COMMITTEE ON RULES
OF
PRACTICE AND PROCEDURE

San Francisco, CA
January 13-14, 2005
Volume III

EXHIBITS ATTACHED TO

DEPARTMENT OF JUSTICE REQUEST

CONCERNING CRIMINAL RULE 29

EXHIBIT A

Table C-8.
U.S. District Courts—Lengths of Civil and Criminal Trials Completed, by District, During the 12-Month Period Ending September 30, 2003

Circuit and District	Total All Trials	Civil Trials: Total	1 Day	2 Days	3 Days	4 to 9 Days	10 to 19 Days	20 Days or More	Criminal Trials: Total	1 Day	2 Days	3 Days	4 to 9 Days	10 to 19 Days	20 Days or More
TOTAL	12,948	5,830	2,408	941	686	1,515	241	39	7,118	3,586	1,196	860	1,221	188	67
DC	221	62	20	14	3	19	4	2	159	65	14	21	50	5	4
1ST	451	267	66	40	37	99	23	2	184	70	25	20	50	13	6
ME	57	24	9	5	3	4	3	-	33	21	5	4	3	-	-
MA	198	109	17	17	14	49	11	1	89	28	15	9	27	8	2
NH	32	14	3	1	3	7	-	-	18	9	3	1	5	-	-
RI	49	39	12	6	4	16	1	-	10	3	-	2	3	2	-
PR	115	81	25	11	13	23	8	1	34	9	2	4	12	3	4
2ND	1,147	641	237	99	63	200	32	10	506	178	51	69	163	27	18
CT	136	93	34	12	10	30	5	2	43	12	3	6	14	4	4
NY,N	79	45	7	11	6	21	-	-	34	14	2	6	7	4	1
NY,E	354	219	103	27	16	56	13	4	135	43	19	29	33	6	5
NY,S	471	247	77	44	25	84	13	4	224	69	21	22	96	11	5
NY,W	68	22	8	3	5	5	1	-	46	23	4	4	10	2	3
VT	39	15	8	2	1	4	-	-	24	17	2	2	3	-	-
3RD	927	548	195	96	67	159	28	3	379	187	48	43	77	16	8
DE	91	59	21	7	5	23	3	-	32	23	5	3	1	-	-
NJ	168	109	35	20	15	28	9	2	59	19	8	4	15	7	6
PA,E	249	147	36	33	17	53	8	-	102	18	16	21	40	6	1
PA,M	230	127	67	15	16	28	1	-	103	83	9	4	4	2	1
PA,W	161	97	35	17	13	25	6	1	64	37	9	7	11	-	-
VI	28	9	1	4	1	2	1	-	19	7	1	4	6	1	-
4TH	1,193	385	203	64	39	69	8	2	808	468	148	84	93	11	4
MD	210	75	40	8	10	13	3	1	135	67	18	12	34	3	1
NC,E	50	10	2	4	1	3	-	-	40	15	12	2	10	1	-
NC,M	88	25	12	3	-	9	1	-	63	30	19	10	4	-	-
NC,W	76	16	10	-	1	5	-	-	60	21	15	12	12	-	-
SC	203	94	50	9	9	24	2	-	109	61	14	22	8	3	1
VA,E	351	94	44	25	10	12	2	1	257	195	32	13	13	2	2
VA,W	102	33	22	6	3	2	-	-	69	40	14	5	9	1	-
WV,N	31	15	9	5	1	-	-	-	16	3	8	4	-	1	-
WV,S	82	23	14	4	4	1	-	-	59	36	16	4	3	-	-

Table D-4. Defendants
U.S. District Courts—Criminal Defendants Disposed of, by Type of Disposition and Major Offense, During the 12-Month Period Ending September 30, 2002

Nature of Offense	Total Defendants	Not Convicted				Convicted and Sentenced				
				Acquitted by					Convicted by	
		Total	Dismissed	Court	Jury	Total	Plea of Guilty	Nolo Contendere	Court	Jury
TOTAL	78,835	7,953	7,217	336	400	70,882	67,856	332	423	2,271
GENERAL OFFENSES										
HOMICIDE	301	36	31	1	4	265	232	-	2	31
MURDER—FIRST DEGREE	226	30	26	1	3	196	165	-	1	30
MURDER—SECOND DEGREE	24	1	-	-	1	23	23	-	-	-
MANSLAUGHTER	51	5	5	-	-	46	44	-	1	1
ROBBERY	1,505	53	45	2	6	1,452	1,390	2	3	57
BANK	1,446	42	34	2	6	1,404	1,349	2	3	50
POSTAL	30	5	5	-	-	25	20	-	-	5
OTHER	29	6	6	-	-	23	21	-	-	2
ASSAULT	599	118	104	5	9	481	442	2	11	26
BURGLARY	58	6	6	-	-	52	50	-	1	1
BANK	-	-	-	-	-	-	-	-	-	-
POSTAL	13	-	-	-	-	13	12	-	-	1
INTERSTATE SHIPMENTS	4	-	-	-	-	4	4	-	-	-
OTHER	41	6	6	-	-	35	34	-	1	-
LARCENY AND THEFT	3,316	753	723	16	14	2,563	2,451	41	18	53
BANK	271	8	7	-	1	263	261	-	2	-
POSTAL	547	34	34	-	-	513	510	-	1	2
INTERSTATE SHIPMENTS	286	37	32	3	2	249	227	-	2	20
OTHER U.S. PROPERTY	1,705	509	495	9	5	1,196	1,130	40	12	14
TRANSPORT, ETC., STOLEN PROP.	239	43	35	3	5	196	180	-	-	16
OTHER	268	122	120	1	1	146	143	1	1	1
EMBEZZLEMENT	1,048	120	114	2	4	928	902	-	3	23
BANK	511	52	49	1	2	459	454	-	1	4
POSTAL	239	20	20	-	-	219	216	-	-	3
OTHER	298	48	45	1	2	250	232	-	2	16

Table D-4. (September 30, 2002—Continued)

Nature of Offense	Total Defendants	Not Convicted				Convicted and Sentenced				
				Acquitted by					Convicted by	
		Total	Dismissed	Court	Jury	Total	Plea of Guilty	Nolo Contendere	Court	Jury
FRAUD	**10,722**	**818**	**739**	**23**	**56**	**9,904**	**9,514**	**4**	**11**	**375**
INCOME TAX	580	21	18	1	2	559	524	-	2	33
LENDING INSTITUTION	1,510	104	101	2	1	1,406	1,351	-	1	54
POSTAL	1,586	143	129	4	10	1,443	1,367	-	1	75
VETERANS AND ALLOTMENTS	10	-	-	-	-	10	9	1	-	-
SECURITIES AND EXCHANGE	132	6	6	-	-	126	116	-	-	10
SOCIAL SECURITY	531	98	94	2	2	433	418	1	1	13
FALSE PERSONATION	46	6	3	1	2	40	38	-	-	2
NATIONALITY LAWS	231	13	11	1	1	218	215	-	1	2
PASSPORT FRAUD	279	17	17	-	-	262	260	-	-	2
FALSE CLAIMS & STATEMENTS	1,770	153	133	2	18	1,617	1,558	1	4	54
OTHER	4,047	257	227	10	20	3,790	3,658	1	1	130
AUTO THEFT	**209**	**32**	**30**	**1**	**1**	**177**	**160**	**-**	**-**	**17**
FORGERY AND COUNTERFEITING	**1,544**	**140**	**134**	**1**	**5**	**1,404**	**1,366**	**-**	**2**	**36**
TRANSPORT FORGED SECURITIES	-	-	-	-	-	-	-	-	-	-
POSTAL FORGERY	-	-	-	-	-	-	-	-	-	-
OTHER FORGERY	129	16	16	-	-	113	110	-	-	3
COUNTERFEITING	1,415	124	118	1	5	1,291	1,256	-	2	33
SEX OFFENSES	**1,013**	**101**	**90**	**2**	**9**	**912**	**862**	**1**	**6**	**43**
SEXUAL ABUSE	390	52	44	-	8	338	308	-	3	27
OTHER	623	49	46	2	1	574	554	1	3	16
DRUGS	**29,477**	**2,351**	**2,167**	**41**	**143**	**27,126**	**26,110**	**22**	**53**	**941**
MISCELLANEOUS GENERAL OFFENSE	**13,617**	**2,494**	**2,167**	**216**	**111**	**11,123**	**10,216**	**240**	**185**	**482**
BRIBERY	163	13	10	-	3	150	142	-	-	8
DRUNK DRIVING AND TRAFFIC	4,400	1,279	1,098	179	2	3,121	2,772	219	126	4
ESCAPE[1]	546	65	59	1	5	481	470	-	3	8
EXTORT., RACKETEERING, THREATS	1,146	119	105	3	11	1,027	940	1	4	82
GAMBLING AND LOTTERY	21	4	4	-	-	17	17	-	-	-
KIDNAPPING	112	17	16	-	1	95	82	-	-	13
PERJURY	116	17	17	-	-	99	83	-	4	12
WEAPONS AND FIREARMS	6,154	723	616	22	85	5,431	5,055	2	32	342
OTHER	959	257	242	11	4	702	655	18	16	13

Table D-4. (September 30, 2002—Continued)

Nature of Offense	Total Defendants	Not Convicted				Convicted and Sentenced				
		Total	Dismissed	Acquitted by		Total	Plea of Guilty	Nolo Contendere	Convicted by	
				Court	Jury				Court	Jury
SPECIAL OFFENSES										
IMMIGRATION LAWS	**12,191**	**479**	**463**	**8**	**8**	**11,712**	**11,585**	**5**	**29**	**93**
LIQUOR, INTERNAL REVENUE	**9**	**-**	**-**	**-**	**-**	**9**	**8**	**-**	**-**	**1**
FEDERAL STATUTES	**3,226**	**452**	**404**	**18**	**30**	**2,774**	**2,568**	**15**	**99**	**92**
AGRI./CONSERVATION ACTS	294	69	66	3	-	225	209	-	14	2
ANTITRUST VIOLATIONS	42	4	-	-	4	38	33	-	-	5
FOOD AND DRUG ACT	95	5	5	-	-	90	89	-	-	1
MIGRATORY BIRD LAWS	111	17	16	1	-	94	89	2	3	-
MOTOR CARRIER ACT	7	-	-	-	-	7	7	-	-	-
NATIONAL DEFENSE LAWS	1	-	-	-	-	1	1	-	-	-
CIVIL RIGHTS	98	24	13	1	10	74	62	-	-	12
CONTEMPT	70	14	13	1	-	56	41	9	4	2
CUSTOMS LAWS	155	17	16	1	-	138	131	-	-	7
POSTAL LAWS[2]	187	18	18	-	-	169	167	1	-	1
OTHER	2,166	284	257	11	16	1,882	1,739	3	78	62

NOTE: DEFENDANTS CHARGED IN TWO OR MORE CASES THAT WERE TERMINATED DURING THIS YEAR ARE REPORTED ONLY ONCE; THEREFORE, THIS TABLE'S FIGURES FOR TOTAL DEFENDANTS DISPOSED OF ARE LESS THAN THE FIGURES IN TABLES D AND D-1 FOR TOTAL DEFENDANTS TERMINATED. THIS TABLE'S FIGURES FOR TOTAL DEFENDANTS EXCLUDE 703 TRANSFERS AND 1,282 TERMINATIONS FOR DEFENDANTS CHARGED IN MORE THAN ONE CASE DURING THIS YEAR. THIS TABLE INCLUDES DEFENDANTS IN ALL FELONY AND CLASS A MISDEMEANOR CASES, BUT INCLUDES ONLY THOSE PETTY OFFENSE DEFENDANTS WHOSE CASES HAVE BEEN ASSIGNED TO DISTRICT JUDGES.

[1] INCLUDES ESCAPE FROM CUTODY, AIDING OR ABETTING AN ESCAPE, FAILURE TO APPEAR IN COURT AND BAIL JUMPING.

[2] OBSTRUCTING MAIL, MAILING NONMAILABLE MATERIAL, AND OTHER POSTAL REGULATIONS

Table D-6. Defendants
U.S. District Courts—Median Time Intervals From Filing to Disposition of Criminal Defendants Disposed of, by District (Excluding Transfers), During the 12-Month Period Ending September 30, 2002

Circuit and District	Total		Dismissed		Plea of Guilty		Court Trial		Jury Trial	
	Number	Median (in Months)*	Number	Median (in Months)*	Number	Median (in Months)*	Number	Median (in Months)*	Number	Median (in Months)*
TOTAL	**78,835**	**6.2**	**7,217**	**5.2**	**68,188**	**6.1**	**759**	**3.0**	**2,671**	**11.9**
DC	**436**	**9.5**	**46**	**6.1**	**369**	**10.1**	**1**	**-**	**20**	**16.5**
1ST	**2,404**	**11.2**	**283**	**23.3**	**1,968**	**10.3**	**54**	**3.2**	**99**	**20.5**
ME	230	5.3	11	9.1	208	5.2	2	-	9	-
MA	620	13.4	26	12.6	573	13.4	5	-	16	17.3
NH	154	9.8	16	11.8	127	9.1	1	-	10	11.5
RI	177	6.9	9	-	151	6.5	1	-	16	10.4
PR	1,223	13.4	221	31.1	909	11.8	45	2.6	48	40.1
2ND	**4,968**	**11.1**	**166**	**19.7**	**4,543**	**10.5**	**12**	**8.6**	**247**	**20.3**
CT	367	10.6	20	10.9	329	10.2	1	-	17	15.3
NY,N	445	8.2	5	-	422	7.9	3	-	15	19.8
NY,E	1,700	11.2	50	34.4	1,588	10.8	2	-	60	18.2
NY,S	1,785	12.6	75	20.3	1,576	11.6	5	-	129	21.6
NY,W	483	10.3	9	-	448	9.1	-	-	26	24.7
VT	188	10.6	7	-	180	10.7	1	-	-	-
3RD	**3,419**	**8.7**	**307**	**5.7**	**2,959**	**8.6**	**15**	**9.0**	**138**	**18.3**
DE	101	9.3	18	9.1	81	9.2	1	-	1	-
NJ	976	8.1	99	3.9	851	8.4	1	-	25	23.4
PA,E	1,055	10.5	36	9.4	947	10.1	4	-	68	18.2
PA,M	481	11.0	48	7.1	418	11.0	2	-	13	16.0
PA,W	406	7.3	52	3.9	339	7.6	1	-	14	11.8
VI	400	.2	54	10.4	323	.1	6	-	17	19.1
4TH	**8,937**	**5.6**	**1,540**	**2.7**	**6,924**	**5.8**	**157**	**2.8**	**316**	**9.7**
MD	1,171	5.5	332	2.5	789	6.6	9	-	41	13.8
NC,E	992	5.8	112	1.7	845	6.0	16	4.9	19	10.7
NC,M	504	6.5	33	16.1	429	6.5	2	-	40	6.9
NC,W	651	12.0	42	13.8	573	11.4	-	-	36	18.1
SC	1,256	8.6	178	7.5	1,042	8.5	4	-	32	10.8
VA,E	3,313	2.8	773	1.8	2,346	3.1	116	2.4	78	6.4
VA,W	468	8.7	16	18.2	406	8.4	6	-	40	9.1
WV,N	291	5.9	24	15.9	250	5.7	1	-	16	12.3
WV,S	291	5.5	30	23.2	244	5.2	3	-	14	9.5

Table D-6. (September 30, 2002—Continued)

Circuit and District	Total		Dismissed		Plea of Guilty		Court Trial		Jury Trial	
	Number	Median (in Months)*	Number	Median (In Months)*	Number	Median (in Months)*	Number	Median (in Months)*	Number	Median (in Months)*
5TH	**14,200**	**5.2**	**809**	**5.3**	**12,914**	**5.2**	**71**	**7.9**	**406**	**9.6**
LA,E	477	6.6	23	6.6	435	6.6	-	-	19	15.7
LA,M	146	6.8	29	3.7	106	7.3	-	-	11	14.4
LA,W	462	6.9	48	4.7	386	6.7	7	-	21	8.7
MS,N	188	6.9	11	4.8	170	6.9	-	-	7	-
MS,S	454	7.6	39	7.8	393	7.5	1	-	21	11.4
TX,N	1,244	6.0	93	11.3	1,090	5.9	5	-	56	7.8
TX,E	689	8.8	51	7.7	611	8.7	3	-	24	11.6
TX,S	5,070	4.7	257	3.0	4,668	4.7	21	7.3	124	8.0
TX,W	5,470	5.0	258	5.9	5,055	4.9	34	6.7	123	9.7
6TH	**5,612**	**7.5**	**540**	**8.4**	**4,797**	**7.3**	**40**	**5.6**	**235**	**10.8**
KY,E	536	6.2	49	13.6	462	5.9	1	-	24	8.2
KY,W	704	5.2	123	2.3	542	5.5	17	4.6	22	10.9
MI,E	876	10.7	87	18.9	723	10.1	9	-	57	15.1
MI,W	425	6.2	25	8.6	377	6.1	-	-	23	9.9
OH,N	930	6.6	46	5.5	851	6.6	3	-	30	11.9
OH,S	468	7.2	33	8.0	423	7.1	1	-	11	8.6
TN,E	699	7.6	50	4.8	619	7.6	4	-	26	8.9
TN,M	409	10.9	66	15.5	322	10.7	2	-	19	15.2
TN,W	565	8.4	61	10.0	478	8.3	3	-	23	10.8
7TH	**3,142**	**7.8**	**207**	**4.6**	**2,779**	**7.7**	**5**	**-**	**151**	**15.1**
IL,N	1,144	10.1	41	10.0	1,040	9.8	-	-	63	20.7
IL,C	519	6.3	83	2.5	426	6.9	-	-	10	12.4
IL,S	318	7.2	9	-	300	7.2	2	-	7	-
IN,N	461	7.5	29	6.3	391	7.3	1	-	40	11.9
IN,S	267	6.8	26	5.0	226	6.4	2	-	13	13.7
WI,E	298	7.1	13	7.6	270	6.9	-	-	15	12.2
WI,W	135	5.4	6	-	126	5.3	-	-	3	-
8TH	**4,264**	**7.3**	**258**	**6.1**	**3,776**	**7.2**	**20**	**7.1**	**210**	**11.3**
AR,E	296	10.0	33	11.6	238	9.6	1	-	24	21.2
AR,W	155	6.5	9	-	140	6.3	-	-	6	-
IA,N	387	8.4	12	6.6	337	8.2	5	-	33	12.2
IA,S	323	7.1	10	5.2	281	6.9	2	-	30	9.0
MN	465	8.3	34	5.0	402	8.3	2	-	27	11.7
MO,E	742	5.7	40	4.3	680	5.7	1	-	21	9.8
MO,W	721	8.9	36	7.0	670	8.9	2	-	13	11.7
NE	586	7.5	44	6.1	528	7.5	2	-	12	15.8
ND	197	4.9	10	4.5	177	4.8	-	-	10	6.3
SD	392	6.6	30	5.6	323	6.7	5	-	34	7.6

Table D-6. (September 30, 2002—Continued)

Circuit and District	Total		Dismissed		Plea of Guilty		Court Trial		Jury Trial	
	Number	Median (in Months)*	Number	Median (in Months)*	Number	Median (in Months)*	Number	Median (in Months)*	Number	Median (in Months)*
9TH	**17,020**	**5.5**	**1,735**	**5.9**	**14,923**	**5.4**	**52**	**7.4**	**310**	**12.8**
AK	214	5.9	27	3.4	166	5.8	5	-	16	8.7
AZ	4,103	4.6	204	10.1	3,869	4.5	2	-	28	10.9
CA,N	960	10.4	148	18.0	783	9.7	6	-	23	28.6
CA,E	1,042	7.4	127	11.7	902	7.0	-	-	13	18.4
CA,C	1,980	8.5	152	10.0	1,756	8.2	6	-	66	16.0
CA,S	3,940	3.8	183	3.9	3,714	3.7	7	-	36	8.7
HI	627	9.8	119	4.5	487	10.5	3	-	18	24.4
ID	265	6.5	37	3.9	211	6.4	5	-	12	8.3
MT	540	6.5	132	2.0	379	6.8	3	-	26	9.0
NV	740	9.1	74	15.1	638	8.9	3	-	25	10.0
OR	705	7.9	63	8.4	622	7.6	6	-	14	14.6
WA,E	384	6.2	53	4.9	315	6.3	3	-	13	12.1
WA,W	1,340	4.2	371	3.7	952	4.3	3	-	14	14.0
GUAM	152	7.7	37	18.0	110	6.1	-	-	5	-
NMI	28	6.8	8	-	19	8.9	-	-	1	-
10TH	**5,615**	**5.4**	**735**	**4.3**	**4,754**	**5.4**	**12**	**3.8**	**114**	**11.2**
CO	720	8.4	70	11.1	628	8.1	3	-	19	12.4
KS	590	7.7	75	5.4	499	8.0	5	-	11	10.1
NM	2,289	4.1	235	4.3	2,027	4.0	1	-	26	12.6
OK,N	215	8.0	47	4.8	161	8.2	-	-	7	-
OK,E	98	4.7	12	1.5	84	4.9	-	-	2	-
OK,W	613	1.3	121	.4	473	2.0	1	-	18	9.0
UT	939	5.7	166	6.8	755	5.5	1	-	17	14.4
WY	151	5.5	9	-	127	5.4	1	-	14	7.0
11TH	**8,818**	**5.9**	**591**	**4.7**	**7,482**	**5.9**	**320**	**.1**	**425**	**10.0**
AL,N	661	5.2	97	3.4	535	5.3	5	-	24	6.9
AL,M	224	7.4	30	5.4	170	7.8	3	-	21	10.3
AL,S	349	6.8	20	4.3	314	6.7	2	-	13	9.6
FL,N	561	4.6	42	2.5	467	4.4	8	-	44	8.0
FL,M	1,533	7.0	41	8.2	1,391	6.8	10	6.5	91	9.4
FL,S	2,683	6.5	83	12.0	2,419	6.3	14	5.5	167	11.0
GA,N	1,114	6.8	102	9.4	956	6.3	18	9.0	38	14.4
GA,M	1,249	.1	70	5.8	904	.1	258	.1	17	11.5
GA,S	444	4.7	106	2.7	326	5.0	2	-	10	6.7

NOTE: DEFENDANTS CHARGED IN TWO OR MORE CASES THAT WERE TERMINATED DURING THIS YEAR ARE REPORTED ONLY ONCE; THEREFORE, THIS TABLE'S FIGURES FOR TOTAL DEFENDANTS DISPOSED OF ARE LESS THAN THE FIGURES IN TABLES D AND D-1 FOR TOTAL DEFENDANTS TERMINATED. THIS TABLE'S FIGURES FOR TOTAL DEFENDANTS EXCLUDE 703 TRANSFERS AND 1,282 TERMINATIONS FOR DEFENDANTS CHARGED IN MORE THAN ONE CASE DURING THIS YEAR. THIS TABLE INCLUDES DEFENDANTS IN ALL FELONY AND CLASS A MISDEMEANOR CASES, BUT INCLUDES ONLY THOSE PETTY OFFENSE DEFENDANTS WHOSE CASES HAVE BEEN ASSIGNED TO DISTRICT JUDGES.

* MEDIAN COMPUTED ONLY FOR 10 OR MORE DEFENDANTS

Table D-7. Defendants
U.S. District Courts—Criminal Defendants Disposed of, by Type of Disposition and District, During the 12-Month Period Ending September 30, 2002

Circuit and District		Total Defendants	Not Convicted				Convicted and Sentenced					Type of Sentence	
			Total	Dismissed	Acquitted by		Total	Plea of Guilty	Nolo Contendere	Convicted by		Fine Only	Imprisonment
					Court	Jury				Court	Jury		
	TOTAL	78,835	7,953	7,217	336	400	70,882	67,856	332	423	2,271	2,427	56,686
DC		436	48	46	-	2	388	369	-	1	18	-	300
	1ST	2,404	303	283	4	16	2,101	1,968	-	50	83	7	1,722
ME		230	13	11	-	2	217	208	-	2	7	3	175
MA		620	32	26	2	4	588	573	-	3	12	-	453
NH		154	19	16	-	3	135	127	-	1	7	2	100
RI		177	12	9	1	2	165	151	-	-	14	1	144
PR		1,223	227	221	1	5	996	909	-	44	43	1	850
	2ND	4,968	215	166	5	44	4,753	4,542	1	7	203	26	3,636
CT		367	23	20	1	2	344	329	-	-	15	1	236
NY,N		445	7	5	2	-	438	422	-	1	15	13	324
NY,E		1,700	64	50	-	14	1,636	1,587	1	2	46	3	1,321
NY,S		1,785	102	75	1	26	1,683	1,576	-	4	103	7	1,289
NY,W		483	11	9	-	2	472	448	-	-	24	2	336
VT		188	8	7	1	-	180	180	-	-	-	-	130
	3RD	3,419	331	307	10	14	3,088	2,958	1	5	124	14	2,407
DE		101	18	18	-	-	83	81	-	1	1	2	58
NJ		976	100	99	-	1	876	851	-	1	24	3	617
PA,E		1,055	48	36	3	9	1,007	947	-	1	59	6	794
PA,M		481	51	48	2	1	430	418	-	-	12	3	359
PA,W		406	53	52	-	1	353	338	1	1	13	-	248
VI		400	61	54	5	2	339	323	-	1	15	-	331

Table D-7. (September 30, 2002—Continued)

Circuit and District	Total Defendants	Not Convicted				Convicted and Sentenced					Type of Sentence	
				Acquitted by					Convicted by			
		Total	Dismissed	Court	Jury	Total	Plea of Guilty	Nolo Contendere	Court	Jury	Fine Only	Imprisonment
4TH	**8,937**	**1,618**	**1,540**	**42**	**36**	**7,319**	**6,922**	**2**	**115**	**280**	**839**	**4,832**
MD	1,171	340	332	4	4	831	788	1	5	37	127	477
NC,E	992	121	112	5	4	871	845	-	11	15	121	484
NC,M	504	38	33	1	4	466	429	-	1	36	1	424
NC,W	651	46	42	-	4	605	573	-	-	32	2	544
SC	1,256	184	178	3	3	1,072	1,042	-	1	29	6	816
VA,E	3,313	807	773	24	10	2,506	2,346	-	92	68	581	1,266
VA,W	468	24	16	4	4	444	406	-	2	36	1	353
WV,N	291	27	24	-	3	264	249	1	1	13	-	238
WV,S	291	31	30	1	-	260	244	-	2	14	-	230
5TH	**14,200**	**911**	**809**	**28**	**74**	**13,289**	**12,909**	**5**	**43**	**332**	**58**	**11,724**
LA,E	477	24	23	-	1	453	434	1	-	18	36	324
LA,M	146	31	29	-	2	115	106	-	-	9	-	82
LA,W	462	59	48	5	6	403	386	-	2	15	3	284
MS,N	188	13	11	-	2	175	170	-	-	5	-	138
MS,S	454	42	39	1	2	412	393	-	-	19	-	320
TX,N	1,244	110	93	5	12	1,134	1,090	-	-	44	8	912
TX,E	689	54	51	2	1	635	611	-	1	23	2	560
TX,S	5,070	282	257	2	23	4,788	4,668	-	19	101	6	4,405
TX,W	5,470	296	258	13	25	5,174	5,051	4	21	98	3	4,699
6TH	**5,612**	**583**	**540**	**11**	**32**	**5,029**	**4,792**	**5**	**29**	**203**	**116**	**3,903**
KY,E	536	57	49	1	7	479	462	-	-	17	-	387
KY,W	704	133	123	6	4	571	540	2	11	18	87	268
MI,E	876	96	87	1	8	780	723	-	8	49	3	614
MI,W	425	25	25	-	-	400	376	1	-	23	9	349
OH,N	930	49	46	-	3	881	850	1	3	27	5	702
OH,S	468	35	33	1	1	433	422	1	-	10	8	300
TN,E	699	52	50	1	1	647	619	-	3	25	4	592
TN,M	409	70	66	1	3	339	322	-	1	16	-	302
TN,W	565	66	61	-	5	499	478	-	3	18	-	389

Table D-7. (September 30, 2002—Continued)

Circuit and District	Total Defendants	Not Convicted				Convicted and Sentenced					Type of Sentence	
		Total	Dismissed	Acquitted by		Total	Plea of Guilty	Nolo Contendere	Convicted by		Fine Only	Imprisonment
				Court	Jury				Court	Jury		
7TH	**3,142**	**220**	**207**	**2**	**11**	**2,922**	**2,777**	**2**	**3**	**140**	**12**	**2,456**
IL,N	1,144	41	41	-	-	1,103	1,038	2	-	63	-	888
IL,C	519	83	83	-	-	436	426	-	-	10	7	336
IL,S	318	11	9	1	1	307	300	-	1	6	2	278
IN,N	461	38	29	1	8	423	391	-	-	32	-	376
IN,S	267	26	26	-	-	241	226	-	2	13	1	214
WI,E	298	15	13	-	2	283	270	-	-	13	-	247
WI,W	135	6	6	-	-	129	126	-	-	3	2	117
8TH	**4,264**	**300**	**258**	**8**	**34**	**3,964**	**3,772**	**4**	**12**	**176**	**55**	**3,300**
AR,E	296	36	33	1	2	260	238	-	-	22	1	206
AR,W	155	9	9	-	-	146	139	1	-	6	-	121
IA,N	387	21	12	3	6	366	337	-	2	27	1	335
IA,S	323	13	10	1	2	310	281	-	1	28	-	277
MN	465	36	34	-	2	429	402	-	2	25	3	376
MO,E	742	46	40	-	6	696	679	1	1	15	24	558
MO,W	721	39	36	-	3	682	670	-	2	10	11	569
NE	586	46	44	-	2	540	527	1	2	10	2	490
ND	197	11	10	-	1	186	176	1	-	9	2	129
SD	392	43	30	3	10	349	323	-	2	24	11	239
9TH	**17,020**	**1,798**	**1,735**	**21**	**42**	**15,222**	**14,915**	**8**	**31**	**268**	**412**	**12,641**
AK	214	27	27	-	-	187	166	-	5	16	-	134
AZ	4,103	206	204	-	2	3,897	3,868	1	2	26	19	3,347
CA,N	960	150	148	1	1	810	782	1	5	22	5	556
CA,E	1,042	129	127	-	2	913	902	-	-	11	7	747
CA,C	1,980	164	152	3	9	1,816	1,756	-	3	57	1	1,430
CA,S	3,940	189	183	4	2	3,751	3,713	1	3	34	2	3,559
HI	627	123	119	1	3	504	483	4	2	15	111	310
ID	265	40	37	-	3	225	211	-	5	9	2	173
MT	540	139	132	3	4	401	379	-	-	22	12	291
NV	740	86	74	2	10	654	638	-	1	15	-	553

Table D-7. (September 30, 2002—Continued)

Circuit and District	Total Defendants	Not Convicted				Convicted and Sentenced					Type of Sentence	
		Total	Dismissed	Acquitted by		Total	Plea of Guilty	Nolo Contendere	Convicted by		Fine Only	Imprisonment
				Court	Jury				Court	Jury		
9TH (Continued)												
WA,E	384	58	53	3	2	326	315	-	-	11	-	291
WA,W	1,340	373	371	2	-	967	952	-	1	14	253	580
GUAM	152	38	37	-	1	114	110	-	-	4	-	92
NMI	28	8	8	-	-	20	19	-	-	1	-	15
10TH	**5,615**	**756**	**735**	**7**	**14**	**4,859**	**4,530**	**224**	**5**	**100**	**250**	**3,820**
CO	720	77	70	2	5	643	626	2	1	14	37	482
KS	590	79	75	3	1	511	495	4	2	10	6	429
NM	2,289	240	235	1	4	2,049	2,027	-	-	22	3	1,909
OK,N	215	48	47	-	1	167	161	-	-	6	2	129
OK,E	98	13	12	-	1	85	84	-	-	1	-	63
OK,W	613	122	121	-	1	491	255	218	1	17	144	188
UT	939	167	166	-	1	772	755	-	1	16	57	495
WY	151	10	9	1	-	141	127	-	-	14	1	125
11TH	**8,818**	**870**	**591**	**198**	**81**	**7,948**	**7,402**	**80**	**122**	**344**	**638**	**5,945**
AL,N	661	104	97	2	5	557	535	-	3	19	22	417
AL,M	224	39	30	1	8	185	170	-	2	13	7	131
AL,S	349	21	20	-	1	328	314	-	2	12	2	267
FL,N	561	59	42	8	9	502	467	-	-	35	100	336
FL,M	1,533	55	41	3	11	1,478	1,390	1	7	80	5	1,275
FL,S	2,683	134	83	12	39	2,549	2,418	1	2	128	-	2,232
GA,N	1,114	107	102	2	3	1,007	926	30	16	35	72	732
GA,M	1,249	240	70	168	2	1,009	856	48	90	15	426	311
GA,S	444	111	106	2	3	333	326	-	-	7	4	244

NOTE: DEFENDANTS CHARGED IN TWO OR MORE CASES THAT WERE TERMINATED DURING THIS YEAR ARE REPORTED ONLY ONCE; THEREFORE, THIS TABLE'S FIGURES FOR TOTAL DEFENDANTS DISPOSED OF ARE LESS THAN THE FIGURES IN TABLES D AND D-1 FOR TOTAL DEFENDANTS TERMINATED. THIS TABLE'S FIGURES FOR TOTAL DEFENDANTS EXCLUDE 703 TRANSFERS AND 1,282 TERMINATIONS FOR DEFENDANTS CHARGED IN MORE THAN ONE CASE DURING THIS YEAR. THIS TABLE INCLUDES DEFENDANTS IN ALL FELONY AND CLASS A MISDEMEANOR CASES, BUT INCLUDES ONLY THOSE PETTY OFFENSE DEFENDANTS WHOSE CASES HAVE BEEN ASSIGNED TO DISTRICT JUDGES.

Table D-10. Defendants
U.S. District Courts—Median Time Intervals from Filing to Dispostion of Criminal Defendants Disposed of by Major Offense (Excluding Transfers) During the 12-Month Period Ending September 30, 2003

Nature of Offense	Total		Dismissed		Plea of Guilty		Court Trial		Jury Trial	
	Number	Median (In Months)	Number	Median (In Months)	Number	Median (In Months)	Number	Median (In Months)	Number	Median (In Months)
TOTAL	83,530	6.2	7,957	6.8	72,110	6.0	620	2.6	2,843	12.3
GENERAL OFFENSES										
HOMICIDE	247	9.9	24	11.6	192	9.2	2	-	29	17.0
MURDER—FIRST DEGREE	186	10.9	23	13.9	136	9.9	1	-	26	17.0
MURDER—SECOND DEGREE	21	6.6	-	-	19	8.0	-	-	2	-
MANSLAUGHTER	40	7.8	1	-	37	7.8	1	-	1	-
ROBBERY	1,499	7.2	59	8.2	1,367	7.0	9	-	64	11.3
BANK	1,445	7.2	57	7.5	1,318	7.0	9	-	61	11.4
POSTAL	28	7.1	1	-	25	7.1	-	-	2	-
OTHER	26	5.8	1	-	24	5.8	-	-	1	-
ASSAULT	786	5.7	168	3.0	560	6.0	17	6.8	41	7.8
BURGLARY	53	6.9	9	-	41	6.8	-	-	3	-
BANK	-	-	-	-	-	-	-	-	-	-
POSTAL	15	8.0	-	-	13	8.0	-	-	2	-
INTERSTATE SHIPMENTS	-	-	-	-	-	-	-	-	-	-
OTHER	38	6.2	9	-	28	6.2	-	-	1	-
LARCENY AND THEFT	3,211	5.6	754	3.6	2,353	5.7	19	2.0	85	13.9
BANK	234	5.7	9	-	220	5.6	-	-	5	-
POSTAL	510	6.4	26	5.8	476	6.3	1	-	7	-
INTERSTATE SHIPMENTS	314	12.6	44	13.7	233	11.2	1	-	36	14.7
OTHER U.S. PROPERTY	1,600	4.1	472	2.9	1,094	4.4	15	1.8	19	13.9
TRANSPORT, ETC., STOLEN PROP.	202	8.7	24	21.2	161	7.9	1	-	16	8.9
OTHER	351	4.8	179	3.3	169	5.9	1	-	2	-
EMBEZZLEMENT	1,038	5.6	81	5.1	927	5.5	5	-	25	9.8
BANK	431	5.1	33	3.6	394	5.1	-	-	4	-
POSTAL	259	5.4	19	3.5	232	5.4	-	-	8	-
OTHER	348	6.8	29	18.1	301	6.5	5	-	13	12.3

EXHIBIT B

SURVEY OF U.S. ATTORNEYS' OFFICES

RULE 29 ACQUITTALS FROM 10/1/99 INTO 2003[1]

Unless otherwise noted, in all cases the judgments of acquittal ended the case as to all defendants and all counts.

