United States brought an action to revoke citizenship. The United States District Court for the District of New Jersey, Dickinson R. Debevoise, J., 571 F.Supp. 1104, found for defendant, and the United States appealed. The Court of Appeals, Carol Los Mansmann, Circuit Judge, 793 F.2d 516, reversed and remanded. The United States Supreme Court granted certiorari and, in an opinion by Justice Scalia, held that: (1) the test of whether concealments or misrepresentations were "material" within the meaning of a statute providing for the denaturalization of citizens whose citizenship orders and certificates of naturalization were procured by concealment of a material fact or by willful misrepresentation, was whether they could be shown by clear, unequivocal and convincing evidence to have been predictably capable of affecting the Immigration and Naturalization Service's decision, and (2) statute providing that a person shall be deemed not to be of good moral character if he has given false testimony for the purpose of obtaining immigration or naturalization benefits did not impose a materiality requirement for false testimony.

Reversed and remanded.

Justice Kennedy did not participate in the decision.

Justice Brennan filed a concurring opinion.

Justice Stevens filed an opinion concurring in the judgment in which Justices Marshall and Blackmun joined.

Justice O'Connor filed an opinion concurring in part and dissenting in part.

Justice White filed a dissenting opinion.

West Headnotes (13)

[1] **Aliens, Immigration, and Citizenship** Concealment of material fact or willful misrepresentation in application

In order for a naturalized citizen to be denaturalized, it must be shown that the naturalized citizen misrepresented or concealed some fact, that the misrepresentation or concealment was willful, that the fact was material, and that the naturalized citizen procured citizenship as result of the misrepresentation or concealment. Immigration and Nationality Act, § 340(a), as amended, 8 U.S.C.A. § 1451(a).

52 Cases that cite this headnote

[2] **Aliens, Immigration, and Citizenship** Concealment of material fact or willful misrepresentation in application

The term "material" as used in a statute providing for the denaturalization of naturalized citizens applied to a concealment or misrepresentation which had a natural tendency to influence or was capable of influencing the decision of the decision-making body to which it was addressed. Immigration and Nationality Act, § 340(a), as amended, 8 U.S.C.A. § 1451(a).

275 Cases that cite this headnote

[3] **Aliens, Immigration, and Citizenship** Concealment of material fact or willful misrepresentation in application

In determining whether a misrepresentation or concealment by a naturalized citizen was "material" within the meaning of denaturalization statute, the test of materiality was not that the misrepresentation or concealment would more likely than not have produced an erroneous decision, or even that it would more likely than not have triggered an investigation. Immigration and Nationality Act, § 340, as amended, 8 U.S.C.A. § 1451.

47 Cases that cite this headnote

[4] **Aliens, Immigration, and Citizenship** Weight and sufficiency

In determining whether a misrepresentation or concealment is "material" within the meaning of a denaturalization statute, the misrepresentation or concealment must be shown by clear, unequivocal, and convincing evidence to be predictably capable of affecting, that is, having a natural tendency to affect, the official decision of whether the applicant meets requirements for citizenship. Immigration and Nationality Act, § 340, as amended, 8 U.S.C.A. § 1451.

141 Cases that cite this headnote

[5] **Aliens, Immigration, and Citizenship** Hearing

The question of the materiality of a naturalized citizen's concealments or misrepresentations to the Immigration and Naturalization Service in an application for naturalization was a question of law for the court. Immigration and Nationality Act, § 340(a), as amended, 8 U.S.C.A. § 1451(a).

50 Cases that cite this headnote

[6] **Federal Courts** Review of federal district courts

It is not the normal practice of the United States Supreme Court to consider fact-bound legal consequences of contested district court findings not yet reviewed by the Court of Appeals. (Per Justice Scalia with two Justices concurring and three Justices concurring in judgment.)

4 Cases that cite this headnote

[7] **Aliens, Immigration, and Citizenship** Concealment of material fact or willful misrepresentation in application

The Supreme Court would not consider whether a misrepresentation made by a naturalized American citizen in his visa proceeding was a material misrepresentation, as "concealment or misrepresentation" under the denaturalization provision under which the United States sought to revoke a naturalized citizen's citizenship was limited to falsehood or deceptions in the naturalization proceeding. (Per Justice Scalia with two Justices concurring and three Justices concurring in judgment.) Immigration and Nationality Act, §§ 101(f)(6), 312, 318, 340(a), as amended, 8 U.S.C.A. §§ 1101(f)(6), 1423, 1429, 1451(a).

11 Cases that cite this headnote

[8] **Aliens, Immigration, and Citizenship** Concealment of material fact or willful misrepresentation in application

A naturalized citizen's misrepresentation of the date and place of his birth in his naturalization petition was not "material" within the meaning of the denaturalization statute absent any suggestion that the facts were themselves relevant to his qualifications for citizenship or a showing that the true date and place of birth would predictably have disclosed other facts relevant to the applicant's qualifications and would have been likely to result either in outright denial or an investigation resulting in the denial of the application. (Per Justice Scalia with two Justices concurring and three Justices concurring in judgment.) Immigration and Nationality Act, § 340(a), as amended, 8 U.S.C.A. § 1451(a).

16 Cases that cite this headnote

[9] **Aliens, Immigration, and Citizenship** Concealment of material fact or willful misrepresentation in application

For purposes of determining the natural tendency of a misrepresentation to affect a decision to grant a petition for naturalization, what is relevant is what would have ensued from official knowledge of the misrepresented fact, not what would have ensued from official knowledge of inconsistency between a posited assertion of the truth and an earlier assertion of falsehood. (Per Justice Scalia with two Justices concurring and three Justices concurring in judgment.) Immigration and Nationality Act, § 340(a), as amended, 8 U.S.C.A. § 1451(a).

44 Cases that cite this headnote

[10] **Aliens, Immigration, and Citizenship** Illegal or fraudulent procurement of naturalization in general

Aliens, Immigration, and Citizenship Presumptions and burden of proof

Requirement that government establish that misrepresentation by applicant for naturalization was "material" did not require government to establish that naturalization would not have been granted if the misrepresentations or concealments had not occurred; the "procured by" language of the naturalization statute established a rebuttable presumption that one who obtained his citizenship in a proceeding where he made material misrepresentations was disqualified from obtaining citizenship. (Per Justice Scalia, with two Justices concurring and three Justices concurring in judgment.) Immigration and Nationality Act, § 340(a), as amended, 8 U.S.C.A. § 1451(a).

15 Cases that cite this headnote

[11] **Aliens, Immigration, and Citizenship** Illegal or fraudulent procurement of naturalization in general

Immigration provision stating that a person should be deemed not to be of good moral character if he had given false testimony for the purpose of obtaining immigration or naturalization benefits did not contain a materiality requirement for false testimony; the primary purpose of the provision was to identify lack of good moral character, rather than to prevent false pertinent data from being introduced into the naturalization process. Immigration and Nationality Act, §§ 101(f)(6), 316(a)(3), 340(a), as amended, 8 U.S.C.A. §§ 1101(f)(6), 1427(a)(3), 1451(a).

87 Cases that cite this headnote

[12] **Aliens, Immigration, and Citizenship** Moral character in general

Immigration provision preventing person from being deemed to have good moral character if he had given false testimony for the purposes of obtaining immigration or naturalization benefits was limited to oral statements made under oath, applied only to those misrepresentations made with the subjective intent of obtaining immigration benefits, and did not apply to “concealments.” Immigration and Nationality Act, §§ 101(f)(6), 316(a)(3), 340(a), as amended, 8 U.S.C.A. §§ 1101(f)(6), 1427(a)(3), 1451(a).

101 Cases that cite this headnote

[13] **Aliens, Immigration, and Citizenship** Review

In denaturalization proceeding, material questions of law and additional question of fact existed as to whether misrepresentation made by naturalized citizen as to his date and place of birth constituted “false testimony for the purpose of obtaining immigration or naturalization benefits” under statute preventing applicant for naturalization from being deemed to be of good moral character if he had given false testimony for the purpose of obtaining immigration or naturalization benefits. (Per Justice Scalia with three Justices concurring and three Justices concurring in result.) Immigration and Nationality Act, § 101(f)(6), as amended, 8 U.S.C.A. § 1101(f)(6).

82 Cases that cite this headnote

**1539 *Syllabus* *

***759** The Immigration and Nationality Act provides for the denaturalization of citizens whose citizenship orders and certificates of ****1540** naturalization "were illegally procured or were procured by concealment of a material fact or by willful misrepresentation." 8 U.S.C. § 1451(a). In 1982, the United States filed a complaint pursuant to § 1451(a) to denaturalize petitioner, who came to the United States in 1948 under an immigration visa which he had applied for in Germany in 1947 and was naturalized as a United States citizen in 1954. The District Court entered judgment for petitioner. It rejected the Government's first claim that petitioner had participated in executing Lithuanian citizens (most of them Jewish) in 1941, holding that the evidence was insufficient to sustain the charges. Regarding the Government's second claim, the court held that, although petitioner had made false statements as to, *inter alia*, his date and place of birth in his visa and naturalization applications, the misrepresentations were not material within the meaning of § 1451(a), as illuminated by *Chaunt v. United States*, 364 U.S. 350, 81 S.Ct. 147, 5 L.Ed.2d 120. The court also rejected the Government's third asserted ground for denaturalization, that petitioner's citizenship had been "illegally procured" under § 1451(a) for lack of "good moral character," required for naturalization by 8 U.S.C. § 1427(a). Although 8 U.S.C. § 1101(f)(6) makes the giving of false testimony to obtain immigration or naturalization benefits determinative of lack of "good moral character," the court ruled that petitioner's false statements were not covered by this provision because they were not material. The Court of Appeals declined to pass on the Government's submission as to its first claim, and upheld the District Court's rejection of the third asserted ground for denaturalization. However, the Court of Appeals reversed the District Court's rejection of the second ground, concluding that petitioner's willful misrepresentation in his visa and naturalization applications of the date and place of his birth was material for purposes of § 1451(a)'s "concealment or misrepresentation" provision. The Court of Appeals therefore reversed the judgment of the District Court and remanded for denaturalization proceedings.

***760** *Held:* The judgment of the Court of Appeals is reversed, and the case is remanded.

793 F.2d 516 (CA3 1986), reversed and remanded.

Justice SCALIA delivered the opinion of the Court with respect to Parts I, II–A, and III–A, concluding that:

1. For purposes of § 1451(a)'s "concealment or misrepresentation" provision, the test of whether concealments or misrepresentations are "material" is whether they can be shown by clear, unequivocal, and convincing evidence to have been predictably capable of affecting, *i.e.,* to have had a natural tendency to affect, the Immigration and Naturalization Service's decisions. This test is consistent with the lower federal courts' uniform understanding of the "materiality" concept as

embodied in other federal statutes criminalizing false statements to public officials. See, *e.g.,* 18 U.S.C. §§ 1001, 1621, 1623. The dicta in *Chaunt v. United States* should not be used to construct a different materiality standard in the immigration context. Materiality under § 1451(a), as under other federal statutes, is an issue of law, which is for the court, and not one of fact, which must be decided by the trier of facts. Pp. 1544–1547.

2. Contrary to the Court of Appeals' holding (for purposes of the Government's claim under § 1451(a)'s "illegally procured" provision), § 1101(f)(6) does not impose a materiality requirement for false testimony. Section 1101(f)(6)—which provides that a person shall be deemed not to be of good moral character if he "has given false testimony for the purpose of obtaining" immigration or naturalization benefits—is to be given its plain meaning, denominating one who has made false oral statements under oath with the subjective intent of obtaining immigration or naturalization benefits. The absence of a materiality requirement in § 1101(f)(6) can be explained by the fact ****1541** that its primary purpose is not (like the misrepresentation clause of § 1451(a)) to prevent false pertinent data from being introduced into the naturalization process, but to identify lack of good moral character. Pp. 1551–1552.

Justice SCALIA, joined by THE CHIEF JUSTICE, Justice BRENNAN, and (as to Part III–B) Justice O'CONNOR, concluded in Parts II–B and III–B, that:

1. Under the "natural tendency" test, petitioner's misrepresentation of the date and place of his birth in his 1954 naturalization petition was not shown to be clearly, unequivocally, and convincingly material within the meaning of § 1451(a)'s "concealment or misrepresentation" provision. It is improper to address the 1947 episode when petitioner made the same misrepresentation in his visa application, since § 1451(a)'s "concealment or misrepresentation" clause is limited to falsehoods or deceptions that procure the order and certificate of naturalization. As to ***761** petitioner's naturalization petition, there has been no showing that the date and place of his birth were themselves relevant to his qualifications for citizenship or that true information, if supplied, would predictably have disclosed other facts relevant to his qualifications. For purposes of determining the natural tendency of a misrepresentation to affect a decision under § 1451(a), what must have a natural tendency to influence the official decision is the misrepresentation itself, not the failure to create an inconsistency with an earlier misrepresentation.

It is for the Third Circuit on remand to determine whether other misrepresentations or concealments that the District Court found to have been made in 1954 were supported by the evidence and material to the naturalization decision. If so, it will have to reach another, independent § 1451(a) issue: whether petitioner "procured" his citizenship by means of those misrepresentations or concealments. This does not require the Government to establish "but for" causality—that is, that naturalization would not have been granted if the misrepresentations or concealments had not occurred. Section 1451(a)'s "procured by" language should be read to express the notion that one who obtained his citizenship in a proceeding where he made material misrepresentations was presumably unqualified. The naturalized citizen should be able to refute that presumption, and avoid the consequence of denaturalization, by showing, through a preponderance of the evidence, that the statutory requirement as to which the misrepresentation had a natural tendency to produce a favorable decision was in fact met. Pp. 1547–1549.

2. Although the Third Circuit erred in importing a materiality requirement into § 1101(f)(6), denaturalization cannot be affirmed on the alternative basis of that section because the question whether any misrepresentation made by petitioner constituted “false testimony for the purpose of obtaining” immigration or naturalization benefits cannot be answered without resolving the additional question of law—which this Court will not resolve because the case must be remanded—as to whether petitioner's misrepresentation constituted “testimony.” Moreover, an additional question, which must be resolved by the trier of fact, is whether in making the misrepresentations petitioner possessed the subjective intent of thereby obtaining immigration or naturalization benefits. P. 1552.

Justice STEVENS, joined by Justice MARSHALL and Justice BLACKMUN would vacate the decision below and remand for further proceedings consistent with the following conclusions:

1. Our conclusion in *Chaunt* that the Government cannot denaturalize a citizen under the misrepresentation clause of § 1451(a) without proving the existence of a disqualifying fact is supported by both the requirement that the misrepresentation be material and the requirement that it procurecitizenship. ***762** Together and separately, the materiality and procurement requirements reflect congressional intent ****1542** that citizenship status not be taken away unless the Government proves that the defendant was not qualified to hold that status at the time citizenship was obtained.

A misrepresentation is material within the meaning of § 1451(a) only if it is capable of influencing the decision whether to confer citizenship. Because the decision whether to confer citizenship is an objective one, the only statements that are capable of influencing the outcome are those that conceal disqualifying facts or that prevent or hinder the discovery of disqualifying facts.

To demonstrate that citizenship was “procured by” a material misrepresentation, the Government must demonstrate by clear, unequivocal, and convincing evidence that it relied on the misrepresentation in deciding whether to confer citizenship. Unless a disqualifying fact existed, it cannot be said that a misrepresentation procured citizenship. Thus, the existence of a disqualifying fact is a necessary element of the Government's proof of materiality and reliance. Pp. ____ – ____.

2. A citizen cannot be found to lack good moral character under § 1101(f)(6) for giving “false testimony for the purpose of obtaining any benefits” under the naturalization laws unless the false

statements were material and had the actual effect of securing some benefit under the immigration and naturalization laws. A materiality requirement is implicit in § 1101(f)(6). In *Fedorenko v. United States,* 449 U.S. 490, 101 S.Ct. 737, 66 L.Ed.2d 686, we held that the language of § 10 of the Displaced Persons Act providing for the exclusion from the United States of persons who willfully made misrepresentations for the purpose of gaining admission to the United States implicitly included a materiality requirement. The logic of our decision in *Fedorenko* applies equally here.