District	Total Cases	Pre Verdict Acquittal	Post Verdict Acquittal	Comments
M.D. Ala.	7	5*	2	*In one of these cases, two of the defendants were Rule 29ed. In another, three of the counts were Rule 29ed.
N.D. Ala.	6	6		
S.D. Ala.	0			
D. Ariz.	1		1	
C.D. Cal.	6	6*		*In four of these cases, some of the counts were Rule 29ed.
E.D. Cal.	1	1*		*One of the counts was dismissed. A case was entirely Rule 29ed before the verdict earlier in 1999.
S.D. Cal.	12	2	10	
D. Colo.	1	1		
D. Conn.	2	1	1	
D. Del.	?	?	?	Delaware assumes they have had Rule 29s, however, they are unsure due to lack of data.

[1] Returns for 2003 are incomplete.

Unless otherwise noted, in all cases the judgments of acquittal ended the case as to all defendants and all counts.				
M.D. Fla.	5	4*	1	*In one of these cases, one of the defendants was Rule 29ed.
N.D. Fla.	17	8*	9	*In one of these cases, two of the counts were Rule 29ed.
S.D. Fla.	5	3	2	
M.D. Ga.	3	1	2	
N.D. Ga.				
S.D. Ga.	0			
D. Guam, N. Mariana Islands	0			One case was completely Rule 29ed pre-verdict in 1998.
Hawaii	1	1*		*One of the counts was Rule 29ed.
N.D. Ill.	5	5*		*In four of the cases, some of the counts were Rule 29ed.
S.D. Ill.	1	1		
N.D. Ind.	2	2		
S.D. Ind.	0			
S.D. Iowa	4	1	3*	*In one of these cases, some of the counts were Rule 29ed.
D. Kan.	3	3		
E.D. Ky.	1	1		
W.D. Ky.	3	3		
E.D. La.	1		1	

Unless otherwise noted, in all cases the judgments of acquittal ended the case as to all defendants and all counts.				
M.D. La.	0			
W.D. La.	2	2*		*In one of these cases, three defendants were Rule 29ed pre-verdict, and the other two defendants were Rule 29ed after guilty verdicts.
D. Me.	3	3		
D. Mass.	9	9*		*In three of these cases, some of the counts were Rule 29ed. In addition, 9 cases were wholly or partially Rule 29ed in 1995-99, and 7 cases were wholly or partially Rule 29ed in 1988-94 -- all before verdict.
E.D. Mich.	7	2	5	
W.D. Mich.	3	3*		*In one case, one of the defendants was Rule29ed. In another case, one of the counts was Rule 29ed.
D. Minn.	1		1	
N.D. Miss.	2	2*		*In both (related) cases, one of the counts was Rule 29ed.
S.D. Miss.	2	2		
E.D. Mo.	1	0	1	*Four pre-1999 cases had some of the counts Rule 29ed.
W.D. Mo.	2	2		
D. Mont.	7	6*	1	*In five of these cases, some of the counts were Rule 29ed.
D. Neb.	1		1*	*One of the counts was Rule 29ed.
D. Nev.	1	1		

Unless otherwise noted, in all cases the judgments of acquittal ended the case as to all defendants and all counts.				
D.N.H.	0	0		Govt. dismissed one case after the judge hinted he would Rule 29 it.
D.N.J.	9	8*	1**	*In one of these cases, two defendants were Rule 29ed, and some of the counts were Rule 29ed against the remaining defendant; in four of these cases, some of the counts were Rule 29ed. **Two defendants were Rule 29ed, and the principal count against the three others was Rule 29ed.
D.N.M.	10	6	4	
N.D.N.Y.	6	2*	4**	*One case was a partial Rule 29. **One case was a partial Rule 29.
W.D.N.Y.	5	4*	1	*In two cases, some of the defendants and counts were Rule 29ed; in the other two cases, some of the counts were Rule 29ed.
S.D.N.Y.	10	8	2	
E.D.N.Y.	9	9		
E.D.N.C	5	2	3	
M.D.N.C.	2	2		
W.D.N.C.	8	6	2	
D.N.D.	1	1*		*One of seven defendants was Rule 29ed.
N.D. Ohio	1	1*		*One of the counts was Rule 29ed.
S.D. Ohio	2	2*		*One of the counts was Rule 29ed.
E.D. Okl.	5	4	1	

Unless otherwise noted, in all cases the judgments of acquittal ended the case as to all defendants and all counts.				
N.D. Okl.	0			
W.D. Okl.	1	1		
D. Or.	0			
E.D. Pa.	0			
M.D. Pa.	3	3*		*In these cases, some of the counts were Rule 29ed.
W.D. Pa.	1	1		
D.P.R.	3	2	1	
D.R.I.	2	2		
D.S.C.	4	4*		*In three of these cases, one or more of the counts were Rule 29ed.
D.S.D.	1	1		
M.D. Tenn.	0			
W.D. Tenn	0			
E.D. Tex.	5	4*	1	*In three of these cases, some of the counts were Rule 29ed.
N.D. Tex.	4	4*		*In one of these cases, one of the counts was Rule 29ed.
S.D. Tex.	2	2		
W.D. Tex.	5	1	4*	*In one of these cases, one of the counts was dismissed. On another, it is unclear whether the Rule 29 was pre- or post-verdict.
D. Utah	1	1		

Unless otherwise noted, in all cases the judgments of acquittal ended the case as to all defendants and all counts.				
D. Vt.	3	1	2*	*In one of these cases, one of the defendants was Rule 29ed; in the other, some of the counts were Rule 29ed.
E.D. Va.	5	2	3	
W.D. Va.	1	1		
D.V.I.	4	4		
E.D. Wash.	3	3*		*In these cases, some of the counts were Rule 29ed.
W.D. Wash.	0			
N.D. W.Va.	0			
S.D. W.Va.	6	5*	1	*In four of the cases, some of the counts were Rule 29ed.
E.D. Wis.	1		1*	*One of the counts was Rule 29ed.
W.D. Wis.	0			
D. Wyo.	0			

last update: 9/12/03

EXHIBIT C

Post-Verdict Rule 29s Reported to Criminal Appellate

2000 TABLE

APPEALS

Date	Case Name	District	Judge	Decision Upon Appeal
Oct. 29, 1999	US v. Dwight D. Sundby	D.N.D.	Conmy	Reversed 221 F.3d 1345 (8th Cir. 2000) (Table)
Dec. 7, 1999	US v. Michael Abbell and William Moran	S.D. Fla.	Hoeveler	Reversed 271 F.3d 1286 (11th Cir. 2001)
Jan 4, 2000	US v. Tony Johnson	W.D. TN	Todd	Reversed 39 Fed. Appx. 114 (6th Cir. 2002)
Jan 6, 2000	US v. Ronald Dean Deucher	D.N.M.	Vazquez	Reversed 3 Fed. Appx. 889 (10th Cir. 2000)
Jan. 21, 2000	US v. Eddie Tosado	M.D. Fla.	Sharpe	Affirmed 226 F.3d 649 (11th Cir. 2000) (Table)
Jan. 26, 2000	US v. Harline DeCordova Young No. 00-11137	M.D. Fla.	Aldrich	Affirmed in part, Reversed in part 252 F.3d 439 (11th Cir. 2001) (Table)
Jan. 27, 2000	US v. Daniel Bologna	N.D.N.Y.	Scullin, Jr.	Reversed 58 Fed. Appx. 865 (2d Cir. 2003)
Apr. 27, 2000	US v. Anthony J. Thompson	E.D. Missouri	Shaw	Reversed 285 F.3d 731 (8th Cir. 2002)
Sept. 18, 2000	US v. Tina Nichols	E.D.N.C.	Britt	Vacated 15 Fed.Appx. 80 (4th Cir. 2001)
Oct. 3, 2000	US v. Clifford Timmons	N.D. GA	Hunt	Reversed 283 F. 3d 1246 (11th Cir. 2002)

NO APPEALS

Date	Case Name	District	Judge
Sep. 21, 1999	US v. Jeffrey Holmes Ayers	N.D. Ca	Ware

Jan. 3, 2000	**US v. Thomas O'Neil**	**E.D. Mich**	**Cleland**
Jan. 21, 2000	**US v. Mark Saripkin**	**W.D. Tenn.**	**Julia Smith Gibbons**
Feb. 11, 2000	**US v. Jose Madera-Melendez**	**D.P.R.**	**Fuste**

2000 FACTS

APPEALS

United States v. Dwight D. Sundby (D.N.D. October 29, 1999)
The judge granted post-verdict motion of acquittal on two counts: conspiracy to possess with intent to distribute methamphetamine and possession with intent to distribute methamphetamine. The judge refused to draw adverse inferences from the fact that marked baggies were left at the defendant's house and there were corroborative entries in the defendant's drug ledger. Reversed.

United States v. Michael Abbell and William Moran (S.D. Fla. Dec. 7, 1999)
District court granted judgment of acquittal on a RICO conspiracy charge arising out of the defendant's participation in efforts by the Cali drug cartel to obstruct justice by seeing to it that the cartel members arrested and imprisoned in the U.S. remained silent about the cartel's activities. The court held that the defendants' inappropriate conduct did not demonstrate a direct link to the drug conspiracies. Reversed.

United States v. Tony Johnson (W.D. Tenn. Jan. 4, 2000)
District court granted judgment of acquittal on firearms counts, 18 U.S.C. 924c and 922(g). The court found no evidence that the defendant used or carried a firearm, and further ruled that his possession of a firearm was not related to a drug trafficking crime. The government appealed only on the judgment relating to the Section 924 count. Reversed.

United States v. Ronald Dean Deucher (D.N.M. Jan 6, 2000)
The judge granted the motion of acquittal after verdict convicting the defendant for possession with intent to distribute 50kg or more of marijuana and conspiracy to possess with the intent to distribute marijuana. The court found the following evidence insufficient to support a conviction: the defendant's nervousness at the border checkpoint, referral to cargo as UPS shipment, the fact that the trailer doors weren't secure even though he told the border agent he checked them, and the defendant's trial testimony denying guilt. Affirmed.

United States v. Eddie Tosado (M.D. Fla. Jan. 21, 2000)
The judge granted a judgment of acquittal on the charge of conspiracy to possess heroin with the intent to distribute. The judge found that there was insufficient evidence to establish an intent to distribute the heroin. The defendant possessed 50 grams of heroin, but because he bought that amount over a five month period, the judge contended that the defendant could have bought the heroin for personal use. Affirmed.

United States v. Harline DeCordova Young (M.D. Fla. Jan. 26, 2000)
The judge granted the motion for judgment of acquittal of the defendant, who was charged with importing and possessing cocaine, in violation of 21 U.S.C. 952 and 841(a)(1).

The judge said that traces of cocaine residue in the defendant's briefcase were inexplicable and could in no way be connected to the sealed drugs found in the airplane lavatory trash bin. The judge also found it impossible that the defendant could have gotten the drugs through airport security x-rays to place them in the lavatory. Affirmed in part, Reversed in part.

United States v. Daniel Bologna (N.D.N.Y Jan. 27, 2000)

The judge granted post-verdict motion for judgment of acquittal with respect to two counts involving false Reports of Investigation written by the defendant, a United States Customs Special Agent. Bologna allegedly filed false dates of convictions to justify the hundreds of hours he reported working on the cases. The court found that while Bologna reported false dates of conviction, there was insufficient evidence that he knew the dates were false and that he knowingly reported false dates. Reversed.

United States v. Anthony J. Thompson (E.D. Missouri Apr. 27, 2000)

The court granted a post-verdict motion of acquittal on a charge of possession of crack cocaine with intent to distribute and instead convicted the defendant of the lesser-included offense of simple possession of more than five grams of crack cocaine. The judge found there was insufficient evidence of the defendant's intent to distribute, even though the amount of cocaine was consistent with distribution and not personal use. Reversed.

United States v. Tina Nichols (E.D.N.C. Sept. 18, 2000)

Judge granted the motion for judgment of acquittal on the charge of bank fraud on the grounds that the evidence did not establish that the defendant misrepresented or concealed a material fact from the bank. The defendant oversaw the accounts for a partnership that built a shopping center in North Carolina. She deposited loan checks into her own account without the contractor's endorsement. The court found that depositing a check without more did not involve representation. Vacated.

United States v. Clifford Timmons (N.D. Ga. Oct. 3, 2000)

The district court granted a motion for judgment of acquittal on a firearms charge, finding the evidence insufficient to support the jury's finding that the defendant possessed a firearm "in furtherance of" a drug trafficking crime. Reversed.

NO APPEALS

United States v. Jeffrey Holmes Ayers (N.D. Ca Sep. 21, 1999)

District court granted post-verdict motion for judgment of acquittal on the ground that evidence that defendant possessed a shotgun and ammunition for 60 to 90 seconds was insufficient to support conviction for possession of firearms.

United States v. Thomas O'Neil (E.D. Mich. January 3, 2000)

The Rule 29 motion was granted 16 months after it was made because the evidence was insufficient to show that O'Neil (who was being prosecuted for dealing in explosive

materials without a license) had sold "explosive materials" within the definitions of 18 U.S.C. 841(c) and (d).

<u>United States v. Mark Saripkin</u> **(W.D. Tenn. Jan. 21, 2000)**

Judge granted motion on Count 1: conspiracy to obstruct justice, to kill an FBI agent, and to kill a witness in violation of 18 U.S.C. 371. The court found that the evidence did not demonstrate that the defendant was part of the conspiracy, even though tapes of conversations appeared to show otherwise. The acquittal was entered after the jury was unable to reach a verdict and the court's ruling was not appealable.

<u>United States v. Jose Madera-Melendez</u> **(D.P.R. Feb. 11, 2000)**

After a jury found the defendant guilty of conspiracy to commit murder during a drug offense, the judge *sua sponte* reconsidered a Rule 29 motion made during trial. He concluded that there was not "even a scintilla of evidence" that the defendant joined the conspiracy, because, according to the judge, there was no admissible evidence that the defendant was part of the drug organization and the defendant was merely present at the murder scene.

2001 TABLE

APPEALS

Date	Case Name	District	Judge	Decision Upon Appeal
7/7/00	US v. Deville No. 98-60049-15	W.D. La.	Haik	Reversed 278 F.3d 500 (5th Cir. 2002)
7/13/00	US v. Moran No. 96-10335-RCL	D. Mass.	Lindsay	Reversed 312 F.3d 480 (1st Cir. 2002)
9/29/00	US v. Nance No. 3:99-CR-144	E.D. Tenn.	Jordan	Affirmed 40 Fed. Appx. 59 (6th Cir. 2002)
3/7/01	US v. Ares No. 98-943-Cr-Gold	S.D. Fla.	Gold	Affirmed 34 Fed.Appx. 388 (11th Cir. 2002)
4/4/01	US v. Oberhauser Crim. No. 99-20(07)	D. Minn.	Frank	Reversed 284 F.3d 827 (8th Cir. 2002)
4/18/01	US v. Reyes No. 01-1258	S.D.N.Y. D.N	Patterson	Reversed 302 F.3d 48 (2d Cir. 2002)
4/28/01	US v. Smith et al. No. 01-2605	D.N.J.	Lifland	Reversed 294 F.3d 473 (3d Cir. 2002)
6/26/01	US v. Donaldson No. 00-CR-20067-BC	E.D. Mich.	Tarnow	Reversed 52 Fed. Appx. 700 (6th Cir. 2002)
7/2/01	US v. Hernandez-Bautista No. P-01-CR-103	W.D. Tex.	Furgeson	Affirmed 293 F.3d 845 (5th Cir. 2002)
8/7/01	US v. Canine No. CR 01-43	S.D. Iowa	Vietor	Reversed 30 Fed. Appx. 678 (8th Cir. 2002)
8/14/01	US v. Hernandez No. 01-57	S.D. Iowa	Vietor	Affirmed 301 F.3d 886 (8th Cir. 2002)
8/31/01	US v. Bruce Brown	E.D.N.C.	Howard	Reversed 52 Fed. Appx. 612 (4th Cir. 2002)
9/14/01	US v. Chang Qin Zheng D.C. No. 1-00-CR-338 (MMP)	N.D. Fla.	Paul	Reversed 306 F.3d 1080 (11th Cir. 2002)
9/25/01	US v. Lusk No. CR 00-564-RE	D. Oregon	Redden	Affirmed 41 Fed. Appx. 955 (9th Cir. 2002)
4/13/02	US v. As-Sadiq No. 5:00-CR-176-1F(3)	E.D. N.C.	Fox	Affirmed 58 Fed. Appx. 952 (4th Cir. 2003)

NO APPEALS

Date	Case Name	District	Judge
1/23/01	US v. Ayala-Torres No. CR00-5585R JB	W.D. Wa.	Burgess

4/18/01	US v. Sanchez No. 992(B)-DDP	C.D. Cal.	Pregerson
7/13/01	US v. de Saad No. CR 98-504	C.D. Cal.	Friedman
8/17/01	US v. Sandoval- Ahumada CR 00-987-FMC	C.D. Cal.	?
10/15/01	US v. Sowada No. 4:01cr2(3)	E.D. Tex.	Brown

2001 FACTS

APPEALS

United States v. Deville, (W.D. La. July 7, 2000)

The defendant, a former chief of police, was convicted of, *inter alia*, one count of possessing and carrying a firearm during, in relation to, and in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1)(A)(i), for keeping his semi-automatic hand gun in a nearby overnight bag while transporting 62 pounds of marijuana from Texas to Louisiana. The district court entered a judgment of acquittal on the § 924(c) count, expressing concern about the lack of corroboration regarding certain pieces of evidence. Reversed.

United States v. Moran, (D. Mass. July 13, 2000)

Defendants, corporate insiders of the First American Bank for Savings, were convicted of one count of conspiracy to commit bank fraud, in violation of 18 U.S.C. § 371, and two counts of bank fraud, in violation of 18 U.S.C. § 1344. The district court, one year after the conviction, entered a judgment of acquittal on all counts for both defendants, arguing that one witness's testimony should be discounted due to his memory problems stemming from alcoholism, and that the government failed to prove that one of the defendants had knowingly acted to defraud the bank. Reversed.

United States v. Nance, (E.D. Tenn. Sept. 29, 2000)

The defendant was convicted of, *inter alia*, possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1)(A), for firearms found in the defendant's car when the defendant was confronted, arrested, and searched in his apartment; the search of the defendant revealed drugs and related paraphernalia. The district court granted defendant's motion for acquittal on the § 924(c) charge because the court found that the gun was not on the defendant or within his reach, and that there were no drugs in the car; therefore, the defendant did not use or carry the firearm in furtherance of a drug trafficking violation within the meaning of the statute. Affirmed.

United States v. Ares, (S.D. Fla. Mar. 7, 2001)

The defendant was convicted of obstruction of justice, in violation of 18 U.S.C. § 1503, for giving false statements in response to a request by the Probation Office regarding the employment status of a former employee who was being sentenced for an unrelated crime. The district court granted a post-verdict judgment of acquittal, arguing that (1) there was insufficient proof that the defendant knew of a pending judicial proceeding; (2) there was insufficient evidence that she "corruptly" intended to impede it; (3) there was no evidence that the defendant's misrepresentations had the "natural and probable effect" of impeding the due administration of justice in the sentencing hearing. Affirmed.

United States v. Oberhauser, D. Minn. Apr. 4, 2001

The defendant was convicted of two counts of money laundering in violation of 18 U.S.C § 1956(a)(1)(A)(i) for setting up fraudulent trust accounts. The district court entered

a judgment of acquittal, finding primarily that there was insufficient evidence to show that the defendant was aware that the operation was fraudulent at the time of the specific transactions on which he was convicted. Reversed.

United States v. Reyes, (S.D.N.Y. Apr. 18, 2001)

The defendant was convicted of conspiring to transport stolen property in interstate commerce, in violation of 18 U.S.C. §§ 371 and 2314, for referring customers to a neighboring business that sold stolen automobile airbags. The district court entered a judgment of acquittal, finding that the evidence was insufficient to show that the defendant "had the specific intent to become a knowing and willing member of the . . . conspiracy to deal in stolen airbags." Reversed.

United States v. Smith, (D.N.J. April 28, 2001)

Five police officers were convicted under 18 U.S.C. § 241 of conspiracy to violate the civil rights of an arrestee they wrongly suspected of murder, by beating and pepper-spraying him, which led to his death. The district court entered a judgment of acquittal for all defendants (freeing two entirely) on the conspiracy count, misinterpreting the law of conspiracy by concluding that concerted action could not be inferred if there was any other possible inference, and by refusing to consider post-death conspiratorial acts. Reversed.

United States v. Donaldson, (E.D. Mich. June 26, 2001)

The defendant was convicted of bank robbery, in violation of 18 U.S.C. § 2113(a). The district court entered a judgment of acquittal, relying on the government's failure to produce several pieces of evidence as well as a number of other factors. Reversed.

United States v. Hernandez-Bautista, (W.D. Tex. July 2, 2001)

The defendants were convicted of possessing between 100 and 1000 kilograms of marijuana with intent to distribute, in violation of 21 U.S.C. § 841(a)(1). The district court entered a judgment of acquittal and conditionally granted defendants' motion for a new trial, arguing that footprints found near abandoned bags of marijuana were not similar enough to the defendants' to establish anything more than proximity to the marijuana. Affirmed.

United States v. Canine, (N.D. Iowa Aug. 7, 2001)

The defendant was convicted of bankruptcy fraud, in violation of 18 U.S.C. § 157, for knowingly and intentionally failing to report funds that she and her husband had received as an inheritance from his husband's mother's estate. The district court entered a judgment of acquittal, arguing that the defendant had no duty to report the assets from her husband's mother's estate, and that there was no evidence that the defendant denied receiving her husband's inheritance. Reversed.

United States v. Hernandez, (S.D. Iowa Aug. 14, 2001)

The defendant was convicted of aiding and abetting the possession of methamphetamine for purposes of distribution. The district court entered a judgment of acquittal; among other grounds, although it found the evidence sufficient to demonstrate

that the defendant knew that her codefendants possessed with the intent to distribute, it concluded that knowledge was insufficient to give rise to criminal liability for aiding and abetting. Affirmed.

United States v. Brown, (E.D. N.C. Aug. 31, 2001)
The district court granted a motion for judgment of acquittal for bankruptcy fraud, finding that the jury's acquittal of a codefendant showed that the evidence was insufficient to support the defendant's conviction. Reversed.

United States v. Chang Qin Zheng, D.C. No. 1-00-CR-338 (MMP) (N.D. Fla. Sept. 14, 2001)
Defendants were convicted of conspiring to conceal or harbor illegal aliens for the purpose of commercial advantage and private financial gain, in violation of 8 U.S.C. § 1324 (a)(1)(A)(iii), for hiring and housing several illegal aliens. The district court entered a judgment of acquittal on all counts for both defendants, concluding that, although the defendants did harbor illegal aliens, they did so primarily in order to give the aliens shelter and hence were not harboring them "for commercial advantage or private financial gain" under the meaning of the statute. Reversed.

United States v. Lusk, No. CR 00-564-RE (D. Oregon Sept. 25, 2001)
In his first trial, the defendant was convicted of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g). The district court denied defendant's motion for a judgment of acquittal but granted his motion for a new trial. In his second trial, the defendant was again convicted. The district court granted defendant's motion for a judgment of acquittal and, in the event the judgment of acquittal were to be vacated or reversed, granted defendant's motion for a new trial. The court found the evidence insufficient in the second trial despite finding the evidence sufficient in the first trial, because several pieces of evidence used in the first trial had been excluded or weakened. Affirmed.

United States v. As-Sadiq, No. 5:00-CR-176-1F(3) (E.D. N.C. Apr. 13, 2001)
The defendant was convicted of, *inter alia*, aiding and abetting the use of a firearm during a crime of violence, in violation of 18 U.S.C. §§ 2 and 924(c). A shotgun was found in his apartment after he "cased" a bank for his co-felons; and he was present at (but did not participate in) the bank robbery itself, during which a firearm was brandished. The district court granted a judgment of acquittal, finding that the bank robbery was "a separate and distinct crime" and that "you have no activity on that particular day that in any way indicates that Mr. As-Sadiq assisted in the obtaining, using, carrying, brandishing, or whatever, the gun." Affirmed.

NO APPEALS

United States v. Ayala-Torres, No. CR00-5585R JB (W.D. Wa. Jan. 23, 2001)
The defendant was convicted of attempted manufacture of metamphetamine, based on the defendant's physical presence in a mobile home where the drug was manufactured,

the presence of his identity card in the mobile home, and his fingerprints on several methamphetamine precursors and paraphernalia. The district court granted a post-verdict judgment of acquittal, arguing that "mere presence at a methamphetamine lab, even if supplemented by a poor or incredible explanation for that presence, is an insufficient basis for an inference, beyond a reasonable doubt, of intent to manufacture."

United States v. Sanchez, No. 992(B)-DDP (C.D. Cal. Apr. 18, 2001)

The defendant was convicted of conspiring to possess cocaine with the intent to distribute, in violation of 21 U.S.C. § 846, for allowing his brother to use the defendant's residence for drug dealing. After finding that it should have excluded the statements of defendant's coconspirators, the district court granted defendant's motion for a judgment of acquittal because the remaining evidence was insufficient to show that the defendant did anything to further the conspiracy. However, the district court subsequently granted a new trial motion as well on several different grounds, including its conclusion that the evidence heavily preponderated against a verdict.

United States v. de Saad, No. CR 98-504 (C.D. Cal. July 13, 2001)

The defendant, a high-level bank executive, was convicted of one count of conspiring to launder monetary instruments, in violation of 18 U.S.C. § 1956(h), and ten counts of aiding and abetting money laundering, in violation of 18 U.S.C. § 1956(a)(3)(B), after agreeing during a sting operation to move large amounts of money that she was told were derived from narcotics trafficking. The district court entered a judgment of acquittal, arguing that the evidence was insufficient to prove that the defendant actually thought, from the sting operators' statements, that she was managing drug proceeds.

United States v. Sandoval-Ahumada, CR 00-987-FMC (C.D. Cal. Aug. 17, 2001)

The defendant was convicted of, *inter alia*, hostage taking, in violation of 18 U.S.C. § 1203, for participating in the detention of several aliens after they failed to pay the defendant and her codefendants their smuggling fee. The district court entered a judgment of acquittal on the hostage-taking count, arguing that it was not foreseeable that the smuggling venture would involve the taking of hostages, and that the evidence was insufficient to show that the defendant aided and abetted her codefendants.

United States v. Sowada, No. 4:01cr2(3) (E.D. Tex. Oct. 15, 2001)

The defendant was convicted of marketing in motor vehicle parts with altered vehicle identification numbers and trafficking in motor vehicle parts with obliterated identification numbers, in violation of 18 U.S.C. § 2321, and conspiracy to commit money laundering, in violation of 18 U.S.C. § 1956(h). The district court entered a judgment of acquittal on the money laundering count, finding the evidence insufficient to prove that the illegal funds generated were involved in the financial transactions that formed the basis for the charge.

2002 TABLE

APPEALS

Date	Case Name	District	Judge	Decision Upon Appeal
9/24/01	US v. Alan Mikell and Christopher Grisel	E.D. Mich.	Cleland	None so far
10/19/01	US v. Jack Carl Velte	S.D. Ca.	Breyer	Reversed 331 F.3d 673 (9th Cir. 2003)
1/3/02	US v. Virgil Brown and James Yazzie	D.N.M.	Parker	Reversed 50 Fed. Appx. 970 (10th Cir. 2002)
2/13/02	US v. Jerome Stack No. 00-CR-585	N.D. Ill.	Castillo	Affirmed 2003 WL 21418411 (7th Cir. 2003)
2/25/02	US v. Santos Iglesias Hernandez	D.N.M.	Vasquez	Reversed 327 F.3d 1110 (10th Cir. 2003)
3/22/02	US v. Herbert Pierre-Louis	S.D. Fla.	Gold	Affirmed 54 Fed. Appx. 691 (11th Cir. 2002)
3/22/02	US v. Lenertz No. 0:99-21	D.S.C.	Perry	Reversed 63 Fed. Appx. 704 (4th Cir. 2003)
4/5/02	US v. Charles Jackson	W.D.N.Y.	Larimer	Reversed 335 F.3d 170 (2nd Cir. 2003)
3/27/02	US v. Kerry Baker No. 8:01CR261	D. Neb.	Bataillon	None so far
5/7/02	US v. William Merlino Crim. No. 99-10098-RGS	D. Mass.	Stearns	None so far
6/5/02	US v. Stefan Brodie Cr. No. 00-629	E.D. Pa.	McLaughlin	None so far
8/22/02	US v. Alvarez & Gonzalez No. 5:0222-CR-86-H-3	E.D.N.C.	Howard	None so far
9/9/02	US v. Reginald Shelley No. CR-02-0298-W	N.D. Ala.	Clemon	None so far
9/26/02	US v. Alan Hammond No. 3-02-CR-006	N.D. Fla.	Vinson	None so far
10/16/02	US v. Gupta No. 98-6118-CR	S.D. Fla.	Ryskamp	None so far

NO APPEALS

Date	Case Name	District	Judge
11/7/01	US v. Cortez-Montano, et al.	W.D. La.	Trimble
1/7/02	US v. Anna Martinez	S.D. Iowa	Longstaff
1/30/02	US v. Royston	W.D. Va.	Turk

2/13/02	**US v. Victor Piuneda**	**W.D. Va.**	**Turk**
2/27/02	**US v. John Miller, Pamela Joyce, and John Latourette**	**E.D. Pa.**	**Buckwalte r**
5/7/02	**US v. Brooke Jones** **Crim. No. CR 01-36-H-DWM**	**D. Mont.**	**Molloy**
7/18/02	**US v. Rodgers** **No. 3-02-CR-006 RV**	**N.D. Fla.**	**Vinson**
8/28/02	**US v. Stanley Sims** **CR No. 00-193-MV**	**D.N.M.**	**Vasquez**

2002 FACTS

APPEALS

United States v. Alan Mikell and Christopher Grisel (E.D. Mich. Sept. 24, 2001)

Judge granted the defendants' post-verdict motion for judgment of acquittal on seven charges (a conspiracy count and six counts of wire fraud). The court found that the evidence did not establish that the defendant's scheme to defraud deprived a large milk cooperative (NFO) of any money or property because NFO's security interest in another company's (RPC) inventory did not have any value (because two other creditors filed their financing statements first and were owed money in excess of RPC's inventory). Pending.

United States v. Jack Carl Velte (S.D. Ca. Oct. 19, 2001)

Judge granted the defendant's post-verdict motion for judgment of acquittal on the charge of willfully and without authority setting on fire and burning down 300 acres in Cleveland National Forest. The judge found insufficient evidence that the defendant had no authority to set the fire. The defendant had been smoking a cigarette, which was permitted by forest regulations. The judge contended that the fact that an authorized fire spread does not lead to the conclusion that a fire was started without authority. Reversed.

United States v. Virgil Brown and James Yazzie (D.N.M. Jan. 3, 2002)

Judge granted the defendant's post-verdict motion for judgment of acquittal on the charge of assault resulting in serious bodily injury. The judge found that there was insufficient evidence of causation. The defendant testified that he had been knocked down and found that his leg was broken when he tried to get up. The judge said that this story did not adequately explain the seriousness of the injury, and common experience suggests that some aggravating factor must have caused the severity of the injury. Reversed.

United States v. Jerome Stack, No. 00-CR-585 (N.D. Ill. Feb. 13, 2002)

The defendant was convicted of, *inter alia*, two counts of theft of funds, in violation of 18 U.S.C. § 666, for his involvement in a long-running public corruption scheme with the mayor and city prosecutor in Calumet City, Illinois. The district court entered a judgment of acquittal on these two counts, reasoning that each count required a minimum jurisdictional amount of $5,000 for each year, and that the evidence did not support the Government's contention that this jurisdictional amount was satisfied. Affirmed.

United States v. Santos Iglesias Hernandez (D.N.M. Feb. 25, 2002)

Judge granted the defendant's post-verdict motion for judgment of acquittal on the charge of transporting an illegal alien in furtherance of the alien's presence in the United States. The judge held that there was insufficient evidence to prove that the defendant willfully acted in furtherance of the alien's violation of the law. The evidence showed that 15 illegal aliens were found in the sleeper compartment of the tractor cab, but the judge held that there was no evidence to demonstrate the defendant's intent/willfulness. Reversed.

<u>United States v. Herbert Pierre-Louis</u> (S.D. Fla. Mar. 22, 2002)

Judge granted the defendant's post-verdict motion for judgment of acquittal on two charges of causing the transmission of a program or code with the intention of causing damage to a protected computer, the pre-USA PATRIOT Act version of the Computer Fraud and Abuse Act. The district court found that the statutory definition of "loss" did not include "economic damages" and does not support a conclusion that "lost profits" or "loss revenue" was within the statutory definition. Affirmed.

<u>United States v. Lenertz</u>, (D.S.C. Mar. 22, 2002)

The defendant was convicted of three counts of wire fraud, in violation of 18 U.S.C. § 1343, for devising a scheme to defraud individuals into investing in the development of a resort project in the Bahamas. After defense counsel argued that the evidence was insufficient to prove that those who had actually wired the funds in question relied on the defendant's representations, the district court entered a judgment of acquittal without explaining its decision. Reversed.

<u>United States v. Jackson</u> (W.D. N.Y. April 5, 2002)

The defendant was convicted of conspiracy to import five or more kilograms of cocaine. The district court granted a motion for judgment of acquittal on that charge, instead finding that the defendant was guilty only of the lesser crime of conspiracy to import 500 grams to five kilos. Reversed.

<u>United States v. Kerry Baker</u>, No. 8:01CR261 (D. Neb. Mar. 27, 2002)

The defendant was convicted of, *inter alia*, conspiring to distribute crack cocaine. The district court entered a judgment of acquittal on the conspiracy count, finding that there was no physical evidence indicating that the defendant was involved in a conspiracy to distribute crack cocaine rather than powder cocaine, and that there was no credible testimony establishing defendant's participation in the crack conspiracy. Pending.

<u>United States v. William Merlino</u>, Crim. No. 99-10098-RGS (D. Mass. May 7, 2002)

The defendant was convicted of conspiracy and attempt to violate the Hobbs Act, 18 U.S.C. § 1951, and two counts of carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c), for being the driver and lookout in a scheme to rob an armored car facility. The district court entered a judgment of acquittal, finding the informant witness's testimony was "too slender a reed to support the mandatory thirty-year consecutive sentence" that was required under the § 924(c) charge. Pending.

<u>United States v. Stefan Brodie</u>, Cr. No. 00-629 (E.D. Pa. June 5, 2002)

The defendant, the president and CEO of Bro-Tech Corp., was convicted of conspiracy to make illegal sales to Cuba, in violation of 50 U.S.C. § 5(b) and 16, and 31 C.F.R. § 515.201(b), for selling goods to Cuba through the United Kingdom. The district court entered a judgment of acquittal, finding the evidence insufficient to conclude that the defendant knew that sales to Cuba through the U.K. violated the law during the time when the relevant sales were made. Pending.

United States v. Alvarez & Gonzalez, No. 5:0222-CR-86-H-3 (E.D.N.C Aug. 22, 2002)

Defendants were indicted for conspiracy to distribute crack cocaine and possession with intent to sell; defendant Alvarez was further charged with carrying a firearm during a drug conspiracy. The jury deadlocked and the court declared a mistrial. The defendants made a motion for judgment of acquittal; the district court said it was granting the motion, entered an order captioned "Judgment of Acquittal," but in the order seemed to rely on factors other than sufficiency of the evidence (though there were also hints that the district court thought the evidence insufficient). On appeal, the Government will argue that the judgment of acquittal should properly be considered a dismissal of an indictment. Pending.