An objective test of whether a false statement was made for the purpose of obtaining a benefit under the immigration laws is more reasonable than a subjective test. An objective test is more consistent with the heavy burden of proof borne by the Government in denaturalization cases and has the virtue of diminishing the risk of erroneous determinations. Pp. 1548–1551.

SCALIA, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II–A, and III–A, in which REHNQUIST, C.J., and BRENNAN, WHITE, and O'CONNOR, JJ., joined, and an opinion with respect to Parts II–B and III–B, in which REHNQUIST, C.J., and BRENNAN and (as to Part III–B only) O'CONNOR, JJ., joined. BRENNAN, J., filed a concurring opinion, *post,* p. ——. STEVENS, J., filed an opinion concurring in the judgment, in which MARSHALL and BLACKMUN, JJ., joined, *post,* p. ——. O'CONNOR, J., filed an opinion concurring in part ***763** and dissenting in part, *post,* p. ——. WHITE, J., filed a dissenting opinion, *post,* p. ——. KENNEDY, J., took no part in the consideration or decision of the case.

Attorneys and Law Firms

Donald J. Williamson reargued the cause for petitioner. With him on the briefs were *Michael F. Rehill* and *Ivars Berzins.*

Robert H. Klonoff reargued the cause for the United States. With him on the briefs were *Solicitor General Fried, Assistant Attorney General Weld, Deputy Solicitor General Bryson, Samuel Rosenthal, Michael Wolf,* and *Joseph F. Lynch.**

* *William S. Hemsley, Jr.,* and *Frank A. S. Campbell* filed a brief for the Baltic-Ukranian-American Compact et al. as *amici curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the Anti-Defamation League of B'nai B'rith et al. by *Ruti Teitel, Justin J. Finger, Jeffrey P. Sinensky,* and *Jovi Tenev;* and for the World Jewish Congress by *Eli M. Rosenbaum* and *Robert H. Lande.*

Opinion

Justice SCALIA announced the judgment of the Court and delivered the opinion of the Court as to Parts I, II–A, and III–A, and an opinion as to Parts II–B and III–B, in which THE CHIEF JUSTICE and Justice BRENNAN joined, and in Part III–B of which Justice O'CONNOR joined.

Juozas Kungys seeks our review of a judgment and opinion of the Third Circuit remanding his case for the completion of denaturalization proceedings. The issues presented are: first, whether certain misrepresentations or concealments made by Kungys in connection with his naturalization proceeding were material within the meaning of the Immigration and Nationality Act of 1952, § 340(a), 66 Stat. 260, as ****1543** amended, 8 U.S.C. § 1451(a), and *Chaunt v. United States,* 364 U.S. 350, 81 S.Ct. 147, 5 L.Ed.2d 120 (1960); and second, whether those misrepresentations, made under oath and in the form of forged documents, rendered Kungys' citizenship "illegally procured" under 8 U.S.C. §§ 1101(f)(6), 1427(a)(3), and 1451(a), because they ***764** established that he lacked the requisite good moral character when he was naturalized 34 years ago.

I

Petitioner applied for an immigration visa in Stuttgart, Germany, in 1947. In 1948, the visa was issued, and he came to the United States; he was naturalized as a citizen in 1954. In 1982, the United States, acting through the Office of Special Investigations of the Department of Justice, filed a complaint pursuant to 8 U.S.C. § 1451(a) to denaturalize him. [1] The United States advanced three grounds. First, it attempted to show that Kungys had participated in executing over 2,000 Lithuanian civilians, most of them Jewish, in Kedainiai, Lithuania, between July and August 1941. As proof of this claim, the United States offered in evidence three videotaped depositions taken for use in this case in the Soviet Union. After determining that for numerous reasons the Soviet-source depositions were inherently unreliable, the District Court admitted them only for the limited purpose of showing that the atrocities actually occurred. The District Court then held that the admissible evidence was insufficient to sustain the charges that Kungys had participated in the Kedainiai atrocities.

Second, the United States attempted to show that, in applying for his visa and in his naturalization petition, Kungys had made false statements with respect to his date and place of birth, wartime occupations, and wartime residence. The ***765** District Court found that these misrepresentations had been made but held them not to be material within the meaning of 8 U.S.C. § 1451(a), as illuminated by language in *Chaunt v. United States, supra.*

Third, the United States argued that Kungys' citizenship had been "illegally procured" under § 1451(a) because when he was naturalized he lacked the good moral character required of applicants for citizenship by 8 U.S.C. § 1427(a). [2] In support of this theory, the United States asserted that Kungys' false representations, whether or not material, were sufficient to show that he had given false testimony to obtain immigration or naturalization benefits, which 8 U.S.C. § 1101(f)(6) makes determinative of lack of good moral character. [3] The District ****1544** Court ruled that the false statements at issue were not covered by 8 U.S.C. § 1101(f)(6) because they were not material.

***766** Having rejected each of the three asserted grounds for denaturalization, the District Court entered judgment for Kungys. 571 F.Supp. 1104 (N.J.1983). The United States appealed. The Third Circuit declined to pass on the United States' submission that the first asserted ground (participation in the Kedainiai atrocities) was wrongfully rejected because of error in failing to admit unqualifiedly the Soviet-source depositions. It reversed, however, the District Court's rejection of the second ground, concluding that Kungys' willful misrepresentation of the date and place of his birth in connection with his applications for visa and naturalization (which was no longer disputed), was material for purposes of the "concealment or misrepresentation" provision of § 1451(a). Finally, the Third Circuit upheld the District Court's rejection of the third asserted ground for denaturalization agreeing that in order to establish "illegal procurement" under § 1451(a) on account of lack of good moral character under § 1101(f)(6), false testimony must be shown to have been material. 793 F.2d 516 (1986).

We granted certiorari, 479 U.S. 947, 107 S.Ct. 431, 93 L.Ed.2d 381 (1986), and heard argument last Term, on the question of what materiality standard applies to the "concealment or misrepresentation" clause of § 1451(a) and the false testimony provision of § 1101(f)(6) as incorporated by the "illegally procured" clause of § 1451(a). On June 26, 1987, we restored the case to the calendar and directed parties to file supplemental briefs addressing certain questions. [4] 483 U.S. 1017, 107 S.Ct. 3258, 97 L.Ed.2d 758. The case was reargued October 13, 1987.

***767** II

A

[1] As noted above, 8 U.S.C. § 1451(a) provides for the denaturalization of citizens whose citizenship orders and certificates of naturalization "were procured by concealment of a material fact or by willful misrepresentation...." This Court has previously suggested, and the parties do not dispute, that this requires misrepresentations or concealments that are both willful and material. See *Fedorenko v. United States,* 449 U.S. 490, 507–508, n. 28, 101 S.Ct. 737, 747–748, n. 28, 66 L.Ed.2d 686 (1981). So understood, the provision plainly contains four independent requirements:

the naturalized citizen must have misrepresented or concealed some fact, the misrepresentation or concealment must have been willful, the fact must have been material, and the naturalized citizen must have procured citizenship as a result of the misrepresentation ****1545** or concealment. It is no longer in dispute that the first two of these requirements were met here, since petitioner now concedes that he willfully misrepresented the date and place of his birth in his naturalization proceeding in 1954 as well as in applying for his visa in 1947. [5]

***768** This Court has had occasion to consider the last two requirements only twice. In *Chaunt v. United States,* 364 U.S. 350, 81 S.Ct. 147, 5 L.Ed.2d 120 (1960), we held that a naturalized citizen who had willfully and falsely stated during the naturalization process that he had never been arrested could nevertheless not be denaturalized pursuant to § 1451. A year later, in *Costello v. United States,* 365 U.S. 265, 81 S.Ct. 534, 5 L.Ed.2d 551 (1961), we held that a naturalized citizen who had willfully and falsely stated during the naturalization process that his occupation was "real estate," when in fact it would more accurately have been described as "bootlegging," could be denaturalized pursuant to § 1451. In neither case did the Court's opinion purport to announce a conclusive judicial test to guide the determination whether a given misrepresentation or concealment was "material" and whether it "procured" a naturalization certificate. Indeed, in neither case did the opinion clearly differentiate between these two separate requirements. Nevertheless, it has been thought that a test for materiality can profitably be derived from certain language in *Chaunt.* That language comes at the end of the opinion, where the Court, in summarizing its holding, states that "the Government has failed to show by 'clear, unequivocal, and convincing' evidence either (1) that facts were suppressed which, if known, would have warranted denial of citizenship or (2) that their disclosure might have been useful in an investigation possibly leading to the ***769** discovery of other facts warranting denial of citizenship." 364 U.S., at 355, 81 S.Ct., at 150–151. The efforts to make this formulation the test for materiality have not met with notable success. Not only have the Courts of Appeals failed to arrive at a single interpretation (compare *United States v. Riela,* 337 F.2d 986 (CA3 1964), and *United States v. Rossi,* 299 F.2d 650 (CA9 1962), with *Kassab v. INS,* 364 F.2d 806 (CA6 1966), and *Langhammer v. Hamilton,* 295 F.2d 642 (CA1 1961)), but our one attempt to dispel their confusion, see *Fedorenko,* 449 U.S., at 521, n. 4, 101 S.Ct., at 754, n. 4 (BLACKMUN, J., concurring in judgment), seemingly produced at least three variants on this Court, see *id.,* at 508–509, 101 S.Ct., at 748–749; *id.,* at 523–526, 101 S.Ct., at 755–757 (BLACKMUN, J., concurring in judgment); *id.,* at 528–530, 101 S.Ct., at 758–759 (WHITE, J., dissenting); *id.,* at 536–538, 101 S.Ct., at 762–763 (STEVENS, J., dissenting).

With the wisdom of experience, we now conclude that the attempts to construct a standard from the *Chaunt* dicta have been both unnecessary and unfortunate. The term "material" in § 1451(a) is not a hapax legomenon. Its use in the context of false statements to public officials goes back as far as Lord Coke, who defined the crime of perjury as follows:

> "Perjury is a crime committed, when a lawful oath is ministred by any that hath ****1546** authority, to any person, in any judicial proceeding, who sweareth absolutely, and falsly in a matter material to the issue, or cause in question, by their own act, or by the subornation of others." 3 E. Coke, Institutes 164 (6th ed. 1680).

[2] Blackstone used the same term, writing that in order to constitute "the crime of wilful and corrupt *perjury* " the false statement "must be in some point material to the question in dispute; for if it only be in some trifling collateral circumstance, to which no regard is paid," it is not punishable. 4 W. Blackstone, Commentaries *137. See also 1 W. Hawkins, Pleas of the Crown, ch. 27, § 8, p. 433 (Curwood ed. 1824). Given these common-law antecedents, it is unsurprising that a number of federal statutes criminalizing false statements to public officials use the term "material." The most ***770** prominent of these is perhaps 18 U.S.C. § 1001, which makes unlawful willful concealment of material facts in any matter within the jurisdiction of a department or agency of the United States. The federal courts have long displayed a quite uniform understanding of the "materiality" concept as embodied in such statutes. See, *e.g., Gonzales v. United States,* 286 F.2d 118, 122 (CA10) (construing 18 U.S.C. § 1001), cert. denied, 365 U.S. 878, 81 S.Ct. 1028, 6 L.Ed.2d 190 (1961); *Weinstock v. United States,* 97 U.S.App.D.C. 365, 367–368, and n. 6, 231 F.2d 699, 701–702, and n. 6 (1956) (same); *Blackmon v. United States,* 108 F.2d 572, 573 (CA5 1940) (construing language now codified at 18 U.S.C. § 1621); *Carroll v. United States,* 16 F.2d 951, 953 (CA2) (same), cert. denied, 273 U.S. 763, 47 S.Ct. 477, 71 L.Ed. 880 (1927); *United States v. Lardieri,* 497 F.2d 317, 319 (CA3 1974) (construing 18 U.S.C. § 1623); *United States v. Koonce,* 485 F.2d 374, 380 (CA8 1973) (same). The most common formulation of that understanding is that a concealment or misrepresentation is material if it "has a natural tendency to influence, or was capable of influencing, the decision of" the decisionmaking body to which it was addressed. See, *e.g., Weinstock v. United States, supra,* 97 U.S.App.D.C., at 367–368, 231 F.2d, at 701–702; *United States v. Corsino,* 812 F.2d 26, 30–31 (CA1 1987) (citing cases). While we have before us here a statute revoking citizenship rather than imposing criminal fine or imprisonment, neither the evident objective sought to be achieved by the materiality requirement, nor the gravity of the consequences that follow from its being met, is so different as to justify adoption of a different standard. "Where Congress uses terms that have accumulated settled meaning under either equity or the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms." *NLRB v. Amax Coal Co.,* 453 U.S. 322, 329, 101 S.Ct. 2789, 2794, 69 L.Ed.2d 672 (1981). See also *Perrin v. United States,* 444 U.S. 37, 42–43, 100 S.Ct. 311, 314–315, 62 L.Ed.2d 199 (1979).

[3] **[4]** ***771** One might perhaps view the *Chaunt* test as not a repudiation of the established meaning of "material," but as an attempt to craft a more precise test for what constitutes "a natural tendency to influence" a naturalization decision. Surely, however, there is no less need for precision in the criminal context than in the denaturalization context. The more general formulation is preferable there, as we think it is here, because the judgment in question does not lend itself to mechanical resolution. The disagreement between the District Court and the Court of Appeals in *Fedorenko* turned on whether the *Chaunt* test required that, had the truth been told, an investigation *would* have resulted which *would* have disclosed disqualifying facts, or rather that an investigation *would* have resulted which *might* have disclosed disqualifying facts. *Fedorenko, supra,* 449 U.S., at 528, 101 S.Ct., at 758 (WHITE, J., dissenting). But if the ultimate question is "natural tendency to influence," it would seem to make little difference whether the probabilities of investigation and resulting disclosure, respectively, are 100%–20%, ****1547** 20%–100%, 51%–51%, or even 30%–30%. It has never been the test of materiality that the misrepresentation or concealment would *more likely than not* have produced an erroneous decision, or even that it would *more likely than not* have triggered an investigation. Thus, while the *Chaunt* formulation may be an adequate explanation of why the misrepresentation in that case was judged not to have had a natural tendency to influence the decision, it does not necessarily facilitate judgment in the infinite variety of other factual patterns that may emerge—which is perhaps why we did not employ it in *Costello* a year later. We think it safer in the naturalization context, as elsewhere, to fix as our guide the central object of the inquiry: whether the misrepresentation or concealment was predictably capable of affecting, *i.e.,* had a natural tendency to affect, the official decision. The official decision in question, of course, is whether the applicant meets the requirements for citizenship, so that the test more specifically is whether the misrepresentation ***772** or concealment had a natural tendency to produce the conclusion that the applicant was qualified. This test must be met, of course, by evidence that is clear, unequivocal, and convincing. See, *e.g., Schneiderman v. United States,* 320 U.S. 118, 158, 63 S.Ct. 1333, 1352–1353, 87 L.Ed. 1796 (1943). Though this formulation may seem less verbally precise than *Chaunt,* in application it may well produce greater uniformity, since judges are accustomed to using it, and can consult a large body of case precedent.

[5] We hold, therefore, that the test of whether Kungys' concealments or misrepresentations were material is whether they had a natural tendency to influence the decisions of the Immigration and Naturalization Service. To determine the effect of this holding upon our disposition of the present case, we must first consider whether materiality under § 1451(a) is an issue of law, which we may decide for ourselves, or one of fact, which must be decided by the trial court. Here again we see no reason not to follow what has been done with the materiality requirement under other statutes dealing with misrepresentations to public officers. "[T]he materiality of what is falsely sworn, when an element in the crime of perjury, is one for the court." *Sinclair v. United States,* 279 U.S. 263, 298, 49 S.Ct. 268, 273, 73 L.Ed. 692 (1929). As the Sixth Circuit has said in a case involving 18 U.S.C. § 1001:

> "Although the materiality of a statement rests upon a factual evidentiary showing, the ultimate finding of materiality turns on an interpretation of substantive law. Since it is the court's responsibility to interpret the substantive law, we believe [it is proper to treat] the issue of materiality as a legal question." *United States v. Abadi,* 706 F.2d 178, 180, cert. denied, 464 U.S. 821, 104 S.Ct. 86, 78 L.Ed.2d 95 (1983).

B

[6] **[7]** We turn, then, to whether the one misrepresentation on which the trial court's finding was considered and upheld by the Third Circuit—misrepresentation of the date and place of ***773** Kungys' birth—was material under the foregoing test. [6] As discussed earlier, Kungys made that misrepresentation in both the 1947 visa proceeding and the 1954 naturalization proceeding. But insofar as application of the "concealment or misrepresentation" clause of § 1451(a) is concerned, we find it improper to address the 1947 episode. Unlike § 1101(f)(6), which covers false testimony "for the purpose of obtaining *any* benefits" under the immigration and naturalization laws, the "concealment or misrepresentation" clause of § 1451(a) applies only where the "*order and certificate of naturalization* ... were procured by concealment of a material fact or by willful misrepresentation." ****1548** Procurement of other benefits, including visas, is not covered. Especially in light of this contrast with § 1101(f)(6), we are unpersuaded by the Government's argument that a misrepresentation in the visa proceeding "procures" the naturalization because it obtains United States residence, which in turn is a prerequisite to naturalization, see 8 U.S.C. § 1429. The same argument could be made with respect to a misrepresentation that effects free enrollment in a reading course, which produces the prerequisite of English literacy, see 8 U.S.C. § 1423. [7] Such analysis stretches the "concealment or misrepresentation" clause of § 1451(a) beyond its intent, which we think is ***774** limited to falsehoods or deceptions in the naturalization proceeding. [8]

[8] Looking, therefore, solely to the question whether Kungys' misrepresentation of the date and place of his birth in his naturalization petition was material within the meaning of § 1451(a), we conclude that it was not. There has been no suggestion that those facts were themselves relevant to his qualifications for citizenship. Even though they were not, the misrepresentation of them would have a natural tendency to influence the citizenship determination, and thus be a misrepresentation of material facts, if the true date and place of birth would predictably have disclosed other facts relevant to his qualifications [9]. But not even that has been found here. The Third Circuit merely held:

> "[H]ad [Kungys] told the truth at the time he applied for his citizenship, the discrepancies between the truth and his visa materials would have resulted in either a field investigation or an outright denial of the petition. Had an investigation transpired, ... such investigation probably would have resulted in a denial of the petition since it would have tended to prove his ineligibility for a visa in the first instance. In this case, as previously noted, ***775** the defendant's claim of persecution by the Nazis—which is directly related to eligibility—would be called into question." 793 F.2d, at 533.

[9] It seems to us not so clear that, had Kungys explained his earlier misstatement of date and place of birth as he has here, see n. 5, *supra,* the discrepancy would likely have produced either “outright denial” or an investigation, or that an investigation would have produced the described outcome. [10] But even a high probability that ****1549** one or another of those consequences would have resulted from the discrepancy does not establish that Kungys' misrepresentation was material. Section 1451(a) imposes denaturalization for “concealment *of a material fact* (emphasis added); and the materiality requirement implicit in the misrepresentation provision likewise relates to misrepresentation *of a material fact.* Thus, for purposes of determining the natural tendency of a misrepresentation to affect a decision under § 1451(a), what is relevant is what would have ensued from official knowledge of the misrepresented fact (in this case, Kungys' true date and place of birth), not what would have ensued from official knowledge of inconsistency between a posited assertion of the truth and an earlier assertion of falsehood. On the basis of the Third Circuit's reasoning, a misrepresentation that, in and of itself, is utterly immaterial *both* in the visa proceeding *and* in the naturalization proceeding, becomes material simply because it is repeated in both. That is not what the statute ***776** intends. What must have a natural tendency to influence the official decision is the misrepresentation itself, not the failure to create an inconsistency with an earlier misrepresentation; the failure to state the truth, not the failure to state what had been stated earlier. The Government has failed to establish clearly, unequivocally, and convincingly that Kungys' misrepresentation of the date and place of his birth had this natural tendency.

[10] We leave it to the Third Circuit on remand to determine whether the other misrepresentations or concealments that the District Court found to have been made in 1954 were supported by the evidence and material to the naturalization decision under the standard we have described—bearing in mind the unusually high burden of proof in denaturalization cases. *Baumgartner v. United States,* 322 U.S. 665, 670, 64 S.Ct. 1240, 1243, 88 L.Ed. 1525 (1944); *Schneiderman,* 320 U.S., at 158, 63 S.Ct., at 1352–1353. If so, it will have to reach the fourth § 1451(a) issue described in our earlier analysis: whether Kungys “procured” his citizenship by means of those misrepresentations or concealments. That requirement demands, first of all, that citizenship be obtained as a result of the application process in which the misrepresentations or concealments were made. The difficult question, and that on which we part company with Justice STEVENS' opinion concurring in the judgment, is what it demands beyond that. We do not agree with petitioner's contention that it requires the Government to establish that naturalization would not have been granted if the misrepresentations or concealments had not occurred. If such a “but for” causation requirement existed in § 1451(a), it is most unlikely that a materiality requirement would have been added as well—requiring, in addition to distortion of the decision, a natural tendency to distort the decision. Moreover, the difficulty of establishing “but for” causality, by clear, unequivocal, and convincing evidence many years after the fact, is so ***777** great that we cannot conceive that Congress intended such a burden to be met before a material misrepresentation could be sanctioned. We do think, however, that the “procured by” language can and should be given some effect beyond the mere requirement that the misrepresentation have been made in the application proceeding. Proof of materiality can sometimes be regarded as establishing a rebuttable presumption. See, *e.g., Basic Inc. v. Levinson,* 485 U.S. 224, 245–249, 108 S.Ct. 978, 990–992, 99 L.Ed.2d 194 (1988). Though the "procured by" language of the present statute cannot be read to *require* proof of disqualification, we think it can be read to express the notion that one who obtained his citizenship in a proceeding where he made material misrepresentations was *presumably* disqualified. ****1550** The importance of the rights at issue leads us to conclude that the naturalized citizen should be able to refute that presumption, and avoid the consequence of denaturalization, by showing, through a preponderance of the evidence, that the statutory requirement as to which the misrepresentation *had a natural tendency* to produce a favorable decision was in fact met.[11] Such a construction gives ample meaning to both the "materiality" and "procured by" requirements.

Justice STEVENS' concurrence would adopt a requirement of "but for" causality, emphasizing the necessity that the ***778** Government establish, at least, that the misrepresenting applicant was in fact not qualified to be naturalized. This emphasis highlights another difficulty with "but for" causality: that requirement is simply not a conceivable construction of the "procured by misrepresentation" provision of § 1451(a) if one adheres, as Justice STEVENS' concurrence purports to do, see *post,* at 1558, to our holding in *Fedorenko* that even without any misrepresentation the applicant's failure to meet a statutory requirement for naturalization subjects him to denaturalization under the "illegally procured" provision of § 1451(a). *Fedorenko,* 449 U.S., at 506–507, 514–515, 101 S.Ct., at 747–748, 751–752.[12] Thus, Justice STEVENS' concurrence's construction violates the cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant. See, *e.g., Colautti v. Franklin,* 439 U.S. 379, 392, 99 S.Ct. 675, 684, 58 L.Ed.2d 596 (1979); *Jarecki v. G.D. Searle & Co.,* 367 U.S. 303, 307–308, 81 S.Ct. 1579, 1582, 6 L.Ed.2d 859 (1961); *United States v. Menasche,* 348 U.S. 528, 538–539, 75 S.Ct. 513, 519–520, 99 L.Ed. 615 (1955). It makes nonsense of the statute to say that its misrepresentation provision can only be the basis of denaturalization if the Governmentestablishes ***779** *in addition* a factor that is itself, without misrepresentation, a basis for denaturalization anyway. On Justice STEVENS' concurrence's reading, the law says, in effect: Citizenship you obtain by lying may be revoked, but only for a reason other than lying. This is likely to have the congressionally desired deterrent effect upon only the most dim-witted of prevaricators. But worse than making an enigma of the statute, Justice STEVENS' concurrence's position makes a scandal of the results the statute achieves: Proof that an applicant ****1551** lied when he said he was not an SS officer at Dachau would not suffice for denaturalization without clear, unequivocal, and convincing proof—after 40 years of disappearing evidence—that he was guilty of war crimes.

III

A

[11] The United States argues, as an alternative basis for affirming the Third Circuit's upholding of denaturalization, that Kungys' misrepresentations, made under oath and in the form of forged documents, rendered his citizenship "illegally procured" under 8 U.S.C. §§ 1101(f)(6), 1427(a)(3), and 1451(a). As discussed earlier, the alleged ground of "illegal procurement" is that Kungys lacked the requisite good moral character in 1954, at the time of his naturalization, because he had given false testimony for the purpose of obtaining benefits in both the visa and naturalization proceedings, in violation of § 1101(f)(6). In connection with this aspect of the judgment, we address only the issue considered (and resolved in the affirmative) by the Third Circuit: whether § 1101(f)(6) contains a materiality requirement for false testimony. We hold that it does not.

Under 8 U.S.C. § 1101(f)(6), a person shall be deemed not to be of good moral character if he "has given false testimony for the purpose of obtaining" immigration or naturalization benefits. On its face, § 1101(f)(6) does not distinguish between material and immaterial misrepresentations. Literally ***780** read, it denominates a person to be of bad moral character on account of having given false testimony if he has told even the most immaterial of lies with the subjective intent of obtaining immigration or naturalization benefits. We think it means precisely what it says.

[12] The absence of a materiality requirement in § 1101(f)(6) can be explained by the fact that its primary purpose is not (like § 1451(a)) to prevent false pertinent data from being introduced into the naturalization process (and to correct the result of the proceedings where that has occurred), but to identify lack of good moral character. The latter appears to some degree whenever there is a subjective intent to deceive, no matter how immaterial the deception. A literal reading of the statute does not produce draconian results, for several reasons. First, "testimony" is limited to oral statements made under oath. The United States concedes that it does not include "other types of misrepresentations or concealments, such as falsified documents or statements not made under oath." Supplemental Brief for United States 3. See, *e.g., Sharaiha v. Hoy,* 169 F.Supp. 598, 601 (SD Cal.1959); *Matter of Ngan,* 10 I. & N. Dec. 725, 726 (1964); *Matter of G—L—T—,* 8 I. & N. Dec. 403, 404–405 (1959). See also *Ensign v. Pennsylvania,* 227 U.S. 592, 599, 33 S.Ct. 321, 322–323, 57 L.Ed. 658 (1913). Second, § 1101(f)(6) applies to only those misrepresentations made with the subjective intent of obtaining immigration benefits. As the Government acknowledges:

> "It is only dishonesty accompanied by this precise intent that Congress found morally unacceptable. Willful misrepresentations made for other reasons, such as embarrassment, fear, or a desire for privacy, were not deemed sufficiently culpable to brand the applicant as someone who lacks good moral character." Supplemental Brief for United States 12.

Obviously, it will be relatively rare that the Government will be able to prove that a misrepresentation that does not have the natural tendency to influence the decision regarding ***781** immigration or naturalization benefits was nonetheless made with the subjective intent of obtaining those benefits. This is especially so since the invalidating intent, like all other factual matters necessary to support denaturalization, must be proved by " 'clear, unequivocal, and convincing' evidence which does not leave 'the issue in doubt.' " *Schneiderman,* 320 U.S., at 158, 63 S.Ct., at 1352. Third, unlike the misrepresentation clause ****1552** of § 1451(a), the false testimony provisions of § 1101(f)(6) do not apply to "concealments." With all these built-in limitations, and given the evident purpose of the provision, we see no reason for straining to avoid its natural meaning.

Justice STEVENS would read a materiality requirement into § 1101(f) because in his view "[t]here is no 'material' distinction," *post,* at 1560, between the language of that provision and the language of § 10 of the Displaced Persons Act of 1948 (DPA), which we found to contain a materiality requirement in *Fedorenko.* We think there is a world of difference between the two. First, the texts of the statutes are significantly different. Section 10 of the DPA uses the phrase "willfully make a misrepresentation." Our conclusion in *Fedorenko* that this contains a materiality requirement was grounded in the word "misrepresentation," which has been held to have that implication in many contexts—as the name of the common-law tort of misrepresentation (which requires a material falsehood) adequately demonstrates. Section 1101(f), by contrast, uses the phrase "giv[e] false testimony." While we do not say that statutory use of the term "false" or "falsity" can never imply a requirement of materiality, such a requirement is at least not so commonly associated with that term as it is with misrepresentation. In fact, we recently described falsity and materiality as *separate* requirements of misrepresentation, see *Basic Inc. v. Levinson,* 485 U.S., at 238, 239–240, n. 17, 108 S.Ct., at 986, 987, n. 17. Second, the statutory provisions differ in their purpose and their relationship to other provisions in their respective statutory schemes. Section 10 of the DPA, ***782** like the willful misrepresentation provision of § 1451(a), is a freestanding provision having no apparent purpose but to punish and thereby deter misrepresentation in the immigration process. Section 1101(f)(6), on the other hand, is part of a definition of what constitutes a lack of "good moral character" for purposes of qualifying for immigration. More importantly, § 10 is the only provision treating misrepresentation in the DPA, whereas § 1101(f)(6) must be reconciled with the willful misrepresentation provision of § 1451(a). That seems to us ill achieved by reading the two differently worded provisions (or, as the concurrence would have it, *three* differently worded provisions, see, *supra,* at 1550–1551) to be redundant.

B

[13] Accordingly, it is clear that the Third Circuit erred in importing a materiality requirement into § 1101(f)(6). Nevertheless, we cannot affirm denaturalization under that section because the question whether any misrepresentation made by Kungys constituted "false testimony for the purpose of obtaining" immigration or naturalization benefits cannot be answered without resolving an additional question of law and an additional question of fact. The former, which we choose not to resolve ourselves, since the case must be remanded in any event, is whether Kungys' misrepresentations constituted "testimony." The latter, which must be resolved by the trier of fact, is whether in making the misrepresentations Kungys possessed the subjective intent of thereby obtaining immigration or naturalization benefits. See generally *Pullman–Standard v. Swint,* 456 U.S. 273, 288, 102 S.Ct. 1781, 1789–1790, 72 L.Ed.2d 66 (1982) (issues of intent are factual matters for the trier of fact); *Berenyi v. District Director, INS,* 385 U.S. 630, 634–635, 87 S.Ct. 666, 669–670, 17 L.Ed.2d 656 (1967). We are unpersuaded by the United States' argument that Kungys' so-called pattern of lies establishes the illegal subjective intent of his alleged false testimony as a matter of law.

3

***783** For the reasons stated, the judgment of the Third Circuit is reversed, and the case remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice KENNEDY took no part in the consideration or decision of this case.

****1553** Justice BRENNAN, concurring.

I join the Court's opinion. I write separately, however, to spell out in more detail the showing I believe the Government must make to raise a presumption of ineligibility. The Court holds that a misrepresentation is material if it has "a natural tendency to produce the conclusion that the applicant was qualified" for citizenship. *Ante,* at 1546. A misrepresentation or concealment can be said to have such a tendency, the Court explains, if honest representations "would predictably have disclosed other facts relevant to [the applicant's] qualifications." *Ante,* at 1548. Proof by clear, unequivocal, and convincing evidence that the misrepresentation had this tendency raises a presumption of ineligibility, which the naturalized citizen is then called upon to rebut. *Ante,* at 1549–1550.