United States v. Reginald Shelley, No. CR-02-0298-W (N.D. Ala. Sept. 9, 2002)

The defendant was convicted of being a felon in possession, in violation of 18 U.S.C. § 922(g)(1). Before trial, the district court granted the defendant's motion to bar the government from introducing evidence about the marijuana found next to the defendant's gun in the car. During cross-examination of the defendant, the government asked whether there was "something else" under the front seat near the gun. Defense counsel objected and moved for a mistrial. The court granted defense counsel's motion; then, three days later, the court entered an order labeled "judgment of acquittal" on the ground that it was sanctioning the government's misconduct. Pending.

United States v. Alan Hammond, No. 3-02-CR-006 (N.D. Fla. Sept. 26, 2002)

The defendant was convicted of one count of making an unregistered firearm and one count of possessing an unregistered firearm, in violation of 26 U.S.C. § 5861(d) and (f), for manufacturing a 13"-long cardboard tube with a fuse containing nine ounces of black powder and smokeless gunpowder. The district court entered a judgment of acquittal on the ground that the evidence was insufficient to show that the tube was a destructive device within the meaning of § 5864(f) because it was almost equivalent to dynamite (which is not considered a destructive device) and it was doubtful whether the device would explode. Pending.

United States v. Gupta, No. 98-6118-CR (S.D. Fla. Oct. 16, 2002)

Defendants were convicted of conspiracy to submit false claims, in violation of 18 U.S.C. § 286, and mail fraud, in violation of 18 U.S.C. § 1341, for overbilling and otherwise deceiving Medicare. A little under three years after the guilty verdict, after several motions by the defendants, the district court entered a judgment of acquittal. On appeal, the Government will argue that the district court lacked jurisdiction to rule on defendants' motions for judgments of acquittal and that the district court erred in finding the evidence insufficient. Pending.

NO APPEALS

United States v. Cortez-Montano, et al. (W.D. La. Nov. 7, 2001)

Judge granted all of the defendants' post-verdict motions for judgment of acquittal on the charges of conspiracy to possess with intent to distribute over 50 grams of cocaine base. The judge found that there was evidence to show multiple conspiracies, but not the single conspiracy charged. The court found that there was no common goal and no significant overlap in the defendants' various dealings.

United States v. Anna Martinez (S.D. Iowa Jan. 7, 2002)

Judge granted the defendant's post-verdict motion for judgment of acquittal on the charge of possession of a firearm in relation to a specific substantive drug offense. The judge found insufficient evidence as to whether the defendant knew the firearms were in the house of a codefendant where she was staying.

United States v. Royston (W.D. Va. Jan. 30, 2002)

Judge granted the defendant's post-verdict motion for judgment of acquittal on the charge of bank fraud. The court found insufficient evidence to demonstrate that the defendant intended to "victimize the bank" (though there was a legal question as to whether this intent was even required).

United States v. Victor Piuneda (W.D. Va. Feb. 13, 2002)

Judge granted the defendant's post-verdict motion for judgment of acquittal on the charges of methamphetamine trafficking. At trial, the government's main witness refused to incriminate the defendant and the government had no evidence against the defendant other than this testimony.

United States v. John Miller, Pamela Joyce, and John Latourette (E.D. Pa. Feb. 27, 2002)

Judge granted defendant Joyce's post-verdict motion for judgment of acquittal on the charges of conspiracy to possess and to possess with the intent to distribute crack cocaine. The judge found insufficient evidence to support an inference that Joyce's small drug purchases was evidence of her intent to join the other defendants' conspiracy.

United States v. Brooke Jones, Crim. No. CR 01-36-H-DWM (D. Mont. May 7, 2002)

The defendant, a bank bookkeeper, was convicted of embezzling funds from a bank insured by the Federal Deposit Insurance Corporation (FDIC), for creating fraudulent records showing money deposited into the account of a friend. The district court entered a judgment of acquittal, finding the evidence insufficient to prove that the bank was insured by the FDIC on the dates of the offense.

United States v. Rodgers, No. 3-02-CR-006 RV (N.D. Fla. July 18, 2002)

Defendants, viatical settlement sales agents, were convicted of various counts of fraud and interstate transportation of money obtained by fraud. The district court entered a judgment of acquittal, ruling that the evidence was insufficient to prove that the

defendants had knowledge of the parent corporation's fraudulent activities, and that the evidence could not prove that the defendants had the intent to defraud investors.

United States v. Stanley Sims, CR No. 00-193-MV (D.N.M.)

The defendant was convicted of, *inter alia*, one count of receiving material involving the sexual exploitation of minors, in violation of 18 U.S.C. § 2252(a)(2). The district court entered a judgment of acquittal on this count, on the ground that Ashcroft v. Free Speech Coalition, 122 S. Ct. 1389 (2002), required the government to prove that the sexual depictions of minors involved in that count were real children.

EXHIBIT D

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6 Attorneys for Plaintiff United States of America

7 UNITED STATES DISTRICT COURT

8 SOUTHERN DISTRICT OF CALIFORNIA

9 UNITED STATES OF AMERICA,)	Crim. Case No. 03cr2897-JM
10 Plaintiff,)	DATE: September 7, 2004 TIME: 9:00 a.m.
11 v.)	GOVERNMENT'S TRIAL MEMORANDUM
12 EFRERIN JOYA-JOYA (1), FLAVIANO JOYA-JOYA (2), 13 JOSE JOYA-JOYA (3), MARTIN HUGO JOYA-HERNANDEZ (4), 14 LAUREANO JOYA-RAMOS (5), EUTIMIO NERI (6), 15 JONNY ESTRADA-MACIAS (7), JORGE MERIDA-VAZQUEZ (8), 16	
Defendants.)	
17	

18 COMES NOW the plaintiff, United States of America, by and
19 through its counsel, Carol C. Lam, United States Attorney, Edward C.
20 Weiner, Assistant U.S. Attorney, and Michael F. Kaplan, Assistant U.S.
21 Attorney, and hereby files the Government's Trial Memorandum in
22 connection with above-captioned case.

23 DATED: August 27, 2004.

24 Respectively submitted,

25 CAROL C. LAM
United States Attorney
26

27 EDWARD C. WEINER
Assistant U.S. Attorney
28

MICHAEL F. KAPLAN
Assistant U.S. Attorney

I

STATUS OF THE CASE

A. INDICTMENT

On October 21, 2003, a two count Indictment was filed in the Southern District of California charging eight defendants with conspiracy to possess cocaine with intent to distribute on board a vessel and possession of cocaine with intent to distribute on board a vessel in violation of Title 46, United States Code Appendix, Sections 1903(a), (c) and (j) and Title 46, United States Code Appendix Sections 1903(a),(c)(1)(A) and (f) as well as Title 18, United States Code, Section 2 (aiding and abetting). Defendants are apparently either related to each other or are close friends.

Both the conspiracy allegation in Count 1 and the substantive crime in Count 2 allege that the amount of cocaine was more than five kilograms (approximately 2,365 kilograms or 5,203 pounds). For the conspiracy charge the beginning alleged was a date unknown continuing up to and including September 25, 2003. The date alleged in the substantive count was September 25, 2003.

B. TRIAL STATUS

A jury trial is scheduled for September 7, 2004 at 9:00 a.m. before the Honorable Jeffrey T. Miller, United States District Court Judge. The Government estimates that its case-in-chief (depending on the length of cross examination of its witnesses) will take approximately two weeks (six or seven trial days).

C. STATUS OF COUNSEL

All defendants are represented by appointed counsel. Defendant Efrerin Joya-Joya is represented by Mary Frances Prevost, defendant Flaviano Joya-Joya is represented by Siri Shetty (formerly of Federal

Defenders of San Diego, Inc.), defendant Jose Joya-Joya is represented by Kristen L. Churchill, defendant Martin Hugo Joya-Hernandez is represented by George W. Hunt, defendant Laureano Joya-Ramos is represented by Frank J. Ragen, II, defendant Eutimio Neri is represented by Jeremy D. Warren, defendant Jonny Estrada-Macias is represented by Brian P. Funk, and defendant Jorge Merida-Vasquez is represented by Howard B. Frank.

D. CUSTODY STATUS

All defendants are in custody having been detained based on risk of flight.

E. JURY STATUS

No jury waiver has been filed.

F. INTERPRETER

All defendants require a Spanish language interpreter. The Government does not anticipate needing an interpreter for any of its witnesses.

G. PRETRIAL MOTIONS AND IN LIMINE MOTIONS

A number of rounds of pretrial motions have been conducted in this case. On August 9, 2004, the court held an evidentiary hearing on the issue of statelessness of the vessels under the Maritime Drug Law Enforcement Act (MDLEA). On August 17, 2004, the court filed a written order finding the two vessels stateless and addressing certain other pretrial motions. On August 20, 2004, the Government filed a document with its list of trial witnesses, notice of expert witnesses, and in limine motions. The Government has given notice of its expert witnesses and notes that there may be a dispute over the testimony of a witness from the Drug Enforcement Administration (Special Agent Manuel E. Almaguer) who may be called upon to testify about the use

of Go-Fast vessels in cocaine smuggling organizations. The Government does not anticipate any problems regarding its expert on the Global Positioning System (GPS) track points, or its expert forensic chemist.

As of this writing, the Government has provided all counsel with 515 pages of documents and a number of video tapes and photographs. The defense has provided the Government with a CD Rom containing a number of photographs. The Government has filed a motion for reciprocal discovery.

H. STIPULATIONS

The Government will be proposing several stipulations to expedite the presentation of evidence in this case. These may include a stipulation to the analysis of the suspected cocaine, a stipulation on the value of the cocaine (wholesale value in Mexico) and a stipulation on chain of custody. If defense counsel and their clients agree, signed stipulations can be read into evidence at the appropriate place during the Government's case-in-chief.

II

STATEMENT OF FACTS

A. BACKGROUND OF COAST GUARD OPERATIONS

The Coast Guard has a specified mission to combat drug smuggling on the high seas. Coast Guard enforcement personnel are either stationed on Navy Ships (as the boarding team from the Coast Guard was in the instant case) or are stationed on Coast Guard Cutters which also have the power and authority to patrol international waters. The Coast Guard is the lead agency for the interdiction of drugs on the high seas and Coast Guard law enforcement teams are routinely assigned to surface Navy vessels in drug interdiction areas.

The Navy may lawfully engage in detection and monitoring

activities in a support role for the Coast Guard. Navy communication devices and Navy aircraft on routine patrol in suspected drug trafficking areas on the high seas are utilized as well as surveillance aircraft from Immigration and Customs Enforcement groups are utilized to spot suspected drug trafficking vessels.

During the month of September 2003, a Coast Guard law enforcement group was aboard the USS Shoup, a Navy destroyer assigned to law enforcement patrol in the Eastern Pacific Ocean. Approximately 10 Coast Guard law enforcement team members were aboard that Navy ship which had numerous Navy support personnel. Also attached to the law enforcement group was a Navy helicopter, designated as a Saberhawk. That Navy helicopter was gray in color. Video taping equipment and cameras were available. Coincidently on September 25, 2003, a Coast Guard Cutter, the US Hamilton was in the area of the USS Shoup's patrol in the Eastern Pacific Ocean, approximately 550 miles off the coast of Acapulco, Mexico. The Hamilton also had a helicopter known as a Hitron which was orange and white in color. The Navy helicopter (Saberhawk) was not armed with weapons. A Navy pilot and co-pilot were assigned to the Saberhawk. The Coast Guard helicopter (Hitron) was armed with a machinegun. The Coast Guard helicopter had a Coast Guard pilot and co-pilot assigned to it.

Because the law enforcement team assigned to the USS Shoup was on an extended mission and because the Coast Guard cutter, US Hamilton, was available to transport contraband back to port, the individuals and the cocaine eventually seized in the instant case were transferred from the Shoup to the Hamilton so that the Hamilton could transport the individuals and the contraband more swiftly to the designated prosecution location in San Diego, California.

1 B. SIGHTING AND INTERFACE WITH TWO GO-FAST VESSELS ON SEPTEMBER 25, 2003

2

3 On the morning of September 25, 2003, U.S. Navy Pilot Kenneth
4 R. Coleman was flying in a Saberhawk helicopter which was dispatched
5 from the USS Shoup. Coast Guard observer Joseph A. Poma had video
6 equipment and from a covert location (3,000 to 5,000 above the ocean),
7 he and others observed two Go-Fast vessels. These speed boats were
8 close to one another at first. Then the two Go-Fast boats proceeded
9 at a high rate of speed parallel to one another with one of the boats
10 peeling off and running perpendicular. The observers and the
11 helicopter remained "covert" for a brief period after sighting the Go-
12 Fast vessels at approximately 9:47 a.m. After being spotted, the
13 helicopter became "overt" and observed approximately four individuals
14 who were in Go-Fast #1 (a blue/green boat) quickly board Go-Fast #2
15 (a white boat), abandoning the blue/green boat.
16 Although none of the individuals could be identified
17 specifically by the observers (or by the video tape) as being in Go-
18 Fast #1 (the blue/green boat) when it was traveling on a parallel
19 course with Go-Fast #2 (the white boat), the observers did note that
20 the transfer of the people from the blue/green boat to the white boat
21 took no more than a few minutes. The white boat then sped away
22 leaving the blue/green boat abandoned and dead in the water.
23 The photographic evidence from the video tape showed the
24 vessels together, then separating, and then coming back together again
25 when approximately four of the individuals in the blue/green Go-Fast
26 vessel abandoned it and jumped into the white Go-Fast vessel. At
27 approximately 10:06 a.m., the white Go-Fast sped away at approximately
28 30 knots. The Navy Saberhawk helicopter followed the white Go-Fast

1 vessel while contact was made with Coast Guard District headquarters
2 in Alameda, California. While the helicopter gave chase, the Coast
3 Guard law enforcement detachment on the Shoup divided itself into two
4 boarding teams which would be sent out in motorized inflatable boats.
5 The first boarding team was assigned to the abandoned, blue/green Go-
6 Fast vessel (Go-Fast #1). That team, consisting of three Coast Guard
7 personnel and a Navy crew, left the Shoup on one of the inflatable
8 boats (a rigid hull inflatable boat - "RHIB") and approached the
9 blue/green Go-Fast vessel to make an initial assessment.
10 Meanwhile, the Navy Saberhawk helicopter was following the
11 white Go-Fast vessel (Go-Fast #2) with eight individuals identified
12 as being on board. Hand signals to stop were ignored by the "driver"
13 of the white Go-Fast, who was observed to "cross" himself and signal
14 that he was going forward. This activity was observed by Navy Crewman
15 Patrick Quilter. When the white Go-Fast vessel refused to yield for
16 over an hour chase and because the Navy Saberhawk helicopter was
17 running low on fuel, the Coast Guard dispatched its Hitron helicopter
18 from the Coast Guard cutter, US Hamilton.
19 Attempts were made to stop the white Go-Fast boat by personnel
20 aboard the Hitron helicopter. Hand signals, radio broadcasts over the
21 marine emergency channel, and a loud speaker with Coast Guard observer
22 Justo Rivera announcing in Spanish to "halt" were employed. The
23 attempts to halt the white Go-Fast were ignored. At approximately
24 11:17 a.m., the Hitron helicopter was given permission to fire warning
25 shots and the first volley of shots was fired over the bow of Go-Fast
26 boat #2. After other machinegun fire was accomplished, the white Go-
27 Fast stopped and the crew of eight individuals surrendered.
28

C. BOARDING AND SEIZURE OF ITEMS FROM ABANDONED BLUE/GREEN GO-FAST BOAT

Christopher G. Longaker and two other Coast Guard personnel (Arturo Portillo, Jr. and John Richter) were assigned to investigate and assess the abandoned blue/green Go-Fast vessel. As they approached in their inflatable boat launched from the USS Shoup, they observed an abandoned vessel with no one on board with the name "SAM 71" taped on the bow. There was no flag or home port visible on the vessel and numerous attempts to hail it were made in both English and Spanish. The vessel had two Yamaha V-6 200 outboard motors, a steering console, numerous plastic fuel jugs, and a compartment which was covered by a blue tarp. Mr. Longaker could see some black bales sticking out from under the tarp and as his boarding party approached he could hear a "beeping" sound coming from the console.

Between 10:33 a.m. and 11:52 a.m., the Coast Guard boarding team headed by Mr. Longaker stayed along side the blue/green Go-Fast awaiting further instructions. After being given permission to board, Mr. Longaker observed that the wiring to the outboard motors appeared to have been sabotaged. Numerous plastic fuel jugs were located in the area forward of the steering console. These jugs were 10 gallon plastic containers filled with premixed gasoline; some of the gasoline had leaked into the bilge. The vessel was observed to be a deep V-hull, approximately 25 to 30 feet in length. After the initial safety check was completed at approximately 12:37 p.m., one of the bales was pulled out and inspected. It had approximately 20 wrapped "bricks" in it. The blue tarp was removed and there were additional bales located.

Mr. Longaker and Mr. Portillo searched the blue/green Go-Fast for other items and found a Global Positioning System (GPS) unit which had some track points still in it. In addition, some food, tools, a bible and clothing were located.

The Navy Saberhawk helicopter had responded to the location where the blue/green vessel was being assessed and was assisting in relaying communications back to the Shoup and on to Coast Guard headquarters. Mr. Longaker and Mr. Portillo noticed that the ignition wires had been cut and the key was pulled out. There was no documentation or identification located.

Mr. Longaker successfully started the engine of the blue/green Go-Fast boat and navigated it to the USS Shoup. A Narcotics Identification Kit (NIK) color test was performed on some of the white powder contained in the bales and it tested positive for cocaine. Mr. Longaker later was assigned to assist in loading the cocaine on the Shoup. At that time he noticed that numerous kilo bricks were packaged in several different ways - yellow, brown, and black. The suspected cocaine was in 118 bales with a total count of 2,365 "kilo-sized" bricks.

D. BOARDING AND CONTACT WITH EIGHT SUBJECTS IN WHITE GO-FAST BOAT

While the Longaker boarding team was assessing the abandoned blue/green Go-Fast vessel, another boarding team headed by Brian Hoke took another inflatable boat from the Shoup to the white Go-Fast vessel. This occurred sometime after the white Go-Fast boat became dead in the water at approximately 11:33 a.m. Mr. Hoke and his team members drew along side the white Go-Fast vessel and observed eight individuals in yellow rain gear. Mr. Hoke and his armed Coast Guard

1 personnel ordered the eight individuals to put up their hands and move
2 to the bow of the white Go-Fast vessel. Mr. Hoke asked all the
3 persons on board who the captain was and they stated that there was
4 none. Mr. Hoke used Spanish in conversing with all individuals. He
5 also asked whether there was any registration or identification and
6 all persons said that there was none. The individuals all claimed to
7 be Mexican Nationals, that their last port of call was Cabo
8 Corrientes, Mexico and that their next port of call would be Punta
9 Maldonado, Mexico.

10 At approximately 12:49 p.m., Mr. Hoke and his boarding party
11 were given permission to board the white Go-Fast, and did so. Again,
12 questions in Spanish were related to all the crew members inquiring
13 of each member if he was the master and if not, did he know who the
14 master or captain was. Each of the eight individuals was asked their
15 name and date of birth and that information was relayed by radio from
16 the boarding team headed by Mr. Hoke to the Officer-in-Charge (Todd
17 LaFleur) who was on board the Shoup. A radio and a compass were
18 seized from the white Go-Fast vessel. No fishing equipment, lures,
19 nets, bait, or fish were found on the white Go-Fast boat or in any of
20 its ice chests. Numerous fuel jugs were found on board the white Go-
21 Fast vessel.

22 A survey of the exterior hull of the white Go-Fast vessel
23 located certain markings, partially illegible and painted over on the
24 starboard quarter of the vessel. The following was noted: CA?O ??AL
25 O1 ? O ? VI ? JA??. The question marks indicate an illegible or
26 missing character. Mr. Hoke related these markings during the period
27 that he and his boarding team were aboard the white Go-Fast. It took
28 a number of hours while Mr. Hoke and his boarding team were aboard the

white Go-Fast boat before instructions were given about treating the white Go-Fast vessel as one without nationality for purposes of enforcement of the MDLEA. At approximately 8:00 p.m. on September 25, 2003, Mr. Hoke's boarding team was relieved by other Coast Guard personnel. Thereafter, at approximately 9:00 p.m., permission was granted to move the eight persons on the white Go-Fast vessel and detain them on board the USS Shoup.

E. GOVERNMENT EXPERT ANALYSIS

The GPS unit seized from the blue/green Go-Fast boat was analyzed by Jon S. Price, the product training supervisor at Garmin International, Inc., Olathe, Kansas. Mr. Price extracted information from the GPS unit and plotted the track points found in the memory of the device. Satellite monitoring during September 24, 2003, and September 25, 2003 showed travel in the Eastern Pacific in a northern direction (indicating travel north from Colombia to Mexico). This is consistent with the Government's theory that the cocaine manufactured in Colombia was being transported by Go-Fast boats to Mexico where it would eventually be trans-shipped to the United States of America for distribution.

The 2,365 bricks seized from the blue/green Go-Fast boat were analyzed by Forensic Chemist Jason A. Bordelon at the Southwest Drug Enforcement Administration Laboratory in Vista, California. He performed recognized scientific tests on a composite of the suspected cocaine taken from 158 boxes of kilo sized bricks of a white powdery substance that he received sometime after October 9, 2003. Photographs of the suspected cocaine included bricks stamped "Nokia", a Mercedes Benz logo, and a label of a Nokia phone.

F. ANTICIPATED DEFENSE

The following statements were made in connection with defendant Laureano Joya-Ramos' motion to take foreign depositions: "the essence of the defense to be presented at trial is that each of the defendants is a fisherman who lives and works in a small fishing village not far from Puerto Vallarta. At the time they were arrested by the Navy and Coast Guard they were in the midst of a shark fishing trip." "The witnesses would also testify it is common for the type of boat which the defendants were arrested in to go out with several men in the boat accompanied by another boat carrying gear and supplies."

Counsel for defendant Jonny Estrada-Macias has provided the Government information about Hurricane Marty and it is assumed that all defendants may present evidence that Hurricane Marty (or some other storm) blew them off course and out to sea quite a ways distant from their shark fishing location. In connection with this, the Government knows from several post arrest statements of various defendants (which will not be offered in the Government's case-in-chief) that defendants claim that they were shark fishing, that they were blown off course, that they were lost for several days, that they were out of food and water, and they happened across the blue/green boat, and several defendants boarded it seeking food and water. When the helicopter arrived, defendants got scared and fled thinking that the owner of the drugs on board the blue/green Go-Fast would be chasing them in a helicopter and would cause harm to defendants.

If this or other evidence is presented in the defense case, the Government may offer rebuttal evidence.

1 United States District Court

2 Southern District of California

3 UNITED STATES OF AMERICA,)
)
4 Plaintiff,)
)
5 v.) 03-CR-2897 JM
) Ruling on Rule 29 Motion
6 EFRERIN JOYA-JOYA,)
FLAVIANO JOYA-JOYA,) Monday, September 20, 2004
7 JOSE JOYA-JOYA,)
MARTIN HUGO JOYA-HERNANDEZ,)
8 LAUREANO JOYA-RAMOS,)
EUTIMIO NERI,)
9 JONNY ESTRADA-MACIAS,)
JORGE MERIDA-VAZQUEZ,)
10)
Defendants.)
11)

12

13 Before the Honorable Jeffrey T. Miller
United States District Judge

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20 Official Interpreter: Bonnie Ramirez, CCI
Daniel Novoa, CCI

21 Official Court Reporter: Debra M. Henson, CSR, RPR
U.S. Courthouse
22 940 Front Street, Suite 3142
San Diego, CA 92101
23 (619) 238-4538

24

25 Record produced by stenographic reporter

1 Appearances:

2 For the Government: Carol C. Lam
UNITED STATES ATTORNEY
3 By: Edward C. Weiner
Michael Kaplan
4 ASSISTANT U.S. ATTORNEYS

5 For the Defendants:
(E. Joya-Joya) Mary Frances Prevost, Esq.
6
(F. Joya-Joya) Siri Shetty, Esq.
7
(J. Joya-Joya) Kristin L. Churchill, Esq.
8
(Joya-Hernandez) George W. Hunt, Esq.
9
(Joya-Ramos) Frank J. Ragen II, Esq.
10
(Neri) Jeremy D. Warren, Esq.
11
(Estrada-Macias) Brian P. Funk, Esq.
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(Merida-Vazquez) Howard B. Frank, Esq.
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1 San Diego, California - Monday, September 20, 2004

2 (Following is a partial transcript of the proceedings.)

3 THE COURT: All right. Well, obviously we know
4 that the evidence must be viewed in the light most favorable
5 to the government. Let me indicate at the outset that I have
6 some very serious concerns about the state of the evidence in
7 this case; I'll attempt to summarize or state what those
8 concerns are.

9 I think Mr. Warren has pretty much summed up what
10 the state of the evidence is relative to identification of
11 any of these individuals currently before the Court as
12 defendants in this case. I think the following, however, is
13 pretty clear. First of all, not one witness called by the
14 government identified any defendant in this courtroom as
15 being on the white boat.

16 Next, I would note that no member of the Coast
17 Guard boarding team, either that segment of the boarding team
18 originally with the occupants of the white boat nor any
19 member of the relief portion of the team, identified any
20 defendant in this courtroom, any person in this courtroom, as
21 being on the white boat. Furthermore, not one witness made
22 any courtroom identification of any defendant as being
23 involved in this case in any manner.

24 Next, I would note that no piece of physical
25 evidence has been connected to any defendant by way of named

1 identification, dominion and control documents, or by any
2 other method. And I realize that there were no items of
3 personal identification in the white boat, or the green boat
4 for that matter, for any of these individuals.
5 Next, I would note that no witness called by the
6 government was ever even asked if he recognized any of the
7 defendants as being on the white boat.
8 Next, I would note that there is no mention of any
9 defendant's name in the evidentiary record, and I stress "the
10 evidentiary record."
11 Next, there is no personal item of identification
12 as to any defendant in the evidentiary record.
13 Next, I would note that neither any of the
14 videotape nor any photograph taken of the white boat
15 occupants while still in the white boat is capable of
16 identifying any of the defendants. I would note that the
17 only evidence in the record even indirectly relating to
18 defendants are photos of eight individuals taken on the
19 Shoup, and, according to the testimony of Officer Hoke,
20 consists of individual photographs of the individuals who
21 were removed from the white boat. I note that those
22 photographs are actually copies of photos reproduced on
23 standard copy paper. I have further had an opportunity to
24 view these photographs, and they are not of particularly good
25 quality; some of the images -- some of the photos are taken

1 with the lighting being darker than it should be and some of
2 the features of the individuals taken in this photograph not
3 being particularly clear.
4 Next, I would note that each photograph was
5 projected on a screen for a matter of a few seconds before
6 the jury.
7 Next, I would note that none of these photographs
8 show a person with a name; no name is associated with any one
9 any of these photographs. Further, no witness identified any
10 person in such a photograph as a person that he observed in
11 the white boat. When the photographs were displayed to the
12 jury, no one identified any of the individuals in the
13 photographs. I would note that this jury has obviously been
14 seated in the jury box approximately 35 to 40 feet from the
15 defendants throughout the trial. The defendants are seated
16 on the opposite side of the courtroom. Some of them may be
17 obscured by the attorneys, their attorneys, who are sitting
18 in front of them and closer to the jury. The only evidence
19 connecting any of the defendants to the individuals in the
20 boat would be Hoke's statement that these are photographs of
21 persons taken from the white boat and then the ability of
22 jury to somehow identify these photographs as photographs of
23 the defendants themselves, and I think that this is asking
24 the jury to do an awful lot.
25 Certainly the mere fact that the defendants are

1 present in the courtroom cannot be used as evidence against
2 them, that is, their mere presence. They are presumed to be
3 innocent. They are here to defend against the charges that
4 have been brought, and so the fact that they are in this
5 courtroom to defend these charges cannot be utilized as
6 evidence against them. I'm not suggesting, Mr. Kaplan, that
7 you are arguing that. That is obviously a principle that
8 cannot be gainsaid.
9 Turning to the photographs themselves, I've already
10 described the quality of the photographs, and as I say, there
11 is no name on any of the photographs. The jury has not heard
12 any witness mention any persons taken from the white boat by
13 name. No government witness mentioned the name of any
14 defendant during the course of the trial. Even assuming that
15 the jury could associate a defendant with a particular
16 photograph, unmarked as it is, without any name how would the
17 jury decide what defendant that was? That's another question
18 I've had continuously throughout the course of this trial.
19 Each defendant is entitled to have an individual
20 determination of whether or not he is guilty of the charges.
21 There is no evidence before the Court as to who any of these
22 people are in the courtroom. Aside from the introduction to
23 the jury panel of the participants in this case consisting of
24 the attorneys, the parties, representatives of parties, and a
25 reading of a long list of names, this jury has not heard the

1 name of any of the defendants since that time.

2 I would find that on this evidentiary record, no
3 reasonable jury could find beyond a reasonable doubt that,
4 for example, defendant Efrerin Joya-Joya is guilty or not
5 guilty of the charges in this case.

6 I would find that on this evidentiary record, no
7 reasonable jury could find beyond a reasonable doubt that
8 defendant Flaviano Joya-Joya is guilty of either charge.

9 I would find on this evidentiary record, no
10 reasonable jury could find beyond a reasonable doubt that
11 defendant Jose Joya-Joya is guilty of either of the charges.

12 I would find on this evidentiary record, no
13 reasonable jury could find beyond a reasonable doubt that
14 defendant Martin Hugo Joya-Hernandez is guilty of either
15 charge.

16 I would find on this evidentiary record that no
17 reasonable jury could find beyond a reasonable doubt that
18 defendant Laureano Joya-Ramos is guilty of either of these
19 charges.

20 I would find on this evidentiary record that no
21 reasonable jury could find that defendant Eutimio Neri is
22 guilty of either charge.

23 I would find on this evidentiary record, no
24 reasonable jury could find beyond a reasonable doubt that
25 defendant Jonny Estrada-Macias is guilty of either charge.

1 And I would find that on this evidentiary record,
2 no reasonable jury could find by evidence beyond a reasonable
3 doubt that defendant Jorge Merida-Vazquez is guilty of either
4 charge.
5 Another troubling issue for the Court -- and these
6 remarks I think are probably more by way of clarification at
7 this point than anything else. Another troubling issue for
8 me is that the government is asking the jury to find each
9 defendant guilty without knowing who they are individually.
10 The jury on this evidentiary record could not identify these
11 individuals by name. The mere fact that there were eight
12 individuals taken from the boat, that there are eight
13 individuals in trial at this point is an insufficient basis
14 for a jury to make a determination that these eight
15 individuals were the eight individuals on the boat or that
16 these eight individuals carry the names of the eight
17 individuals who were named as defendants in this case. And I
18 was -- as I was giving this some thought, I was thinking that
19 if, for example, this case did go to the jury and the jury
20 were asked to make a determination as to whether or not, for
21 example, Efrerin Joya-Joya was guilty, a jury might -- well
22 theoretically could say well, we find Efrerin Joya-Joya
23 guilty, but by the way, who's Efrerin Joya-Joya? All we know
24 is he's one of eight individuals, and I think that runs
25 counter to the principle that each defendant in a

1 multidefendant case is entitled to an individualized
2 determination of guilt. That simply can't be done in this
3 case.
4 I am mindful -- believe me, I am mindful that this
5 Court is granting judgment for multiple defendants in a case
6 involving a very large quantity of cocaine. However, it is
7 precisely because of the scale of this case and the decision
8 by the Coast Guard personnel directing the LEDET team in this
9 case that ultimately the government, acting through the U.S.
10 Attorney's office, was I think somewhat limited in its
11 ability to introduce sufficient evidence to meet this motion.
12 I don't point this out as an indication of blame or
13 responsibility but only as an indication of where I think
14 this case may have gotten off the tracks for the government.
15 I have absolutely no doubt that if this -- if the
16 government felt that any one of the defendants who were
17 called as Coast Guard members could have personally
18 identified any of the defendants in this courtroom, they
19 would have done so. That's the standard way to try the case.
20 I've seen you, Mr. Kaplan, try other cases before or perhaps
21 try the same case many times, but I know you to be a very,
22 very able trial attorney to ask those questions; I know Mr.
23 Weiner belongs in the same category as well. There is no
24 doubt in my mind that, for example, if Officer Hoke had been
25 able to look at any one of these eight gentlemen and identify

1 them through his memory, he would have done so. I have no
2 doubt that he was unable to do so and that proper -- and that
3 the workup of this case that actually took place indicated
4 that that was a limitation in this case.
5 Interestingly enough, Officer Hoke, the boarding
6 officer in this case, testified that he was not given enough
7 time to conduct his investigation in a thorough manner; and
8 if he didn't use those words expressly, I think that was the
9 implication of what he said. He was rushed. He felt rushed;
10 he testified to that. There were circumstances beyond his
11 control. I realize there were limited resources and assets
12 out there. They cover a big ocean. I think the weather, the
13 elements, were certainly a part of it as well. But I think
14 Officer Hoke, being the honest witness he was -- and believe
15 me, he impressed the Court with his honesty and his
16 credibility -- was the first one to indicate that things were
17 not done according to the manner in which he would have
18 preferred. Clearly, there was no proper or thorough
19 identification of evidence, and certainly the report writing,
20 I had the distinct feeling, was less than Officer Hoke had
21 hoped for.
22 Interestingly, he talked about -- seemed to make a
23 point of the limited amount of sleep that he himself had
24 received while he was multitasking, running back and forth
25 taking care of contraband, making sure that these eight

1 individuals had proper clothing, were cleaned up, had their
2 medical exams, were fed, received cots, and then and only
3 then was he able to sit down and begin the paperwork on the
4 case; and then after a short period of time, he was advised
5 that things -- all people and contraband and exhibits were
6 going to be transfered to the Hamilton. He was given a
7 certain amount of time to do that. I clearly had the
8 impression that he was not given a sufficient amount of time.
9 Due to all of the circumstances that I've mentioned, Officer
10 Hoke was clearly rushed.
11 As I say, it's not an observation by way of
12 criticism, it's just a possible explanation for the
13 evidentiary lapses ultimately that existed and over which
14 counsel had no control. I think in this case the government
15 had to play the cards it was dealt by circumstances beyond
16 its control. And so for the reasons I've indicated, the Rule
17 29 motion is granted on behalf of each individual defendant.
18 (The requested partial transcript was concluded.)
19
20
21
22
23
24
25

1 Certificate of Reporter

2

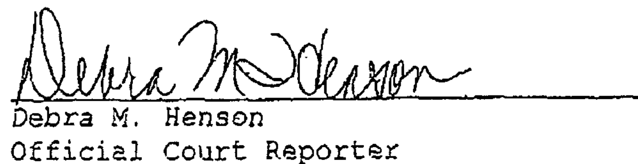
3 I hereby certify that I am a duly appointed, qualified, and
4 acting Official Court Reporter for the United States District
5 Court; that the foregoing is a true and correct transcript of
6 the proceedings had in the mentioned cause on the date or
7 dates listed on the title page of the transcript; and that
8 the format used herein complies with the rules and
9 requirements of the United States Judicial Conference.

10

11 Dated this 22nd day of September, 2004, at San
12 Diego, California.

13

14



15

Debra M. Henson
16 Official Court Reporter

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EXHIBIT E

United States v. Thomas Cooley.

D.Mass. 01-10261-JLT (Hon. Joseph L. Tauro)

I. Statement of Facts

Defendant was charged with committing two bank robberies using a demand note. On both occasions there were photographs from bank surveillance cameras. (Though it was not possible to positively identify defendant from the photographs, the surveillance film did clearly show the robber presenting a demand note). Most significantly, defendant's finger or palm prints were found on both of the demand notes. The government also introduced the descriptions of the robber that tellers had given police shortly after the robberies, but the district court refused to allow the tellers to make in-court identifications of the defendant, reasoning that the length of time that had passed since the robbery created an unacceptable risk of erroneous identification. The tellers' descriptions were not entirely consistent, but all described the robber as an overweight male with a pale complexion.

II. The Court's Rule 29 ruling.

Relying principally on a Fourth Circuit case, *United States v. Corso*, 439 F.2d 956 (4th Cir. 1971), the district court granted the defendant's Rule 29 motion at the close of the government's case, reasoning that fingerprints alone can never support a conviction.