I agree with this construction of the statute. I wish to emphasize, however, that in my view a presumption of ineligibility does not arise unless the Government produces evidence sufficient to raise a fair inference that a statutory disqualifying fact actually existed. It is this fair inference of ineligibility, coupled with the fact that the citizen's misrepresentation necessarily frustrated the Government's investigative efforts, that in my mind justifies the burden-shifting presumption the Court employs. Evidence that simply raises the possibility that a disqualifying fact might have existed does not entitle the Government to the benefit of a presumption that the citizen was ineligible, for as we have repeatedly emphasized, citizenship is a most precious right, see, *e.g., Klapprott v. United States,* 335 U.S. 601, 611–612, 69 S.Ct. 384, 388–389, 93 L.Ed. 1099 (1949), ***784** and as such should never be forfeited on the basis of mere speculation or suspicion. I therefore would not permit invocation of the presumption of disqualification in circumstances where it would not otherwise be fair to infer that the citizen was actually ineligible.

Because nothing in the Court's opinion is inconsistent with this standard, I join it.

Justice STEVENS, with whom Justice MARSHALL and Justice BLACKMUN join, concurring in the judgment.

American citizenship is "a right no less precious than life or liberty." *Klapprott v. United States,* 335 U.S. 601, 616–617, 69 S.Ct. 384, 391, 93 L.Ed. 266 (1949) (Rutledge, J., concurring in result). For the native-born citizen it is a right that is truly inalienable. For the naturalized citizen, however, Congress has authorized a special procedure that may result in the revocation of citizenship. That statute provides that a certificate of naturalization may be canceled and an order granting citizenship revoked if the Government proves that "such order and certificate of naturalization were illegally procured or were procured by concealment of a material fact or by willful misrepresentation." 8 U.S.C. § 1451(a). [1]

In this case the Government maintains that petitioner is subject to denaturalization because it has proved that he made certain misrepresentations in his 1947 Application for Immigration Visa (Quota), which he repeated in his October 23, 1953, Petition for Naturalization. He stated that his date of birth was October 4, 1913, when it in fact was September 21, 1915; he stated that his place of birth was Kaunas, Lithuania, when it was in fact Reistru. He asserted that he ***785** resided in Kedainiai, Lithuania, only through July 1941, when in fact he did not leave Kedainiai until October 1941. He failed to disclose that he had been a bookkeeper-clerk in a Kaunas brush and broom establishment during the war. The Government failed in its efforts to ****1554** prove that petitioner would have been denied a visa if he had disclosed the true facts in his application. It also failed to prove that truthful responses would have led to a more complete investigation of petitioner's background before granting him a visa or that an investigation would have revealed any fact that would have disqualified petitioner from obtaining a visa. Indeed, the Government failed to prove the existence of any fact that, if known, would have led to the denial of petitioner's visa application or disqualified him from later becoming an American citizen.

In support of its position that petitioner's false statements in 1947 and 1953 justify his denaturalization the Government makes two separate legal arguments. First, it argues that the misrepresentations were "material" within the meaning of § 1451(a) and that they procured petitioner's citizenship. Second, the Government urges that petitioner's citizenship was "illegally procured," because his misrepresentations—even if not material—demonstrate that he lacked the requisite good moral character at the time of his application for citizenship. Neither argument is tenable.

I

Over a quarter of a century ago, in *Chaunt v. United States,* 364 U.S. 350, 81 S.Ct. 147, 5 L.Ed.2d 120 (1960), the Court considered a case in which the District Court found that petitioner had concealed his membership in the Communist Party as well as three arrests that, had they been disclosed, would have led to further investigation by the Immigration and Naturalization Service. Although the dissenting Justices thought that Chaunt's failure to tell the truth about his arrest record was sufficient reason to revoke his citizenship, see *id.,* at 360, 81 S.Ct., at 153, the majority ***786** came to the contrary conclusion. It held that the Government had failed to prove "either (1) that facts were suppressed which, if known, would have warranted denial of citizenship or (2) that their disclosure might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship." *Id.,* at 355, 81 S.Ct., at 151. Thus we announced a test for whether citizenship was procured by a material misrepresentation that required the Government to prove the existence of a disqualifying fact. This result was compelled both by the statute's requirement that the misrepresentation be material and by the requirement that it procure citizenship. The controversy between the parties here makes it necessary to parse the statute, paying particular attention to the meaning of the word "material." That parsing, however, merely confirms the conclusion we reached in *Chaunt.*

"Material" means "having real importance" or "great consequences." Webster's Ninth New Collegiate Dictionary 733 (1983). The adjective "material" is widely used to distinguish false statements that are actionable at law from those that are not. In the context of criminal false statements, the term "material" has been said to require that the false statement be one that had "a natural tendency to influence, or was capable of influencing, the decision of" the decisionmaking body to which it was addressed. See *ante,* at 1546. In tort law, a misrepresentation is material if "a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question." Restatement (Second) of Torts § 538, p. 80 (1977). In contract law, a misrepresentation is material if "it would be likely to induce a reasonable person to manifest his assent." Restatement (Second) of Contracts § 162, p. 439 (1981).

In all of these contexts, the use of the word "material" serves to distinguish the trivial from the substantive, drawing the line between statements that appear to be capable of ***787** influencing an outcome and those that do not. It is reasonable to assume that the term serves the same role in the denaturalization statute. It guarantees that trivial misstatements do not result in ****1555** the loss of citizenship by making actionable only those that are capable of influencing the decision whether to confer citizenship. This principle may be stated more specifically. Unlike the decision to enter a contract or to do some act in detrimental reliance on the assertion of another, the decision whether to grant citizenship is an objective one. The applicant either does or does not possess the requisite qualifications. The process relies on facts, not hunches or intuitions. Thus, in the denaturalization context, the only statements that are capable of influencing the outcome are those that conceal disqualifying facts or that prevent or hinder the discovery of disqualifying facts. Our statement in *Chaunt* was not a rejection of the traditional definition of materiality, it was merely an acknowledgment of the realistic consequences of that term's use in the context of an objective decisionmaking process.

Our holding in *Chaunt* is also supported by the statutory requirement that there must be a causal connection between the misrepresentation and the award of citizenship. Section 1451(a) provides that the Government must demonstrate that the misrepresentation "procured" citizenship. That is, the statute requires that the Government demonstrate that it relied on the misrepresentation in deciding whether to allow the applicant to become a citizen. In imposing this causation requirement, the statute again merely tracks the law of actionable misrepresentation in other contexts. A material misrepresentation, that is, a statement not in accordance with the truth that a reasonable person would attach importance to in deciding whether to enter a contract, may form the basis for voiding or reforming the contract, but only if the contracting party in fact relied on the statement in entering the contract. Restatement (Second) of Contracts § 164. The material misrepresentation must have induced the recipient ***788** of the statement to enter the contract.[2] Likewise, in tort law, a person may recover for a loss resulting from another's material misrepresentation, but only if he or she in fact relied upon the misrepresentation to his or her detriment. Restatement (Second) of Torts § 525. Although in both contract and tort law it is recognized that if a misrepresentation was material, the recipient probably relied on it, that probability does not alleviate the requirement that inducement be proved distinctly. Restatement (Second) of Contracts § 167.

If anything, the causation requirement of § 1451(a) is stricter than that in tort and contract law. The statute specifically requires that the material misrepresentation "procure" citizenship, not merely that it have been an inducement to granting citizenship. Thus it requires that the material misrepresentation must have had the effect of allowing the person to obtain citizenship when a truthful statement would have led directly or after investigation to the denial of citizenship. In other words, the Government must have relied on the statement in offering the defendant the opportunity to become a citizen. Although as is recognized in tort and contract law, it is likely that any material misrepresentation was relied on by the Government, this likelihood does not change the burden imposed by the statute.[3]

***789** ****1556** Thus the Government cannot prevail in a denaturalization action based on a false statement in an application for a naturalization certificate unless it can prove by clear, unequivocal, and convincing evidence the existence of a disqualifying fact. To prove that a misrepresentation was material, the Government must prove that the statement concealed a disqualifying fact or hindered the discovery of a disqualifying fact. Further, the existence of a disqualifying fact is a necessary element of the Government's proof of reliance. Unless a disqualifying fact existed, it cannot be said that a misrepresentation "procured" citizenship. Section 1451(a) does not allow an individual who was in all ways qualified to be an American citizen to be deprived of that citizenship because of a false statement that did not prevent the discovery of a fact that would have affected his or her eligibility to become a United States citizen. Together and separately, the materiality and procurement requirements reflect congressional intent that citizenship status not be taken away unless the Government proves that the person was not qualified to hold that status at the time it was obtained. [4]

***790** In his separate opinion in *Fedorenko v. United States*, 449 U.S. 490, 518, 101 S.Ct. 737, 753, 66 L.Ed.2d 686 (1981), Justice BLACKMUN correctly pointed out that as construed by our decision in *Chaunt* the misrepresentation ground of § 1451(a) requires that the Government "prove the existence of disqualifying facts." *Id.*, at 523–524, 101 S.Ct., at 755–756. [5] Until today, Justice WHITE was the ****1557** only Memberof ***791** the Court to have disagreed with this reading of the *Chaunt* opinion. Even today, it is not clear whether the Court disagrees with this interpretation of *Chaunt*, or simply rejects it based on its current notion of "the wisdom of experience." See *ante*, at 1545.

In my opinion, the wisdom of experience has provided firm support for *Chaunt* 's holding. Our construction of the denaturalization statute must be animated by our longstanding recognition of the severity of the sanction being sought. I firmly believe that denaturalization is far too heavy a sanction to impose on an otherwise innocent citizen for making false statements in 1947 and 1953. Without evidence of any wrongdoing before he came to the United States in 1948 or after he acquired his citizenship in 1954, the revocation of petitioner's citizenship—a punishment that is tantamount to exile or banishment—is patently excessive. [6]

The wisdom of experience is further reflected in our prior cases imposing a special burden on the Government when it ***792** seeks to denaturalize an American citizen. Thus, in explaining why the Government's burden of proof in this kind of civil proceeding is equivalent to that enforced in criminal cases, and why default judgments in denaturalization proceedings are intolerable, the Court has written:

> "Denaturalization consequences may be more grave than consequences that flow from conviction for crimes.... This Court has long recognized the plain fact that to deprive a person of his American citizenship is an extraordinarily severe penalty. The consequences of such

a deprivation may even rest heavily upon his children. 8 U.S.C. § 719. As a result of the denaturalization here, petitioner has been ordered deported. 'To deport one who so claims to be a citizen, obviously deprives him of liberty.... It may result also in loss of both property and life; or of all that makes life worth living.' *Ng Fung Ho v. White*, 259 U.S. 276, 284 [42 S.Ct. 492, 495, 66 L.Ed. 938] [1922]. Because denaturalization proceedings have not fallen within the technical classification of crimes is hardly a satisfactory reason for allowing denaturalization without proof while requiring proof to support a mere money fine or a short imprisonment.

"Furthermore, because of the grave consequences incident to denaturalization proceedings we have held that a burden rests on the Government to prove its charges in such cases by clear, unequivocal and convincing evidence which does not leave the issue in doubt. *Schneiderman v. United States,* 320 U.S. 118, 158 [63 S.Ct. 1333, 1352, 87 L.Ed. 1796] [1943]. This burden is substantially identical with that required in criminal cases—proof beyond a reasonable ****1558** doubt." *Klapprott v. United States,* 335 U.S., at 611–612, 69 S.Ct., at 389.

Virtually ignoring the foregoing settled law, today the Court announces a new burden-shifting presumption that lowers the standard of proof required for the Government to prevail in a denaturalization proceeding. Under the Court's test, a misrepresentation or concealment is material if it concerned ***793** a fact that was relevant to the naturalization decision or if the true facts "would predictably have disclosed other facts relevant to [the citizen's] qualifications." *Ante,* at 1548–1550. A fact may be relevant if it would have led to an investigation. *Ante,* at 1550. Thus the Government becomes entitled to the presumption that the citizen was not qualified to become a citizen, that is, to the presumption that citizenship was "procured by" the misrepresentation, if it shows by clear and convincing evidence that the true facts would have led to further investigation. The citizen then bears the burden of "showing, through a preponderance of the evidence, that the statutory requirement as to which the misrepresentation *had a natural tendency* to produce a favorable decision was in fact met." *Ante,* at 1550 (emphasis in original). Since under the Court's test the Government is never required to identify a specific disqualifying fact, apparently the citizen must refute the existence of every disqualifying fact that might have been revealed by an investigation. The Government need not introduce any proof whatsoever suggesting the existence of a disqualifying fact.

Though joining the Court's opinion, Justice BRENNAN would require more. He would not allow the Government the benefit of the presumption unless it first produced "evidence sufficient to raise a fair inference that a statutory disqualifying fact actually existed." *Ante,* at 1553. Although Justice BRENNAN imposes a burden of production on the Government, he agrees with the majority that the burden of ultimate persuasion rests with the defendant. Under Justice BRENNAN's approach, however, the defendant at least has the benefit of knowing specifically what disqualifying fact must be rebutted. Both approaches require the defendant to rebut the existence of the presumed disqualifying fact—even demonstrating that there is a completely innocent explanation for the misrepresentation would not be sufficient to rebut the presumption.

***794** Neither the majority's nor Justice BRENNAN's formulation of shifting burdens is faithful to our previous recognition of the special burden the Government must bear when it seeks to denaturalize an American citizen or to our previous rejection of default judgments in denaturalization proceedings. See *Klapprott v. United States,* 335 U.S., at 611–612, 69 S.Ct., at 389; *supra,* at 1556–1557.[7] ****1559** "[B]ecause of the grave consequences incident to denaturalization proceedings," ***795** *Klapprott,* 335 U.S., at 612, 69 S.Ct., at 389, this Court has always held that the Government must prove its charges in denaturalization cases by clear, unequivocal, and convincing evidence which does not leave the issue in doubt. We have recognized that this burden is substantially identical to the beyond-a-reasonable-doubt burden of proof borne by the Government in criminal cases. *Ibid.* Indeed, the factors that support the imposition of so heavy a burden are largely the same in both contexts—particularly critical are the immense importance of the interests at stake, *ibid.; In re Winship,* 397 U.S. 358, 363, 90 S.Ct. 1068, 1072, 25 L.Ed.2d 368 (1970), the possibility of loss of liberty, *Klapprott,* 335 U.S., at 612, 69 S.Ct., at 389; *In re Winship,* 397 U.S., at 363, 90 S.Ct., at 1072, the resultant stigmatization, *Schneiderman v. United States,* 320 U.S. 118, 122–23, 63 S.Ct. 1333, 1335, 87 L.Ed. 1796 (1943); *In re Winship,* 397 U.S., at 363, 90 S.Ct., at 1072, and the societal interest in the reliability of the outcome, *id.,* at 363–364, 90 S.Ct., at 1072. The use of burden-shifting presumptions to reduce the Government's burden of proof in criminal cases has been consistently rejected by this Court without regard to whether the presumptions were rebuttable. See *Francis v. Franklin,* 471 U.S. 307, 313, 105 S.Ct. 1965, 1970, 85 L.Ed.2d 344 (1985), and cases cited therein. Such presumptions are equally objectionable in the denaturalization context.

II

The reasons why the Court has required the Government to carry a heavy burden of proof in denaturalization cases apply equally to the argument that petitioner is subject to denaturalization because his false statements demonstrate that he lacked good moral character in 1953.

As amended in 1961, § 1451(a) allows the Government to revoke the citizenship of anyone whose citizenship was "illegally procured." In *Fedorenko,* we held that citizenship had been illegally procured because the petitioner, a former armed concentration camp guard, was ineligible for the visa he had been issued under the Displaced Persons Act of 1948 (DPA), 62 Stat. 1009. Because the naturalization statutes required applicants to be lawfully admitted to the United ***796** States for permanent residence, petitioner had failed to "satisfy a statutory requirement which Congress has imposed as a prerequisite to the acquisition of citizenship by naturalization." *Fedorenko,* 449 U.S., at 515, 101 S.Ct., at 752. One prerequisite to naturalization is that the applicant be of "good moral character." 8 U.S.C. § 1427(a). Certain minimum standards for being deemed in possession of good moral character are set out in 8 U.S.C. § 1101(f). Subsection 6 of § 1101(f) provides that no person shall be deemed to be of good moral character if he or she "has given false testimony for the purpose of obtaining any benefits under this chapter." The Government contends that it is not necessary for it to establish that petitioner's false statements were material to denaturalize him under this provision. Under the Government's theory, the mere fact that the statements were false is sufficient to compel petitioner's denaturalization if they were made under oath and with the subjective intention of obtaining a benefit—any benefit, no matter how trivial [8]—under the naturalization ***797** laws. Because ****1560** I am convinced that a materiality requirement is implicit in § 1101(f)(6), I reject this contention.

In *Fedorenko v. United States,* we were called upon to interpret the language of § 10 of the DPA, which provided that "[a]ny person who shall willfully make a misrepresentation for the purpose of gaining admission into the United States as an eligible displaced person shall thereafter not be admissible into the United States." 62 Stat. 1013. We held, agreeing with the Government, that this provision applied "only [to] willful misrepresentations about 'material' facts." 449 U.S., at 507, 101 S.Ct., at 748. We found the implication of a materiality requirement in the DPA's willful misrepresentation section to follow logically from our construction of § 1451(a) as having such a requirement even though its plain language requires only that the misrepresentation have been willful. That same logic applies here. There is no "material" distinction between the language of the DPA at issue in *Fedorenko* and the language of § 1101(f)(6). See *United States v. Sheshtawy,* 714 F.2d 1038, 1041 (CA10 1983). It is implausible ***798** to suggest that Congress intended by the language of the DPA to engraft a materiality requirement, but had no such intention in drafting § 1101(f)(6). [9]

In addition to requiring materiality, both § 10 of the DPA and § 1101(f)(6) require that the false statement have been made for the purpose of obtaining a benefit under the immigration and naturalization laws. The Government would have us adopt a subjective test of the individual's motive in any particular case, thus forcing the factfinder to inquire of the defendant in ****1561** each case why the particular falsehood was asserted and insuring that many citizenship determinations would boil down to credibility battles. An objective test is far more reasonable. Under an objective approach, a false testimonial statement would be considered made "for the purpose of obtaining any benefits under [the immigration laws]" if it in fact had the effect of giving the defendant a benefit under the immigration laws. An objective test would eliminate the necessity of inquiring in each case whether a person lied about his or her date of birth for personal reasons, ***799** such as mere vanity, or to conceal information that would lead to the denial of a visa or certificate of naturalization. [10] If the false statement as to age actually had the effect of obtaining for the individual a benefit he or she would not otherwise have enjoyed, then, and only then, would American citizenship have been "illegally procured." An objective test is more consistent with the heavy burden of proof borne by the Government in denaturalization cases and with the severity of the sanction. Because states of mind are notoriously difficult to prove, an objective test also has the critical virtue of diminishing the risk of erroneous determinations.

It is obvious that there is some overlap between the scope of the misrepresentation and illegally-procured clauses of § 1451(a).[11] That the Government may in ****1562** some cases be able to choose one of two available paths for denaturalizing a citizen ***800** for essentially the same conduct, however, does not suggest that either of the paths should be made more lenient than Congress intended.

***801** III

The Government attempted to prove the existence of a disqualifying fact before the District Court by introducing videotaped deposition testimony, which it asserted proved petitioner's participation in the Kedainiai atrocities. The District Court found the deposition testimony unreliable and admitted the depositions only for the limited purpose of establishing that the atrocities occurred.[12] Because the Court of Appeals did not address the propriety of this ruling, I would vacate its judgment and remand the case for further proceedings not inconsistent with this opinion.

Justice O'CONNOR, concurring in part and dissenting in part.
I join Parts I, II–A, and III of Justice SCALIA's opinion in this case. For the reasons given in Part II of Justice WHITE's opinion, however, I dissent from Part II–B of Justice SCALIA's opinion. In my view, when the correct standard of materiality is applied to the facts of this case, the misrepresentations made by petitioner are properly viewed as material.

Justice WHITE, dissenting.
In 1982, the Government filed a complaint to denaturalize petitioner. It set out three reasons why this action was justified. First, it tried to show that petitioner assisted in the arrest and execution of more than 2,000 civilians in Kedainiai, Lithuania, during a 2-month period in 1941. The Government offered three videotaped depositions taken in the Soviet Union as proof of this claim. Although the District Court observed that these depositions would strongly tend to prove the Government's case if they were admitted as evidence ***802** without qualification, it admitted them only for the purpose of showing that the atrocities took place. Without the excluded evidence, the District Court held that the Government failed to prove this claim.

The Government also showed that petitioner had made certain false statements in applying for his visa and in his naturalization petition. These false statements concerned his date and place of birth, his wartime occupations, and his wartime residence: petitioner added two years to his age and misstated the city in which he was born, listed various occupations that he was engaged in from 1942 to 1947 without listing that he was a bookkeeper for several of those years, and swore that he had resided in another city rather than in Kedainiai at the time these atrocities occurred. The District Court found that petitioner had indeed made these misrepresentations, but that they were immaterial under 8 U.S.C. § 1451(a) because the true facts, if known, would not themselves have warranted denial of a visa and would not have led to an investigation. See *Chaunt v. United States*, 364 U.S. 350, 81 S.Ct. 147, 5 L.Ed.2d 120 (1960). It therefore did ****1563** not inquire into what an investigation might have uncovered.

Finally, the Government asserted that petitioner's false representations, whether or not material, were in themselves sufficient to show that petitioner did not have good moral character and that therefore he did not qualify for naturalization under 8 U.S.C. §§ 1427(a) and 1101(f)(6). The District Court rejected this claim also, ruling that because the false statements at issue were not material, they were not in themselves sufficient to prove that petitioner lacked good moral character.

The District Court accordingly entered judgment for petitioner. The Government appealed, and the Court of Appeals reversed. Initially, the Court of Appeals agreed with the District Court that misrepresentations must be material in order to constitute sufficient grounds for finding lack of "good moral character" under § 1101(f)(6). It disagreed with ***803** the District Court, however, with respect to the materiality of the false statements in the visa application and the naturalization petition, holding that the misrepresentations about birth and age would have triggered an investigation that *probably* would have led to the discovery of facts disqualifying petitioner for a visa and for naturalization. It did not rule on the Government's further submission that the District Court erred by not admitting the videotaped depositions into evidence without qualification.

This case has been argued and now reargued before this Court. The Court today reverses the judgment of the Court of Appeals and remands for further consideration of several issues. Although I agree with Parts I, II-A, and III-A of the Court's opinion, I disagree with other parts and with the result it reaches. I therefore dissent.

I

I would affirm the judgment below and grant the Government's petition for denaturalization. The Court holds, and I agree, that there was error in the holding below that petitioner's misrepresentations must be material in order to constitute sufficient grounds for finding that petitioner lacks "good moral character" under § 1101(f)(6). As the Court states, the statute "does not distinguish between material and immaterial misrepresentations," but instead "denominates a person to be of bad moral character on account of having given false testimony if he has told even the most immaterial of lies with the subjective intent of obtaining immigration or naturalization benefits." *Ante,* at 1551. In addition to the language of § 1101(f)(6), which in itself compels this conclusion, the legislative history of the 1961 amendments to the statute, Pub.L. 87–301, § 18, 75 Stat. 656, shows that Congress sought to *broaden,* not restrict, the grounds upon which naturalization could be revoked. [1]

***804** ****1564** In this connection, we must bear in mind the necessity of striking an appropriate balance between the serious consequences that attend loss of citizenship and the need for "strict compliance with all the congressionally imposed prerequisites to the acquisition of citizenship." *Fedorenko v. United States,* 449 U.S. 490, 506, 101 S.Ct. 737, 747, 66 L.Ed.2d 686 (1981). We need not decide in this case whether § 1101(f)(6) would bar naturalization of an individual who offered a single piece of false testimony in only one instance or who later offered a reasonable explanation for why misstatements were made; we also need not decide whether such a construction of the statute would be inconsistent with a proper balancing of the two important but opposing considerations set out above. There may well be cases in which a single willful but immaterial misrepresentation would be insufficient to establish lack of good character, but would constitute grounds for denaturalization if it were material. Similarly, there are cases like this one in which repeated and numerous willful misrepresentations justify a ***805** finding of lack of good moral character notwithstanding that the misrepresentations may not involve material facts.

Here, petitioner's false testimony was not confined to one occasion, nor did it concern only a single piece of evidence. And at no time before or during the naturalization process did petitioner voluntarily step forward and attempt to explain the reasons for his various misrepresentations. To the contrary, the facts as found by the District Court demonstrate clearly, unequivocally, and convincingly that petitioner engaged in a pattern of repeated misrepresentations and nondisclosures at both the visa application stage and during his naturalization proceedings. The District Court found:

> "Throughout his visa and citizenship proceedings [petitioner] misrepresented the date and place of his birth. In addition in his application for a visa [petitioner] failed to disclose (and therefore concealed) his presence in Kedainiai during the 1940–42 period and he failed to disclose (and therefore concealed) that he had been a bookkeeper-clerk in the Kaunas brush and broom establishment during the 1941–44 period. [Petitioner] in effect perpetuated these non-disclosures or concealments throughout his naturalization proceedings by representing that the information contained in his visa application was correct." 571 F.Supp. 1104, 1139 (NJ 1983). [2]

***806** The congressional mandate expressed in § 1101(f)(6) speaks clearly to such a pattern of falsehoods, and that statute would have precluded a determination in 1954 that petitioner possessed "good moral character." Accordingly, petitioner lacked an essential prerequisite to becoming a naturalized citizen, and he is now subject to denaturalization for having "illegally procured" his citizenship. § 1451(a).

Despite its recognition that materiality is not required by § 1101(f)(6), the Court declines to uphold the judgment below, and ****1565** remands the case for further consideration of one point of law and one point of fact. Neither point is at all substantial. The point of law is whether petitioner's misrepresentations constituted "testimony" within the meaning of the statute. As the Court notes, the term "testimony" in § 1101(f)(6) has been construed as referring only to oral evidence, and thus as excluding the written documents submitted by petitioner in his naturalization petition. Yet petitioner in this case did make oral misrepresentations: he testified falsely when he swore under oath before a naturalization examiner that the contents of his naturalization forms were true. Deposition of Julius Goldberg, App. 145–162. See also *Matter of Ngan,* 10 I. & N. Dec. 725 (1964). Furthermore, he had testified falsely in order to obtain his visa into this country.

The point of fact is whether petitioner made these misrepresentations "for the purpose of obtaining any benefits" under the immigration and naturalization laws. There is no difficulty about this point either. The willful misrepresentations at issue here were made in the context of petitioner's naturalization petition and were made earlier at the visa ***807** stage. The fact that the misrepresentations were willful, coupled with the fact that they were made during proceedings and on documents required for immigration and naturalization purposes—indeed, the very proceedings and documents that petitioner was required to complete in order to "obtai[n] " the "benefits" he sought of gaining naturalization—satisfies the elements of § 1101(f)(6). The District Court itself found that petitioner's naturalization petition was false *in particular* because it "stated that defendant had not previously given false testimony to obtain benefits under the immigration and naturalization laws." 571 F.Supp., at 1138. [3] In light of this specific finding by the District Court, there is no justification for remanding this issue to be resolved *again* by the trier of fact.

II

Because the Court declines to affirm the decision below on the basis of § 1101(f)(6), it finds it necessary to revisit the definition of the term "material" as it is used in § 1451(a). The Court today holds that the proper test of materiality is whether the misrepresentations "had a natural tendency to influence the decisions of the Immigration and Naturalization ***808** Service." *Ante,* at 1547. I do not disagree with this definition, but the Court's application of the definition in this case is flawed.

To begin with, the Court finds it proper under § 1451(a) to consider only the misrepresentations petitioner made in his naturalization proceedings but not those made in his earlier visa proceedings. The view of the United States is much more persuasive: the misrepresentations made by petitioner at the visa stage were instrumental to his procuring naturalization, for by obtaining the visa petitioner obtained lawful admission to residence in this country, which is one requirement for naturalization under § 1429. See also *Fedorenko,* 449 U.S., at 518–520, 101 S.Ct., at 753–754 (BLACKMUN, J., concurring in judgment). The ****1566** Court responds that by that logic, *any* misrepresentation that helps an individual to obtain *any* prerequisite to naturalization, such as English literacy, would be considered material. These two things, however, are not the same, and the Court's supposed extension of its logic is merely foolish. The visa proceedings and the naturalization proceedings are intimately related not only because they both are proceedings governed by the same provisions of the immigration and naturalization laws, but also because the visa and the certificate of naturalization are obtained as part of the same process for obtaining citizenship, and both must be *lawfully* procured. For example, it is not mere residence in this country that is a prerequisite to naturalization, but residence after being “lawfully admitted.” § 1429. It makes no sense, on the other hand, to speak of proceedings to attain “lawful” literacy skills or a “lawful” understanding of American history and government, as required under § 1423, and the statute does not speak in these terms but instead manifests complete and understandable indifference as to how the individual came by those proficiencies. Thus the visa proceedings can accurately be regarded as one crucial stage in the naturalization proceedings themselves, yet the time spent acquiring literacy skills or an understanding of American ***809** history and government obviously cannot be regarded as a stage in those proceedings.

Even if I were to accept the proposition that we should consider only the materiality of the misrepresentations that petitioner made in the naturalization proceedings, those misrepresentations surely had a natural tendency to influence the decisions of the INS. As an initial matter, there is no requirement that the Court focus only on petitioner's misrepresentations about his date and place of his birth and leave aside his other potentially more significant misrepresentations that were also identified by the District Court.[4] But even limiting the focus as the Court does, I would find these statements to be material. In reaching this conclusion I would ask not only whether these misrepresentations of fact would have a natural tendency to influence the decisions of the INS, but also whether the fact of these misrepresentations *itself* would have had such a tendency. In other words, the proper inquiry is not only whether the true date and place of birth, in isolation, would have aroused suspicion, but also whether an investigation would have ensued had petitioner revealed the true facts and thereby disclosed the discrepancy between them and the false statements in his supporting documents. Former Ambassador Seymour Maxwell Finger, Vice Consul in Stuttgart in January 1947, testified that if there were discrepancies between the visa application and the supporting documents an investigation certainly would have occurred, a view that is consistent with the regulations then in effect. See 22 CFR § 61.329 (Supp.1946).

***810** The Court of Appeals arrived at the same conclusion, and the United States supports this construction of the statute, which is a sound one. The materiality of misrepresentations may be, but need not be, established by considering the true facts alone. It also may be shown by a comparison between those true facts and the false assertions made about those same matters. Therefore, when the plurality states that "[w]hat must have a natural tendency to influence the official decision is *the misrepresentation itself ... the failure to state the truth,*" *ante,* at 1549 (emphasis added), it is wrong to limit its consideration to whether those true facts alone, if known, would have had a natural tendency to influence the decisions of the INS. Instead, it should also consider whether "the misrepresentation itself ... the failure to state the truth" would have ****1567** had such a tendency; this inquiry also encompasses the INS' knowing the fact that the true facts do not match the false assertions that the individual seeking naturalization has made about those same matters. For whether a misrepresentation has actually been made is itself a matter of fact, and in certain circumstances this fact alone may possess great significance. Unless a court is to pretend that petitioner's lies themselves are not facts, it defies reality to conclude that "official knowledge of the misrepresented fact," *ante,* at 1549, means only that the INS now knows how to correct the lies but must not take into account the fact that those lies have been told.

For these reasons, I would affirm the decision below on this ground also. At the very least I note that it is open to the trier of fact on remand to consider whether knowledge of petitioner's repeated and numerous misrepresentations would have had a natural tendency to influence the decisions of the INS.

III

As a final point, it should be emphasized that the Court of Appeals never passed on the correctness of the District Court's determination that the videotaped depositions could ***811** not be admitted into evidence unqualifiedly because they were inherently unreliable.[5] On remand, this issue should be resolved definitively. If the depositions are found to be admissible without qualification, rather than merely for the limited purpose allowed by the District Court, then the petition for denaturalization would be granted regardless of how the other issues are resolved, for it is undisputed that if petitioner were shown to have participated in the mass arrests and executions at Kedainiai, he never would have qualified for naturalization and thus now would be properly subject to denaturalization.

I respectfully dissent.