III. Why the Ruling Was Incorrect.

There is a line of cases, apparently originating with *Borum v. United States*, 380 F.2d 595 (D.C. Cir. 1997), holding that fingerprints alone cannot support a conviction when the government cannot establish that the fingerprints could only have been left at the time of the crime. Borum's conviction for housebreaking was based solely on the identification of his fingerprints on one or two empty jars which the homeowner testified had held valuable coins. The government's fingerprint expert admitted that there was no way to tell how long the fingerprints had been on the jars – admitting it could have been "years" – and the government did not produce any evidence about when the homeowner had purchased the jars or whether they had ever been out of the house. *Id.* at 49. Moreover, police could not identify defendant's prints on any of the many other objects that must have been touched when the house was "thoroughly ransacked." *Id.* at 50 & n. 8. Over a vigorous dissent by then-Circuit Judge Warren Burger, the court of appeals held, "The case should not have been submitted to the jury, for the Government produced no evidence, either direct or circumstantial, which could support an inference that the fingerprints were placed on the jars during the commission of the crime." *Id.*

In *Corso*, the only evidence linking defendant to the scene of a credit union robbery was his fingerprint on a matchbox that had been folded up and used to prevent the automatic door lock from catching properly. Again, the government's fingerprint expert testified that it was impossible to know how long Corso's fingerprints had been on the matchbox and his fingerprints were not found anywhere else at the scene of the crime. Citing *Borum*, the Fourth Circuit stated the test differently: "The probative value of an accused's fingerprints upon a readily movable object is highly

questionable, unless it can be shown that such prints could have been impressed *only* during the commission of the crime." 439 F.2d at 957 (emphasis added). *Corso* failed to acknowledge that *Borum* merely required evidence "which could support an inference that the fingerprints" were made during the commission of the crime.

The objects on which defendant's prints were found in this case were not simply ordinary moveable objects that defendant might have touched innocently. They were not the pens or desktops where legitimate customers may write out deposit slips or the kinds of things that a person might accidently leave behind while on legitimate business such as a chewing gum wrapper or a discarded deposit slip. Here, defendant's prints were found on the demand notes handed to the tellers and they were found in two different robberies. The court failed to consider how unlikely it was that defendant's fingerprints would be found on two demand notes used in two different robberies if he had merely touched the paper at some time before the demand notes were written. This factor nearly eliminates the possibility that defendant was merely the victim of coincidence. *See United States v. Peters*, 126 F.3d 655, 660 (5th Cir. 1997).

The district court rejected the only First Circuit case directly on point, the unpublished opinion in *United States v. Wade*, 45 F.3d 424 (table), 1995 WL 37304 (1st Cir. 1995). *Wade* was also a bank robbery case in which the defendant's fingerprints were found on a demand note. In addition to the fingerprints, a government expert testified that the note was in defendant's handwriting and the bank teller who received the demand note testified that the robber was a black male dressed in a black, white, and red jacket, and wearing a baseball cap. At trial she testified that the thought the robber was approximately six feet tall, though shortly after the robbery she had guessed he was somewhere between 5'7" and 5'9". Also, as in this case, the jury was shown a videotape from the bank's surveillance camera. With respect to that evidence, the First Circuit noted that the jury had an opportunity to compare the teller's description and what could be seen on the videotape with the defendant's appearance in court. This evidence was found to be sufficient.

Wade noted that it had not yet addressed the "fingerprints only" argument, but concluded that it did not have such a case before it. In addition to defendant's fingerprints on the demand note, the teller's description and the surveillance video were introduced. That combination of evidence, the court held, was sufficient to sustain a conviction.[1]

Interestingly, the trial judge in *Wade*, who submitted that case to the jury, was the same judge

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[1]The following year, in a habeas case, the First Circuit upheld a conviction where the only evidence was the robbery victim's description of the robber as a black man, slender, and of medium height who was wearing blue jeans and a black sweater and the fact that his unsmudged fingerprint was found on the knob of the private bathroom door. She had allowed the man to use the bathroom and after he robbed her he shut her into that same bathroom. *Hall v. DiPaolo*, 72 F.3d 243 (1st Cir. 1996). In *Hall* the court stated the rule as follows: "Where, as here, there is no evidence linking defendant to the crime other than his fingerprint at the scene, our question is whether it could be found beyond a reasonable doubt that defendant left his print at the time of the robbery. The evidence must foreclose all reasonably viable possibilities that he could have left it at some other time." 72 F.3d at 245.

who granted a pre-verdict judgment of acquittal in this case. The judge professed to have no memory of the earlier trial or the court of appeals decision affirming it. Nevertheless, even recognizing that *Wade* was not binding authority, it should have persuaded the judge to submit this case to the jury. A fingerprint on the demand note, when the robber's possession of a demand note is confirmed by a videotape, ought to be sufficient, standing alone, to allow the case to go to the jury. While it may not be absolutely certain that the fingerprint could not have been put on the paper at some earlier time, the photographic evidence that the bank robber gave the note to the tellers should be viewed as "foreclos[ing] all reasonably viable possibilities that he could have left it at some other time. *Hall*, 72 F.3d at 245. But here there was more. As in *Wade*, the jury also had the opportunity to consider the tellers' descriptions of the robber given to police immediately after the robbery and to compare the person on the videotape to the defendant.

IV. <u>Harm Due to the Ruling</u>.

A two-time bank robber was completely exonerated in this case. Surely the public would find it difficult to understand why a court would prohibit the government from asking the eyewitnesses to identify the defendant in court and then rule that there was insufficient evidence to convict him because there was a reasonable possibility that defendant's fingerprints on the demand notes used in two robberies were not deposited there during the commission of the crimes or in preparation for the crimes.

V. <u>Appendix.</u>

A transcript of the Rule 29 motion hearing is attached along with copies of the decisions in *Borum*, *Corso*, *Wade*, *Hall*, and *Rogers*, cited above.

1 UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

2

* * * * * * * * * * * * * * *

3 UNITED STATES OF AMERICA *
*
4 vs. * CRIMINAL ACTION
* No. 01-10261-JLT
5 THOMAS F. COOLEY *
*
6 * * * * * * * * * * * * * * *

7 BEFORE THE HONORABLE JOSEPH L. TAURO
UNITED STATES DISTRICT JUDGE
8 **DAY THREE**
EXCERPT -- RULE 29 ARGUMENT
9

A P P E A R A N C E S

10

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16 By: Daniel J. Cloherty, Esq.

17

18 Courtroom No. 20
John J. Moakley Courthouse
19 1 Courthouse Way
Boston, Massachusetts 002210
20 September 10, 2003
11:30 a.m.
21

22

CAROL LYNN SCOTT, CSR, RMR
23 Official Court Reporter
One Courthouse Way, Suite 7204
24 Boston, Massachusetts 02210
(617) 330-1377
25

1 (Excerpt from proceedings on September 10, 2003.)

2 THE CLERK: All rise for the Honorable Court.

3 THE COURT: Sit down everybody.

4 Okay. I have read very carefully all of the cases

5 that -- when I say I have read them, I read them myself --

6 all the cases that have been presented to me and reread the

7 government's -- I mean the defendant's motion. And I am

8 inclined to allow it. You know, the good faith basis, you

9 know, I have a lot of respect for you. And I know that you

10 are not going to make that argument frivolously. And I will

11 give you all the time you want to talk me out of it.

12 MR. CABELL: Thank you, Your Honor.

13 In our view, Corso, No. one, is not binding

14 authority. And we don't think it applies in this case.

15 The First Circuit in 1995 --

16 THE COURT: Well, Corso --

17 MR. CABELL: Corso I think being the principal

18 case that the defense cited, the Fourth Circuit 1971 case

19 for --

20 THE COURT: Well, there is no binding

21 precedent. Just, you know, you look at everything as

22 persuasive.

23 MR. CABELL: Your Honor, in 1995 the First

24 Circuit in an unpublished decision on facts very close to

25 this --

1 THE COURT: See, I can't go on that; can I?
2 MR. CABELL: Your Honor, I believe you can
3 take guidance from any source. I am not suggesting that
4 this is binding on the Court.
5 THE COURT: All right. Go ahead.
6 MR. CABELL: But in terms of the First Circuit
7 having considered this -- and this was a case before Your
8 Honor -- United States versus Wade.
9 THE COURT: Wade?
10 MR. CABELL: Wade, Gary T. Wade.
11 THE COURT: Did I get reversed?
12 MR. CABELL: You got affirmed.
13 THE COURT: I must have done something wrong.
14 (Laughter.)
15 MR. CABELL: It was a case involving Peter
16 Krupp from the Federal -- then from the Federal Defender's
17 Office and Sheila Sawyer from our office. It was a bank
18 robbery. It was a note job like this case.
19 The only difference between that case and this case
20 was in addition to evidence from an FBI examiner that the
21 prints matched, there was a print on the note, there was
22 also forensic evidence from a handwriting expert that a
23 handwriting exemplar provided by the defendant also matched.
24 In analyzing it though, the First Circuit didn't --
25 the First Circuit just said okay, we take that as a

1 fingerprints only sort of situation and said that on its
2 own, is that on its own enough to get to the jury.
3 He was convicted and he had appealed. What the
4 First Circuit said was where there was evidence that the
5 tellers had provided some description, a physical
6 description of the robber, and where the defendant was
7 present in the courtroom and the jury had the sense to
8 assess the credibility of the witnesses and to look at the
9 defendant to see whether he did, in fact, match the
10 description, and where there was also a bank video
11 surveillance tape, as there is in this case, which had a
12 depiction of the robber, that was enough under the Rule 29
13 standard to get to the jury, even where the defendant
14 adduced some evidence that the description given by the
15 tellers didn't match the defendant.
16 And where the First Circuit itself noted in the
17 footnote, We have seen the bank surveillance videotape and
18 we don't think it is particularly helpful. But they said
19 that's not the issue.
20 The issue is whether any rational trier of fact,
21 because our job is not to assess credibility or to make
22 those judgments, that's for the jury to decide. If you have
23 fingerprint plus some other substantive evidence that could
24 allow a jury to find guilt, that's enough to get to the
25 jury.

1 THE COURT: Well, that strikes me, you know, I
2 didn't read that.
3 MR. CABELL: Our copier just broke but I have
4 a copy right here (indicating).
5 THE COURT: I will look at it now. But that
6 doesn't strike me as being particularly different from the
7 essence of all the opinions that I read.
8 Here, let me just give you a chance to catch your
9 breath. Let me read this.
10 (Pause in proceedings.)
11 THE COURT: I see that the panel here is made
12 up of Judge Diclerico of New Hampshire and Judge Cyr and
13 Judge Selya, both of whom are senior judges. I mean, you
14 got a different -- not that the result would necessarily
15 change.
16 MR. CABELL: Your Honor, were they senior at
17 the time?
18 THE COURT: No, I am not saying that there is
19 anything wrong with the decision. I am just trying to --
20 you are asking me to read this and anticipate what it is
21 that the Court of Appeals would do today in the year 2003.
22 It would be easier if I had Selya, you know, and
23 Judge Boudin, you know, in a very sharply worded opinion so
24 I could hear the trumpets blow.
25 MR. CABELL: Your Honor, I do have two other

1 cases --

2 THE COURT: Let me finish. I can only read

3 one at a time.

4 MR. CABELL: Oh, all right.

5 (Pause in proceedings.)

6 THE COURT: Well, they don't seem to say

7 whether they would go along with the prints theory but sort

8 of point and find other evidence.

9 MR. CABELL: In essence what they state is

10 this really isn't a fingerprints only case.

11 THE COURT: Yes.

12 MR. CABELL: Which is -- and I believe that's

13 analogous to this case. This isn't a fingerprints only

14 case.

15 THE COURT: But what else is there?

16 MR. CABELL: Well, just like in Wade, we had

17 the testimony of Jennifer Hechemy and Robin Thomas and Susan

18 Moniz who gave physical descriptions of the robber. Unlike

19 that case, the descriptions they gave, at least we would

20 argue, are essentially consistent with the defendant.

21 But the First Circuit noted there that even if

22 they're inconsistent, it doesn't matter. There is some

23 other evidence in the record. There is also the bank

24 surveillance videotape in this case. It distinctly shows

25 the robber approaching the window with the note in his hand

1 exactly as the witness described.
2 THE COURT: You absolutely can't make an
3 identification from that.
4 MR. CABELL: No, and I am not contending
5 otherwise, Your Honor. And just as the First Circuit, there
6 is footnotes three and four in the Wade decision where the
7 First Circuit said we don't think this evidence is really
8 all that strong. And as far as the descriptions given by
9 the teller, the defendant adduced some evidence to the
10 contrary.
11 But that's not what's important here in determining
12 whether the case gets to a jury. It's whether there is some
13 other evidence in the record in addition to the fingerprints
14 only or in addition to the fingerprints evidence such that a
15 rational trier of fact can conclude.
16 And unlike in Wade, in this case we have got two --
17 THE COURT: But just to pick up on that
18 footnote, they talk about, in that footnote three, "not
19 particularly sharp," in quotes.
20 Here no one could fathom who that surveillance
21 photograph was representative of.
22 MR. CABELL: Your Honor, respectfully there
23 are two different photos. The photo of the second robbery
24 is of less quality --
25 THE COURT: Yes, it is the one behind the

1 sign. The first one all you see is a lumbering figure with
2 something in his hand.
3 MR. CABELL: To the extent that the jury can
4 look at that and say could that be the defendant, it's
5 something that they can consider along with the rest of the
6 evidence in deciding whether he committed the crime.
7 The other thing, Your Honor -- and, granted, we
8 only had an hour or so to look at this. But these
9 fingerprints only cases, the origin of these cases, and in
10 particular I go back to the Corso case which is the one
11 Mr. Cloherty cited in his brief, the Fourth Circuit case.
12 It is the one where the fingerprint was found on an object
13 of such questionable probative value that it was unfair to
14 allow the case to get to the jury on that basis.
15 THE COURT: What was it there?
16 MR. CABELL: Corso was a matchbook.
17 THE COURT: It was very probative. It was
18 used to hold the door open.
19 MR. CABELL: But they said because there was
20 no evidence as to when that matchbook had been placed there,
21 there was no evidence, in fact, as to whether or when --
22 THE COURT: No, but it was very much a part of
23 the play. It was very much a part of the robbery, just as
24 the note is here. That matchbook was the key to the door
25 literally.

1 MR. CABELL: That's correct, Your Honor. But
2 in Corso there was no evidence at all that the defendant was
3 there at the time of the crime.
4 And, in fact, the defendant argued that he was
5 someplace else and the government put on no evidence to show
6 that he was actually there around the time the crime was
7 committed.
8 And in a case still in that circuit --
9 THE COURT: We don't have any evidence that he
10 was there.
11 MR. CABELL: Except for the evidence of the --
12 that in Wade that the First Circuit found to be sufficient
13 which is evidence that the jury could look at in deciding is
14 the person the tellers said robbed me the defendant. They
15 gave physical descriptions.
16 The jury can look at the defendant and decide
17 whether that is plausible or not.
18 THE COURT: One of them gave a description of
19 someone like 145 pounds who was five foot six or five foot
20 seven, something like that, and somebody else gives a
21 little, you know, a different one. And they have -- the
22 only thing that they have in common -- I don't mean any
23 offense. I mean, they said he was pudgy, both of them. And
24 in this day and age, that's not particularly probative.
25 MR. CABELL: But that --

1 THE COURT: Certainly, I will tell you, if the
2 only thing you have are the surveillance photographs, I
3 definitely would direct a verdict just on those because I
4 think they are ineffective and I don't think any probative
5 value.
6 MR. CABELL: Your Honor, if I may -- forgive
7 me but before I forget.
8 On the first robbery we have the testimony of
9 Jennifer Hechemy which is pretty dead on in terms of
10 describing the defendant. Not giving height and weight per
11 se but in terms of describing the build, skin tone, race,
12 and gender.
13 Susan Moniz who did on the direct exam -- or did on
14 cross-examination acknowledge that she gave a height and
15 weight that would really be for somebody much smaller, also
16 testified on redirect examination that those were estimates.
17 She is not good with numbers.
18 And she then went on to describe the person as
19 being larger than her, as being overweight, and, as before,
20 pale complexion.
21 I continue to maintain that in light of Wade and
22 what these other cases appear to suggest, that's still the
23 jury's domain. That is, the defense is going to argue they
24 can't rely on what Susan Moniz said because she said the
25 person was much smaller and much lighter and that's not my

1 client.

2 And we, the government, have to respond to that.

3 But that's what I believe the argument is for, and that's

4 for the jury to decide.

5 But the Fourth Circuit, which, again, was one of

6 the first circuits to come up with this doctrine, five years

7 after Corso had a case -- now Corso was not a bank crime, as

8 Your Honor is aware.

9 Five years after that they had a note job case like

10 this one. And aside from the fingerprints on the note,

11 later they get an admission from the defendant. And the

12 defendant said -- this was just on appeal -- it never should

13 have gone the jury. All you had linking me to the crime

14 were fingerprints.

15 And the Fourth Circuit said, Harris contends that

16 the fingerprints identified as his on the written note he

17 presented to the bank teller could have been impressed on

18 the paper before the demand was written or presented. Our

19 holding in Corso is not dispositive of this question because

20 that opinion merely states that when fingerprint evidence is

21 of questionable probative value, it cannot sustain a

22 conviction if it is the only substantive evidence presented.

23 And, again, I would argue this brings us back to

24 Wade where the First Circuit appears to be saying that where

25 you have got this evidence in the record from eyewitnesses,

1 giving descriptions of the robber, where you have got some
2 forensic evidence at least in the terms of a photograph --
3 THE COURT: Except the descriptions aren't
4 descriptive. The --
5 MR. CABELL: The quality of those -- and I
6 understand that --
7 THE COURT: No, but I understand what you are
8 saying. I mean, under normal circumstances -- under every
9 circumstance, if there is a question of fact, it should go
10 to the jury. And I do understand that. And I don't think
11 anybody has a problem with me on that as I look back in the
12 courtroom.
13 But when the description tells us nothing, that is
14 not the same as the description being fuzzy, hazy,
15 contradictive, she went both ways on her testimony. You
16 know, that still gets to the jury. But not when you look at
17 it and all you have is that the guy is white and has a pale
18 complexion.
19 MR. CABELL: I suppose to the extent --
20 THE COURT: If we were here and we were
21 listening to somebody testify and the only evidence in the
22 case was that the guy was black --
23 MR. CABELL: The case never would be brought.
24 THE COURT: But, you know, listen. There are
25 a lot of cases around this country where that has been --

1 MR. CABELL: I understand. I don't mean to be
2 flippant, but if you have fingerprints and some evidence
3 beyond that the person was a man or a woman, or about the
4 race, I think you get to the point where -- and
5 understanding the people, reasonable people can disagree to
6 the strength of a case --
7 THE COURT: Yes.
8 MR. CABELL: -- but I think at that point you
9 get to the jury. And I understand --
10 THE COURT: Suppose the jury asks me a
11 question, Is it enough that we find that the fingerprints
12 were his? That is the question they ask. You want me to
13 answer no.
14 MR. CABELL: No, that's not correct. What I
15 would instruct the jury in that instance is it's not for me
16 to tell you what is enough to find the defendant guilty --
17 THE COURT: Oh, please.
18 MR. CABELL: -- beyond a reasonable doubt.
19 THE COURT: The Court of Appeals --
20 MR. CABELL: You must look at the evidence as
21 a whole.
22 THE COURT: The Court of Appeals would come
23 all the way down the corridor here and slap me on the hand.
24 In other words, if they ask me a question like
25 that, I have to answer it. Is it enough? What do I do in

1 this case? Punt? I can't tell you whether it's enough.

2 MR. CABELL: Well, in light of these cases, I

3 suppose the answer would be if the only evidence in the

4 record or the only evidence you find is a fingerprint, then,

5 no, it's not enough but --

6 THE COURT: Suppose they ask another question.

7 Suppose they ask another follow-up question. You know, you

8 think your job is tough. You know, we get a lot of

9 interesting questions up here. They say, Was there any

10 other evidence. They ask me that question.

11 MR. CABELL: Then I -- then you'd be

12 charitable to me and say the government likes to think so

13 but that's your job to decide whether there was.

14 And if they say no, then we, I mean, we've

15 definitely failed our burden.

16 But, Your Honor, there is one or two other

17 decisions that I'd like to bring to the Court's attention.

18 THE COURT: Go ahead. Do you want your copy

19 back?

20 MR. CABELL: Your Honor, there is a Third

21 Circuit case from 1990, Government of the Virgin Islands

22 versus Edwards. It's 903 F.2d 267.

23 This is a case where the police found the

24 defendant's prints on windows that were washed once a month.

25 And the building was located in the -- the window was

1 located in the back of the building at a dead-end road, such
2 that in order for the defendant to be there he had to
3 trespass on the property to get to that point. And it was a
4 burglary charge.
5 And the Third Circuit concluded that the prints
6 were sufficient to support a burglary conviction even though
7 the defendant conceivably could have left the print while
8 trespassing on the victim's backyard at some time prior to
9 the burglary.
10 They noted that even though it was true that he
11 could have left the print on the outside of the glass while
12 he was trespassing at some other time, the evidence doesn't
13 have to be inconsistent with every conclusion save that of
14 guilt, provided that it establishes a case from which the
15 jury can find the defendant guilty beyond a reasonable
16 doubt.
17 What underlies this is exactly what underlies Wade
18 and what the Fourth Circuit in Harris was getting at five
19 years after Corso, which is a fingerprint on its own may or
20 may not be enough. But certainly where the jury can,
21 looking at that fingerprint in light of the context of the
22 case conclude that this person could have committed the
23 crime, it should get to the jury.
24 And I say that not flippantly because in a case
25 like this where there is evidence that the person coming

1 into the bank had the piece of paper in their hand and then
2 put it on the counter and then nobody else touched it, the
3 jury could as a -- would almost certainly as a matter of
4 common sense I would argue -- but certainly could infer that
5 the print left on there that was lifted must have come from
6 the person who put it there, ergo, it must have come from
7 the robber.

8 And I would argue that that in and of itself along
9 with the information from the tellers and the photograph of
10 the surveillance tape which they can look at -- and,
11 granted, I concede you can't see the face. But you can
12 certainly look -- especially in the Sovereign Bank -- you
13 can certainly look at that picture and say that could be the
14 defendant. And maybe they will say that couldn't be him.
15 But we maintain that is for them to decide.

16 **THE COURT:** I think I understand your
17 position.

18 Go ahead. Do you want to be heard?

19 **MR. CLOHERTY:** Well, I guess if you'd like to
20 hear me.

21 Briefly on Wade, there is, as Mr. Cabell alluded,
22 an enormous difference because there is a handwriting
23 analysis that was also in evidence. That was an unpublished
24 decision and not binding.

25 But there was a handwriting analysis. And so they

1 how smart you are, argue and read the opinion at the same
2 time.
3 (Laughter.)
4 (Pause in proceedings.)
5 MR. CABELL: Your Honor, having read this, I
6 don't think it's inconsistent with anything we have argued.
7 I don't -- this is Commonwealth versus Morris. I don't
8 think it undermines our position.
9 This is one where the intruder left a mask at the
10 scene. It's got a great thumbprint. And it turns out to be
11 a fingerprints only case, which should have required a
12 judgment of acquittal in his favor because there was no
13 other evidence linking that person to the crime. There was
14 nobody who saw him. Nobody who could give a description of
15 him. And there was evidence that the print could have been
16 left at any time thereafter.
17 What is different about that case from this case is
18 we do have the testimony, in this case, the victim Dunn
19 (ph.). In our case we have the tellers.
20 And the tellers were here to say no, the person who
21 came in looked like this. And this picture is of that
22 person. And I would -- I am certain that --
23 THE COURT: They didn't say that. They didn't
24 say that.
25 MR. CABELL: I'm sorry?

1 THE COURT: They didn't say that the
2 photograph looks like the defendant.
3 MR. CABELL: No, no, no. The photograph is
4 the robber. That's what --
5 THE COURT: No.
6 MR. CABELL: -- they said.
7 I am sure that as that was going on -- and we don't
8 know what's in their minds -- but I'm sure as that was going
9 on the jury was sitting there and thinking, okay, could this
10 be the defendant? Does he match the description that she is
11 giving us? Does this picture look like it could be him?
12 None of that was present in Morris. And to that
13 extent --
14 THE COURT: Did you ask the witness does the
15 defendant seated at the table match?
16 MR. CABELL: Your Honor, you had not permitted
17 us to use an in-court identification. And we had
18 instructed --
19 THE COURT: Because of the -- I think there
20 was some problem with turning something over.
21 MR. CABELL: No, no. The defense had argued
22 there was simply so much time between the crime and the
23 trial that any in-court identification would almost
24 certainly be due to the fact that the defendant was seated
25 right there as opposed to a recollection.

1 So it was, I just mean clinically it was sort of an
2 artificial prohibition on what we could do such that we had
3 to instruct the witness if you think you can identify him,
4 you have got to be quiet. You can't say anything.
5 So we couldn't do that. So all we are left with is
6 the jury listening to her describe what she told the police
7 at the time what the person looked like coupled with the
8 bank's surveillance tape, which under Wade was sufficient.
9 And I respectfully disagree with Mr. Cloherty as to
10 the significance of the handwriting exemplar. All the First
11 Circuit said was, well, we take that and the fingerprint
12 together as the point of departure. There is forensic
13 evidence linking the defendant to this note. Fine.
14 The question is we need something else in addition
15 to that to get to the jury. It was of absolutely no
16 significance in that case that there was handwriting
17 exemplar testimony as well as the print. All they merely
18 say there, in fact, in the reading of it, Mr. Krupp argued
19 that still constituted a fingerprints only sort of scenario.
20 And the First Circuit said that on its own we accept that
21 for purposes of argument. So they didn't actually decide
22 whether it was meaningful. For purposes of argument,
23 accepting that as true, your argument still fails because
24 you have a victim who could give testimony. And we're not
25 saying whether that testimony was accurate or not. That's

1 for the jury to decide.

2 And you had a bank surveillance tape. Maybe not a

3 great case, but it is for the jury to decide. And

4 especially whereas here the temporal relationship between

5 that note, that print and this crime is so short, as I have

6 argued before, Your Honor -- and I'm not sure this is

7 present in the other cases -- the jury almost certainly

8 would infer that the print came to be on the note at the

9 time the crime was being committed. And that is supported

10 more so by the evidence that the only person who ever

11 touched the note in each case was the teller and the robber.

12 That was why we had Detective Keefe who briefly

13 took the stand just to show that the crime scene, the

14 integrity of the scene was never broken and nobody ever

15 touched the note until Officer Burke came and took it

16 with --

17 **THE COURT:** But then you go to the Morris case

18 with the thumbprint on the mask. And, you know, the mask

19 obviously was used in the robbery.

20 **MR. CABELL:** But that's all there was in that

21 case, Your Honor. That's all there was.

22 **THE COURT:** Well, I think we are --

23 **MR. CABELL:** Well, we are but --

24 **THE COURT:** -- going around in circles.

25 **MR. CABELL:** And, Your Honor, I'm not trying

1 to beat a dead horse. But importantly in Morris what we
2 didn't have is further testimony that the jury could look at
3 and conclude along with the print that the defendant could
4 have done it. We didn't have anybody in Morris who could
5 say that was the person who was there, or the person who did
6 it looked like this.
7 This was one of those actually four black men
8 running. We would never argue that was sufficient. But
9 Morris to that extent is just not analogous to this case.
10 MR. CLOHERTY: Just to be clear, Your Honor,
11 regarding Morris, there was other evidence that the
12 Commonwealth pointed to and the SJC concluded is not enough.
13 And specifically they pointed to evidence that one
14 of the witnesses testified on cross-examination that he
15 thought he recognized the man in the mask as a person he
16 knew as Francis but he couldn't tell because of the mask.
17 And he volunteered -- and this is the testimony that came
18 in -- that the man in the clown mask also resembled the
19 defendant. So you had some, you know, evidence there. They
20 also said --
21 THE COURT: He hung around with somebody?
22 MR. CLOHERTY: Right, that there was
23 evidence -- oh, he also attributed the height and weight,
24 sort of a general type of description. In fact, a little
25 more accurate than what we have in this case. But the court

1 said that's too fuzzy. That's not specific.

2 There was testimony that there was a car that was

3 part of the crime that resembled the defendant's mother's

4 car.

5 And I believe you're right -- and I am remembering

6 as I look at it -- that there was evidence linking sort of

7 through friendships I believe or some acquaintanceship the

8 defendant with other people involved so -- and not enough.

9 Not enough.

10 And then, you know -- well, and I guess I'd like to

11 point out, I think I did before; but that decision that the

12 First Circuit didn't have the benefit of at the time they

13 made a decision in Wade, and I don't really think that

14 they're inconsistent in light of the handwriting analysis

15 that was in Wade. But that's, you know, pretty compelling

16 law. And it has been followed since in Massachusetts so.

17 **THE COURT:** I am going to allow the motion. I

18 think that I erred in denying it on September 9th so I am

19 going to allow it now. Okay.

20 And I will do it by crossing out my denial and

21 writing "allowed."

22 And as I do this, I want to say, you know, it is

23 not something that I toss out in every case. This case was

24 superbly handled by both sides, very, very professionally

25 done. It was a pleasure to preside. And you both did a

1 terrific job.

2 I have to tell you, I never heard of the single

3 print doctrine before. I can't even remember that case with

4 Krupp, although I always remember when he is -- I think he

5 had me reversed once. He told me he was going to have me

6 reversed when I made a ruling, he says you will get reversed

7 if you do that. And I said to him, I said, Are you kidding

8 me. I raised the sentence. You can imagine, they see that

9 Joe Tauro raises a sentence and they're going to reverse me.

10 I said, No, never happen. Sure as hell, reversed.

11 (Laughter.)

12 **THE COURT:** So anyway.

13 Now, what do we --

14 (Whereupon, the Court and the Clerk conferred.)

15 **THE COURT:** Is there anything else -- we send

16 him back to the marshals anyway. Is there any detainer?

17 **MR. CABELL:** I think there is. I think

18 Worcester County may have an outstanding detainer.

19 **THE COURT:** So I am not going to release him.

20 **MR. CABELL:** I mean, I understood the normal

21 protocol would be he would go back to where he is being held

22 and they would run his name through the system to see if

23 anybody else has a warrant outstanding.

24 **THE COURT:** Don't let him go -- we had one

25 situation not too long ago where that happened.

1 THE MARSHAL: Just so I'm clear, is he being
2 released on these charges? And he has a warrant out in the
3 Worcester District Court?
4 THE COURT: Yes. I don't know. You have to
5 find out -- you have to run it through --
6 THE MARSHAL: That's right. He is released up
7 here and we will run a full warrant downstairs.
8 THE COURT: You take him down. And if
9 somebody else wants him, you give him to somebody else.
10 If nobody else wants him, make sure you are right
11 because we had a situation in one of Judge Zobel's cases
12 that the guy walked out the door and he hasn't been seen.
13 THE MARSHAL: He is to be released from these
14 charges?
15 THE COURT: As far as this charge, he is
16 released.
17 THE CLERK: Mr. Thomas Cooley, you are to go
18 without day on this particular case.
19 THE DEFENDANT: Thank you.
20 MR. CLOHERTY: Thank you, Your Honor.
21 THE COURT: Thank you everybody.
22
23 (WHEREUPON, the proceedings were recessed at 3:25
24 p.m.)
25

EXHIBIT F

MEMORANDUM

To: Jonathan Wroblewski
From: Albert Moskowitz
Date: November 12, 2004
Re: Rule 29 judgment of acquittal in *United States v. Collins, et al.* (W.D.N.C.)

I. EVIDENCE AND ELEMENTS OF THE CHARGED OFFENSE

On May 10, 2000, Paul Midgett, who was then a pre-trial detainee at the Mecklenburg County Jail in Charlotte, North Carolina, was punched and kicked multiple times in the head and torso by Captain Rodney Collins and Sergeant Paul Gee ("the defendants"), who were supervisory corrections officers at the jail. Paul Midgett stands approximately 5'5" and weighs approximately 110 pounds. The defendants are both well over 6 feet tall and weigh over 200 pounds. Prior to this use of force by the defendants, Midgett, who had been released from his cell to go to the recreation yard, got into a verbal altercation with another corrections officer, refused an order to return to his cell, and was then taken to the floor by Officers AB Smith (the officer with whom Midgett had the verbal dispute) and Doltheia Thigpen. Smith and Thigpen testified that they were holding Midgett down on the floor and had Midgett fully under control when the defendants entered the area, told Smith and Thigpen to release Midgett and move out of the way, and then picked Midgett up and dragged him into an adjoining room, where the defendants proceeded to strike him with their fists and feet. According to the testimony of Smith and Thigpen, as well as the testimony of inmate Aaron Little, who was watching the incident from the recreation yard, there was no legitimate reason for the defendants to strike Midgett because Midgett was not fighting them or posing any physical threat to them. Although the defendants later claimed (in their written use of force reports and statements to the jail's internal affairs investigators) that they had used force on Midgett because Midgett had grabbed defendant Gee's leg and refused to let go, causing the defendants to fear that Midgett (who had hepatitis C) might bite Gee, the government's witnesses all testified that they never saw Midgett grab Gee's leg. Officer Smith testified that he saw the defendants deliver approximately eight blows to Midgett. Thigpen and Little were unsure of how many blows the defendants delivered, but were certain that Midgett sustained multiple blows.

According to the testimony of Dr. Dwight Wait, who was the medical director of the Mecklenburg County Jail, he examined Midgett immediately following the incident and noted that Midgett exhibited evidence of bruising to his face, chest, and arms, and that he had a laceration above his eye that required stitching, as well as possible rib and facial bone fractures. Subsequent x-rays taken later on May 10, 2000, at the Carolinas Medical Center ruled out facial bone fractures. A few days later, Dr. Wait ordered rib detail x-rays that confirmed Midgett had sustained a non-displaced fracture to one of his right ribs. Dr. Wait testified that the injuries he observed to Midgett immediately following the incident on May 10, 2000, were most likely caused by multiple blunt force trauma and that the injuries to Midgett that he observed were consistent with "multiple" blows or kicks with closed fists or feet. Dr. Wait also testified that he had never treated an inmate following a use of force by jail staff who was in worse condition than Paul Midgett.

The indictment charged the defendants with aiding and abetting each other in violating 18 U.S.C. § 242, which prohibits anyone from acting under color of law to willfully deprive any person of a right secured by the Constitution, which, in this case, was Midgett's right under the Due Process Clause of the Fourteenth Amendment to be free from excessive force amounting to punishment. See Bell v. Wolfish, 441 U.S. 520, 535-39 (1979). The indictment further charged that the violation of section 242 resulted in bodily injury to Midgett, thus rendering the violation a felony. In order to show that Midgett suffered a constitutional deprivation, the government had the burden of proving that the defendants' use of force against Midgett was not undertaken for a legitimate law enforcement purpose but rather that it was "malicious and sadistic for the purpose of causing harm." See Hudson v. McMillian, 503 U.S. 1, 5 (1992). See also Whitley v. Albers, 475 U.S. 312, 320 (1986); Estelle v. Gamble, 429 U.S. 97, 104 (1976).

The government's argument to the jury based on the evidence presented at trial would have been that the defendants purposely used their state-sanctioned authority as supervisory corrections officers to inflict physical pain on Midgett without any reason for doing so. Specifically, we would have argued that the evidence demonstrated that Midgett was under control and not posing a threat to the defendants when they struck him repeatedly in the head and chest, that officers trained at the Mecklenburg County Jail know that they are not allowed to use physical force against inmates who are already under control, and that it defies common sense that the defendants could not control an inmate less than half their sizes without administering multiple blows and kicks to his head and torso. We would also have argued that Dr. Wait's testimony regarding his observations of Midgett's injuries established both that the beating described by the government's witnesses was consistent with Midgett's injuries, and that Midgett sustained "bodily injury" as a result of the defendants' unlawful actions.

II. THE COURT'S RULE 29 RULING

At the close of the government's case, the District Court, Chief Judge Graham C. Mullen presiding, entered a judgment of acquittal pursuant to Rule 29. The Court's stated basis for doing so was as follows:

> "I believe that I am compelled at this time to determine that the evidence fails to establish any motive to punish by ordeal rather than by trial. That the failure to call Mr. Midgett, indeed, creates a fatal vacuum, and particularly in evidence of strikes by Thigpen and Smith. And while the injuries sustained by Mr. Midgett would satisfy the element of bodily injury, the relatively minor injuries he sustained are completely inconsistent with government testimony. A prolonged beating by men as big and strong as these, the defendants would have produced horrific injuries. They aren't there. The injuries are minor. So even if we believed the government's evidence, the medical evidence completely contradicts it.
>
> The Court believes that it is compelled on this matter to grant the defense motions for directed verdicts of acquittal pursuant to Rule 29 as to both

defendants as to all charges."