All Citations

485 U.S. 759, 108 S.Ct. 1537, 99 L.Ed.2d 839, 56 USLW 4373

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 Section 1451(a) provides in pertinent part:

> "(a) It shall be the duty of the United States attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 1421 of this title in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground that such order and certificate of naturalization were illegally procured or were procured by concealment of a material fact or by willful misrepresentation...."

2 Section 1427(a) provides:

> "No person, except as otherwise provided in this subchapter, shall be naturalized unless such petitioner, (1) immediately preceding the date of filing his petition for naturalization has resided continuously, after being lawfully admitted for permanent residence, within the United States for at least five years and during the five years immediately preceding the date of filing his petition has been physically present therein for periods totaling at least half of that time, and who has resided within the State in which the petitioner filed the petition for at least six months, (2) has resided continuously within the United States from the date of the petition up to the time of admission to citizenship, and (3) during all the period referred to in this subsection has been and still is a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States."

3 Section 1101(f)(6) provides in pertinent part:

"(f) For the purposes of this chapter—

No person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be established, is, or was—

---

(6) one who has given false testimony for the purpose of obtaining any benefits under this chapter."

4 Those questions were:

"(1) Whether petitioner is subject to denaturalization for want of good moral character under 8 U.S.C. §§ 1451(a), 1427(a), and 1101(f)(6), with particular attention to:

"(a) whether the 'false testimony' provision of 8 U.S.C. § 1101(f)(6) should be interpreted to include a requirement that the false testimony concern a material fact;

"(b) what standards should govern the determination under 8 U.S.C. § 1101(f)(6) whether 'false testimony' has been given 'for the purpose of obtaining any benefits under this chapter....'; and

"(c) whether the latter determination is one of law or fact.

"(2)(a) Should the materiality standard articulated in *Chaunt v. United States*, 364 U.S. 350 [81 S.Ct. 147, 5 L.Ed.2d 120] (1960), be abandoned and, if so, what standard should govern the materiality inquiry under 8 U.S.C. § 1451(a); and

"(b) is the determination of materiality under 8 U.S.C. § 1451(a) one of law or fact.

"(3) When a misrepresentation has been established as 'material' within the meaning of 8 U.S.C. § 1451(a), must any further showing be made to establish that citizenship was 'procured by' that misrepresentation." 483 U.S. 1017, 107 S.Ct. 3258, 97 L.Ed.2d 758.

5 The Government asserted that the purpose of the misrepresentations was to distance Kungys from Kedainiai, where atrocities had occurred, and to make it more difficult to identify him as one of the perpetrators. Kungys contended that even greater atrocities had occurred in the city he falsely listed as his birthplace; and that the age difference (two years) was of little consequence for identification purposes. Kungys asserted that he had lied concerning his date and place of birth in obtaining identity documents from the Nazis to go from Lithuania to Germany—the purpose of the dissembling at that time being to place him above the age of conscription and to avoid the risk of persecution for his participation in the Lithuanian resistance movement. (Vydaudas Vidiekunas, a leader of the resistance movement validated Kungys' account of his participation.) Kungys asserted that in applying for his visa he simply repeated the information contained on his identity documents, believing the falsities inconsequential for United States immigration purposes; and that with similar belief he conformed his naturalization petition to his visa application.

6 Although as Justice WHITE observes there is no requirement that we focus only on this one misrepresentation, *post*, at 1566, it is not our normal practice to consider fact-bound legal consequences of contested district court findings not yet reviewed by the court of appeals.

7 Justice WHITE considers the prospect of such coverage "foolish." *Post,* at 1566. As a policy matter it assuredly is, which is precisely why we use it as an example. Justice WHITE fails to establish, however, how language requiring that the "order and certificate of naturalization [be] ... procured by ... misrepresentation" can conceivably be interpreted to exclude this example while yet including the misrepresentation at the visa stage which (we concede) would not as a policy matter be foolish. It is not our function to construct prudent policy except within the confines of the statutory text.

8 It is a quite different question, not argued here, whether, under the statutes governing the issuance of visas in 1947, Kungys' misrepresentations or concealments at that time *rendered his visa invalid,* thus causing his United States residence to be unlawful, and (since lawful residence is a requirement of naturalization) his naturalization to be "illegally procured" under that separate provision of § 1451(a). See *Fedorenko v. United States,* 449 U.S. 490, 509, 101 S.Ct. 147, 748–749, 66 L.Ed.2d 686 (1981).

9 Justice STEVENS minimizes the substance of what we require by describing it as no more than a showing "by clear and convincing evidence that the true facts would have led to further investigation." *Post,* at 1558. But further investigation would not occur—and its predictability could assuredly not be clear and convincing—if the facts at issue were not such as gave cause to believe that the applicant was not qualified. We are not talking about investigations by detective hobbyists, but by public officials seeking only evidence concerning citizenship qualifications.

10 We note in this regard that there was a factual dispute whether those who had been victims of Nazi persecution were given priority for nonpreference visas. Although the District Court apparently found the evidence on this point inconclusive, 571 F.Supp. 1104, 1137, n. 7 (NJ 1983), the Court of Appeals resolved the dispute in the Government's favor. We do not believe that resolution is the only one that could be drawn from the record, and thus conclude that the Court of Appeals improperly made a finding on a disputed question of fact. See *Icicle Seafoods, Inc. v. Worthington,* 475 U.S. 709, 106 S.Ct. 1527, 89 L.Ed.2d 739 (1986).

11 The italicized language in this sentence is ignored by the statement in Justice STEVENS' concurrence that we require the applicant to "refute the existence of every disqualifying fact that *might have been* revealed by an investigation." *Post,* at 1558 (emphasis added).

Justice STEVENS is correct that "even demonstrating that there is a completely innocent explanation for the misrepresentation would not be sufficient" always to prevent a finding of procurement by willful misrepresentation. *Ibid.* Sometimes it might, however, since it is certainly one of the factors that the court can take into account in determining whether the applicant has established that the disqualifying fact relevant to the misrepresentation did not exist. In any case, it will assuredly be rare that a lie which has been shown, clearly, unequivocally, and convincingly, to have a natural tendency to produce the conclusion that the applicant was qualified, will have a "completely innocent explanation."

12 Justice STEVENS' concurrence avoids this difficulty by saying that *Fedorenko* does not apply to "insignificant," or "trivia[l]," or "technica[l]" requirements. *Post,* at 1561, n. 11. Apart from the less than precise character of this qualification, it is nowhere to be found in *Fedorenko,* which said:

"At the same time, our cases have also recognized that there must be *strict* compliance with *all* the congressionally imposed prerequisites to the acquisition of citizenship. Failure to comply with *any* of these conditions renders the certificate of citizenship "illegally procured," and naturalization that is unlawfully procured can be set aside." 449 U.S., at 506, 101 S.Ct., at 747 (emphasis added).

It is, moreover, difficult to see how any *willful misrepresentation* regarding compliance with a naturalization requirement, no matter how technical that requirement, can be considered merely an "insignificant" or "trivial" violation for purposes of determining whether citizenship has been unlawfully procured. Thus, even by amending *Fedorenko* Justice STEVENS has not succeeded in showing how the willful misrepresentation provision, interpreted as he would prefer, would do anything not already achieved by the "illegally procured" provision.

1 Although the denaturalization statute refers to "willful misrepresentation" and "concealment of a material fact" in the disjunctive, this Court has construed the statute to require that the concealment, no less than the misrepresentation, be willful and that the misrepresentation, no less than the concealment, relate to a material fact. See *Costello v. United States,* 365 U.S. 265, 271–272, n. 3, 81 S.Ct. 534, 538, n. 3, 5 L.Ed.2d 551 (1961); *Fedorenko v. United States,* 449 U.S. 490, 507–508, n. 28, 101 S.Ct. 737, 747–748, n. 28 (1981).

2 Contract law also allows recovery for *non* material statements if they are fraudulent. But even in this instance the misrepresentation must have induced the formation of the contract. Restatement (Second) of Contracts § 167 (1981).

3 The following example, though admittedly unlikely, demonstrates the distinction in the roles played by the materiality and procurement elements. Suppose an individual appears to qualify for American citizenship on two distinct grounds. He or she claims to have lived in the United States the required number of years and to be "a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States." See 8 U.S.C. § 1427(a). The individual also claims to be the surviving spouse of an American member of the Armed Forces who died while on active duty. See 8 U.S.C. § 1430(d). The claim to be a surviving spouse is false, but the other representations are true. The claim to be a surviving spouse is clearly material because it is capable of influencing the outcome of the naturalization process. However, if in

fact citizenship was conferred because of the individual's other qualifications, then the Government would not be able to demonstrate that the material misrepresentation "procured" citizenship.

4 As I stated in *Fedorenko v. United States,* 449 U.S. 490, 101 S.Ct. 737, 66 L.Ed.2d 686 (1981):

"There are really three inquiries [under the *Chaunt* test]: (1) whether a truthful answer would have led to an investigation, (2) whether a disqualifying circumstance actually existed, and (3) whether it would have been discovered by the investigation. Regardless of whether the misstatement was made on an application for a visa or for citizenship, in my opinion the proper analysis should focus on the first and second components and attach little or no weight to the third. Unless the Government can prove the existence of a circumstance that would have disqualified the applicant, I do not believe that citizenship should be revoked on the basis of speculation about what might have been discovered if an investigation had been initiated. But if the Government can establish the existence of a disqualifying fact, I would consider a willful misstatement material if it were more probable than not that a truthful answer would have prompted more inquiry." *Id.,* at 537, 101 S.Ct., at 763 (STEVENS, J., dissenting).

5 Justice BLACKMUN continued:

"First, this Court's reasoning before *Chaunt* contains no suggestion that a naturalized citizen would be reduced to alien status merely because a thwarted Government inquiry *might* have shown him to be unqualified. Instead, the Court has been willing to approve denaturalization only upon a clear and convincing showing that the prescribed statutory conditions of citizenship had never been met. This, it seems to me, is the clear import of the Court's exhaustive reviews in *Nowak v. United States,* 356 U.S. [660], at 663–668 [78 S.Ct. 955, at 957–960, 2 L.Ed.2d 1048 (1958)]; *Knauer v. United States,* 328 U.S. [654], at 656–669, [66 S.Ct. 1304, at 1306–1312, 90 L.Ed. 1500 (1946)]; *Baumgartner v. United States,* 322 U.S. [665], at 666–678 [64 S.Ct. 1240, at 1241–1247, 88 L.Ed. 1525 (1944)]; and *Schneiderman v. United States,* 320 U.S. [118], at 131–159, 63 S.Ct. 1333, at 1339–1353, 87 L.Ed. 1796 (1943)]. Of course, the Government's ability to investigate with vigor may be affected adversely by its inability to discover that certain facts have been suppressed. That standard announced by the Court of Appeals, however, seems to me to transform this interest in unhampered investigation into an end in itself. Application of that court's standard suggests that a deliberately false answer to any question the Government deems worth asking may be considered material. I do not believe that such a weak standard of proof was ever contemplated by this Court's decisions prior to *Chaunt.*

"Instead, I conclude that the Court in *Chaunt* intended to follow its earlier cases, and that its 'two tests' are simply two methods by which the existence of ultimate disqualifying facts might be proved. This reading of *Chaunt* is consistent with the actual language of the so-called second test; it also appears to be the meaning that the dissent in *Chaunt* believed the Court to have intended.

"Significantly, this view accords with the policy considerations informing the Court's decisions in the area of denaturalization. If naturalization can be revoked years or decades after it is conferred, on the mere suspicion that certain undisclosed facts *might* have warranted exclusion, I fear that the valued rights of citizenship are in danger of erosion." 449 U.S., at 524–526, 101 S.Ct., at 756–757 (emphasis in original) (footnotes omitted).

6 In his concurrence opinion explaining why special procedural safeguards are appropriate in denaturalization proceedings, Justice Rutledge advanced an argument that further demonstrates the importance of the requirement that the Government prove the existence of a disqualifying fact. He wrote:

"To take away a man's citizenship deprives him of a right no less precious than life or liberty, indeed of one which today comprehends those rights and almost all others. To lay upon the citizen the punishment of exile for committing murder, or even treason, is a penalty thus far unknown to our law and at most but doubtfully within Congress' power. U.S. Const., Amend. VIII. Yet by the device or label or a civil suit, carried forward with none of the safeguards of criminal procedure provided by the Bill of Rights, this most comprehensive and basic right of all, so it has been held, can be taken away and in its wake may follow the most cruel penalty of banishment.

"No such procedures could strip a natural-born citizen of his birthright or lay him open to such a penalty." *Klapprott v. United States,* 335 U.S. 601, 616–617, 69 S.Ct. 384, 391, 93 L.Ed. 266 (1949).

7 In *Schneiderman v. United States,* 320 U.S. 118, 63 S.Ct. 1333, 87 L.Ed. 1796 (1943), a case in which the Government sought "to turn the clock back twelve years after full citizenship was conferred upon petitioner by a judicial decree, and to deprive him of the priceless benefits that derive from [citizenship] status," we discussed the grave consequences of denaturalization and the special burden borne by the Government in denaturalization proceedings:

"In its consequences it is more serious than a taking of one's property, or the imposition of a fine or other penalty. For it is safe to assert that nowhere in the world today is the right of citizenship of greater worth to an individual than it is in this country. It would be difficult to exaggerate its value and importance. By many it is regarded as the highest hope of civilized men. This does not mean that once granted to an alien, citizenship cannot be revoked or cancelled on legal grounds under appropriate proof. But such a right once conferred should not be taken away without the clearest sort of justification and proof. So, ... in an action instituted ... for the purpose of depriving one of the precious right of citizenship previously conferred we believe the facts and the law should be construed as far as is reasonably possible in favor of the citizen. Especially is this so when the attack is made long after the time when the certificate of citizenship was granted and the citizen has meanwhile met his obligations and has committed no act of lawlessness. It is not denied that the burden of proof is on the Government in this case.

"... [A] certificate of citizenship is 'an instrument granting political privileges, and open like other public grants to be revoked if and when it shall be found to have been unlawfully or fraudulently procured.' ... To set aside such a grant the evidence must be 'clear, unequivocal, and convincing,'—'it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt.' ... This is so because rights once conferred should not be lightly revoked. And more especially is this true when the rights are precious and when they are conferred by solemn adjudication, as is the situation when citizenship is granted." *Id.,* at 122–123, 125, 63 S.Ct., at 1335, 1336–1337.

8 At oral argument, counsel for the Government made the following remarks in response to questioning by a Member of the Court:

"QUESTION: You know, there are a lot of people that came to this country who were given different names at Ellis Island. The immigration officer couldn't pronounce the name, and they said, well, Sam, is that okay? Yeah, that's my name Sam. Now his name wasn't Sam.

"Did he give that name to procure the visa, or to procure admission to the United States, falsely to procure?

"MR. KLONOFF [Assistant to the Solicitor General]: That's a factual question in each case, we would submit.

"QUESTION: He just wants to facilitate the thing. The guy will never learn how to spell Salvator, or whatever the name is, and the officer—it's happened very often.

"MR. KLONOFF: It has to be a question of fact. If the person had adopted a false I.D. many, many years earlier for a totally different purpose—

"QUESTION: No, no, there is no evil purpose except to facilitate getting in. I don't want to be here, you know, trying to straighten out what the proper spelling of my name is. He says Sam, what do I care; Sam is fine.

"MR. KLONOFF: If he adopted a false identity to facilitate getting in and jumped ahead of the pack—

"QUESTION: Do you consider that facilitating getting in?

"MR. KLONOFF: We would.

"QUESTION: Just to facilitate—to make it quicker so the fellow doesn't have to figure out how to spell Salvator.

"MR. KLONOFF: That would be our position. That's consistent with the statutory—

"QUESTION: Wow, that's a tough position, and I think there are probably a lot of people that are excludable." Tr. of Oral Arg. 39–40.

The observation that a lot of people would be excludable (and a lot of Americans put at risk of losing their citizenship) under the Government's interpretation is, of course, correct. The example instructs that misrepresentations as to matters that are immaterial to the decisions being made by immigration officials simply do not reflect the lack of good moral character § 1101(f)(6) seeks to identify.

9 It is somewhat ironic that both the Government and the Court accept the fact that a materiality requirement is implicit in the disjunctive reference to "willful misrepresentation" in § 1451(a), see *ante,* at 1544, but reach a contrary conclusion with respect to § 1101(f)(6). Moreover, the implication of a materiality requirement in § 1101(f)(6) is consistent with the interpretation of 18 U.S.C. § 1015(a), which punishes the making of "any false statement under oath, in any case, proceeding, or matter relating to ... naturalization, citizenship, or registry of aliens." Courts have construed the statute to contain a requirement that the false statement be material. *United States v. Bressi,* 208 F. 369, 370–371 (WD Wash. 1913) (to constitute the crime of false swearing in a naturalization case the testimony given had to be material even though the statute does not expressly so state); *United States v. Laut,* 17 F.R.D. 31, 34 (SDNY 1955) (courts have consistently construed § 1015(a) and its forebears to have a materiality requirement even though the statute does not expressly contain this limitation).

10 Counsel for the Government asserted at oral argument:

"Let me just round the situation out. Let's say that age is fundamentally important to the decision that's being made, but the person doesn't know this. He lies about his age not because he's trying to obtain immigration benefit, but because his wife is sitting there next to him and throughout their marriage he has lied about his age and he doesn't want to tell the truth.

"Now, that type of lie is willful. He clearly was lying deliberately, but he wasn't lying to obtain immigration benefits.... He has made a material misrepresentation and it's willful, but he doesn't fit within the good moral character provisions." Tr. of Oral Arg. 29–30.

11 Although they overlap, they are not coterminous. Illegal procurement originally appeared as a ground for denaturalization in the Act of June 29, 1906, Pub.L. 59–338, § 15, 34 Stat. 601, which provided that denaturalization proceedings could be based "on the ground of fraud or on the ground that such certificate of citizenship was illegally procured." The provision was retained in the Nationality Act of 1940, Pub.L. 76–853, 54 Stat. 1137. It was deleted, however, in the Immigration and Nationality Act of 1952, Pub.L. 82–414, § 340(f), 66 Stat. 261, which substituted the provision that citizenship could be revoked if it was procured by "concealment of a

material fact or by willful misrepresentation." The purpose of the change in language was to make clear that the statute encompassed both extrinsic and intrinsic fraud. S.Rep. No. 1515, 81st Cong., 2d Sess., 756, 769 (1950).

Illegal procurement was restored as an alternative ground for denaturalization by the Act of September 26, 1961, Pub.L. 87–301, § 18, 75 Stat. 656. It is clear from the legislative history that the purpose of the restoration was to allow denaturalization of persons who did not meet important statutory prerequisites for naturalization but who were not guilty of willful misrepresentation. See H.R.Rep. No. 1086, 87th Cong., 1st Sess., 1, 38–40 (1961), U.S.Code Cong. & Admin.News 1961, p. 2950. Congress was particularly concerned that criminal conduct such as rape, incest, and fraud could not form the basis for denaturalization without the illegally-procured provision. Although the illegally-procured provision may reach some of the conduct encompassed within the material misrepresentation provision, the illegally-procured provision has an independent and broader reach.

Further, the material misrepresentation provision reaches some conduct not assailable under the illegally-procured provision. The Government contends that construing the material misrepresentation provision to require proof of a disqualifying fact renders that provision meaningless since the Government could always seek denaturalization under the illegally-procured provision if it could prove a disqualifying fact. The Government apparently construes our holding on the facts in *Fedorenko* that citizenship may be considered illegally procured if it is discovered that the applicant failed at the time citizenship was conferred to meet a statutory prerequisite of citizenship as warranting the conclusion that every newly discovered noncompliance, no matter how insignificant, would warrant a subsequent finding that citizenship had been illegally procured. Thus, for example, an innocent miscalculation of the applicant's period of physical presence within the United States or residence within a particular State, see *ante,* at 1543–1544, n. 2, would place a naturalized citizen's status in permanent jeopardy. I disagree. I do not construe the illegally-procured provision to reach such trivialities despite the reality that an individual who submitted an application for citizenship one day before fulfilling the residency requirements would technically have failed to "satisfy a statutory requirement which Congress has imposed as a prerequisite to the acquisition of citizenship by naturalization." *Fedorenko,* 449 U.S., at 515, 101 S.Ct., at 752. However, if the Government could establish that a naturalized citizen had willfully misrepresented his or her time of residence and that he or she would have been denied citizenship if the true duration of residency had been known, that person would be subject to denaturalization under § 1451(a).

12 The difference between this case and the Court's hypothetical concerning an SS officer at Dachau, see *ante,* at 1551, is critical. Proof by clear and convincing evidence that a naturalized citizen concealed his official status at Dachau would establish his lack of good moral character. In this case, however, there is no such proof of any official or unofficial connection between petitioner and the atrocities at Kedainiai.

1 Prior to 1952, "illegal procurement" constituted grounds for revoking a citizen's naturalization. When Congress enacted § 340 of the Immigration and Nationality Act of 1952, it dropped, without explanation, the "illegal procurement" provision, adding in its stead the "concealment of a material fact" or "willful misrepresentation" language. The deleted provision was reinserted in § 1451(a) by the 1961 amendments, Pub.L. 87–301, § 18, 75 Stat. 656. The House Report accompanying the amendments noted that "[e]limination of the illegality ground bars denaturalization under section 340 unless it is proved that the naturalized person has been guilty of wrongdoing amounting to concealment of a material fact or willful misrepresentation...." H.R.Rep. No. 1086, 87th Cong., 1st Sess., p. 38 (1961), U.S.Code Cong. & Admin.News 1961, p. 2982. The Report explained that "[p]roof of concealment of material facts or willful misrepresentation ... is fraught with difficulty," *id.,* at 39, U.S.Code Cong. & Admin.News 1961, p. 2983, and that the amendment to § 1451(a) was necessary because "[t]he congressional mandate that no person shall be naturalized unless possessed of certain qualifications is ineffectual unless there is also statutory provision for revoking citizenship where the prerequisites did not in fact exist." *Ibid.* These statements evince clear congressional intent that "illegal procurement" be maintained as a *separate* basis for denaturalization, and do not sanction collapsing § 1101(f)(6) into the willful and material misrepresentation or concealment provision of § 1451(a).

2 On October 23, 1953, petitioner swore under oath before a naturalization examiner that the contents of his naturalization forms were true. As stated above, this testimony was false in that petitioner supplied an incorrect date and place of birth, and he represented that the information he had supplied in the visa application was true. This false testimony falls within the coverage of § 1101(f) because petitioner offered it "during the period for which good moral character is required to be established." Although petitioner's false testimony given at the visa application stage is not, standing alone, similarly covered by this provision, it is directly relevant to the "good moral character" determination. Section 1427(e) provides that in making this determination, a court "shall not be limited to the petitioner's conduct during the five years preceding the filing of the petition, but may take into consideration ... the petitioner's conduct and acts at any time prior to that period." It is also of some interest, though irrelevant to this determination, that petitioner was still lying in 1981, when he tried to explain his previous falsehoods. App. 79–137. The trial court also found that he falsely denied at trial his membership in a local rifleman's organization that at the time of the atrocities provided military training to its members and on occasion assisted German occupation forces.

3 The Court phrases this inquiry as whether petitioner made these misrepresentations with "the subjective intent of obtaining immigration or naturalization benefits," and finds it necessary to remand on this issue because issues of intent are properly matters for resolution by trier of fact. *Ante,* at 1551. This approach rests on a recasting of the statutory language, which requires that the misrepresentations be made "for the purpose of obtaining" such benefits, but even if those two linguistic formulations were exactly the same, it is quite clear that when misrepresentations of fact are made in the process of applying for immigration and naturalization benefits, in a very real and immediate sense those misrepresentations are made "for the purpose of obtaining" such benefits, and at least in this case all of this is so clear that we should find it to be established as a matter of law. Although the Court is certainly correct that issues of intent are normally reserved for resolution by the trier of fact, I do not think that we should prolong proceedings unnecessarily by parsing matters in microscopic detail, creating a legion of subissues, and demanding their resolution while losing sight of what is both clear and dispositive about this case.

4 The District Court found as a matter of fact that petitioner also misrepresented his residence and employment during the time in which the atrocities occurred at Kedainiai. 571 F.Supp. 1104, 1139 (NJ 1983). The correctness of those factual findings has not been challenged. The Government, as respondent, urges us to consider the effect of these other misrepresentations as an additional reason for affirming the decision below, which is entirely proper.

5 The District Court found the three videotaped depositions to be unreliable largely because they were taken in the Soviet Union, which "has a strong state interest" in this case and which "on occasion distorts or fabricates evidence in cases such as this involving an important state interest," and because these depositions "were conducted in a manner which made it impossible to determine if the testimony had been influenced improperly by Soviet authorities." 571 F.Supp., at 1132.

End of Document

6 F.3d 336
United States Court of Appeals,
Fifth Circuit.

RESOLUTION TRUST CORPORATION, In its Corporate Capacity, Plaintiff,
v.
H.R. "BUM" BRIGHT, et al., Defendants–Appellees,
Hopkins & Sutter, Peter F. Lovato III and Thomas D. Graber, Appellants.

No. 92–1978.
|
Nov. 9, 1993.
|
Rehearing Denied Dec. 7, 1993.

In connection with a lawsuit filed by the Resolution Trust Corporation (RTC) alleging misconduct in connection with activities at a savings and loan association, defendants sought protective order and sanctions against the RTC for the manner in which its counsel interviewed a former savings and loan association employee. The United States District Court for the Northern District of Texas, Joe Kendall, J., found that attorneys attempted to persuade witness to sign affidavit containing statement she had not made, disbarred attorneys from practicing before district judge, disqualified attorney's law firm from further representing RTC, and assessed attorney fees against law firm. Appeal was taken. The Court of Appeals, Kazen, District Judge, sitting by designation, held that: (1) attorneys did not attempt to induce witness to testify falsely under oath merely because they were persistent and aggressive in presenting their theory of case to witness; (2) actions of attorneys did not violate Texas disciplinary rules; and (3) absent proof that attorneys conducted themselves in bad faith, attorney fees could not be assessed against RTC.

Reversed and remanded.

West Headnotes (14)

[1] **Federal Courts** Counsel

Order disqualifying counsel in civil case is not final judgment on merits of litigation and does not fall under "collateral order" exception.

Cases that cite this headnote

[2] **Attorney and Client** Trial or hearing

Although federal court clearly has power to suspend or dismiss attorney as exercise of court's inherent powers, court must make specific finding that attorney acted in bad faith before sanctioning any attorney under those inherent powers.

18 Cases that cite this headnote

[3] **Federal Courts** Sanctions

Court's imposition of sanctions under its inherent powers is reviewable under abuse of discretion standard.

5 Cases that cite this headnote

[4] **Federal Courts** Abuse of discretion in general

Court abuses its discretion if its ruling is based on erroneous view of law or on clearly erroneous assessment of evidence.

1 Cases that cite this headnote

[5] **Attorney and Client** Disqualification proceedings; standing

In context of motion to disqualify attorney, court reviews fact-findings for clear error while carefully examining district court's application of relevant ethical standards.

1 Cases that cite this headnote

[6] **Attorney and Client** Grounds for Discipline

Because disbarment from practicing before specific court is quasi-criminal proceeding, any disciplinary rules used to impose sanction on attorneys must be strictly construed, resolving ambiguities in favor of person charged.

2 Cases that cite this headnote

[7] **Federal Courts** Counsel

Federal court may hold attorneys accountable to state Code of Professional Conduct, even though Texas disciplinary rules of professional conduct did not expressly apply to sanctions in federal courts.

6 Cases that cite this headnote

[8] **Attorney and Client** Grounds for Discipline

Attorneys' action of placing statements in draft affidavit that have not been previously discussed with witness is not automatically "bad faith conduct" for purposes of determining whether attorney may be disbarred from practice before court.

2 Cases that cite this headnote

[9] **Attorney and Client** Falsification or abstraction of records or papers

Attorneys' attempt to persuade witness to adopt statements in affidavit, where she had not expressly made those statements and which she initially and subsequently refused to adopt, did not constitute making of false statement in violation of Texas disciplinary rules; absent any indication that attorneys lacked factual basis for additional statements, attorneys were not "manufacturing" evidence. State Bar Rules, V.T.C.A., Government Code Title 2, Subtitle G App., Art. 10, § 9, Rules of Prof.Conduct, Rules 3.04(b), 4.01(a).

2 Cases that cite this headnote

[10] **Federal Courts** Counsel

Motion to disqualify attorney in federal court must be determined based on standards developed under federal law and not solely on authority of state disciplinary rules.

1 Cases that cite this headnote

[11] **Attorney and Client** Disbarment; Revocation of License

Court may disbar attorney for attempting to induce witness to testify falsely under oath.

1 Cases that cite this headnote

[12] **Attorney and Client** Deception of court or obstruction of administration of justice

Actions of attorneys in persistently and aggressively presenting their theory of case to witness and requesting that she sign affidavit which made changes in statements she had initially made was not equivalent to attempt to induce witness to testify falsely under oath where attorneys did not hide from witness that statements were included in draft affidavits that had not been discussed with her previously but rather brought statements to her attention and warned her to read them carefully, particularly where attorneys were clearly advocates for particular position and did not claim to be neutral parties.

4 Cases that cite this headnote

[13] Attorney and Client Grounds for Discipline

Attorneys' lengthy interviews with witness in which attorneys attempted to persuade witness to alter some statements in her affidavit did not result in violation of Texas disciplinary rule prohibiting attorneys from burdening third party without valid "substantial purpose" and prohibiting violation of third party's legal rights; interviews were conducted with goal of eliciting accurate and favorable affidavit. Fed.Rules Civ.Proc.Rule 11, 28 U.S.C.A.

1 Cases that cite this headnote

[14] Federal Civil Procedure Bad faith, vexatiousness, etc

Under exception to rule prohibiting fee shifting, court may assess attorney fees if party acts in bad faith, vexatiously, wantonly, or for oppressive reasons. Fed.Rules Civ.Proc.Rule 11, 28 U.S.C.A.

1 Cases that cite this headnote

Attorneys and Law Firms

***338** Thomas Gibbs Gee, Jane Neninger, Baker & Botts, L.L.P., Houston, TX, for appellants.

A. Erin Dwyer, Ernest E. Figari, Jr., Donald Colleluori, Figari & Davenport, Dallas, TX, for defendants-appellees.

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

Before JONES and DeMOSS, Circuit Judges, and KAZEN, District Judge. [1]

Opinion

KAZEN, District Judge:

This appeal arises out of a lawsuit filed in May 1992 by the Resolution Trust Corporation ("RTC") against H.R. "Bum" Bright and James B. "Boots" Reeder, based on their alleged misconduct in connection with activities at Bright Banc Savings Association, Dallas ("Bright Banc"). Approximately two months after the suit was filed, appellees moved for a protective order and sanctions against the RTC for the manner in which its attorneys, Peter F. Lovato III and Thomas D. Graber, interviewed a former Bright Banc employee. After four days of hearings on the motion for sanctions, the district court issued an oral order on October 19, 1992, finding that the attorneys, appellants herein, impermissibly attempted to persuade the witness to sign an affidavit containing statements which the witness had not previously told appellants. The order disbarred the attorneys from practicing before the district judge and disqualified the attorneys' law firm, Hopkins & Sutter, from further representing RTC in the underlying case. In a December 28, 1992 written order, the court assessed attorneys' fees against the law firm for costs incurred by appellees in prosecuting the sanctions motion. [2] Appellants timely appealed the district court's decision. We reverse.

A. *Factual Background*

On May 14, 1992, the RTC filed suit in federal district court charging appellees Bright and Reeder, as shareholders, directors and officers of Bright Banc, with fraud, negligence, and breach of fiduciary and other duties owed to the bank's shareholders. As part of their pre-filing investigation of the case, attorneys Lovato and Graber conducted several interviews—all voluntary—with Barbara Erhart, formerly the Senior Vice President of Finance Support at Bright Banc. Erhart had worked closely with defendant Reeder and had contact with defendant Bright on "critical matters."