III. DISCUSSION OF WHY THE COURT'S RULING WAS INCORRECT

In granting the defendants' Rule 29 motion in this case, the court misconstrued the elements of an offense under 18 U.S.C. § 242 while also improperly assessing the credibility of the government's witnesses. First, the court improperly stated that the United States was required to prove that the defendants' harbored a motive to punish Paul Midgett "by ordeal rather than by trial," which suggests that the government was required to prove that the defendants had a specific intent to deprive Midgett of the due process afforded by a trial by, instead, physically punishing him. However, the government is not required to prove any such motive to engage in summary punishment in order to establish that the defendants willfully deprived Midgett of his rights under the due process clause. Rather, the government is required to prove only that the defendants purposely engaged in conduct that constituted "excessive force amounting to punishment." In other words, there is no requirement that the government prove that the defendants intended to avoid process and punish Midgett, but only, as noted above, that the lack of legitimate justification for the defendants' actions rendered them "malicious and sadistic for the purpose of causing harm" or a "wanton and unnecessary infliction of pain." The evidence presented at trial was more than sufficient to meet this standard. Two officers and one inmate testified that the defendants not once, but repeatedly, struck Midgett with their fists and feet in the head and torso even though Midgett was not posing any threat to the defendants. The evidence of the repeated nature of the defendants' actions and the lack of justification for those actions was sufficient to establish the requisite intent.

Further, the court failed to follow the proper deferential standard in determining the sufficiency of the government's evidence. When addressing whether evidence is sufficient to sustain a conviction, the trial court "must view the evidence in the light most favorable to the government and inquire whether any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt." United States v. Lentz, 383 F.3d 191, 199 (4th Cir. 2004); United States v. Pearce, 65 F.3d 22, 25 (4th Cir. 1995) (explaining Jackson v. Virginia, 443 U.S. 307, 318-319 (1979)); see also United States v. Carter, 355 F.3d 920, 925 (6th Cir. 2004) ("[i]t is well established that a *trial judge* confronted with a Rule 29 motion must consider all of the evidence in a light most favorable to the government) (emphasis added). The court conducting the inquiry should not resolve the issue by inquiring whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt." Jackson, 443 U.S. at 318-319 (internal quotations omitted; emphasis in original). The focus is upon whether "*any* rational trier of fact" could find that the government met its burden of proof. See id. at 319 (emphasis in original). Because the defendants have exercised their right to a jury trial, it is for the jury, not this court, to "assesses the credibility of the witnesses and resolve any conflicts in the evidence presented." Lentz, 383 F.3d at 199.

By concluding that the beating described by the government's witnesses should have resulted in "horrific" rather than "relatively minor" injuries to Midgett, the district court failed to

construe the evidence in the light most favorable to the government and instead made its own determination concerning the credibility of witnesses.[1] The impropriety of the Court's assessment is obvious when viewed in light of the treating physician's testimony that the injuries he observed were both serious enough to warrant that Midgett be sent to the hospital, and consistent with the defendants' actions as described by the government's eyewitnesses. Finally, even if a rational juror had determined that the government's witnesses exaggerated the extent of the beating by the defendants, that juror could nonetheless have found the defendants guilty if they credited the witnesses' testimony that the defendants used *some* degree of physical force against Midgett, that *no* use of force by the defendants was necessary because Midgett was already under the control of other officers, and that Midgett suffered bodily injury as a result of whatever force the defendants did exert on him.

IV. HARM TO THE COMMUNITY RESULTING FROM THE RULING

The Court's erroneous ruling in this case has caused significant harm to the community. First, in ruling that the government had insufficient evidence to prove that Paul Midgett had been the victim of an unjustified beating and in effectively stating that the government's witnesses were liars, the Court dealt a considerable setback to the Department's efforts to enforce the civil rights laws in the Western District of North Carolina. The Court's judgment resulted in virtually immediate statements to the press by defense counsel, and worse, the Sheriff of Mecklenburg County, that the case was frivolous and was, in the Sheriff's words, a "witch hunt," conducted by the federal government. Second, the two officers who cooperated with the government in this case have now been suspended from their duties by the Sheriff's Department and will most likely be fired. The Court's ruling will therefore either cause the community to harbor the erroneous belief that the Department of Justice is not a credible enforcer of the Constitution, or it will further the notion that law enforcement officers are not accountable to the public. Either result will serve to undermine public confidence in the justice system and in law enforcement officers.

[1] In this regard, the court's suggestion that the government's case was somehow made weaker by its failure to call Paul Midgett to testify defies reason. There is no requirement that a victim must testify in order to establish proof of a criminal assault. Indeed, if there was, murder would not be a prosecutable offense. In an assault case, the victim may be a far worse witness than other observers both because the victim's perception is impaired by the assault itself and because the victim is a necessarily interested witness. Moreover, Midgett's testimony was not necessary to establish any element of a felony section 242 violation in this case. The court itself acknowledged that there was sufficient evidence of "bodily injury" for purposes of section 242. As to the other elements, the government's witnesses gave a more than sufficient account that there was a purposeful unjustified use of force by the defendants. Whether those witnesses' testimony was incorrect as a result of some failure of perception or somehow exaggerated, or whether the injuries to Midgett were "minor" or more severe, was for the jury to determine.

V. APPENDIX

Attached are transcripts of the trial testimony of the government's witnesses, the oral argument on the Rule 29 motion, and a photocopy of a photograph of Paul Midgett's visible injuries that was taken a few days after the incident on May 10, 2000.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. RODNEY COLLINS AND PAUL GEE, Defendant.	3:03CR163 OCTOBER 19, 204

VOLUME 2

TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE GRAHAM C. MULLEN
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF	GERARD V. HOGAN, ESQ. KRISTY L. PARKER, ESQ. Civil Rights Division U. S. Department of Justice 601 D. Street, NW Washington, DC 20004
FOR DEFENDANT COLLINS	LYLE J. YURKO, ESQ. 402 W. Trade Street Charlotte, NC 28202
FOR DEFENDANT LEE	JAMES F. WYATT, III, ESQ. ROBERT A. BLAKE, JR., ESQ. 435 E. Morehead Street Charlotte, NC 28202

Proceedings reported and transcript prepared by:

JOY KELLY, RPR
U. S. Official Court Reporter
Charlotte, North Carolina
704-350-7495

COPY

1 A Yes.

2 MR. YURKO: Objection to leading.

3 THE COURT: Overruled.

4 Q Could you describe for us Mr. Midgett's physical

5 appearance?

6 A He's a small guy of about maybe five foot tall at the

7 most, maybe hundred, to 110 pounds.

8 Q And you've already described Mr. Midgett's attitude.

9 Could you tell us a little bit more about what it was like

10 dealing with Mr. Midgett?

11 A Well, Mr. Midgett was always an annoying person to deal

12 with. Usually if you told him to go lock down, you had to

13 tell him several times and he would cuss you out while he

14 was doing it, but usually he would just go to his room.

15 Q During the time you had known Mr. Midgett, how often

16 had you needed to use physical force with Mr. Midgett?

17 A Never.

18 Q How often had you seen other officers need to use

19 physical force with Mr. Midgett?

20 A Never.

21 Q How often had you been warned about the need to use

22 physical force with Mr. Midgett?

23 A Never.

24 Q Now, you were beginning to tell us that on this date,

25 this morning on May the 10th, you saw Mr. Midgett in the

1 slider area. Could you tell us how that came to pass?

2 A He was in the slider areas and I was talking to him

3 because he was asking about his medication. And I told

4 him --

5 Q Let me stop you right there. What was Mr. Midgett

6 doing in the slider area at that time?

7 A He was getting ready to go to the rec yard.

8 Q Okay. So he was legitimately in the slider area. Is

9 that correct?

10 A Yes, he was.

11 Q And I take it that he was one of the inmates who was

12 actually justed back in Pod 5100. Is that correct?

13 A Yes, he was.

14 Q And so he was -- what route was he taking to get to the

15 rec yard?

16 A He was coming out of the 30 side to walk towards the

17 rec yard.

18 Q And what were you doing at that time?

19 A I was going -- I was standing out there about to do a

20 pod tour, which is walking around, checking on everybody in

21 the pod.

22 Q How many other officers were there in the pod area at

23 that time?

24 A There were two other officers in the pod area.

25 Q And who were those officers?

1 A Officer Thigpen and Officer Hill.
2 Q Do you know the first names of Officer Thigpen and
3 Hill?
4 A Officer Thigpen is Doltheia, and Officer Hill is
5 Gabriel.
6 Q Now, these officers were in the bubble area. Is that
7 correct?
8 A Yes, they were.
9 Q What was their job at that time?
10 A They job was just to watch me as I was walking around
11 during my tour.
12 Q Can you describe for us your contact with Mr. Midgett
13 at that time?
14 A At that time me -- I seen Mr. Midgett in the slider and
15 he had asked me about his medication. I had told him I had
16 already called about his medication. And he demanded that I
17 call again about his medication. I told him I would not
18 make a call about the medication again.
19 He got very abusive and loud with the verbal comments.
20 And I asked him to go lock down in his room. And at that
21 time he reached his hand out to place his hand on my stomach
22 area.
23 Q So Mr. Midgett touched your stomach. Is that correct?
24 A Yes, he did.
25 Q Now, is that a violation of the rules for an inmate to

1 touch the body of a staff member?
2 A Yes, it is.
3 Q So what did you do in response to Mr. Midgett violating
4 the rules?
5 A I grabbed his hand that he had on my stomach and tried
6 to put it in a hold.
7 Q And how successful were you at achieving that?
8 A I got it in the hold but his other hand was free.
9 Q And what did you do with Mr. Midgett at that time?
10 A I grabbed him. I'm just trying to get ahold of him,
11 that's all I was trying to do.
12 Q And were you behind Mr. Midgett, in other words, did
13 you spin him around at that time?
14 A Yes, I did.
15 Q Okay. And where were Mr. Midgett's feet at that time?
16 A They were dangling in the air.
17 Q You've described Mr. Midgett as about five feet tall.
18 Is that correct?
19 A Yes, sir.
20 Q You are how many feet tall? How tall are you?
21 A Six foot three.
22 Q So you had Mr. Midgett and his feet were actually up
23 off the ground. Is that correct?
24 A Yes, sir.
25 Q What was he doing with his feet at that time?

1 A He was kicking his feet.
2 Q What was Mr. Midgett saying to you at that time?
3 A He was using profanity towards me. I do not know
4 exactly what he was saying but he was cursing towards me.
5 Q Okay. Now, you described two other officers as being
6 in the bubble. Did any other officers come to your
7 assistance at that time?
8 A Yes. Officer Thigpen came out of the bubble area.
9 Q Now Officer Thigpen, is that a man or a woman?
10 A A woman.
11 Q And approximately how big is Officer Thigpen?
12 A She's roughly maybe five foot two, five foot three.
13 Q Is Officer Thigpen a member of what's called a DART
14 team?
15 A At the time she was.
16 Q What is the DART team?
17 A The DART team is direct action response team. That's
18 the team that is activated whenever we have a very combative
19 situation which we need specialized training to do.
20 Q So she was hot there as a member of the DART team. She
21 was there as a bubble officer assisting you. Is that
22 correct?
23 A Yes.
24 Q When Officer Thigpen came out to assist, what did she
25 do?

1 A She grabbed his legs and then we fell to the floor wit'
2 him.
3 Q Did you fall to the floor or to you actually take
4 Mr. Midgett down to the floor?
5 A We took him down to the floor.
6 Q How is that consistent with your training procedures?
7 A That is the proper procedure for what we were doing.
8 Q At that time what part of Mr. Midgett's body did you
9 have?
10 A I had his arms.
11 Q And what part of Mr. Midgett's body did Officer Thigpen
12 have?
13 A She had his legs.
14 Q When Mr. Midgett went down to the ground, did he use
15 his hand to do anything?
16 A No.
17 Q Did there come a time when Mr. Midgett was secured on
18 the ground by the two of you officers?
19 A Yes.
20 Q And at that point in time what was your goal in dealing
21 with Mr. Midgett?
22 A To restrain him. We take him to his room or escort him
23 to the hallway.
24 Q How would you -- in the normal course of things, how
25 would you go about restraining somebody in a that situatio

1 A Place handcuffs on him. Just pick him up and carry him
2 out of the pod.
3 Q Now, did you have handcuffs on him at that time?
4 A Yes.
5 Q What effort did you make to handcuff Mr. Midgett at
6 that time?
7 A I could not get to my handcuffs, so I could not put
8 handcuffs on him at that time.
9 Q And were there any other officers present in the slider
10 area at that time?
11 A Officer Latimer came in, came back into the pod and he
12 was about to place handcuffs on him.
13 Q Now, who is Officer Latimer?
14 A He is another detention officer who was working that
15 pod at the time.
16 Q And it's your testimony that Officer Latimer was about
17 to place handcuffs on him?
18 A Yes, sir.
19 Q Now, at that time, as you are on top of Mr. Midgett,
20 you have the upper body. Is that correct?
21 A Yes.
22 Q And Officer Thigpen has what part of body?
23 A The legs.
24 Q At that time was Mr. Midgett secured, in your opinion?
25 A Yes, he was.

1 Q What happened next?
2 A We heard a voice that said, "Let him go." And we let
3 him go and he pulled up from under us.
4 Q And whose voice was it?
5 A I do not know which one it was. It was either
6 Sergeant Gee or Captain Collins.
7 Q When you looked up, did you see Sergeant Gee and
8 Captain Collins?
9 A Yes, I did.
10 Q Where were they at that time?
11 A They were standing over Mr. Midgett.
12 Q And when one of them issued the command to let go, what
13 did you do?
14 A Let him go.
15 Q And what did Officer Thigpen do?
16 A Let him go.
17 Q And what did officers -- what did Sergeant Gee and
18 Captain Collins do then?
19 A They pulled him out to the open area, which I described
20 as the food prep area, and they started hitting on him and
21 kicking.
22 Q Okay. At that time you had just been on the floor.
23 Correct?
24 A Yes.
25 Q What did you do at that time?

1 A I was just trying to get up off the floor. And I
2 turned around and I just stood there and watched.
3 Q And where were you standing as you watched?
4 A About eight feet, I was standing still between the
5 sliders.
6 Q And how far were you from where Sergeant Collins and --
7 Captain Collins and Sergeant Gee had Mr. Midgett?
8 A About eight feet away.
9 Q What, if any, obstructions were there between you and
10 where Captain Collins and Sergeant Gee had Mr. Midgett?
11 A None.
12 Q How clearly could you see what was happening in the
13 food preparation area?
14 A Very clear.
15 Q You mentioned that Captain Collins and Sergeant Gee
16 started striking blows against Mr. Midgett. Is that
17 correct?
18 A Yes.
19 Q At the time you first saw those blows being struck,
20 where was Mr. Midgett?
21 A He was laying on the floor, on the floor.
22 Q Was Mr. Midgett laying on his stomach or his back at
23 that time?
24 A He was laying on his back.
25 Q What was Mr. Midgett doing with his hands at that time?

1 A He had his hands in a defensive-like stance as he was
2 defending himself from being hit or something.
3 Q And at that time did you see Mr. Midgett grabbing hold
4 of the leg of the person you've identified as Sergeant Gee?
5 A No.
6 Q How sure are you about that?
7 A I'm positive of that.
8 Q Was Mr. Midgett grabbing hold of Sergeant Gee's leg or
9 ankle at that time?
10 A No.
11 Q What, if any, blows did you see Mr. Midgett attempt to
12 throw against either Sergeant Gee or Captain Collins?
13 A I didn't see any.
14 Q Now, can you describe the blows that you saw
15 Sergeant Gee throw?
16 A They were pretty hard kicks and punches.
17 Q And approximately how many kicks or punches were
18 thrown?
19 A Maybe four or five.
20 Q Turning to Captain Collins, what did you see him do at
21 that time?
22 A I saw him kicking as well.
23 Q And how many blows did you see Captain Collins strike
24 against Mr. Midgett?
25 A About three.

1 Q Now, what part of Mr. Midgett's body did you see
2 Sergeant Gee and Captain Collins strike?
3 A His upper torso area, from his waist to his neck.
4 Q Approximately how long did this go on from the time you
5 witnessed the first blow to the time of the last blow?
6 A About 30, 45 seconds.
7 Q And during that 30 to 45 seconds, Officer Smith, did
8 you ever see Mr. Midgett clinging to the leg of Sergeant Gee
9 or Captain Collins?
10 A No.
11 Q Did you ever see Mr. Midgett strike out blows against
12 Sergeant Gee or Captain Collins?
13 A No.
14 Q You talked earlier about training that you received on
15 use of force. Were you trained to deal with situations like
16 the one you were witnessing that day?
17 A Yes.
18 Q And did the behavior of Sergeant Gee and
19 Captain Collins match the training, the use of force
20 training that you had received regarding how to deal with
21 somebody in the position of Paul Midgett as he lay on the
22 floor?
23 A No.
24 Q According to your training, what is the goal of the use
25 of force continuum when somebody is flat on their back in

1 the position that Mr. Midgett was in?
2 A The goal is restrain him and secure them and put
3 handcuffs on him.
4 Q And during that 30- to 45-second period when you saw
5 these blows and kicks being struck by Sergeant Gee and
6 Captain Collins, what attempt did you see either of these
7 men make to handcuff Mr. Midgett?
8 A None.
9 Q Now, what other officers were standing there at that
10 time?
11 A Officer Thigpen and Officer Latimer.
12 Q Taking you one by one, did you make any effort to
13 assist Sergeant Gee and Captain Collins during this 30- to
14 45-second period?
15 A No.
16 Q Why not?
17 A I saw no need for me to get involved and assist.
18 Q What, if anything, did Officer Latimer do to try to
19 come to the assistance of these two officers at that time?
20 A Nothing.
21 Q What did Officer Thigpen do to try to come to the
22 assistance of these officers?
23 A Nothing.
24 Q Why didn't you make an effort to stop this thing you
25 said was contrary to your training?

1 A Because these were supervisors and you're not going to
2 contradict your supervisor when you work for an agency such
3 as the Sheriff's Office.
4 Q You mentioned earlier an Officer Hill. Do you know
5 where Officer Hill was at this time?
6 A He was in the bubble area.
7 Q Based on what you saw during that 30- to 45-second
8 period, did you see any reason for Sergeant Gee or
9 Captain Collins to strike the blows against Mr. Midgett?
10 A No.
11 Q At the end of the 30- to 45-second period, did there
12 come a time when Mr. Midgett was cuffed?
13 A He was cuffed. I do not know who cuffed him but he was
14 cuffed by someone.
15 Q At the end of that 30- to 45-second period, what was
16 Mr. Midgett's condition?
17 A He was laying on the floor with blood around his body
18 area.
19 Q Could you see what part of his body was bleeding?
20 A No. It appeared to be his face was bleeding.
21 Q At that time did you hear Sergeant Gee or
22 Captain Collins issue any orders to you?
23 A No.
24 Q Or other officers?
25 A No.

1 Q What role did these two officers, Sergeant Gee and
2 Captain Collins, play in cuffing Mr. Midgett?
3 A None.
4 THE COURT: Well, he can't answer that question
5 because he already said he didn't see and didn't know who
6 did cuff him, so ignore that, members of the jury.
7 MR. HOGAN: Could I ask a question to clarify?
8 THE COURT: Proceed, Mr. Hogan.
9 BY MR. HOGAN
10 Q What observations -- in the wake of this incident, what
11 observations did you make with respect to Mr. Midgett's
12 face?
13 A It looked -- it was pretty badly bruised. It was a
14 purplish-like color, bluish color to it.
15 Q Now, you had been dealing with Mr. Midgett just minutes
16 before in the slider area prior to the time you had this
17 discussion with Mr. Midgett or as you were discussing the
18 medication issue with Mr. Midgett in the slider area, how
19 did his face look then?
20 A It was plain, clear. Just normal as -- normal white
21 appearance.
22 Q And how did he look differently after he had this
23 incident with Captain Collins and Sergeant Gee?
24 A His face was purplish and bluish-like color to it.
25 Swollen up pretty bad.

1 Q Now, do you know, did any medical people come and treat
2 Mr. Midgett?
3 A I don't know if medical came and treated him.
4 Q What did you do after this incident was over?
5 A I stayed in the pod area.
6 Q Did there come a time when you filled out what's called
7 a Use of Force Report about this incident?
8 A Yes, I did.
9 Q And could you tell the jury pursuant to your training
10 who is supposed to fill out a Use of Force Report when
11 something like this happens?
12 A Those involved in the force. Those applying the force.
13 Those who witnessed the force.
14 Q So as somebody who was both involved in the use of
15 force and a witness to the use of force, you had an
16 obligation to fill out a Use of Force Report. Is that
17 correct?
18 A Yes, I did.
19 MR. HOGAN: Your Honor, at this time we'd put on
20 the screen just for the witness what has been marked as
21 Government's Exhibit No. 1.
22 THE COURT: It's not supposed to be before the
23 jury yet, so whoever has got --
24 MR. HOGAN: It is not, Your Honor.
25 THE COURT: Okay.

1 MR. HOGAN: It is not.

2 BY MR. HOGAN

3 Q Officer Smith, do you recognize what has been marked as

4 Government's Exhibit No. 1?

5 A Yes, I do.

6 Q What is it?

7 A It is an officer's record Use of Force Statement.

8 Q And who filled out this Use of Force Statement?

9 A I did.

10 Q And when did you fill this out?

11 A I filled it out on the day of the incident.

12 Q And could you read -- strike that.

13 MR. HOGAN: Your Honor, we offer what's been

14 marked as Government's 1 into evidence.

15 THE COURT: All right. Government's 1 is ordered

16 admitted into evidence. You have my exhibit it to the jury.

17 (Government's Exhibit No. 1 received.)

18 BY MR. HOGAN

19 Q What did you have to say --

20 THE COURT: All right. Are you able to read that,

21 members of the jury, on that screen?

22 THE JURY: Uh-huh.

23 THE COURT: Okay. Move on. No point in having

24 him read it.

25 BY MR. HOGAN

1 Q What, if anything, did you say in your report about
2 what you had seen Captain Collins and Sergeant Gee do to
3 Mr. Midgett?
4 A I stated nothing about that.
5 Q Why is that?
6 A Because they were my supervisors and I didn't feel like
7 I should add that in my report. I just made a general
8 report.
9 Q Did there come a time when you were interviewed by
10 Internal Affairs --
11 A Yes, there was.
12 Q -- about what had happened that day in Pod 5100?
13 A Yes.
14 Q What did you tell Internal Affairs about what you saw
15 Captain Collins and Sergeant Gee do to Mr. Midgett?
16 A I told them the same thing I stated in this Use of
17 Force Report.
18 Q And why was that?
19 A Because they were my supervisors and I will not or
20 would not go against what my supervisors had done or tell on
21 my supervisors at that time.
22 Q When was the first time you told anybody about what had
23 happened in Pod 5100 that morning?
24 A Earlier this year when I talked to Scott Perkins.
25 Q Who is Scott Perkins?

1 A He's the F.B.I. agent that's sitting right there with
2 the beige jacket on.
3 Q Why did you tell Agent Perkins about what you saw in
4 Pod 5100?
5 A I told him because it was explained to me that my
6 statement here was not true and that there was those who
7 have told, so you knew what had happened. He needed me to
8 tell the truth.
9 Q Did Agent Perkins tell you you were going to have to go
10 in front of a federal grand jury and take an oath to tell
11 the truth?
12 A Yes, he did.
13 Q Amd why did you then tell the truth to Agent Perkins?
14 A Because I didn't want to go in front of the grand jury
15 and tell a lie to the grand jury.
16 MR. HOGAN: The Court's indulgence.
17 Pass the witness, Your Honor.
18 THE COURT: All right. Cross-examine.
19 MR. YURKO: Thank you, Your Honor.
20 CROSS EXAMINATION
21 BY MR. YURKO
22 Q Good morning, Mr. Smith.
23 I'm Lyle Yurko and I'm going to ask you some questions
24 about your job and the events of May 10th.
25 You're a detention officer with the Mecklenburg Count

1 Q And while you were testifying in the grand jury, do you
2 recall being asked this question and giving this answer.
3 Prosecutor: "Well, let me ask you this, have you seen
4 photographs of Mr. Midgett and how he looked?
5 "Answer: I've Seen the recent photographs of him."
6 Do you recall giving that answer?
7 A Yes, I do.
8 Q Okay. And you're telling this jury today you never saw
9 those photographs?
10 A I told you they didn't show me the photographs.
11 Q Hhmm?
12 A I saw a picture in "Creative Loafing Magazine."
13 Q Okay. In fact, what your doing is taking that picture
14 and using that to say that's how Midgett looked at the time
15 of this incident, isn't it?
16 A No.
17 **MR. WYATT:** May I have just a moment, Your Honor?
18 **THE COURT:** You may.
19 Q Now, today you've told this jury that Midgett did not
20 punch anyone. Correct?
21 A Yes.
22 Q In your statement to the United States Marshal Service
23 you said he was punching, didn't you?
24 A Yes.
25 Q In your statement to Internal Affairs you said he was

1 punching, didn't you?

2 A Yes.

3 Q But now today you're saying he's not punching anyone.

4 Right?

5 A Yes.

6 MR. WYATT: May I have just a moment, Your Honor?

7 THE COURT: You may.

8 MR. WYATT: That's all, Your Honor.

9 THE COURT: Any redirect?

10 MR. HOGAN: Briefly, Your Honor.

11 **REDIRECT EXAMINATION**

12 **BY MR. HOGAN**

13 Q Mr. Smith, Mr. Yurko and Mr. Wyatt asked you about

14 statements that you made to various people prior to meeting

15 with the F.B.I.. Asked you, first of all, about your Use of

16 Force Report. And Mr. Yurko pointed out that you did not

17 provide any details about what you saw Sergeant Gee and

18 Captain Collins do to Mr. Midgett in that Use of Force

19 Report. Is that correct?

20 A Yes.

21 Q Why not? Why didn't you provide any details in your

22 Use of Force Report?

23 A They are my supervisors and when you're writing a Use

24 of Force Report you usually don't want to incriminate one of

25 your coworkers or your supervisors. And by being in the la

1 enforcement agency, I understand that it is not a good thing
2 to so-called snitch on your supervisors.
3 Q Mr. Yurko and Mr. Wyatt both asked you questions about
4 statements, a statement that you made to a deputy marshal
5 the day after this incident. And they both pointed out you
6 didn't provide any details about Captain Collins or
7 Sergeant Gee had done to that deputy marshal. Why didn't
8 you tell the deputy marshal?
9 A Because I didn't want to tell on my supervisors, as I
10 stated before.
11 Q Mr. Yurko and Mr. Wyatt asked you questions about an
12 interview that was conducted by -- a fellow by the name of
13 Hawes with Internal Affairs. Mr. Wyatt showed you a
14 document that you signed just prior to that interview.
15 Correct?
16 A Yes.
17 Q And Mr. Yurko and Mr. Wyatt asked you about the fact
18 that you had omitted lots of relevant details about what you
19 now say you saw Sergeant Gee and Captain Collins do. Is
20 that correct?
21 A Yes.
22 Q Why is it that you didn't tell Mr. Hawes or
23 Officer Hawes about what you saw?
24 A Because I did not want to put myself in a situation
25 where I was being the one to tell on my supervisor that I

1 had at the time. They are considered good supervisors with
2 the Sheriff's Office and I did not want to be the one to
3 bring them down.
4 Q Mr. Yurko and Mr. Wyatt asked you questions about a
5 meeting you had with Agent Perkins about -- and these
6 representatives of the Department of Justice. He asked you
7 about a civil suit that was filed prior to that interview.
8 Is that correct?
9 A Yes.
10 Q After the civil suit was filed, did you ever make an
11 effort to transfer blame to these officers, Sergeant Gee and
12 Captain Collins --
13 A No.
14 Q -- prior to the interview with Agent Perkins --
15 A No.
16 Q You went in and talked to Agent Perkins. Did
17 Agent Perkins tell you you were going to have to appear
18 before a federal grand jury and take an oath to tell the
19 truth?
20 A Yes.
21 Q Did he tell you that one of the consequences of not
22 telling the truth to the federal grand jury could be a
23 charge of perjury?
24 A Yes.
25 Q And, in fact, when you were put into the federal gran

1 jury, one of the rights or one of the warnings that was read
2 to you in the grand jury was that a failure to tell the
3 complete truth could be the crime of perjury. Is that
4 correct?
5 A Yes.
6 Q And you were made to take an oath in front of that
7 federal grand jury. Is that not true?
8 A Yes.
9 Q Why did you tell the grand jury what you told the grand
10 jury?
11 A I told the grand jury what I told them because I went
12 under oath to tell the truth to the grand jury and I did not
13 want to lie to the grand jury.
14 Q Mr. Wyatt asked you some questions about whether or not
15 Officer Thigpen struck Mr. Midgett. When you were down on
16 the ground with Mr. Midgett, you were on the upper part of
17 body. Is that correct?
18 A Yes.
19 Q What were you concentrating on at that point in time?
20 A The upper part of body.
21 Q Mr. Yurko and Mr. Wyatt asked you about that statement
22 that you gave to your own department, two statements that
23 you gave to your own department wherein you have admitted
24 lying. Is that correct?
25 A Yes.

1 Q Mr. Wyatt showed you a document that you signed where
2 you pledged to tell the truth here today. Is that correct?
3 A Yes.
4 Q What do you expect is going to happen?
5 A I believe I'll be fired.
6 MR. HOGAN: I've got no further questions of the
7 witness.
8 MR. WYATT: Your Honor. Mr. Smith -- I'll be
9 brief. Excuse me.
10 RECROSS EXAMINATION
11 BY MR. WYATT
12 Q You haven't been fired to this day, have you,
13 Mr. Smith?
14 A No.
15 Q You've taken paycheck after paycheck after paycheck
16 since May 10th of 2000. Right?
17 A Yes.
18 Q Okay. Now, when you met with the F.B.I. agent and the
19 prosecutors, you originally told them what you told Internal
20 Affairs about Mr. Midgett resisting when he was down on the
21 ground. Right?
22 A Yes.
23 Q And it's a federal crime to lie to a federal official,
24 isn't it?
25 A Yes.

1 A Well, Ms. Thigpen, she come out of the bubble out of
2 the officer's station and she ran, she ran in the slider and
3 started punching Paul Midgett.
4 Q Okay. Did there come a time when the two officers took
5 Paul Midgett down to the ground?
6 A Yes.
7 Q And how did they do that?
8 A Just pushed, just wrestled him to the ground, wrestled
9 him down to the ground.
10 Q As Paul Midgett is down on the ground, does it appear
11 as if he's under the control of these two officers?
12 A Yes.
13 Q What else did Officer Smith or Thigpen do at that time?
14 A They just held him. They held him down and --
15 Q What happened next?
16 A Captain Collins and Sergeant Gee came to the sliders
17 from the hallway and they picked him up and threw him
18 against the wall. And when he hit the ground they started
19 stomping him in the face and in the head and kicking him
20 around on the floor.
21 Q Okay. Now let's take that slow. You say that
22 Captain Collins and Sergeant Gee came into the slider area.
23 Is that correct?
24 A They came from the outside sliders that leads to the
25 hallway, they come through and grabbed him up. And one

1 grabbed his feet and the other grabbed his hands and they
2 slung him against the wall and when he hit the floor they
3 started stomping him, punching him. Kicking him around on
4 the floor.
5 Q Do you see these two individuals, Sergeant Gee and
6 Captain Collins, in court today?
7 A Yes.
8 Q Can you point them out?
9 A The guy with the -- black guy with the dark suit.
10 MR. WYATT: Your Honor, we'll stipulate this is
11 Sergeant Gee and Captain Collins.
12 THE COURT: Okay. Let's go.
13 BY MR. HOGAN
14 Q Now, which one of these two individuals had Mr. Midgett
15 by the feet?
16 A I can't remember. I can't remember, really.
17 Q Your testimony was that one of them had him by the feet
18 and the other had him by the upper body?
19 A Yes.
20 Q And where did they take Mr. Midgett?
21 A Took him to a wall and threw him against the wall.
22 Q Now, there's something called the food preparation
23 that's outside the sliders.
24 A It's the area right there.
25 Q So did they physically take him from the slider area

1 out to the food preparation area?
2 A He was in the food preparation area when Ms. Thigpen
3 and Mr. Smith wrestled him to the ground.
4 Q Was he near the door of the slider area at this point?
5 A Yes.
6 Q Which of walls in the food preparation area was
7 Mr. Midgett thrown against as you're looking out from the
8 rec yard?
9 A The one that's facing me. It's the one that's facing
10 me when I look out on the rec yard.
11 Q Now, at that time you say Mr. Midgett is thrown against
12 the wall. Is that correct?
13 A Yes.
14 Q Prior to being thrown against the wall, what was
15 Mr. Midgett doing to either Sergeant Gee or Captain Collins?
16 A Nothing.
17 Q What was Mr. Midgett doing with his hands?
18 A Nothing.
19 Q Did you ever see Mr. Midgett grab hold of the leg of
20 Sergeant Gee?
21 A No.
22 Q Did he ever sit up and grab the knee of Sergeant Gee?
23 A No.
24 Q Did he ever grab hold of the ankle of Sergeant Gee?
25 A No.

1 Q Now, after he's thrown up against the wall, what
2 happened with Mr. Midgett?
3 A They started punching and stomping him. Stomping him,
4 kicking him around on the floor.
5 Q And as he's being stomped and kicked around the floor,
6 what is Mr. Midgett doing?
7 A Nothing. Nothing.
8 Q And where are Mr. Midgett's hands?
9 A Just on his back side.
10 Q And at that time do you remember which of these two
11 officers was stomping, as you say?
12 A Both of them.
13 Q And approximately how many blows were struck by these
14 two officers?
15 A I don't remember.
16 Q Can you approximate?
17 A It was a lot. It was a lot. I don't have a number.
18 Q What -- what level of force or how much force were
19 these officers using behind those blows?
20 A They were trying -- they was trying to hurt him. They
21 was hurting him. They was -- it was strong blows.
22 Q During this time, what was Mr. Midgett doing with his
23 legs?
24 A Nothing. Just laying, just getting kicked around is
25 all he was doing.

1 Q Were you interviewed -- well, strike that.

2 How did this thing end, Mr. Little?

3 A Paul Midgett landed in the blood and that was it.

4 Q Did there come a time when any of the officers

5 handcuffed Mr. Midgett?

6 A I don't know. They told me to leave, to go to my room,

7 after they noticed I was standing there. They told me to

8 leave.

9 Q Who told you that?

10 A Mr. Collins.

11 Q Did you ever have any conversations with Mr. Midgett

12 about this incident?

13 A No. I didn't never -- I never saw him after. They

14 made me go to my room. I never saw him anymore.

15 Q Did there come a time and in the few days after this

16 when you talked to a deputy marshal about this?

17 A Yes.

18 Q Did you tell him the --

19 A Yes.

20 Q -- essentials of what you saw?

21 A Yes.

22 Q Did there come a time back in November of 2002 when you

23 talked to F.B.I. Agent Scott Perkins?

24 A Yes.

25 Q About what you saw?

1 A Yes.

2 Q And did you tell him what you saw?

3 A Yes.

4 Q Did there come a time when you were called to appear

5 before the grand jury, were subpoenaed to appear before the

6 grand jury?

7 A Yes.

8 Q And, in fact, you were subpoenaed to appear before the

9 grand jury twice. Is that correct?

10 A Yes. Yes.

11 Q On the first occasion did you testify before the grand

12 jury?

13 A No.

14 Q Why is that?

15 A Because I didn't -- I didn't -- I was scared.

16 Q Well, in fact, you asked the government to write you a

17 letter to try to get you into a drug treatment program.

18 Isn't that true?

19 A Yes.

20 Q And you only testified after the government did that?

21 A Yes.

22 Q And you also said you wanted to talk to an attorney

23 about your testimony?

24 A Yes.

25 Q And you did talk to an attorney. Is that correct?

1 A Yes. I hit him.
2 Q And where did you hit him?
3 A In the groin.
4 Q And about how many times do you think you hit him?
5 A Three. Three, maybe four.
6 Q Why did you do that?
7 A Instinctively I just hit him.
8 Q After you hit Midgett in the groin, what happened next?
9 A Smith regained control of the arms and I lowered down
10 to a laid-out position with my arms wrapped around his
11 knees.
12 Q So when you say you were in a laid-out position does
13 that mean you were actually laying on Paul Midgett?
14 A Yes.
15 Q And where was Officer Smith again?
16 A At the upper end holding on to his torso.
17 Q And at this point did Officer Smith have Mr. Midgett's
18 arms under control?
19 A Yes.
20 Q And did you have his legs under control?
21 A Yes.
22 Q Was Mr. Midgett moving at this point?
23 A No. He was cursing and yelling but not moving.
24 Q So at this point did you feel that you and
25 Officer Smith had Mr. Midgett under control?

1 A Yes.

2 Q How confident are you of that?

3 A Very.

4 MR. WYATT: Objection.

5 THE COURT: Overruled.

6 Q What did you plan to do next?

7 A Just wait for someone to come in to cuff him. There

8 was no -- the way we were positioned, there was no way that

9 either Officer Smith or myself could place handcuffs on the

10 inmate or escort him to the cell or to the jail.

11 Q And just waiting there for someone to cuff him, is that

12 consistent with what you were taught in training about the

13 use of force?

14 A Yes.

15 Q And how so?

16 A That was the amount of force that was needed. At the

17 time there was nothing else at that point that could be done

18 by either/or.

19 Q And based on your observations of the situation, do you

20 feel it would have been difficult for someone to walk up and

21 cuff Mr. Midgett at that point?

22 A No.

23 Q Did anyone actually come in to help you cuff

24 Mr. Midgett at that point?

25 A Captain Collins came in.

1 Q All right. Let me just back up a second and ask you
2 prior to the time Captain Collins came in, were there any
3 other officers around the slider area besides yourself and
4 Officer Smith?
5 A Officer Hill was standing at the door of the control
6 booth but no one was in the slider area.
7 Q All right. So you say Captain Collins came in. Is
8 that correct?
9 A Yes.
10 Q All right. Did Captain Collins say anything when he
11 entered the slider area to you?
12 A Yes. He chuckled and said, "I see you're not letting
13 him move at all."
14 Q And did you tell anything to Captain Collins about what
15 Mr. Midgett had been doing previously?
16 A As Captain Collins walked in, I was like, "I can't
17 believe you just hit me." I said that.
18 Q So you told Captain Collins that Midgett had hit you?
19 A I was talking to Inmate Midgett.
20 Q And what did Captain Collins do next?
21 A He pulled him from -- he first said we're going to pull
22 him -- excuse me. He said he was going to move him. "We're
23 going to pull him out here so we can work." And then he
24 grabbed the feet. He tapped me up. I backed up. He
25 grabbed the feet and pulled him to the area right outside

1 the control booth, which is normally used for -- it's
2 normally where we did the feeding.
3 Q And at the time Captain Collins came in and started as
4 you testified dragging Midgett out, did you notice whether
5 there was anybody else helping him?
6 A Not really. As he was -- as he was pulling him out,
7 Sergeant Gee walked in or ran in.
8 Q And where was Sergeant Gee at the first time you
9 remember seeing him in the area?
10 A The first time. I saw a flash of him coming in and
11 then he had his back to where I was standing.
12 Q And at this point at which he had his back to where you
13 were standing, where was he?
14 A He was standing out into the left of the slider door.
15 Q And is that out actually in the food preparation area?
16 A Yes.
17 Q And where were you standing at this time?
18 A Still at the sliders.
19 Q And was Mr. Midgett out there in the food preparation
20 area --
21 A Yes.
22 Q -- as well?
23 What position was Mr. Midgett in at this point?
24 A On his back.
25 Q Did you see Midgett doing anything at this point?

1 A I saw his -- I saw his arms come out like between
2 Sergeant Gee's legs, I saw an arm come out, and other than
3 that there wasn't a whole lot I could see.
4 Q Did you ever see Paul Midgett grab on to Sergeant Gee's
5 leg?
6 A No.
7 Q Did you ever see anything that appeared to you like
8 Paul Midgett was clinging on to Sergeant Gee's leg?
9 A No.
10 Q All right. Did you see Gee or Collins doing anything
11 at this point to Paul Midgett?
12 A I saw elbows going up and then down, but I didn't see
13 any -- any fists or anything hit. I just saw the elbows
14 moving up and down from the force of motion.
15 Q When you say you saw elbows moving up and down. Is
16 that correct?
17 A That's correct.
18 Q Okay. Did you make a fist at the end of your arm when
19 you just showed the jury the elbow moving up and down?
20 A Yes.
21 Q Did you do that?
22 A Yes, I did.
23 **THE COURT:** Let's hold the leading to a dull roar,
24 okay.
25 Q Okay. So what did it appear like Captain Collins and

1 Sergeant Gee were doing?

2 MR. WYATT: Objection.

3 THE COURT: Sustained. She can describe what she

4 saw.

5 BY MS. PARKER

6 Q Did you hear anything at this point that made you think

7 that there was any results coming from the arm movements you

8 saw?

9 MR. WYATT: Objection.

10 THE COURT: Overruled.

11 THE WITNESS: I heard hitting sounds.

12 Q And how loud were these sounds?

13 A They were pretty loud. I couldn't measure it but it

14 was pretty loud.

15 Q And how close together or far apart were these noises?

16 A It was a rapid movement.

17 Q And did you see anything else at this point that

18 suggested to you that blows might be landing?

19 A I saw blood.

20 Q And where did you see the blood?

21 A On the floor and on the wall.

22 Q Besides arm movements, did you see Captain Collins or

23 Sergeant Gee doing anything else?

24 A I saw Sergeant Gee's leg go back. But it was like all

25 in -- it all looked like one thing going on at one time to

1 me.

2 Q When you say you saw Sergeant Gee's leg going back,

3 could you describe what kind of motion he was making with

4 his leg?

5 A Honestly, I can't tell whether it was pulling it away

6 or kicking it, it just went back.

7 Q All right. What was your reaction when you saw this?

8 A I'm sorry. I just felt like I had seen too much. And

9 I turned after I saw all the blood and turned to go into the

10 control booth.

11 Q Why did you feel like you had seen too much?

12 A Because I was getting nauseous.

13 Q And what about it was making you nauseous?

14 A The man's my size man.

15 **MR. WYATT:** Sorry, Your Honor, I didn't hear.

16 Q Could you repeat that?

17 A The inmate is my size.

18 Q And what about the inmate being your size made you feel

19 this way, that you're describing?

20 **THE COURT:** Well, I think what she felt is largely

21 irrelevant to this situation, so let's get off of that and

22 ignore any discussion about what she was feeling like. She

23 can tell what she saw.

24 Q All right. So you say you turned away at this point?

25 A Yes, ma'am.

1 Q After you turned away, did you continue to hear noises?
2 A Yes.
3 Q And what did those noises sound like?
4 A It was like hitting noises and an inmate yelling,
5 taunting, saying, "My grandmother hits harder." Using
6 racial slurs.
7 Q And again when you heard what you say these hitting
8 noises were, were they again close together, far apart?
9 A Close together.
10 Q And from the time that Captain Collins dragged
11 Paul Midgett out of the food preparation area until you last
12 heard these hitting sounds, about how long did all of this
13 go on?
14 A About five minutes.
15 Q Now, during the time that you had your back turned, did
16 you hear either Captain Collins or Sergeant Gee saying
17 anything?
18 A I did hear, "Stop resisting," but I don't know who said
19 it.
20 Q Now, at some point did the noises end?
21 A Yes. Everything at that point was pretty much a blur.
22 I don't remember when or how.
23 Q Prior to the time you turned your back, was what you
24 saw, what you have described as the punching motions and the
25 movement by Gee's leg, was that consistent with your

1 training?

2 A No, ma'am.

3 Q Why not?

4 A Because we're only supposed to use the amount of force

5 that's necessary to contain the inmate or control the

6 situation.

7 Q At any point while you were watching, did you see

8 Captain Collins or Sergeant Gee do anything that you thought

9 was an attempt to control or restrain Mr. Midgett?

10 A No.

11 Q At some point after the incident or after the noises

12 ended, did you turn back around and actually see

13 Paul Midgett?

14 A Yes.

15 Q Did you describe what Mr. Midgett looked like when you

16 saw him?

17 A He was purple and black. Head was starting to swell.

18 His eye looked like, maybe like he had a mild stroke because

19 it was like lower than the other one. It was like lower

20 than the other. And there was blood, a lot of blood around

21 him.

22 Q And where was Mr. Midgett at the time that you saw him?

23 A On the floor.

24 Q Was he handcuffed at that time?

25 A I don't know.

1 Q Was anybody else standing around him at that point?
2 A Yes, but can't tell you who.
3 Q After the noises ended, or any time after this incident
4 was over, did you hear either Captain Collins or
5 Sergeant Gee say anything about the incident?
6 A Later on after the incident I heard the comment, "We
7 whipped the wheels off of him," and I heard, "Whip that
8 ass." I don't know who said what.
9 Q Did you hear both of them making comments like that?
10 A Yes.
11 Q In an incident like this, anytime force is used on an
12 inmate, are officers required to fill out reports?
13 A Yes.
14 Q We're going to put up on the screen here for you to see
15 a document. Can you see that?
16 A Yes.
17 Q Do you recognize that document?
18 A Yes.
19 Q What is that document?
20 A A Use of Force Officer's Record.
21 **MS. PARKER:** Your Honor, we would offer this as
22 Government's Exhibit No. 2.
23 **THE COURT:** It's ordered admitted. You can
24 publish it to the jury. No point in reading it. The jury
25 can read.

1 (Government's Exhibit No. 2 received.)
2 Q Ms. Thigpen, does this report recount what you saw
3 Collins and Gee doing that you have testified --
4 **THE COURT:** It's leading. Don't ask it like that.
5 Q Okay. Does this -- does this report reflect what you
6 have just testified to here today?
7 A No.
8 Q Not at all?
9 A I said not entirely, ma'am. No, ma'am.
10 Q And did you also talk to Internal Affairs at the jail
11 about this incident?
12 A Yes.
13 Q Did you tell Internal Affairs that you had seen
14 Captain Collins and Sergeant Gee doing the things you have
15 testified to here today to Paul Midgett?
16 A No.
17 Q Are officers supposed to tell Internal Affairs if they
18 see a fellow officer doing something they believe is
19 inconsistent with their training in terms of use of force?
20 A Yes.
21 Q But you didn't do that?
22 A No, ma'am.
23 Q Why didn't you tell jail authorities either in your Use
24 of Force Report or Internal Affairs what you have testified
25 to in this courtroom today?

1 A Because I was between a rock and a hard place. I had
2 to work with both of these people on a daily basis and I did
3 not want to tell -- I didn't want to go against my
4 supervisors.
5 Q Did either Captain Collins or Sergeant Gee ever suggest
6 to you what you should say to jail authorities about this
7 incident?
8 A Captain Collins said, "Just tell the truth. If you
9 didn't see it, you can't say it."
10 Q What did you take that to mean?
11 MR. YURKO: Objection.
12 THE COURT: No. I'll let her answer that.
13 THE WITNESS: You didn't see it, so don't say it.
14 Q Now, did there come a time when you decided to disclose
15 to someone what you have told the jury here today that you
16 saw?
17 A Yes.
18 Q When was the first time that you told anyone about what
19 you had seen Captain Collins and Sergeant Gee do to
20 Paul Midgett?
21 A The first time was a month or so later when I talked
22 with my pastor.
23 Q And why did you talk to your pastor about this
24 incident?
25 A Because I was having nightmares.

1 Q And did there come another time when you told someone
2 what you have told the jury here today that you saw
3 Captain Collins and Sergeant Gee doing to Paul Midgett?
4 A Yes. When I spoke with Mr. Perkins with the F.B.I.
5 Q And how did it come about that you spoke with
6 Mr. Perkins from the F.B.I.?
7 A He contacted me.
8 Q And did he actually serve you a subpoena at that time?
9 A Yes.
10 Q What made you decide to -- well, let me just ask you
11 did you tell the F.B.I. what you have told the jury here
12 that you saw on May 10th, 2000?
13 A Yes.
14 Q What made you decide to tell the F.B.I. that version of
15 events when you had never previously disclosed it to jail
16 authorities?
17 A Because I was told I would be testifying under oath.
18 **THE COURT:** Okay. This is the last time I'm going
19 to tell you. Keep your voice up. The jury can't hear you.
20 If the jury tells me later they didn't hear you, I'm going
21 to order your testimony stricken. Keep your voice up.
22 BY MS. PARKER
23 Q And what was it about the oath that made you tell Scott
24 Perkins what you've told this jury here today?
25 A Because I was swearing before God to tell the truth,

1 the whole truth and nothing but the truth. And I know it
2 would probably cost me my job but I'm not going to lie under
3 oath.
4 MS. PARKER: Nothing further, Your Honor.
5 THE COURT: Who wants to go first? Go ahead.
6 CROSS EXAMINATION
7 BY MR. WYATT
8 Q Well, Officer Thigpen, this beating was so bad it
9 really upset you, didn't it?
10 A It did.
11 Q Okay. You have given very different versions of what
12 happened here and we'll go into those. But in one of those
13 versions you said that Mr. Midgett was beat so bad that you
14 heard blood splashing on the walls like cans of paint,
15 didn't you?
16 A No, I didn't say it like that. I said like paint, not
17 cans of.
18 Q Okay. He was beat so the bad that you could hear it --
19 it was like hearing the sound of paint going on the wall,
20 being throwing on the wall. Right?
21 A No, sir. What I said was that I heard a splat on the
22 wall and it sounded like paint.
23 Q Okay. And you testified before the grand jury that
24 there were 20 or 30 different blows. Right?
25 A Yes.

1 Q There was blood everywhere, according to you. Right?
2 A There was.
3 Q Blood on the floor. Right?
4 A Yes.
5 Q Blood on the wall?
6 A Yes.
7 Q Okay. Was there any blood on Mr. Gee or Mr. Collins'
8 uniforms?
9 A Yes. On the legs, I think on -- I'm pretty sure it was
10 on the legs. I saw the wall. I saw around the inmate and I
11 saw the floor. That's where the.
12 Q And you said there was blood on Mr. Gee's uniform and
13 on Mr. Collins' uniform?
14 A I think there was. I can't swear to it.
15 Q And, you know, there's a policy and procedure at the
16 jail that if there's blood on a uniform, that officer has to
17 be taken to medical. You're aware of that, aren't you?
18 A No.
19 Q Now, you have indicated that this whole incident was
20 just very upsetting to you?
21 A Yes.
22 Q In fact, it was so upsetting when you filled out your
23 Use of Force Report you couldn't remember what happened. Do
24 you remember testifying to that?
25 A No.

1 Q Okay. We'll go into that in a minute.

2 Do you recall testifying before the grand jury, they

3 asked you why you didn't include detail in the Use of Force

4 Report. Do you recall that question?

5 A Yes.

6 Q Okay. And do you recall answering, "Because I saw

7 blood and I just forgot half the incident"?

8 A No. I didn't say that.

9 Q Well --

10 A I saw the blood, and I will be honest with you, I was a

11 little freaked out because I hadn't seen anything like that.

12 And I didn't forget half of the incident. I didn't type the

13 Use of Force, it was done for me.

14 Q Okay. Do you recall testifying before the grand jury

15 and being asked this question: "Did you do a Use of Force

16 Report in this case?"

17 A Yes.

18 Q And your answer was yes.

19 "Question: It would be fair to say, wouldn't it, that

20 it was not the level of detail you just told us here today."

21 You answered, "No, it was not. 'Right?

22 A Right.

23 Q Okay.

24 A Yes, sir.

25 Q You were asked why not. You said, "Once I saw the

1 Q And every page here is typed, isn't it?
2 A Yes.
3 Q Now, in that Use of Force Report you didn't disclose
4 what you now say is that you hit Mr. Midgett three times in
5 the groin, did you?
6 A In the report I gave to Captain Collins I did.
7 Q Well, let's talk about the next.
8 **THE COURT:** Let's talk about listening up and
9 answering the questions before you get me real irritated,
10 okay?
11 Can you understand me, witness? You're not
12 listening to the questions. You're not answering the
13 questions. You're trying to provide stuff you think he's
14 asking about. Listen up. Answer the question. Do you
15 understand?
16 **THE WITNESS:** Yes, sir.
17 **THE COURT:** Excellent.
18 Q In the Use of Force Report you did not say that you
19 struck Mr. Midgett three times in the groin, did you?
20 A No.
21 Q And the next day you were interviewed by the United
22 States Marshals. Right?
23 A Yes.
24 Q And that was in person, wasn't it?
25 A Yes.

1 Q The United States Marshal, Phil Thorpe came and
2 interviewed you, didn't he?
3 A Yes.
4 Q And he, like this jury, expected you to tell the truth
5 to him, didn't he?
6 A Yes.
7 Q And you did not tell U. S. Marshal Phillip Thorpe that
8 you had hit Mr. Midgett three times not groin, had you?
9 A I don't remember.
10 Q Okay. Well, let me show you a copy of what you said to
11 Mr. Thorpe.
12 **MR. WYATT:** May I approach, Your Honor?
13 **THE COURT:** You may. You need not ask permission
14 if you have something to show the witness. Neither one of
15 you do if you have something to show to the witness.
16 Q Here's a copy of Mr. Thorpe's report based on his
17 interview. Show me where in that report you told Mr. Thorpe
18 that you struck Mr. Midgett three times in the groin?
19 A It's not here.
20 Q Okay. All right. Next up is your interview by
21 Internal Affairs. Correct?
22 A Yes.
23 Q And speaking of oaths, before you were interviewed by
24 Internal Affairs you have to sign a statement, don't you?
25 A Yes.

1 Q And Midgett was not under control. Right?
2 A At that point he wasn't, no, sir.
3 Q And it's a police officer's duty to respond in those
4 kind of situations when an inmate is not under control.
5 Right?
6 A Right.
7 Q And Smith is six foot three. Right?
8 A Yes.
9 Q Probably weighs 240, 260 pounds.
10 A Yes.
11 Q Okay. Midgett is a small guy. Right?
12 A Yes.
13 Q Okay. But you felt a duty to respond to that
14 situation. Right?
15 A Yes.
16 Q Now, did Robert Latimer respond to the situation?
17 A I'm not sure when Latimer came in. I know he came in
18 the pod but I'm not sure when.
19 Q Okay. Did he come in when you and Smith and Midgett
20 were on the floor in the slider area?
21 A I don't remember him being there then.
22 Q Okay. When you saw Midgett resisting, you had -- you
23 had Hill make a 1033 call. Right?
24 A Yes.
25 Q And that's an emergency call. Right?

1 A Yes.

2 Q That is an emergency call that means a police -- a

3 detention officer is in an altercation with an inmate and is

4 in danger. Right?

5 A Yes.

6 Q And every available officer is supposed to respond to

7 that kind of situation.

8 A Yes.

9 Q Now, in this situation, in this case Mr. Gee and

10 Mr. Collins are sitting here as defendants, aren't they?

11 A Yes.

12 Q You're sitting here as a witness. Right?

13 A Yes.

14 Q When you finish testifying, you're going to just walk

15 out the door of this courtroom, aren't you?

16 A Yes.

17 Q You're going to be able to see your 11-year-old

18 daughter tonight. Right?

19 **MS. PARKER:** I'm going to object to this line of

20 questioning, Your Honor.

21 **THE COURT:** Overruled.

22 **THE WITNESS:** Yes.

23 Q Your daughter is very important to you.

24 A Yes.

25 Q Like our children are to all of us. Right?

1 the legs. I went to grab the legs so the officer didn't get
2 hurt.
3 Q What's different from that and what you saw
4 Captain Collins and Sergeant Gee doing?
5 A At the point they came in nobody was being hurt.
6 Q And Mr. Wyatt also asked you about your previous
7 experiences seeing things at the jail and incidents with
8 other inmates. Correct?
9 A Yes.
10 Q And he listed off a series of them you might have seen
11 as a member of the DART team?
12 A No.
13 Q Have you seen anything happen to an inmate like what
14 you say so May 10th of 2000?
15 A No.
16 MS. PARKER: Nothing further, Your Honor.
17 MR. WYATT: Nothing further, Your Honor.
18 MR. YURKO: Me neither.
19 THE COURT: Who cleaned up all this blood?
20 THE WITNESS: I don't know.
21 THE COURT: You were on the shift. Were you in
22 the bubble when that was done?
23 THE WITNESS: No, sir. I was downstairs.
24 THE COURT: You're excused. You're instructed you
25 may not discuss your testimony in this trial until the trial

1 is over with. Failure to comply with that instruction will
2 result in your incarceration. Do you understand?
3 THE WITNESS: Yes, sir.
4 THE COURT: Excellent. You're excused.
5 Call your next witness, please.
6 MS. PARKER: The government calls
7 Dr. Dwight Waite.
8 THE COURT: Are we at a point where a brief recess
9 would be in order?
10 MS. PARKER: Sure, Your Honor.
11 THE COURT: We're going to take a 15-minute
12 recess. Thank you very much.
13 (Jury leaves courtroom and recess taken.)
14 THE COURT: All right. Who is the next witness?
15 MS. PARKER: The government calls Dr. Dwight Wait.
16 (Jury enters courtroom.)
17 THE COURT: All right. Members of the jury, this
18 is Dr. Dwight Wait. He has been sworn. You may proceed.
19 DR. DWIGHT WAIT
20 being duly sworn, was examined and testified as follows:
21 DIRECT EXAMINATION
22 BY MS. PARKER
23 Q Please state your name.
24 A Dr. Wait William Wait, III.
25 Q Where are you currently employed, Dr. Wait?

1 Q And do you remember what Mr. Midgett's general demeanor
2 was like?
3 A Yes, I do basically. Uh-huh.
4 Q Could you describe that?
5 A Mr. Midgett could be very demanding, requiring a fair
6 amount of medical attention.
7 Q Did you ever actually have any verbal disagreements
8 with Mr. Midgett in which he expressed displeasure with you?
9 A Well, I'm sure he wasn't completely happy with
10 everything that I attempted to provide him. We have a
11 saying in correctional medicine that we are there to give
12 the patient what they need, not necessarily what they want.
13 They are not always the same.
14 Q About how often did you see Paul Midgett while he was
15 housed at the Mecklenburg County Jail back in May of 2000?
16 A I would imagine every couple weeks, every two to three
17 weeks. Sometimes more often than that. Occasionally less
18 frequently.
19 Q And during those times that you saw Mr. Midgett, did he
20 ever make any physically aggressive moves toward you?
21 A No, he did not.
22 Q Did you ever have any fear for your personal safety in
23 dealing with Paul Midgett?
24 A No, I did not.
25 Q Do you remember examining Paul Midgett on May 10th

1 2000?

2 A Yes, I do.

3 Q Why did you see Paul Midgett on that day?

4 A He was brought down to medical after an apparent

5 altercation with correctional personnel.

6 Q What was your assessment of Paul Midgett's condition

7 when he was brought to see you that day?

8 A It was my impression that he had sustained a blunt

9 force trauma to the face on both sides, and particularly

10 around the left eye and eyebrow area and also to the left

11 side of the chest.

12 Q What about Mr. Midgett's appearance made it apparent to

13 you that he had that evidence or was showing that evidence

14 of blunt force trauma to those areas?

15 A I observed early swelling, early redness and some early

16 black and blue discolorations beginning.

17 Q And when you say that Paul Midgett had evidence of

18 blunt force trauma, can you explain to the jury what blunt

19 force trauma is?

20 A It's a type of trauma that is sustained when an area of

21 the body is struck with a -- something other than a sharp

22 instrument, such as a flat instrument, a closed fist, a

23 foot, perhaps. It does not produce generally puncture

24 wounds or lacerations or abrasions. It generally produces

25 bruising.

1 Q And I'm going to show to Dr. Wait what has been marked
2 as Government's Exhibit No. 3. Dr. Wait, do you recognize
3 that document?
4 A I do.
5 Q What is that?
6 A That is one of our progress note sheets where we record
7 our medical impressions and examination findings when we
8 have an encounter with a patient.
9 Q All right.
10 **MS. PARKER:** I'm going to move to admit this into
11 evidence, Your Honor.
12 **THE COURT:** Not yet.
13 Q Dr. Wait, do you recognize anything in that document
14 that is your own handwriting?
15 A Yes, I do.
16 **MS. PARKER:** Could I now admit this exhibit into
17 evidence?
18 **THE COURT:** Can you tell what inmate these entries
19 are referring to, Dr. Wait.
20 **THE WITNESS:** Yes, sir, I can. Mr. Midgett's name
21 appears in the upper left-hand corner of the page.
22 **THE COURT:** It's ordered admitted now.
23 (Government's Exhibit No. 3 received.)
24 Q Are there entries in that document that pertain to
25 observations made by medical staff by Paul Midgett on May

1 the 10th of 2000?

2 A Yes. There's a note by one of our nurses at 09:20 a.m.

3 hours, and a note made by myself as 0955 hours.

4 **MS. PARKER:** With the the Court's indulgence.

5 Because a doctors' handwriting can sometimes be difficult to

6 read, can he read it?

7 **THE COURT:** He can read it.

8 Q Can you read it?

9 A Yes. I can read it. Would you like me to read it?

10 Q Would you, please.

11 A My note or the nurse's?

12 Q Yes. Your note.

13 A My note. Would you like me to explain it in lay terms

14 to the jury as I read it?

15 Q Please.

16 **THE COURT:** No. I want you to read it first and

17 then tell us what it says.

18 **MR. HOGAN:** All right. "Physician note: Left

19 periorbital hematoma and lacerations of left brow. Palpable

20 tenderness of the left thorax. In addition to closure of

21 lacerations, he probably needs orbital and rib detailed

22 x-rays. Will therefore refer to Carolinas Medical Center

23 Emergency Department for evaluation. C. Orbis.

24 "The left periorbital hematoma represents a large

25 bruise involving the left eye in the soft tissues

1 surrounding the left eye and eye socket."

2 Lacerations of the left brow would be in this

3 area. The tenderness over the left thorax means tenderness

4 over the left rib cage. Closure of lacerations means the

5 laceration would be sutured closed by a physician. And

6 orbital and rib detail x-rays mean he would need x-rays to

7 rule out a fracture of the left eye socket and to rule out

8 possible fractures of the left ribs.

9 Q Did you actually order that Mr. Midgett be sent to the

10 Carolinas Medical Center?

11 A Yes, I did.

12 Q And were you made aware of the treatment that he

13 received at the Carolinas Medical Center?

14 A Yes, I was.

15 Q And could you describe that for the jury?

16 A I can. It would be helpful to see the ER record, if I

17 might.

18 Upon arrival, the usual evaluation was done by the

19 triage nurse and vital signs are taken. Vital signs meaning

20 blood pressure, pulse and respirations.

21 Q Sir, let me just go over this document with you a

22 second, Dr. Wait. Do you recognize the document that's up

23 there before you?

24 A Yes, I do.

25 Q What is it?

1 A It's an Emergency Department record from Carolinas
2 Medical Center.
3 Q And whose is it a record for, can you tell from the
4 document?
5 A It's for Mr. Paul Midgett.
6 Q And does it have a date on it?
7 A Yes, it does. You'll need to lower -- I can't see the
8 top. There we go. Okay. All right. That's good. Okay.
9 5/10/2000.
10 **MS. PARKER:** I move to have this document admitted
11 as Government's Exhibit No. 4.
12 **THE COURT:** Redact the second line under the name
13 Paul Midgett, which you can do by just shoving it up so it
14 doesn't show on that machine.
15 **MS. PARKER:** Okay.
16 **THE COURT:** Higher up. Higher up. There you go.
17 **MS. PARKER:** May it be publish to the jury now,
18 Your Honor?
19 **THE COURT:** In that form, yes.
20 (Government's Exhibit No. 4 received.)
21 BY MS. PARKER
22 Q Dr. Wait, could you interpret this record for the jury.
23 A It's basically an evaluation of injuries related to
24 blunt force trauma as confirmed with the diagnosis which is
25 in the lower portion of the record.

1 It mentions hematoma left periorbital area. Contusion
2 injury of left outer rib cage. A CT scan, or CAT scan, of
3 the abdomen was obtained to rule out possible kidney injury.
4 An intravenous line was established and the patient was
5 given five milligrams of morphine sulfate, a narcotic pain
6 killer for pain. He was also given 800 milligrams of Motrin
7 by mouth. And if you see the face drawn sort of just right
8 of center you will see a line above the eye, a one and a
9 half centimeter laceration. That's the location of the
10 laceration that was sutured in the Emergency Department.
11 Q One of the things you noted was that Mr. Midgett was
12 given 800 milligrams of Motrin by mouth. Is that correct?
13 A That's correct.
14 Q What would be the reason for giving Mr. Midgett Motrin
15 in addition to the morphine?
16 A Motrin is an anti-inflammatory agent and it is hoped it
17 will help to minimize the potential for additional bruising
18 or swelling due to inflammation of injured tissues.
19 Q Now, are you aware of any medical research that
20 suggests that Motrin could, in fact, enhance the appearance
21 of bruising?
22 A Yes, I am.
23 Q And if you can, just explain to the jury what that
24 research suggests.
25 A It does suggest that Motrin, like other

1 anti-inflammatory medications, may have an effect on the
2 ability of the blood to clot in a timely manner. It might
3 be related to the effect on platelets, which is a blood
4 clotting product. I'm not a hematologist so I don't
5 consider myself an expert in this area.
6 Q But you also did say that Motrin did serve the purpose
7 of reducing inflammation and swelling. Is that correct?
8 A That is correct.
9 Q So if Motrin could actually accelerate the appearance
10 of bruising, why would a doctor prescribe it to a patient in
11 Mr. Midgett's situation?
12 A It has been pretty much standard of care to prescribe
13 nonsteroidal anti-inflammatory agents, such as Motrin, for
14 the past 30 years for a generalized trauma for the very
15 reason I stated previously, that it is hoped in addition to
16 providing some analgesia or pain killing property, that it
17 will help to minimize the inflammation that accompanies
18 injury to soft tissue, and also lessen the amount of
19 swelling and discomfort that the patient might expect to
20 experience otherwise.
21 Q Now, you also spoke about various x-rays of
22 Mr. Midgett's chest and head areas. Is that correct?
23 A That's correct.
24 Q Do you know what the results of those x-rays were?
25 A It's my understanding that they were all negative.

1 That no fractures were seen at the time he was evaluated in
2 the Emergency Department.
3 Q Now, at the time you examined Mr. Midgett, did you
4 actually have a suspicion about whether he might have had
5 some fractures?
6 A I certainly had a concern. And that was one of the
7 reasons that I made the decision to refer him to the
8 Emergency Department.
9 Q And was one of the areas you were concerned about
10 possible a rib fracture?
11 A Yes, it was.
12 Q Now, I believe you said that Mr. Midgett had chest
13 x-rays taken as Carolinas Medical Center. Is that correct?
14 A Yes.
15 Q Can chest x-rays detect rib fractures?
16 A They can. But they may not be the best technique with
17 which to do that.
18 Q What in your opinion is the best way to detect a rib
19 fracture?
20 A There are x-rays called rib detail films that actually
21 focus in on the ribs.
22 Q And did Mr. Midgett have rib detail films at Carolinas
23 Medical Center as far as you know?
24 A No. I don't believe he did.
25 Q Now, after Mr. Midgett was discharged from Carolinas

1 Medical Center, did he come back to the Mecklenburg County
2 Jail?
3 A Yes.
4 Q Did you see him in the days subsequent to his return
5 from the hospital?
6 A I did.
7 Q What, if anything, did you continue to do in order to
8 determine whether Mr. Midgett might have suffered a rib
9 fracture?
10 A He continued to complain of pain on the outer aspect of
11 his left rib cage. And I know that rib fractures often do
12 not show up immediately on x-rays because it can take some
13 time for blood to accumulate between the two pieces of
14 broken rib and move them apart enough so that the x-ray can
15 actually see the fracture site. So because of his
16 persistent complaints, I went ahead and ordered rib detail
17 films done at the Mecklenburg County Jail.
18 Q And what were the results of the rib detail films that
19 you ordered?
20 A It did show one nondisplaced rib fracture, which means
21 that the two pieces of the rib were properly aligned, but
22 there was a broken rib, a fractured rib.
23 Q And what would be the standard treatment for a
24 nondisplaced rib fracture?
25 A One nondisplaced rib fracture, the treatment is

1 symptomatic. You provide them with pain relief. You
2 encourage them to continue to take episodic deep breaths--so
3 there's no chance of any partial collapse of the lower parts
4 of the lungs due to shallow breathing.
5 Q And in your experience, based on your medical training,
6 how long would you expect pain to persist from a
7 nondisplaced rib fracture?
8 A As long possibly as three to four weeks, but it should
9 improve as each week goes by. Generally bones take five to
10 six weeks to heal. Broken bones.
11 Q And was the rib fracture that showed up on the rib
12 detail films that you ordered taken, was that consistent
13 with your observations on May 10th, 2000?
14 A Yes, it was.
15 Q And would a rib fracture, based on your experience, be
16 consistent with being punched or kicked in the ribs?
17 A It certainly could be.
18 Q Doctor, I'm going to show you what has been or what
19 will be marked as Government's Exhibit No. 5. Do you
20 recognize the individual in this photograph?
21 A Yes, I do.
22 Q Who is that?
23 A It's Mr. Paul Midgett.
24 Q And could you describe for the jury the injuries you
25 see visible in this photograph?

1 A Yes. May I point, Your Honor?

2 **THE COURT:** You may.

3 A I see a very large bruise around the left eye. That's

4 what we earlier called a periorbital hematoma. I see

5 bruising of the left cheek. Bruising around the right eye

6 and right cheeks, sunken into the chin and throat area. And

7 then I see bruising to the upper mid-chest area.

8 Q And based on what you're looking at here, and I will

9 represent that the government and the defense have agreed

10 that these photographs were taken two days after the

11 incident, is what you see her consistent with the injuries

12 you observed on May the 10th?

13 A Yes, it is.

14 **MS. PARKER:** And I would move to admit this as

15 Government's Exhibit No. 5.

16 **THE COURT:** Ordered admitted.

17 (Government's Exhibit No. 5 received.)

18 Q All right. Doctor, I'm going to show you what's going

19 to be marked as Government's Exhibit No. 6. Do you

20 recognize the individual depicted in that photograph?

21 A Yes, I do.

22 Q Who is that?

23 A Mr. Paul Midgett.

24 Q If you would, describe the injuries you see or the

25 appearance of injury you see present in this photograph.

1 A What we see is what I call the natural evolution of
2 bruising.
3 Surrounding the left eye we see that the initial bruise
4 is evolving and has gone through the changes that we
5 normally see from coming black and blue then becoming
6 greenish and then becoming somewhat yellowish.
7 I see worse bruising of the right eye. I see resolving
8 bruising of the lower part of the face and the neck, as well
9 as the mid-upper chest area.
10 Q Now, let me ask you, can you point to bruising of the
11 right eye in the first photograph here?
12 A Yes, I can. There is bruising on the -- all around the
13 right eye. Worse on the inner aspect of the right eye.
14 Q And in the second photograph, the bruising on the right
15 eye appears -- would's it be fair to say it appears to be
16 much more prominent?
17 A Yes, it does.
18 Q Is there anything about that that surprises you?
19 A Well, it surprises me in that generally speaking you
20 would expect bruising to improve in a rather uniform fashion
21 as time goes by.
22 Q So is it possible Mr. Midgett could have been injured
23 later to this right eye than he was on the left eye?
24 A It's certainly possible, yes.
25 Q But is it possible -- is it also possible that he was

1 injured, in your opinion, on the same day in both eyes, and
2 if so, what would explain the difference in the progression
3 of bruising?
4 A What I would assume, if the injuries were sustained at
5 the same time is that the injury to the left eye was more
6 severe and showed more immediate evidence of soft tissue
7 damage, whereas the injury to the right eye was possibly
8 less severe and would not show as much immediate damage but
9 would later show the damage with time.
10 Q Based on your experience as the jail doctor and also
11 your experience in emergency and trauma medicine, what do
12 you think was the most likely cause of the injuries depicted
13 in these photographs?
14 A The injuries are consistent with blunt force trauma.
15 Q And in looking at these photographs, can you express an
16 opinion on the degree of blunt force trauma that Mr. Midgett
17 experienced to exhibit these injuries?
18 A It's difficult to quantitate that but I would say that
19 it was significant to produce the amount of bruising that I
20 have seen both in examining Mr. Midgett and in looking back
21 at these photographs.
22 Q Would the injuries that are apparent in these
23 photographs be consistent with multiple strikes with a
24 closed fist or a foot to Mr. Midgett's head and chest area?
25 MR. BLAKE: Objection to the leading.