The primary focus of the Erhart interviews was the method Bright Banc used to calculate the amount of non-cash assets it had converted to cash for a December 1986 report on the bank's financial health to the Federal Home Loan Bank Board ("FHLBB"). The RTC attorneys, including Lovato and Graber, questioned Erhart extensively about who made and authorized the computations used in the report. At the conclusion of the third interview, Lovato and Graber asked Erhart to return to their office the next day—April 9, 1992—to review and sign an affidavit summarizing what she had told them in the course of the prior interviews.

When Erhart arrived at the office of Hopkins & Sutter on April 9th, she was not immediately given the affidavit. Instead, the attorneys questioned her again about the cash conversion calculations. As Lovato and Graber spoke to Erhart, they made some last-minute changes to the draft. The changes were incorporated into a revised draft which Graber then presented to Erhart. ***339** He warned her that it "contained a couple of things [they hadn't] discussed with [her]," but which the attorneys nevertheless believed to be true. Erhart was instructed to read the affidavit "very carefully."

Erhart made several changes to the draft affidavit. Some related only to semantical differences, while others reflected Erhart's disagreement with substantive claims in the affidavit. Lovato and Graber questioned Erhart extensively about the changes she made. During this questioning, the attorneys asked Erhart whether she could reword some of her changes to emphasize that Bright and Reeder were more directly involved in the decision to use the controversial cash conversion computations. Erhart declined because she did not have personal knowledge of the statements the attorneys wanted her to include in her affidavit. With respect to some of the statements in the affidavit, the attorneys were not content to accept Erhart's initial refusal to revise her changes. In an effort to have Erhart see things their way, Lovato and Graber described their understanding of how certain events transpired at Bright Banc, presented Erhart with independent evidence to support this interpretation of events, and aggressively challenged some of Erhart's assumptions about Bright and Reeder. After making their case for further revisions, Lovato and Graber asked Erhart whether she believed them and whether she was now convinced that their version of certain events was correct. Erhart, unconvinced, declined to alter the initial changes she had made to the draft affidavit.

When it was clear to the attorneys that Erhart would not sign a statement agreeing with the attorneys' version of some of the disputed events at Bright Banc, they incorporated Erhart's handwritten changes into a new draft affidavit. Erhart read this draft and made a few changes which were then included in a third draft. Erhart read and approved this version of the affidavit, signed it and left the offices of Hopkins & Sutter.

Approximately one month later, Erhart told appellees' attorneys that she had given a statement to appellant-attorneys regarding some of the transactions at issue in the underlying law suit. Appellees' counsel then arranged for Erhart to give them an *ex parte* statement on June 12, 1992 about her meetings with Lovato and Graber. This statement was transcribed by the court reporter but never signed by Erhart. However, she later adopted portions of it during testimony before Judge Kendall on August 9, 1992.

In that testimony, Erhart stated, among other things, that she did not think Lovato and Graber were asking her to say something she did not believe but rather were trying to determine if she could see the case the way they did. She denied being harassed or intimidated and expressed the view that "they were doing their job, just like everybody else." The district court essentially disregarded this testimony, finding it contrary to Erhart's earlier *ex parte* statement given to appellees' attorneys, and concluding that the change must have been the result of "obvious job pressure." Erhart's earlier statement clearly has a different tone from her subsequent court testimony. For example, she earlier described Lovato as having been particularly aggressive in attempts to persuade her to agree with appellants' version of certain events, "almost like browbeating me." Nevertheless even in her *ex parte* statement, Erhart indicated that Lovato and Graber were not trying to have her change facts but rather to agree with a different "interpretation" or "slant" from the facts.

B. *The Motion For Sanctions*

On July 15, 1992, Bright and Reeder moved for sanctions and a protective order against the RTC based on Lovato and Graber's conduct during the Erhart interviews. The motion alleged that the manner in which the RTC's attorneys interviewed Erhart violated Texas Disciplinary Rules of Professional Conduct 3.04, 4.01(a) and 4.04(a) and probably violated 18 U.S.C. §§ 1503, 1512. Appellees also called upon the court to exercise its "inherent powers" to sanction the RTC for intimidating Erhart. The motion asked the court to prevent the RTC from using any notes or statements obtained through the Erhart interviews, to order the RTC not to make any further contact with Erhart, and to award attorneys fees to Bright and Reeder ***340** for their efforts in bringing and prosecuting the motion for sanctions.

On July 20, 1992, the district court ordered that both sides refrain from contacting Erhart while the sanctions motion was pending. Hearings on the sanctions motion were held over the course of several days from August to October 1992.

C. The District Court's Decision

The district court issued an oral ruling on the motion for sanctions on October 19, 1992. This ruling was further clarified in separate written orders issued on October 23 and December 28, 1992.

The court found that Lovato and Graber "knowingly attempted to get a key witness ... to commit to a sworn statement that they knew contained assertions of fact she had not made or told them previously in matters highly relevant to the plaintiff's civil claim." It found that the attorneys were "going to try to talk her into" those statements. The Court was particularly troubled because the draft affidavit given to Erhart added matters only in areas "that established or buttressed the [RTC's] claims." The court characterized the attorneys' actions concerning the draft affidavit as "tampering with" or attempting to "manufacture" evidence to "cause, or aid in, Defendants' downfall."

[1] Based on its inherent power to regulate the conduct of attorneys, Judge Kendall disbarred Lovato and Graber from practicing before him. He assessed $110,000 in attorneys fees against Hopkins & Sutter for expenses incurred by Bright and Reeder in the prosecution of the sanctions motion. [3] Pursuant to its authority under Local Rule 13.2 (N.D.Tex.), [4] the court removed Hopkins & Sutter from further representing the RTC in the underlying action. Finally, it ordered the firm not to charge the RTC for defending against the sanction motion. No sanctions were assessed against the RTC. Lovato, Graber and Hopkins & Sutter timely appealed. [5]

D. *Disbarment* of Lovato and Graber

[2] **[3]** **[4]** **[5]** The district court disbarred attorneys Lovato and Graber from practicing before it pursuant to the court's inherent powers to discipline attorneys. It is beyond dispute that a federal court may suspend or dismiss an attorney as an exercise of the court's inherent powers. *In re Snyder,* 472 U.S. 634, 643–644, 105 S.Ct. 2874, 2880, 86 L.Ed.2d 504 (1985); *Matter of Thalheim,* 853 F.2d 383, 389 (5th Cir.1988). However, before sanctioning any attorney under its inherent powers, the court must make a specific finding that the attorney acted in "bad faith." *Thalheim,* 853 F.2d at 389. The United States Supreme Court has held that a court's imposition of sanctions under its inherent powers is reviewable under the abuse-of-discretion standard. *Chambers v. NASCO, Inc.,* 501 U.S. 32, ——, 111 S.Ct. 2123, 2138, 115 L.Ed.2d 27 (1991). A court abuses its discretion when its ruling is based on an erroneous view of the law or on a clearly ***341** erroneous assessment of the evidence. *Cooter & Gell v. Hartmarx Corp.,* 496 U.S. 384, 405, 110 S.Ct. 2447, 2461, 110 L.Ed.2d 359 (1990). In the specific context of a disqualification motion, this circuit reviews fact findings for "clear error" while "carefully examining" the district court's application of relevant ethical standards. *In re American Airlines, Inc.,* 972 F.2d 605, 609 (5th Cir.1992), *cert. denied* 507 U.S. 912, 113 S.Ct. 1262, 122 L.Ed.2d 659 (1993).

[6] **[7]** Because disbarment is a quasi-criminal proceeding, any disciplinary rules used to impose this sanction on attorneys must be strictly construed, resolving ambiguities in favor of the person charged. *Thalheim,* 853 F.2d at 388. The Texas Disciplinary Rules of Professional Conduct do not expressly apply to sanctions in federal courts, but a federal court may nevertheless hold attorneys accountable to the state code of professional conduct. *See In re Snyder,* 472 U.S. at 645 n. 6, 105 S.Ct. at 2881 n. 6; *In re Finkelstein,* 901 F.2d 1560, 1564 (11th Cir.1990).

The district court failed to make specific findings of how appellants violated the Disciplinary Rules. In its oral findings, the court concluded that Lovato and Graber engaged in "inappropriate conduct, conduct that probably violates the DRs, unethical conduct, as well as a probable violation of the obstruction of justice statutes." We shall assume that the district court's comments referred to the Disciplinary Rules invoked by Appellees in their motion for sanctions.

[8] **[9]** The sanctionable conduct found by the district court was the attorneys' inclusion of statements in draft affidavits that had not been previously discussed with Erhart, combined with the attorneys' attempts to persuade Erhart to agree with their understanding of how certain events transpired at the bank. Placing statements in a draft affidavit that have not been previously discussed with a witness does not automatically constitute bad-faith conduct. *See U.S. v. Brand,* 775 F.2d 1460, 1469 (11th Cir.1985) (giving witness affidavit with statements not previously discussed not obstruction of justice). It is one thing to ask a witness to swear to facts which are knowingly false. It is another thing, in an arms-length interview with a witness, for an attorney to attempt to persuade her, even aggressively, that her initial version of a certain fact situation is not complete or accurate. Disciplinary Rules 3.04(b) and 4.01(a) concern the former circumstance, not the latter. The district court never found that appellants asked Erhart to make statements which they knew to be false. Indeed, the district court pretermitted any consideration of the truth of the draft affidavits. Appellees nevertheless argue that because appellant attorneys attempted to persuade

Erhart to adopt certain statements which she had not expressly made and which she refused to adopt, the attorneys thereby were either making or urging the making of "false" statements in violation of DRs 3.04(b) and 4.01(a). We disagree. The district court characterized the attorneys' behavior as "manufacturing" evidence, but there is no indication that the attorneys did not have a factual basis for the additional statements included in the draft affidavit. *See Koller v. Richardson–Merrell,* 737 F.2d 1038, 1058–59 (D.C.Cir.1984), *vacated on other grounds* 472 U.S. 424, 105 S.Ct. 2757, 86 L.Ed.2d 340 (1985). On the contrary, appellants have attempted to demonstrate in a detailed chart that the contested portions of the affidavit were based either on their notes of interviews with Erhart or on evidence from other sources (e.g., internal bank memorandum).

[10] **[11]** We recognize that the Texas Disciplinary Rules are not the sole authority governing a motion to disqualify in federal court; rather, such a motion must be determined by standards developed under federal law. *In re Dresser Industries, Inc.*, 972 F.2d 540, 543 (5th Cir.1992). Our source for professional standards has been the canons of ethics developed by the American Bar Association. *Id.* The district court opinion, however, makes no reference to any national canons which would add to the analysis here, nor do appellees. A court obviously would be justified in disbarring an attorney for attempting to induce a witness to testify falsely under oath, *see Thalheim,* 853 F.2d at 390 (citing *U.S. v. Friedland,* 502 F.Supp. 611, 619 (D.N.J.1980), *aff'd.* 672 F.2d 905 (3d Cir.1981)), but this record does not support ***342** the conclusion that Lovato and Graber engaged in such behavior. While the attorneys were persistent and aggressive in presenting their theory of the case to Erhart, they nevertheless made sure that Erhart signed the affidavit only if she agreed with its contents. The attorneys never attempted to hide from Erhart the fact that some statements were included in draft affidavits that had not been discussed with her previously. Instead, they brought the statements to her attention and warned her to read them carefully. Additionally, Lovato and Graber never claimed to be neutral parties. Erhart knew that these attorneys were advocates for a particular position, and she was also in communication with attorneys who were advocating the contrary position. Were Erhart giving testimony at a deposition or at trial, the attorneys for either side would not be required to accept her initial testimony at face value but would be able to confront her with other information to challenge her testimony or attempt to persuade her to change it.

[12] Appellees also alleged that RTC attorneys violated Disciplinary Rule 4.04(a), which prohibits an attorney from burdening a third party without a valid "substantial purpose" or violating a third party's legal rights. The district court findings do not reveal that Lovato and Graber committed either wrong. The attorneys' sometimes laborious interviews with Erhart were conducted with the goal of eliciting an accurate and favorable affidavit from a key witness in the underlying case. Additionally, the district court made no findings that the interviews violated Erhart's legal rights, nor does the record contain any evidence to support such a finding.

E. Sanctions Against The Law Firm

[13] **[14]** The district court ordered the firm of Hopkins & Sutter to pay $100,000 in attorneys' fees to appellees for their prosecution of the sanction motion and also restrained the firm from charging the RTC for defending against the motion. The court assessed attorneys' fees under its inherent power to do so against counsel who have conducted themselves "in bad faith." *Chambers,* 501 U.S. at ——, 111 S.Ct. at 2133. It found that Lovato and Graber acted in bad faith because they tampered with or attempted to manufacture evidence and concluded that "a law firm may not escape the consequences of misconduct committed by one of its attorneys." The Supreme Court in *Chambers* described three exceptions to the so-called "American Rule," which prohibits fee shifting in most cases. The exception pertinent to the instant case is that a court may assess attorney's fees when a party acts "in bad faith, vexatiously, wantonly, or for oppressive reasons." 501 U.S. at ——, 111 S.Ct. at 2133. The Supreme Court compared this exception to the requirement under Rule 11, Fed.R.Civ.P., providing that the signer of a paper warrants that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. *Id.* at n. 10. We understand the district court's finding of "bad faith" to be grounded exclusively on the proposition that attorneys Lovato and Graber wrongfully tried to tamper with or manufacture evidence. Because we have already found that the record does not support that conclusion, the assessment of attorney's fees cannot be sustained.

The trial court did not elaborate, either orally or in writing, on its order restraining Hopkins & Sutter from charging the RTC for time spent defending the motion for sanctions. Neither side has specifically addressed that sanction on appeal. Nevertheless, in view of the conclusions we have heretofore announced, there would likewise be no justification for this sanction.

F. Conclusion

We conclude that the district court abused its discretion when it issued its sanctions ruling against appellants.[6] We REVERSE and REMAND for proceedings not inconsistent with this opinion.

All Citations

6 F.3d 336, 62 USLW 2310

Footnotes

1 District Judge of the Southern District of Texas, sitting by designation.

2 Because appellants' Notice of Appeal had already been filed when the district court issued its opinion, the court stayed the operation of the award of attorneys fees pending disposition of the appeal.

3 The court explained that the award of attorneys fees was not intended as a sanction, but that it "flows from equity in light of the Court's inherent power or the purpose of reimbursement rather than sanction." December 28, 1992 Order at 3 n. 1.

4 Local Rule 13.2 of the U.S. District Court For the Northern District of Texas states, in pertinent part,

> Any member of the bar of this Court ... who proves to be incompetent to practice before this Court because of unethical behavior ... is subject to revocation of admission to practice in this District and to other appropriate discipline, after such hearing as the Court may direct in each particular instance.

5 The notice of appeal purports to appeal all sanctions imposed in the Order of December 28, 1992. However, an order disqualifying counsel in a civil case is not a final judgment on the merits of the litigation and does not fall under the "collateral order" exception. *Richardson–Merrell, Inc., v. Koller,* 472 U.S. 424, 430, 105 S.Ct. 2757, 2761, 86 L.Ed.2d 340 (1985). Appellants' brief generally attacks the "sanctions" imposed by the trial court but does not specifically mention the disqualification order. Their Statement of Jurisdiction refers to counsel "who have perforce withdrawn from the case." Appellees' Statement of Jurisdiction asserts that appellants "have not attempted to appeal from that portion of the order disqualifying them as counsel to the RTC." Appellants have not challenged that assertion. We conclude that the disqualification sanction is not before us on this appeal. The remaining three sanctions are ripe for appeal. *Markwell v. County of Bexar,* 878 F.2d 899 (5th Cir.1989).

6 Appellants advance several additional grounds for the reversal of the district court's decision, including due process violations and an impermissible *ex parte* contact between the district court judge and an FBI agent. We need not reach these issues.

End of Document