1 THE COURT: Overruled.

2 A Yes, it would.

3 MS. PARKER: Nothing further, Your Honor.

4 CROSS EXAMINATION

5 BY MR. BLAKE

6 Q Good afternoon, Dr. Wait.

7 A Good afternoon.

8 Q Mr. Midgett was not stranger to the doctors and nurses

9 at the medical unit at the jail, was he?

10 A No, he was not.

11 Q I believe you testified you saw him pretty regularly.

12 A Yes, I did.

13 Q And he could be pretty difficult and demanding,

14 couldn't he?

15 A Yes, he could.

16 Q And he had a number of health complaints, didn't he?

17 A Yes.

18 Q One of his health problems was Hepatitis B and C,

19 wasn't it?

20 A That's correct.

21 Q Now, you were not present at the time that Midgett

22 sustained his injuries on May 10th, 2000, were you?

23 A I was not on the scene of the altercation. I was

24 present in the medical department.

25 Q So you did not witness the incident that resulted in

1 his injuries?
2 A No. I didn't.
3 Q And you have no personal knowledge as to exactly how he
4 sustained his injuries. Isn't that correct?
5 A That is correct.
6 Q And you have no personal knowledge as to what
7 individuals may have caused Mr. Midgett's injuries. Is that
8 correct?
9 A That is correct as well.
10 Q Now, you saw Midgett about 30 minutes or so after the
11 incident?
12 A Yes.
13 Q It would be helpful if the government could put up
14 Government's Exhibit 3, I believe. I'd like to ask Dr. Wait
15 a few questions from that.
16 These are the notes from your observations of Midgett
17 on the 10th of May, 2000. Correct?
18 A Yes.
19 Q Now, when you saw Midgett, he was conscious, wasn't he?
20 A Yes, he was.
21 Q He was alert?
22 A Yes.
23 Q He was not having any difficulty breathing, was he?
24 A Other than the fact that he was complaining of
25 left-sided chest pain that would cause some pain upon

1 Q Was because -- excuse me. Are you aware of the reason
2 he was in jail was because he poured gasoline on an
3 individual, robbed that individual and then set that
4 individual on fire?
5 A I have heard hearsay to that effect. I was not aware
6 of that at the time of the incident when I examined
7 Mr. Midgett.
8 MR. BLAKE: I have no further questions, Your
9 Honor.
10 **CROSS EXAMINATION**
11 **BY MR. YURKO**
12 Q In Mr. Midgett's grand jury testimony he have claimed
13 that this incident caused him to lose nine teeth. You've
14 already said that that wasn't true. Is that correct?
15 A I'm not aware of he lost any teeth. I can tell you I
16 did not do a thorough oral or dental examine at the time I
17 examined him on May 10th.
18 Q He also claimed that he had a broken collarbone. He
19 didn't have a broken collarbone, did he?
20 A No, he did not.
21 MR. YURKO: That's all I have.
22 THE COURT: Redirect.
23 MS. PARKER: Just a couple, Your Honor.
24 **REDIRECT EXAMINATION**
25 **BY MS. PARKER**

1 Q Mr. Blake asked you about the possibility that
2 Mr. Midgett had suggested that his rib was fractured in some
3 way other than the incident on May 10th, 2000.
4 In your treatment of Mr. Midgett in the day subsequent
5 to May 10th, 2000, what was your understanding of how
6 Mr. Midgett's rib area was injured?
7 A It was my general understanding that it was as a result
8 of the altercation that occurred on May 10th.
9 Q And Mr. Brake also asked you if you were aware that it
10 was routine practice at the jail to send an inmate to be
11 evaluated after a use of force with staff. Correct?
12 A Yes.
13 Q Your experience as a medical director at the
14 Mecklenburg County Jail, have you ever seen an inmate come
15 to medical after a use of force with guards who was in the
16 condition Mr. Midgett was in on May the 10th of 2000?
17 **MR. BLAKE:** Objection.
18 **THE COURT:** Overruled.
19 **THE WITNESS:** No, I have not.
20 **MS. PARKER:** Nothing further, Your Honor.
21 **THE COURT:** Recross?
22 **MR. BLAKE:** Nothing further, Your Honor.
23 **MR. YURKO:** No, sir.
24 **THE COURT:** All right. We'll excuse Dr. Wait.
25 Dr. Wait, you're not to the discuss your testimony

1 with anybody until after this trial is over. Do you
2 understand, sir?
3 **THE WITNESS:** Yes, sir, I do.
4 **THE COURT:** Thank you.
5 **THE WITNESS:** Thank you.
6 **THE COURT:** Call your next witness.
7 **MS. PARKER:** The government rests, Your Honor.
8 **THE COURT:** Are you guys going to be ready to go
9 in the morning?
10 **MR. WYATT:** Yes.
11 **THE COURT:** Send the jury home, please. You all
12 are excused. Everybody else stay in the courtroom until the
13 jury has had a chance to leave. Be back in here until ten
14 o'clock in the morning ready to go.
15 (Jury leaves courtroom.)
16 **THE COURT:** Well, I'm pretty much shocked that the
17 government doesn't call this guy, but what's the defense say
18 about Rule 614?
19 **MR. WYATT:** I think we'd like to be heard on the
20 Rule 29 motion first, Your Honor.
21 **THE COURT:** I think we'll hear you in the morning.
22 Do you have any briefing on it at this point?
23 **MR. WYATT:** Would Your Honor like to hear argument
24 this afternoon?
25 **THE COURT:** Yeah. I think I'd like to hear

1 argument this afternoon and I think I'm going to sleep on it
2 and render a decision in the morning.
3 MR. WYATT: Could we have a five-minute break?
4 THE COURT: You can have a ten-minute break and
5 we'll reconvene as quarter to four, and at that time I'll
6 hear argument on the Rule 29 motion, on which I will render
7 a decision in the morning.
8 (Recess taken.)
9 MR. YURKO: For the record, at this time we will
10 move, pursuant to Rule 29, to dismiss both counts of the
11 indictment.
12 I'm going to argue first about Count One.
13 THE COURT: Stop.
14 MR. WYATT: Yes, Your Honor, we join in that
15 motion.
16 THE COURT: Thank you.
17 MR. YURKO: And Mr. Blake will follow up with
18 Count One. Then I'm going to make an argument about Count
19 Two.
20 THE COURT: All right. Go ahead.
21 MR. YURKO: I know the Court knows the seminal
22 case of *Screws versus the United States.*
23 In that case the question was, was the statute
24 Constitutional. And the Court solved Constitutionality
25 problem by focusing on the requirement that there be an

1 intent to deprive a Constitutional right. A general bad
2 purpose was not sufficient.
3 There has to be a motive to punish by ordeal
4 rather than trial. 242, could not Constitutionally make all
5 torts federal claims or all crimes federally actionable. It
6 couldn't do It constitutionally, and the *Screws* court
7 recognized that. Even murder or a serious assault with the
8 intent to kill could not be federalized unless there is a
9 motive to punish by ordeal rather than by trial. It is this
10 requirement that saves the statute from Constitutionally --
11 it saves its Constitutionality.
12 The Fourth Circuit has established that you need
13 to focus on the need for force, that need versus the amount
14 used, good faith of the officer, and the extent of the
15 injuries. You look to preexisting amounts, whether the
16 assault occurred over an extensive period of time and it
17 occurred absent provocation.
18 Here there's absolutely no preexisting malice at
19 all. The time was not extensive at all. One witness said
20 seconds. And there was provocation, meaning that a 1033 had
21 occurred and the officers responded.
22 There simply, in this case, is not a sufficient
23 amount of time to form the intent necessary to comply with
24 this statute. Not every tort or every crime can
25 Constitutionally give rise to federal jurisdiction.

1 THE COURT: Give me a cite to *Screws*, please.

2 MR. YURKO: If you give me a second --

3 THE COURT: Give it to me later. That's fine.

4 MR. YURKO: Okay. And the legacy of *Screws* in its

5 most recent U. S. Supreme Court pronouncement is Lopez. It

6 just can't make every state tort or state crime actionable

7 in federal court. It can't be done constitutionally.

8 So here maybe there's some evidence of an assault.

9 Mr. Blake is going to talk to you about the lack of

10 evidence, but it doesn't rise to an intentional deprivation

11 of the Constitutional right, and, therefore, Rule 29 should

12 be allowed.

13 **MR. BLAKE:** Your Honor, my argument is pretty

14 simple. There's not sufficient evidence in this case beyond

15 a reasonable doubt that connects any specific blows by

16 either Mr. Gee or Mr. Collins to any specific injuries, to

17 anybody an injury, that Mr. Midgett may have sustained. I'd

18 just like to briefly take you through the testimony that

19 we've heard.

20 Aerris Smith testified that he did not see any

21 blows to Midgett's head from either of these defendants.

22 Doltheia Thigpen testified that she punched

23 Midgett three or for your times. Your Honor, I'd submit

24 there's been as much or more evidence submitted by blows

25 from Thigpen and Smith to Midgett than there has of blows

1 from Mr. Collins and Mr. Gee to Midgett. Little -- neither
2 Thigpen or Smith or Little connected any specific blows to
3 any specific injury of Midgett. What does Little say?
4 Little the says both Smith and Thigpen were
5 punching Midgett. Smith was lifting Midgett off the ground
6 and choking him. What does Midgett say? We don't know.
7 The government could have called Midgett in here. They had
8 every opportunity and right to call him in here and he could
9 have sat up there and told the jury that Mr. Collins and
10 Mr. Gee caused his injuries, but he didn't do that because
11 the government didn't call him. The only thing we know
12 about Midgett is what has come in that he said out of court,
13 which we know he said that his rib injury was caused by
14 another officer. He said that he was beat up by Smith and
15 Thigpen.
16 Dr. Wait, what did he testify to? He said
17 Midgett's injuries could be caused by blunt force trauma.
18 He also testified, of course, that Midgett had
19 injuries to his head, but he indicated that there were no
20 injuries to his torso. So Waite's testimony is at odds were
21 Smith's testimony. Smith is saying he didn't see any to the
22 head. And Dr. Wait is saying he didn't see any injuries to
23 the torso.
24 There's not enough evidence beyond a reasonable
25 doubt to connect any conduct by Mr. Collins or Mr. Gee to

1 any injuries sustained by Mr. Midgett.

2 One other thing I would point out, Thigpen, all

3 she said was she saw elbows going up and down but she didn't

4 see Mr. Midgett being hit by Mr. Gee or Mr. Collins. Simply

5 touching is not enough to the constitute bodily injury and

6 establish that element. There's not enough proof beyond a

7 reasonable doubt to connect any blow by Mr. Collins or

8 Mr. Gee to any injury that Mr. Midgett has sustained. Thank

9 you.

10 **MR. WYATT:** Your Honor, the government's failure

11 to call Mr. Midgett inserts a fatal vacuum into the evidence

12 in this case, especially in light of the undisputed evidence

13 of strikes to Mr. Midgett by Officers Thigpen and Smith.

14 Without Midgett, there is no evidence whatsoever,

15 much less evidence beyond a reasonable doubt, that can

16 distinguish any injury on Midgett's body. That demands that

17 a verdict be directed alone.

18 In addition to that, under Mr. Yurko's

19 explanation, unless every bar fight in Charlotte constitutes

20 a violation of 18 U.S.C. 242, then this Court is required

21 under the relevant law to direct a verdict.

22 The government can't even determine what touching

23 caused what. But even if they could, not every touching or

24 not every injury or not every assault constitutes a

25 violation of this very limited federal statute.

1 We were surprised by the lack of evidence the
2 government put forward, and it does not reach any credible
3 standard or legal requirement under this statute.
4 THE COURT: Was there one more you wanted to make?
5 MR. YURKO: We've provided the Court with a trial
6 brief as to the supervisory indictment, Count Two.
7 The Fourth Circuit case requires that the
8 supervisor had actual or constructive knowledge that his
9 subordinates was engaged in conduct that posed a pervasive
10 and unreasonable risk of Constitutional injury to citizens
11 like the plaintiff. That the supervisor's response to that
12 knowledge was so inadequate as to show deliberate
13 indifference or tacit authorization, and that there was an
14 affirmative causal link between the supervisor's inaction
15 and the particular Constitutional injuries suffered by the
16 plaintiff.
17 In this case it just isn't that kind of showing.
18 In this case, as we've said, the conduct must be pervasive.
19 The government's own evidence shows that this happened in a
20 very, very brief period of time. That the conduct is
21 widespread or at least has been used on several different
22 occasions. This was an one-time episode, over in a matter
23 of seconds.
24 I think that based on the Fourth Circuit case, and
25 I will point out that case was cited to the Court by the

1 government in their trial brief, that Count Two simply
2 cannot survive the showing that the government has put on in
3 this case.
4 **THE COURT:** All right. Who is going to argue for
5 the government?
6 **MS. PARKER:** I'll do that, Your Honor.
7 I would simply start by saying that the Rule 29
8 standard is that the facts must be construed in the light
9 most favorable to the government.
10 There are essentially for your elements to Count
11 One, the first of which is that the action took place under
12 color of law. There's no dispute that Captain Collins and
13 Sergeant Gee were acting under color of law on the date that
14 they used force against Mr. Midgett.
15 The second element is the Constitutional violation
16 itself, which is did Captain Collins and Sergeant Gee use
17 what would have amounted to -- use excessive force amounting
18 to punishment, which has been defined as force which is
19 malicious for the purpose of causing harm or not done in any
20 sort of good-faith effort to restore discipline.
21 Speaking to that, the evidence for that particular
22 count, I would first say that it's undisputed that
23 Captain Collins and Sergeant Gee used significant force to
24 Mr. Midgett. They both admitted in their Use of Force
25 Reports that they used blows, multiple blows to

1 Mr. Midgett's head, blows to his abdomen and blows to his
2 chest. So there is evidence before the Court.
3 **THE COURT:** Where is that in evidence?
4 **MS. PARKER:** In the Use of Force of Reports.
5 Those were put into evidence.
6 **THE COURT:** What Use of Force Report signed by
7 these men has been put into evidence by the government?
8 **MS. PARKER:** Sorry, Your Honor. It's not in
9 evidence. I take it back.
10 **THE COURT:** Okay. Stay away from that.
11 **MS. PARKER:** I'll stay away from that.
12 Let's go to the evidence of officers -- well,
13 Officer A. B. Smith. He said that he saw Captain Collins
14 and Sergeant Gee strike eight blows to Mr. Midgett. At the
15 time these blows were struck he said Mr. Midgett was on his
16 back. He said Mr. Midgett was not posing a threat to any
17 officer. He said he saw no effort by either Collins or Gee
18 to try to retrain into Midgett and put him under control.
19 He testified that what he saw was inconsistent with his
20 training on how an inmate was supposed to be dealt with at
21 the jail. He stated that Mr. Midgett was already under the
22 control of himself and Officer Thigpen when Captain Collins
23 and Sergeant Gee came into the slider area and told Thigpen
24 and Smith to simply back off of Midgett and took him into
25 another room.

1 Mr. Smith testified that the use of force went on
2 for 30 to 40 seconds. That he clearly thought it served no
3 purpose other than the delivery of a beating, and that it
4 was obviously an excessive use of force.
5 We also have the testimony of inmate Aaron Little
6 who, while Mr. Wyatt and Mr. Blake have pointed out that
7 they believe that A. B. Smith testified the blows were only
8 to the torso, Aaron Little has repeatedly stated that there
9 were blows and kicks to the head.
10 So we have the evidence from Aaron Little that
11 there were blows and kicks to the head. He also testified
12 that Mr. Midgett was thrown down to the floor. He testified
13 that at all points at which he saw Captain Collins and
14 Sergeant Gee using force, that Mr. Midgett was not doing
15 anything to fight against Captain Collins or Sergeant Gee or
16 to do anything that he perceived to be posing any sort of
17 threat to Captain Collins and Sergeant Gee.
18 Doltheia Thigpen also testified, that officers --
19 she, herself, and Officer Smith, had Mr. Midgett completely
20 under control at the time at which Captain Collins and
21 Sergeant Gee entered and took Mr. Midgett into the other
22 room.
23 Now, she testified that she did not see blows
24 actually land but she saw blows -- or she saw what appeared
25 to be punching motions and kicking motions. Punching

1 motions by both Captain Collins and Sergeant Gee, and
2 kicking motions by Sergeant Gee.
3 She heard what she said sounded like blows being
4 struck to Mr. Midgett. And she testified that at no point
5 while she was watching did she ever see Mr. Midgett do
6 anything that appeared to be a threat to Captain Collins or
7 Sergeant Gee.
8 She also testified that what she saw at the time
9 that she saw it was inconsistent with her training in the
10 use of force.
11 She stated that she also -- let me strike that.
12 She also testified to consciousness of guilt statements made
13 by Captain Collins and Sergeant Gee after the fact. She
14 could not attribute which statement to which officer, but
15 she said both made statements to the effect that they had
16 whipped Mr. Midgett's ass or whipped the wheels off of him.
17 And I also point out that the primary
18 justification for use of force by Captain Collins and
19 Sergeant Gee has been Midgett was grabbing the legs. Not a
20 single one of the witnesses called by the government who
21 witnessed this incident when asked ever saw Paul Midgett
22 grab Sergeant Gee's leg or in any way do anything that posed
23 a threat to Sergeant Gee or Captain Collins.
24 As to the willfulness element, I'd would simply
25 say that *Screws* actually says that an act is done willfully

1 if it's done voluntarily and intentionally with a specific
2 intent to do something that the law forbids. And it makes
3 it very clear that you don't need to be thinking in
4 Constitutional terms when you undertake the action. You
5 simply need to have an intent to do the act itself.
6 Evidence of the training that these officers
7 received in use of force at the jail is relevant on the
8 question of whether or not the conduct of the officers was
9 willful.
10 We had two officers testify that the uses of force
11 they witnessed by Captain Collins and Sergeant Gee were
12 inconsistent with their use of force training at the jail,
13 and that training was you are to use only the amount of
14 force necessary to control an inmate, and once the inmate
15 under control, you are to do no more.
16 They testified that officers at the jail are
17 taught this and officers are aware of this, and that they
18 were shocked and stunned when they saw what these defendants
19 were doing to Mr. Midgett because they thought it was
20 clearly against their training.
21 I would also go on to say that the bodily injury
22 element of the offense is also very clearly satisfied.
23 The bodily injury element of 18 U.S.C. Section 242
24 has been very clearly construed to say that the injury need
25 not be significant or severe or persist for a long period of

1 time. It can be only pain. That's sufficient to establish
2 bodily injury for purposes of this statute.
3 Now, there certainly is a dispute, obviously, in
4 the evidence about the degree of injury Mr. Midgett
5 suffered, you know, how severe it was. No question that
6 there's a dispute about that. But there is no dispute --
7 well, there are multiple witnesses who came in here,
8 including the doctor at the Mecklenburg County Jail, who saw
9 Paul Midgett mere minutes after he was brought into the
10 medical unit, who said he very clearly exhibited injuries to
11 the face, to the chest, which I believe is the same thing as
12 the torso, and to also the arms and a laceration over the
13 forehead, which of course is the head area, and what he
14 suspected to be tenderness to the abdominal region. So that
15 is multiple jury.
16 Mr. Midgett also went to the Carolinas Medical
17 Center where he was, among other things, administered
18 morphine for pain by the doctors there at the hospital.
19 And finally I would speak with respect to the
20 elements of Count One on not calling Mr. Midgett. It is
21 simply not the case that the government needs to call
22 Mr. Midgett to establish that there was injury to
23 Paul Midgett's head.
24 He exhibited injury to his head. The doctor saw
25 that. Aaron Little testified there were punches and kicks

1 to the head or to his body in general. Again, Dr. Wait saw
2 the injuries to Mr. Midgett. We have the testimony of
3 A. B. Smith as to strikes to the torso area. And we have
4 testimony from Doltheia Thigpen, granted not very specific,
5 about blows and punches to various parts of Mr. Midgett's
6 body.
7 So as far as that goes, to meet the Rule 29
8 standard for bodily injury, there's no necessity whatsoever
9 to call Mr. Midgett. His injuries were observed by other
10 people and what happened to him was observed by other
11 people.
12 And I'd simply say that it's clear that the United
13 States has met -- when the evidence is construed in the
14 light most favorable to the government, there are certainly
15 credibility issues. No doubt that credibility issues were
16 raised on cross examination. But if the jury, if the jury
17 chooses to believe Officer A. B. Smith, then there was
18 definitely an unconstitutional use of force. If they
19 believe what A. B. Smith says, then Captain Collins and
20 Sergeant Gee carried Mr. Midgett into that room, kicked him
21 and punched him for no law enforcement reason. And
22 that's -- the same goes if they believe the testimony of
23 Aaron Little. And the same goes if they believe the
24 testimony, limited though it is, from Doltheia Thigpen when
25 she testified he was under control, which is a disputed

1 issue, at the time Collins and Gee came in. She is
2 verifying that by A. B. Smith.
3 Now, with respect to the issue of failure to keep
4 from harm, the government disagrees with Mr. Yurko's
5 characterization that it needs to be a long-standing,
6 ongoing thing in order for liability to obtain on failure to
7 keep from harm.
8 I would cite to the Court -- and I think I can
9 even cite it to you right now -- the case of the *United*
10 *States versus Coon,* which was actually the federal trial of
11 the officers involved in the Rodney King incident. And it's
12 very clear in that statute that even standing by and
13 watching a junior officer or fellow officer commit what
14 would be a constitutional violation, and having an
15 opportunity to intervene and failing to do so, even in a
16 single incident is unconstitutional failure to keep from
17 harm.
18 And here I would submit that the same evidence
19 that provides, construed in the light most favorable to the
20 government, proof beyond a reasonable doubt, at this stage
21 that Captain Collins and Sergeant Gee used unconstitutional
22 force on Paul Midgett, also proves that Captain Collins
23 failed to keep Mr. Midgett from harm. All of the evidence
24 from the witnesses, especially from A. B. Smith and
25 Aaron Little is that Captain Collins was an active

1 participant in the beating. That he made no attempt to stop
2 anyone. He was participating in it. And we also heard fro
3 A. B. Smith that a no point during the entire time that he
4 was watching and in his testimony he said a very clear view,
5 he watched the entire time, and he listened to entire time
6 and he never heard either of these officers give a verbal
7 command, which would certainly include any verbal command by
8 Captain Collins to Sergeant Gee to stop using in force on
9 Paul Midgett.
10 With that, I would submit that the government has
11 met their Rule 29 standard and this trial should proceed.
12 **THE COURT:** All right. Thank you. Do you
13 gentlemen want to say anything?
14 **MR. YURKO:** I would like to respond to the
15 supervisory argument only.
16 First of all, she's citing a Ninth Circuit case
17 and not the Fourth Circuit case, and I'd ask the Court to
18 look a the Fourth Circuit case because that's the
19 controlling law in this circuit. Sometimes you do these
20 arguments --
21 **THE COURT:** The Calhoun case that you've cited?
22 **MR. YURKO:** It's in brief. Yes.
23 **THE COURT:** Which one?
24 **MR. YURKO:** The last one. The Randy case. And
25 sometimes when you make these arguments sometimes you can't

EXHIBIT G

United States v. Paul G. Foster, Esq.

D.Mass. 02-10305-JLT (Hon. Joseph L. Tauro)

I. Statement of Facts

Defendant Foster, a lawyer, was charged with one count of conspiracy to launder money, in violation of 18 U.S.C. § 1956(h) and eight counts of engaging in illegal monetary transactions, in violation of 18 U.S.C. § 1957. The court denied the defendant's Rule 29 motion at the close of the government's case, but later granted it and discharged the jury without allowing it to deliberate.

The court stated that the only issue in controversy was whether the defendant knew that the multiple large amounts of cash that he received from clients were the proceeds of illegal activity, namely drug sales. The government's proofs showed that Foster became a partner in two night clubs with a client who was charged with drug dealing. On one occasion that client, Lozier, gave the defendant more than $600,000 in cash to finance the night club ventures; on another occasion the same client brought $200,000 in cash to defendant's office for a security deposit for one of the night club ventures; and bank records showed that defendant ran at least $370,000 through his client trust account, converting the cash to cashiers' checks for night club landlords or merchants. Lozier testified that he told defendant that he (Lozier) purchased large quantities of ecstasy from Israeli suppliers operating out of New York City; that he referred several other drug dealers to defendant; and that he asked defendant to let him know if certain of those clients decided to cooperate with the police because he had sold them the Ecstasy they were arrested with.

Two other clients provided evidence of defendant's knowledge. Defendant commented to another drug dealer that he "had heard" that Lozier sold Ecstasy and a third client testified that defendant directed him to "structure" cash deposits for one of the night clubs defendant and Lozier owned in amounts less than $10,000 so as not to draw the attention of law enforcement.

II. The Court's Rule 29 ruling.

On September 22, 2004, defense counsel stated that the court was "dealing with a motion" and said, "It is my position that they failed to get over the rail with anything credible that a jury should be allowed to speculate on." (Tr. 2) Without hearing any additional argument, the court turned to the prosecution and asked, "Where is the evidence that he knew?" Apparently everyone understood that to mean evidence that Foster knew the cash he received was proceeds of unlawful activity. The prosecutor began to marshal the evidence, first indicating that Lozier testified that he had referred clients to Foster after they had been arrested in possession of drugs they bought from Lozier and that Lozier needed to know if any of them decided to cooperate with the government. (Tr. 3-4). The judge stated that he didn't remember that testimony, but offered to let the prosecutor get the reporter to read back testimony at a later time. After a lengthy argument, however, the court announced, "I am going to allow the [Rule 29] motion. I am not going to force you to do any more argument."(Tr. 31).

III. Why the Ruling Was Incorrect.

First, the court disregarded evidence that it could not remember, without allowing the prosecutors an opportunity to substantiate their characterization of critical evidence Second, the court refused to draw inferences in the light most favorable to the government. For cxample, when the government argued that Foster's assurance to Lozier that he was "covered up to a federal case" showed that Foster understood that Lozier might face federal criminal charges for selling to other clients, the court countered, "I didn't take it that way. I took it that he is talking about it is much more expensive when you come over here to Fan Pier" and that Lozier was getting credit against future fees for referring clients to Foster. (Tr. 6). Finally, the court appeared to believe that the fact that Foster deposited the cash in his client trust fund or that he filled out currency transaction reports for large cash payments from his drug dealer clients established his innocence. For example, the court stated that it is not a crime to deposit $370,000 in a client trust account in an 18-month period, particularly when there was "nothing surreptitious about it. He walked into the bank, filled out the papers. There is always a transaction report, at least most of the reports are covered by the reporting law. And he just walks in, uses his own name. No subterfuge." When the court characterized Foster as merely an "errand boy," making deposits and turning them into a check payable to a specified recipient in order to hold onto lucrative clients, the prosecutor pointed out that most of the money went to the night clubs in which Foster and Lozier were business partners, not attorney and client. (Tr. 14). Later, when discussing Foster's instructions to one of the night club managers to make deposits in the corporate account and pay the rent in amounts less than $10,000, the court acknowledged that he asked the witness why he had done that and the witness replied, "because the money was dirty. The money was Lozier's drug money." (Tr. 23).

Ultimately, it appears that the court's ruling was based on its conclusion that Foster's actions were "so out front" (Tr. 25), that he opened accounts and purchased cashiers' checks in his own name, precluded a jury finding that Foster knew he was dealing with criminals. Defense counsel picked up on this theme, arguing that a lawyer with guilty knowledge would not have allowed himself to be photographed with three drug dealers and would not fill out currency transaction reports. (Tr. 28). The court rejected out of hand the prosecution's argument that Foster was "open" because he thought his status as an attorney and his use of his client trust fund would insulate him from liability. (Tr. 30).

In short, the court refused to view the evidence in the light most favorable to the government.

IV. Harm Due to the Ruling.

This lawyer was acquitted of all charges despite both direct and circumstantial evidence that he laundered money for more than one drug dealing client. It sends the wrong message to the legal community that "willful blindness" (much less blatantly open conduct) is a valid defense when the lawyer becomes involved in illegal business activities with a client. Blatancy is not a defense.

V. Appendix.

A transcript of the Rule 29 hearing and ruling is attached.

1 UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

2

* * * * * * * * * * * * * * *

3 UNITED STATES OF AMERICA *
*
4 vs. * CRIMINAL ACTION
* No. 02-10305-JLT
5 PAUL G. FOSTER *
*
6 * * * * * * * * * * * * * * *

7 BEFORE THE HONORABLE JOSEPH L. TAURO
UNITED STATES DISTRICT JUDGE
8 **DAY SEVEN**
JURY TRIAL
9 **EXCERPT -- RULE 29 ARGUMENT**

10 A P P E A R A N C E S

11 OFFICE OF THE UNITED STATES ATTORNEY
1 Courthouse Way, Suite 9200
12 Boston, Massachusetts 02210
for the United States
13 By: Robert Peabody, AUSA
Bruce Judge, AUSA
14
LAW OFFICE OF ROBERT L. SHEKETOFF
15 One McKinley Square
Boston, Massachusetts 02109
16 for the defendant
By: Robert L. Sheketoff, Esq.
17

18

19

Courtroom No. 20
20 John J. Moakley Courthouse
1 Courthouse Way
21 Boston, Massachusetts 02210
September 22, 2004
22 10:15 a.m.

23 CAROL LYNN SCOTT, CSR, RMR
Official Court Reporter
24 One Courthouse Way, Suite 7204
Boston, Massachusetts 02210
25 (617) 330-1377

1
2 (EXCERPT FROM PROCEEDINGS ON SEPTEMBER 22, 2004)
3 AFTERNOON PROCEEDINGS
4 THE CLERK: All rise for the Honorable Court.
5 THE COURT: Sit down everybody.
6 Okay. Do you want to do it from here?
7 MR. PEABODY: Yes, I think we can.
8 THE COURT: Go ahead.
9 MR. PEABODY: Well, I think --
10 THE COURT: Do you know where you are? What
11 are we going to be dealing with? Are we dealing with a
12 motion now or are we dealing with a resolution of the case?
13 MR. SHEKETOFF: We are dealing with a motion,
14 Your Honor.
15 THE COURT: Okay.
16 MR. SHEKETOFF: You have heard all the
17 evidence, Your Honor, so I don't intend to go into it.
18 It is my position that they failed to get over the
19 rail with anything credible that a jury should be allowed to
20 speculate on. And that as a matter of law you should --
21 THE COURT: On what issue? On the issue of
22 whether he knew, is that what you are talking about?
23 MR. SHEKETOFF: Yes, Your Honor. That's the
24 only the issue I believe that's raised in the case.
25 THE COURT: Okay. Where is the evidence that

1 he knew?

2 MR. PEABODY: Here, Judge. Let me go through

3 the various witnesses. It will take me ten minutes to do it

4 but from these various locations.

5 Paul Lozier, first witness, longest witness.

6 Person most connected to this defendant. He testified that

7 during the period that he first got to know him in the years

8 following that, '97, '98, '99. He referred to Mr. Foster a

9 series of drug dealer clients, people that he knew and he

10 referred to Mr. Foster for criminal defense purposes.

11 He said that he told Foster, Mr. Foster, that some

12 of these defendants, two or three of them, had been arrested

13 either in possession of drugs that he, Lozier, had sold them

14 or that they were arrested --

15 THE COURT: I don't remember that.

16 MR. PEABODY: Okay. Fine.

17 THE COURT: I am not saying it didn't happen.

18 I don't remember it.

19 MR. PEABODY: The point being --

20 THE COURT: Have you got a transcript, some

21 place in the transcript where he said that?

22 MR. PEABODY: Well, I can find it. I mean, I

23 can find it.

24 THE COURT: Where he says --

25 MR. PEABODY: He says I told Foster.

1 THE COURT: -- these guys I am referring to
2 you and I sold them drugs?
3 MR. PEABODY: There are places in the
4 transcript. Either I sold them or they where going to sell
5 me.
6 But more importantly I needed to know from Foster
7 if they cooperated so that if they were talking, they were
8 talking about me, Lozier, I'd be in trouble.
9 THE COURT: There was some evidence about
10 cooperating but --
11 MR. PEABODY: I am quite sure there was
12 evidence that he told Foster that the pills that they were
13 caught with were pills that were mine, coming to me, going
14 from me. And that I needed to know whether they were
15 cooperating because I was in the jackpot.
16 THE COURT: You find that, you know, after we
17 get through.
18 MR. PEABODY: Okay.
19 Second thing: There is some corroboration of that
20 kind of talk in the tape-recorded conversation that you
21 heard which would occur sometime later in May of 2001
22 where -- this isn't a client that Lozier has referred but
23 they're talking about this guy, Chris DeSimone who Foster
24 represents. And Lozier wanted to know what happened to his
25 case. He said he's pleading and he's going to do a

(?) Check Transcr

1 three-year minimum mandatory sentence.

2 This is Foster saying this. That there was a rat

3 involved. That the government had a hard-on for this guy,

4 that's the expression he used, because he was the one who

5 brought the case down. And Lozier made some remark about,

6 you know, who needs friends like that.

7 And they also go on to talk about a Mexican drug

8 dealer who was tied into another guy with all they knew.

9 The point is they're talking on the record so-to-speak of

10 what's happening on a particular case, what the

11 ramifications are. It's a drug case.

12 **THE COURT:** But that is, you know, God help

13 all of us. I mean, some of the conversations you and I have

14 had in my chambers on various issues.

15 **MR. PEABODY:** Isolated, you are right. But if

16 you take that conversation based on what he said about their

17 previous conversations and previous crimes it gives some

18 credibility to it.

19 Lozier also said he asked Foster for advice about

20 sentencing factors, minimum mandatory issues, drug weights

21 as they would impact him in connection with Ecstasy. He

22 wanted to know what his exposure was. And that was part of

23 a discussion that talked about -- he asked Foster am I

24 covered, after all these people had been sent to him. And

25 Foster said to him you are covered, Paul, Paul Lozier, up

1 through a federal case.

2 THE COURT: Well, I took that to be that does

3 he owe him a fee or were these referrals that he sent to him

4 enough to have given him some credit in the office.

5 MR. PEABODY: Sure. Except he is --

6 THE COURT: I remember that testimony. That

7 is the way I took it.

8 MR. PEABODY: But if you piece them together

9 with all the stuff, the reason why he would get the bonus

10 and no charge is because he sent all these people to him in

11 the first place.

12 THE COURT: I think that is clear, that the

13 defendant here did enjoy the relationship and that it was a

14 source of business to him.

15 MR. PEABODY: It was. But, of course, he says

16 you're covered up to a federal case. In light of what I

17 just said before, some of those guys are in trouble because

18 it's my drugs would give you some inference that he was in

19 the same business and that he may need representation in a

20 federal case.

21 THE COURT: See, I didn't take it that way. I

22 took it that he is talking about it is much more expensive

23 when you come over here to Fan Pier. And down in the Rhode

24 Island Court is one thing but when you come here, it is much

25 more --

1 MR. PEABODY: Let me move on. There is a few
2 more things.
3 Lozier said after Hager, Steve Hager who he
4 described as one of his big Israeli Ecstasy suppliers, the
5 guy who got him from sort of the small time to the big time.
6 Shortly, at some time after his arrest Lozier testified that
7 he told Foster that he bought Ecstasy from these Israelis
8 and that these Israelis were into it big time and they had
9 to handle all the business coming out of New York.
10 And he said that in light of those conversations he
11 offered to Foster to see if he could develop business with
12 some of these guys down in Israel -- down in New York if he
13 wanted to represent them.
14 THE COURT: I am not saying it didn't happen
15 but I don't remember that at all. Do you remember it? I
16 mean, you are an officer of the court. Do you remember? Is
17 he correct?
18 MR. SHEKETOFF: On that particular one, I
19 don't remember it, Your Honor. But what happens is you get
20 so involved in the case, you read everything. Sometimes
21 it's hard to remember what you've heard in a courtroom
22 versus --
23 THE COURT: What you read someplace else.
24 I just don't remember it. But I invite you to get
25 Carol to sit down with you and read it and read it to me.

1 MR. PEABODY: Well, let's keep going though,
2 at least this part.
3 April 12th, 2001, shortly before the arrest you
4 have the Lozier testimony of I'm going to New York to pick
5 up Ecstasy, making surveillance, freaking out, driving to
6 Delaware, throwing his phones and his beepers out the
7 window.
8 THE COURT: He is not telling the defendant
9 that.
10 MR. PEABODY: He says on his way back, when he
11 finally worked his way back to Boston, he called Foster and
12 asked him to meet him. He needed to talk with him. It was
13 important.
14 They met in Kenmore Square and they followed, the
15 silver Mercedes following the black Mercedes or the Rodeo.
16 They drove to the Star Market parking lot up on Comm. Avenue
17 right on the Brighton/Brookline border.
18 Lozier said he got into Foster's car who was
19 driving and then drove to Lozier's house in Brighton not too
20 far away. Lozier said I told Foster everything that
21 happened to me that day. You're making the surveillance,
22 you know, throwing the phones out, et cetera.
23 But then you've got the video of watching the car
24 come up. And, you know, the video is peculiar. The car
25 drives in, the car drives out but stops in front of the

1 front door and looks. Lozier is saying is they're checking
2 to see if the cops are around because he was afraid. He
3 said there is somebody maybe waiting for him in his
4 apartment.
5 They drive out but then seconds later they back in
6 again and then pull into the parking lot. Then the two guys
7 go in, Foster and Lozier go in. Lozier is pretty specific,
8 I kept him in the hall. I went in and got the pills that I
9 had there and the dough that I had there because I wanted
10 them out of the place. And I gave Foster the package of
11 money and I kept the pills in my knapsack.
12 And there is a photo that shows the knapsack, one
13 of the evidentiary photos of Lozier's back.
14 I said did you tell him that was in there? No.
15 But what he did say though is after telling him what he had
16 been through, he said Foster was nervous as, you know, a
17 nervous Nellie, sheet white, and he thanked him for doing it
18 for him. And Foster says, you know, I'm happy to do it or
19 I'm willing to do it for you.
20 And it was this, you know, he had been so crummy to
21 him in the past over these clubs that he said I felt bad.
22 But it gets better I think. They go from there to
23 Maki Okayma's house. And she testifies that Foster is in
24 the car driving. They're in the Mercedes. Lozier is
25 sitting there. And Lozier said in front of him, I'm worried

1 that my phones are tapped and I'm worried that her phones
2 are tapped. Paul, you know, is this something we should be
3 worried about? He said no, nothing to worry about.
4 Now, you know, a lot of this stuff that he's saying
5 taken independently is, you know, innocently, especially if
6 you pile it all together. You know, it leads to the
7 conclusion that he knows this guy sells drugs for a living.
8 And if you never touched a penny of the guy's money after
9 that, you know, no foul, nothing. It is his job.
10 But I think Kenmore Square April 11th is important.
11 Then you have the January 6th surveillance a few
12 months earlier where you just see the hand, you know, the
13 two guys meet in the parking lot, bags of cash, a bag of
14 cash exchanges hands.
15 And then, Your Honor, then what you have over the
16 next, you know, this eighteen-month period you have a ton of
17 cash, a ton of dough exchange hands, from either Lozier or
18 Cutulle or Coyne to a lesser extent. But Lozier, if you
19 look at the exhibits that Mr. Judge used today, $370,000 in
20 cash goes through Mr. Foster's IOLTA account or his -- a
21 bank account I think at any rate over eighteen months.
22 You know, you may not believe it, but I don't know
23 what $370,000 in cash looks like, let alone $20,000 in cash.
24 The number of transactions --
25 **THE COURT:** That is not a crime though.

1 **MR. PEABODY:** It's not but it's evidence that
2 he --
3 **THE COURT:** If that were a crime, there would
4 not be any requirement that you have to prove beyond a
5 reasonable doubt that he knew. I mean, that would -- all
6 you'd have to prove is that he had it in his hands.
7 **MR. PEABODY:** Isolated, of course, there is no
8 crime taking cash. But if you take --
9 **THE COURT:** Especially when you combine it
10 with -- and I am interrupting you but I want you to be able
11 to have a chance to answer me.
12 **MR. PEABODY:** Yes.
13 **THE COURT:** Especially the way in which he
14 handled it, this defendant, nothing surreptitious about it.
15 He walked into the bank, filled out the papers. There is
16 always a transaction report, at least most of the reports
17 are covered by the reporting law. And he just walks in,
18 uses his own name. No subterfuge.
19 **MR. PEABODY:** True. But we are still
20 talking --
21 **THE COURT:** So there is no conduct that you
22 can point to to me that says you see, in addition, his
23 behavior was such that it constitutes some sort of an
24 admission of guilt.
25 **MR. PEABODY:** Well, the transactions are what

1 they were. Of course, you do hear Lozier say he brings the
2 two hundred grand for the security deposit for Ms. Simmons
3 to his office in a bag and dumps -- one hundred one day, a
4 hundred the next-day, dumps that out in a room where the
5 doors are closed. And from there he takes it.
6 I think there is some import of all this money over
7 a short period of time.
8 **THE COURT:** There was another meeting -- one
9 of these guys testified, one of the dealers testified that
10 he met at the defendant's law office. And that had my ears
11 perking up because I said here it is. Here is going to
12 be -- there is also always a conversation that takes place
13 in front of the defendant and this is going to be it.
14 But the conversation was that the defendant wasn't
15 present. Even though they were meeting in his office, they
16 went to some other part of the office and they had their
17 meeting about whatever it was. Now, which gentleman --
18 **MR. PEABODY:** Well, I think Lozier said that
19 he -- well, he made two of -- a number of deliveries he said
20 of cash to the office.
21 **THE COURT:** With another dealer.
22 **MR. PEABODY:** He said David Simeone was
23 present. And he brought the balance.
24 **THE COURT:** But he only had the conversation
25 with Simeone. He didn't -- this defendant was not --

1 **MR. PEABODY:** Well, they didn't hang out their
2 laundry, you're right. They brought the money, combined the
3 money. They got the figure --
4 **THE COURT:** He wasn't present when they were
5 talking about their business.
6 **MR. PEABODY:** No, this was arranged in a phone
7 call beforehand.
8 **THE COURT:** But it was at his office.
9 **MR. PEABODY:** It was at his office.
10 **THE COURT:** So that's what I say, I was
11 waiting for the gong to ring. But they are not in the same
12 room.
13 **MR. PEABODY:** Well, I will move on; but the
14 only point I'm making is this is a lot of cash in a world
15 that doesn't deal in cash and, you know, may be legal --
16 people don't deal in cash in these quantities.
17 And if you add the other information that I've been
18 through, to take cash from this guy Lozier and to then bank
19 it and then to put it towards these various projects,
20 including the boat and the car and this and that, but
21 particularly the clubs is out of the ordinary.
22 One time maybe. Two times, you know, but there are
23 fifteen transactions, fourteen, thirteen transactions over a
24 period of time. And we're talking big money. Really big
25 money. You know, where else would Foster realize --

1 **THE COURT:** Well, does he have some -- let me
2 ask you this: Does he have some obligation to inquire --
3 and I don't mean any disrespect to him -- but he is a small
4 city, ordinary lawyer struggling to make a living, you know,
5 he is no Esdaile. And he has a chance to associate with
6 somebody who he thinks is a big shot and is going to send
7 him some business, criminal business, automobile accident,
8 and that is what he does.
9 So in order to do that he is an errand boy. He
10 takes packages and he deposits them in a bank. And then
11 they make the cash into a check payable to the targeted
12 recipient and it is all done. Anybody can trace the money.
13 The office is here, the IRS. They had no trouble recreating
14 the whole thing for us. It was all done aboveboard.
15 **MR. PEABODY:** Well, I make somewhat of a
16 distinction between going to get the boat -- I think they
17 play off each other. Either the boat, the liquidator thing
18 and the car are little fraudulent detours to take care of
19 the client who's been, you know, who's been taking care of
20 him for a number of years.
21 But most of this cash is for the clubs. Most of
22 this cash is to put this whopping security deposit down and
23 to bond the appeal to the superior court down there. He is
24 not a client but he is a business partner in essence.
25 **THE COURT:** He hopes he is going to have a

1 piece of that. He doesn't realize that they don't want any
2 part of him. But that's --
3 **MR. PEABODY:** That's true. He hopes. It
4 never materializes.
5 **THE COURT:** He is hoping that what he is
6 doing, all this stuff, because he is going to own a piece of
7 it at the end.
8 **MR. PEABODY:** But I think taking the money in
9 the business context like that is much more significant, and
10 for two reasons.
11 One is you heard Simmons talk about Paul Foster
12 never dickered with her on these prices. She wanted two
13 hundred grand, fine. She wanted twenty thousand a month
14 rent, fine. There was no back and forth about whether maybe
15 a lower rent while we renovate, nothing like that. She said
16 those are immediately agreed to.
17 And the reason I say it is so easily agreed to was
18 because he knew it was other people's money.
19 **THE COURT:** That is right.
20 **MR. PEABODY:** And money from drug dealers who
21 had no recourse against him.
22 **THE COURT:** Well, the "and" that --
23 **MR. PEABODY:** Well, I know. But the point is
24 that working in these enormous sums based on the other stuff
25 that I talked about, I mean, he is not, you know, the real

1 point is --
2 THE COURT: If you get right down to it, if
3 that is the way it was going to be, they could have done it
4 in just the cash.
5 MR. PEABODY: They could have.
6 THE COURT: Who says that she wouldn't have
7 taken it?
8 MR. PEABODY: She did say on terms of rent she
9 only wanted a check. I think you can infer that she is not
10 going to take a basket of cash for $200,000.
11 THE COURT: I don't know. I don't know.
12 MR. PEABODY: Let me just keep going and I'll
13 get the whole package to you.
14 Lozier says when he's arrested in this case and
15 he's downstairs in the lockup Mr. Foster comes down to talk
16 to him and they broach the topic of cooperation. And there,
17 at least Lozier is, What should I do, should I cooperate.
18 He says that Mr. Foster says, Why don't you throw
19 one of these Israelis under the bus and save us all. Now, I
20 remember him saying "save us all" but I may be wrong.
21 But I'm very clear I asked Lozier, I said were
22 those his words? Yeah, those were his words, "why don't you
23 throw one of the Israelis under the bus."
24 THE COURT: I remember that. I don't recall
25 the "save us all."

1 MR. PEABODY: But if he is saying that, then
2 he has got knowledge that the Israelis are the Ecstasy guys.
3 And you heard Lozier say thereafter the next two weeks he
4 bagged three Israelis, four Israelis. If he knows the
5 Israelis go under the bus, then he knows the Israelis are in
6 the drug business. And if he knows the Israelis are in the
7 drug business, which he, Lozier, says he told him two years
8 earlier after Steve Hager was arrested in New York, then all
9 the cash that he took after that he knew was from some
10 criminal activity.
11 And Lozier also said he had this insurance company.
12 He worked for his father but he ran to the Registry to get
13 this and that and he did this and that. I mean, that was
14 the nice front for everybody to say, oh, he -- Cynthia
15 Simmons said he owned an insurance company. You know, he's
16 a runner in that thing.
17 And I think in light of the four years they spent
18 together, you know, that was something he did on the side.
19 It wasn't by any means his main source of income.
20 He also said when he went to the office --
21 THE COURT: I think that is clear. The
22 question is whether the defendant knew it and how much of an
23 obligation does -- where is the duty? I mean, you have the
24 obligation to convict him beyond a reasonable doubt. I
25 don't have to tell you that. I am not being pedantic when I

1 say that.
2 Does he have any -- a guy comes in and throws a bag
3 of dough, $100,000, and he says I want you to get a
4 traveler's check or whatever it is. Does he have a duty to
5 say is this legitimate, are you -- and I am asking the
6 question. It is not a provocative one.
7 **MR. PEABODY:** I don't think he has a legal
8 duty to do it. He's a lawyer. He ought to ask those
9 questions. By God, I mean, that's the kind of, well, where
10 did you get this. I mean, to me that's just, you know,
11 Legal Representation 101.
12 **THE COURT:** That, and then there is another
13 school -- and I am not saying which is the right one. I
14 mean, do you ask that question? I have talked to some very
15 eminent criminal lawyers who say the last thing you ever do
16 is ask a client whether they are guilty or not.
17 **MR. PEABODY:** For legal representation I see
18 the issues that may crop up. He's a one-time guy. As Joe
19 Oteri says, we don't have clients, we have cases. That's a
20 case. This is the pay. This is what's coming in.
21 And we run into this all the time in our practice
22 where, you know, we run into money and so forth. Lawyers
23 have it but they don't want to take the time to ask that
24 question, but this is once.
25 This is fourteen times over two years, not just to

1 do the little boats and car stuff, but to invest in a club
2 in which they're partners. The group. They were joined at
3 the hip in that operation. With an overlay of multiple cash
4 distributions and bags at I-Hops or bags at Citizens Bank.
5 You know, the day before Lozier's arrest, going in to
6 tellers and putting cash on the table. This is an ongoing
7 thing.
8 I mean, with all due respect to Mr. Foster, he'd
9 have to be deaf, dumb and blind not to know what's going
10 on -- I realize that's not an argument for this time. But
11 when you put all this -- Lozier testified for five hours
12 because Lozier and Foster were two people joined at the hip
13 for four years. They worked together on these deals. They
14 talked on the phone, as evidenced by the wiretap, very
15 freely. "Hey Paulie; hey, Paulie; is Paulie there; boom,
16 boom, boom." These guys were tight.
17 Paul Lozier told him what he did for a living. He
18 said he mentioned he told this guy what he did for a living.
19 And there is evidence to corroborate that.
20 But there are a few other things too. I should
21 just say them so that you hear them.
22 Cutulle, you know, the Arnold Schwarzenegger
23 witness, said that when they met at Club Play -- they're
24 partners in Club Play -- and they're sitting at the bar
25 having a few drinks. He said Foster said that Foster heard

1 that Lozier sold Ecstasy, or sold E. And Cutulle said I
2 didn't follow up on that. But that's -- and Mr. Sheketoff
3 grilled him pretty hard on that. And he actually said -- he
4 didn't say, Foster didn't say he's an Ecstasy dealer. He
5 said I've heard, he's heard, Foster has heard that he sold
6 Ecstasy.
7 It would make perfect sense in light of what I just
8 said before, but this is coming during Club Play which is
9 the winter of 2000, late December into 2000. So if he knows
10 or has heard that Lozier sells Ecstasy, then the whole Club
11 Enigma venture, starting in January all the way up to the
12 summer of 2001, and the money that was sent down to Florida
13 to Mark Musco, he's on notice that this guy is selling
14 Ecstasis and turning over two, three hundred thousand
15 dollars in cash to him for rental payments and things like
16 that is criminally derived.
17 They also -- Cutulle talked about this retirement.
18 Foster pointed to Simeone and Caswell at the bar and says
19 that Rhode Island thing, that's going to be our retirement.
20 Now, that is innocent on its face but I think if
21 you add it to everything else that's been said, you know,
22 and my theory that this is a bottomless pit of money, of
23 other people's money, not his, and leaving no recourse for
24 these guys around him -- and they all end up in jail. That
25 he's the guy still standing. Perhaps that was his strategy.

1 He is the guy still standing. And they had no recourse
2 against him.
3 But he certainly used Rhode Island as a big deal,
4 that could really be a --
5 **THE COURT:** Well, I think that is true. And
6 the people who are supplying the money are watching where it
7 is going. I mean, it isn't like a bottomless pit where the
8 money is taken in cash and nobody ever sees it again. You
9 know, the testimony from the landlord, they did everything
10 first class. So they were very interested in what was going
11 on --
12 **MR. PEABODY:** Why would she do that --
13 **THE COURT:** -- to try to make it a success.
14 **MR. PEABODY:** Right. She said why would you
15 spend all that money if you didn't have the liquor license
16 rock solid (ph.).
17 And what the drug dealers testify is that, Simeone,
18 for what he's worth, says I'm telling Foster what are you
19 doing? Why are you spending all this money on this place
20 and you don't have a license in play? Why would somebody do
21 that? It defies logic unless he didn't really care where
22 the money came from, or he just assumed that there was a
23 bottomless pit of it. Or, you know what, it doesn't matter
24 whether he put thousands of dollars of drug money into this
25 business or three hundred thousand dollars.

1 THE COURT: Or that the principal -- I'm
2 sorry, I keep forgetting his name.
3 MR. PEABODY: Foster, or Lozier.
4 THE COURT: Lozier says, look, I want it done.
5 Just get it done. Here's the money. Get it done. I didn't
6 ask you your opinion as to whether --
7 MR. PEABODY: I hear you.
8 You know, there is also talk about the Coyne arrest
9 for Vicodin down in Rhode Island. Everybody knew about
10 that. And then there is testimony that Foster and the
11 others tell him he is out. You can't be part of the club,
12 you bring too much attention to it, whatever, whoever said
13 that. It is unclear whether it was Foster or somebody else.
14 But, in any event, at a minimum you're out. If you
15 take that, if that's in Foster's mind and one of his
16 investors, fifty grand investors in Club Play is a drug
17 dealer, Vicodin and steroids, then you have got the whole
18 Enigma thing ahead of you going into that, taking more money
19 not from Coyne but taking money from Simeone and from Lozier
20 to run that deal.
21 THE COURT: Assuming he knew they were -- I
22 mean, doesn't that really cut the other way? He doesn't
23 want to have anything to do with it.
24 MR. PEABODY: It cuts both ways. But I want
25 it to cut my way, certainly at this level. The jury may not

1 buy it; but at this level, because once he's on notice that
2 one of these guys is a drug dealer --
3 **THE COURT:** He is out because we don't want to
4 do business with drug dealers.
5 **MR. PEABODY:** Well, the whole theory is the
6 money he takes from Lozier is drug money too; but that
7 doesn't phase him. He keeps going down that path.
8 **THE COURT:** See, that begs the question. Is
9 there any evidence that he was? Certainly if there was
10 evidence that he was, he put the two in the same package but
11 that is not what he did.
12 **MR. PEABODY:** I think finally, just what I
13 think, Mark Musco testifies that Foster told him to
14 structure the payments -- structure the deposits into the
15 Kira LLC account, put them in less than $10,000.
16 And when Musco is asked, you know, take that on its
17 face, why is Foster telling Musco to put in the deposits in
18 the corporate account and paying the rent under $10,000? He
19 is doing it based on everything else he knows about Lozier
20 and Coyne and so forth, the money that they are putting in
21 is dirty. They didn't want to draw attention to it.
22 I think that you, Judge, asked Musco why did you do
23 that and Musco said because the money was dirty. The money
24 was Lozier's drug money.
25 **THE COURT:** But they never hid Lozier's

1 involvement --

2 **MR. PEABODY:** True.

3 **THE COURT:** -- in that club. Major club.

4 Twenty thousand bucks a month. It is going to be a couple

5 million dollar venture in a small city like Providence. The

6 guy is visible. This woman is captivated by him, how classy

7 he is and the whole -- you know, no secret partners. No

8 people walking around with masks and false identities or

9 lying, anything like that. Everybody right out in the open.

10 **MR. PEABODY:** With their payment of cash too.

11 Cash to contractors, cash to retailers, cash to -- cash,

12 cash, cash, it's all cash.

13 And in reality there isn't a penny of legitimate

14 money in any of these ventures. It's all dirty. Except for

15 Simeone's settlement and things like that. You know, if you

16 add it all up, if you got all this money going through his

17 hands, cash going through his hands, and you listen to

18 Lozier, even giving us the benefit of the doubt for this

19 part of it, seen in the light most favorable to the

20 government, Paul Foster is surrounded by drug dealers.

21 You heard them all. Warts and all. Lozier,

22 Cutulle, Coyne, Simeone. The people connected to his

23 venture. They're all drug dealers.

24 And he didn't know -- and I realize we had to point

25 to those things. I tried to do that. You know, he is

1 clueless. Clueless to the world around him, with all this
2 money, all these transactions, all this activity and all
3 this -- they are out front. And why would he do that? Is
4 that for naiveté? I don't know.
5 But I guess -- the last thing I want to say is
6 this --
7 **THE COURT:** The fact that he was so out front,
8 you say clueless, it may be clueless, but the fact that he
9 is so out front, isn't that consistent also with the fact
10 that he didn't know?
11 **MR. PEABODY:** Well, I realize you --
12 **THE COURT:** There is no duty to inquire.
13 **MR. PEABODY:** Well, again, on the standard, on
14 marshaling evidence of what Lozier said and what Musco said
15 and what Cutulle said, taken in the light most favorable to
16 us, that he was on notice that these guys were into no good.
17 And add that to the ton of dough being processed through the
18 accounts, that he knew if it wasn't drug money, at least
19 there was something suspicious about it. It was dirty.
20 And here's another thing, Judge. And you know this
21 better than anybody. No one walks around with a "Hello, my
22 name is a drug dealer" on their lapel. And nobody puts
23 little Post-its in the brown bags when they opened it up
24 with the cash and say, by the way, this is from my drug
25 dealing activities. Nobody does that. You would be out of

1 business if you did that.

2 **THE COURT:** But if the way it goes is that all

3 you have to do is establish the money --

4 **MR. PEABODY:** You can't do that.

5 **THE COURT:** -- we wouldn't be having this

6 conversation. Those aren't the elements of the crime.

7 **MR. PEABODY:** No, I am not saying as an excuse

8 people don't talk like that. You have to marshal the

9 evidence that this guy knew, Mr. Foster knew that Lozier's

10 money --

11 **THE COURT:** It has to be either he was told,

12 which I don't even, at the best, everything you said,

13 nothing specific there that he was told by anybody, "I'm a

14 drug dealer and this is where I got the money."

15 Or he acts in a way that shows his state of mind as

16 being someone who is aware of the fact that he is dealing

17 with criminals and he acts that way.

18 He didn't act that way. He opened --

19 **MR. PEABODY:** He took the cash. He took

20 hundreds of thousands of dollars.

21 **THE COURT:** He takes hundreds of thousands,

22 but he did it -- the only thing he didn't do is to have a

23 convertible drive out of the --

24 **MR. PEABODY:** One hundred grand of that was

25 Jon Garlinghouse's. He took one hundred out of his account

1 and had Garlinghouse get one hundred out of his account,
2 rather than take the total two hundred and give it to
3 Ms. Simmons. And the two checks were presented to her --
4 THE COURT: Well, we don't know -- the reason
5 for that, I have no idea.
6 MR. PEABODY: Well, the inference is that he
7 didn't put it through his own accounts.
8 My trusted colleague writes here he is also on
9 notice because Lozier is coming to him saying, Paul, they
10 filed an 8300 against me down at Herb Chambers. That's --
11 I'm curious. Come with me. I don't want that to happen. I
12 don't want any attention drawn to me. It doesn't actually
13 mean that he's a drug dealer, although I think it does, but
14 it does show that something is suspicious there.
15 THE COURT: I think you can make the argument
16 that he may well have figured that there is a lot of cash
17 coming out of that insurance company or a lot of cash coming
18 from someplace, no question about it. But not necessarily
19 the --
20 MR. PEABODY: But --
21 THE COURT: Let me give you a rest.
22 MR. PEABODY: Okay.
23 THE COURT: You know, you better respond.
24 MR. SHEKETOFF: Well, Judge, you made my best
25 arguments for me. I don't know what else you want me to

1 say.

2 He was open and notorious about everything that he

3 did. And it was just, I mean, he either knew and he's a

4 complete idiot beyond comprehension or he didn't know.

5 I don't think you can get through law school and be

6 that stupid. Maybe you could. I don't really know.

7 But everything he does is consistent with a lack of

8 knowledge. I mean, the big photograph that they show us:

9 You would take this photograph with three people that you

10 knew were drug dealers so that it is going to end up in the

11 government's hands? You would go and take all this money to

12 your neighborhood bank again and again and again and answer

13 the questions on the CTR?

14 I mean, everything he does is as open and notorious

15 as you can be.

16 And, by the way, Lozier's behavior was open and

17 notorious too. He shows up. He takes the deed in his own

18 name. He does everything that would be consistent with

19 being a legitimate businessman. So I think you should grant

20 this motion.

21 **THE COURT:** Do you want to say something?

22 **MR. JUDGE:** Very briefly, Your Honor. Thank

23 you for letting us both address you.

24 One of the things that I think is being missed here

25 as far as being open and notorious is Lozier is not being

1 tied to the cash, to the cash. And those are all the steps.
2 Yes, Lozier gets a house in Maine, but nothing ties
3 his name to that cash. And, yes, Lozier's name is all over
4 that lease and that guarantee but nothing ties Paul Lozier
5 to cash.
6 Now, all this cash is his. And why can't he take
7 it into a bank himself? What is it about this money that
8 makes it so dangerous for him, his name to be tied to that
9 amount of money?
10 THE COURT: Well, he knows he is a drug
11 dealer.
12 MR. JUDGE: And so --
13 THE COURT: So that is why he doesn't want to
14 do it. He doesn't have to be told he is a drug dealer. He
15 knows he is a drug dealer so he says I don't want my
16 fingerprints on any cash.
17 MR. JUDGE: Right, to Mr. Foster and --
18 THE COURT: No, he didn't say --
19 MR. JUDGE: Well, I'm sorry, Your Honor. But
20 my recollection, for instance, I thought that was
21 illuminative the trip over to Herb Chambers, a business that
22 says over $10,000, an 8300 gets filed. And Lozier was
23 beside himself.
24 And that's why Mr. Foster came with him and they
25 tried to argue to Herb Chambers out of filing this kind of a

1 report.

2 Again, it's the fact that Lozier can't touch this

3 money and take it with him. And then so Mr. Foster steps

4 in.

5 And I think there is, if you look at these

6 documents on display and how they're over Mr. Foster's

7 signature, who we are, we're a group of investors. If you

8 look at what he wrote to Cynthia Simmons, and we -- this is

9 going to be half his business. He's a 40 percent owner of

10 Club Play. And I understand that it exploded on the

11 launching pad but it might have gone somewhere.

12 And this other club in Rhode Island, they thought

13 it might be two or three million dollars. And it wasn't for

14 lack of resources. And if you look on the lease, that's

15 Paul Foster.

16 And when the whistle blows on those drug dealers

17 and they're carted off, well, maybe Mr. Foster is left with

18 it all at the end of the day.

19 And maybe he's, you know, he tells Musco you've got

20 to structure it. But, yeah, I think there is a level here

21 of being an attorney and thinking, you know, as an attorney

22 I can do whatever I want because people won't hold me to the

23 same standard. I can say I'm an attorney and that's why I

24 have this money. And that's out of my IOLTA account, we can

25 go through there. People won't question me about it.

1 And Musco couldn't do that so Musco structured it.
2 But Mr. Foster thought that, you know, as an attorney he
3 could handle this money and no questions asked. And that's
4 how it worked. And it almost did.
5 And that's one of the other things we are leaving
6 out. All these guys, they said they wanted out of the
7 trade. They wanted out of this trade and they wanted to
8 become big nightclub owners. That's what they wanted.
9 **THE COURT:** But they never -- there was no
10 evidence that they ever said that to him, that we want to go
11 straight. Nobody, nobody said that to him. I mean, if it
12 happened, you could have had someone -- I am not suggesting
13 you manufactured it because you wouldn't. You are stuck
14 with the testimony that you get and the way it comes out.
15 And you know how to push. But there is a point beyond which
16 you don't go and that is it. And I respect you for that.
17 It wouldn't take much imagination, you know, to
18 but --
19 (Laughter.)
20 **MR. JUDGE:** As you saw, we got stuck with what
21 we got stuck with.
22 **THE COURT:** Yes, you got stuck with what you
23 got stuck with, that's right. And I can understand that.
24 I am going to allow the motion. I am not going to
25 force you to do any more argument. Okay.

1 MR. SHEKETOFF: Thank you, Your Honor.
2 MR. PEABODY: Thank you, Your Honor.
3 THE COURT: Let me just say this though:
4 This was a very -- and I am not patronizing you.
5 This was a very well tried case by both sides. I truly
6 enjoyed presiding.
7 I don't always enjoy presiding. Most of the time I
8 do, but I truly enjoyed presiding in this case. And it was
9 very well prepared. I even told my judges at lunch what a
10 great job you were all doing and what a pleasure it was.
11 So that is the way it goes. I hope that you won't
12 be too mad at me for too long when you leave. But if you
13 are, that is the way it goes.
14 MR. JUDGE: Thank you, Your Honor.
15 MR. PEABODY: Thank you, Judge.
16 (Whereupon, the Court and the Clerk conferred.)
17 THE COURT: We will call the jury up and just
18 tell them -- is that all right? Zita will just call them
19 and tell them they are excused. Do you want them for --
20 counsel.
21 MR. SHEKETOFF: No, I'm sorry.
22 MR. JUDGE: I'm sorry, Your Honor. I'm not in
23 this district. Is there an opportunity to talk to the
24 jurors?
25 THE COURT: No. No.

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Acquittal by judge draws criticism

The Boston Globe

By Shelley Murphy, Globe Staff | October 18, 2004

For seven days, jurors sat riveted in US District Court, listening to convicted drug dealers testify in a money-laundering case against Charlestown lawyer Paul G. Foster that they delivered bags to him stuffed with as much as $100,000 cash.

But hours after prosecutors finished their case on Sept. 22, jurors received calls saying the case was over -- it had been decided by the judge.

US District Judge Joseph L. Tauro acquitted Foster in a ruling that cannot be appealed, and which prevents prosecutors from retrying him. The decision is final because Tauro acquitted Foster after the jury was sworn in, and before it could render a verdict. Federal prosecutors say Tauro's actions show that federal criminal rules need to be changed so judges cannot exercise unchecked authority. A juror in the Foster case said she felt the outcome signaled the jury had wasted its time.

"I feel really disrespected and insulted," said Lyn Pohl, a juror in the Foster case. "What is the point of the jury being there?"

Pohl, an administrator at Harvard Business School, said she found the evidence very persuasive that Foster knew the cash he used to buy a Mercedes and a boat, and to invest in nightclubs on behalf of his clients, came from illegal sales of ecstasy and OxyContin.

"I think it still should have gone to the jury," Pohl said. "This was an intelligent jury."

Tauro said he was sympathetic to the juror's frustration, but he was fulfilling his responsibility to follow the law when he granted a defense request to acquit Foster before deliberations. "The question in the case was not whether there was overwhelming evidence that he laundered money, the question was did he know there was drug money," said Tauro. "I found there was no evidence warranting giving it to a jury."

The judge said, "Anybody could wait and see what happened and hope the jury would find him not guilty, then you wouldn't have to, but that's ducking responsibility."

Tauro used authority under federal criminal procedure known as Rule 29, which permits judges to acquit a defendant if they find that no rational jury could convict based on the prosecution's evidence. If a judge rules after the jury has decided a case, prosecutors can appeal. But the unappealable decisions judges make during trial draw sharp criticism from prosecutors.

"It's the only time in the federal criminal trial system that a judge has unreviewable, unappealable, unfettered discretion," said First Assistant US Attorney Gerard T. Leone Jr. "You've got to scrutinize the rule that allows one person to substitute themselves for a jury."

The Justice Department proposed an amendment that would require judges to wait until after a jury returns a verdict to rule on motions for acquittal, which would preserve the prosecution's right to appeal. But in May an advisory committee to the US Judicial Conference rejected it, opting not to refer it to the US Supreme Court, which could have forwarded it to Congress.

The US courts don't compile statistics on how often judges grant Rule 29 acquittals during trials. But a Justice Department survey of all US attorneys' offices found that judges acquitted defendants before a jury verdict in 184 cases between Oct. 1999 and mid-2003, according to a memo by Eric H. Jaso, counselor to the assistant attorney general.

Arguing for the amendment, Jaso wrote in September 2003, "It is particularly necessary because preverdict judgments of acquittal are frequent, often wrong, and on significant occasions abusive."

Jaso cited a Massachusetts case in which Tauro acquitted Thomas Cooley of two bank robberies in September 2003 after a three-day trial, finding insufficient evidence.

Government witnesses testified that Cooley's fingerprints were found on the demand notes handed to tellers during the robberies in Andover and Mansfield.

But Cooley's lawyer argued that the fingerprint evidence wasn't enough to convict Cooley, because no witnesses had testified that he was in the banks at the time of the robberies. Tauro agreed.

"The rule is there, regardless of how anyone feels about it," said Tauro, adding that when the defense seeks an acquittal at the close of the government's case, judges must decide it.

Tauro and Chief US District Judge William G. Young said that Rule 29 is rarely used by federal judges in Massachusetts to acquit a defendant during a trial.

"It's rare, I suppose because in most cases the government at least comes up with enough evidence, arguably, to go to the jury and then it's the jury that decides," Young said. "But sometimes they don't, and in those cases Rule 29 exists for the protection of the individual and properly so."

Leone disagreed, contending that anecdotal evidence gathered by federal prosecutors around the country suggests that federal judges in Massachusetts are on "the high end" when it comes to acquitting defendants at the close of the government's case.

The state system has a comparable rule that permits judges to acquit defendants before jury deliberations. But Leone, a former state prosecutor, said he believes state judges are less inclined to take a case away from a jury than their federal counterparts. Salem lawyer Jeanne Kempthorne, a former federal prosecutor, cited more than a dozen cases between 1996 and 2001 in which federal judges in Massachusetts acquitted defendants during trial.

"It is a system that invites abuse," she said.

A judge may acquit a defendant simply because he doesn't like the federal sentencing guidelines, which call for long mandatory prison terms for certain crimes, Kempthorne said. And even if a judge believes there is insufficient evidence to send a case to a jury, she said, he could be wrong. Judges "get overturned all the time," she said.

But Boston attorney Robert Sheketoff, who represents Foster, said judges must have the power to acquit defendants when prosecutors fail to prove the case at trial. "Many cases have good jury appeal, but as a matter of law they're not sufficient," said Sheketoff, adding that sometimes prosecutors "tar and feather" a defendant during the trial, but can't prove he's guilty.

In Foster's case, Sheketoff argued that the government showed that a lot of money went through the lawyer's account and that he associated with "unsavory people." But, he said, the evidence wasn't sufficient.

Another juror in the Foster case, Alex Kevorkian, said he wasn't upset when the trial was cut short. He said he agreed with the judge about the lack of evidence against Foster.

"If you honestly don't believe there's a case against a person, why leave it up to chance? Make sure they get acquitted," Kevorkian said. "It seems like not only a waste of money, but a waste of time and detriment to the defendant to have it always go to a jury." ■

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EXHIBIT H

United States v. Michael Levine

D.N.J. 98-483 (Hon. Nicholas H. Politan)

I. Statement of Facts

A superseding indictment returned in May 2000 charged defendant Michael Levine, an attorney who practiced in New Jersey and New York, and one of his clients, Harold Weingold, with engaging in a fraudulent scheme and laundering the proceeds of that scheme. The indictment alleged that the defendants sent out direct mail solicitations which asked recipients to send money for worthless merchandise such as psychic predictions, lottery-related items, and religious trinkets, promising purchasers that they would receive large sums of money based on a psychic's visions, or that they would learn secret methods for winning lotteries, or that they would receive religious blessings. In addition to the twelve counts of mail fraud related to this scheme, the indictment charged Levine and Weingold with conspiring to launder the proceeds of the scheme and with two substantive counts of money laundering, in violation of 18 U.S.C. §§ 1956(h) and 1956 (a)(2)(B)(i). They were also charged with committing perjury and suborning perjury in a related civil action brought by the government to enjoin the fraudulent mailings and Levine was charged with aiding and abetting Weingold's filing of false tax returns.

At trial, the government proved that after the first fraudulent solicitations were sent out, Levine and Weingold arranged to form new shell corporations and opened new bank accounts in both the United States and the Cayman Islands. The proceeds from the scheme were deposited into various new accounts and into Levine's client trust account, consolidated in two Cayman Islands' accounts, and eventually returned to Weingold by transfers to accounts in the United States in his own name or the name of a corporation in which his ownership was not hidden. (The two substantive money laundering counts were based on two wire transfers of funds from a bank account in New Jersey to one of the corporate bank accounts in the Cayman Islands.) Levine, who was representing himself, moved for a judgment of acquittal on the money laundering counts, arguing that the evidence only showed that he formed corporations and opened bank accounts in his capacity as Weingold's attorney and that there was no evidence that he, Levine, had been involved in the transfers of money between accounts.

The money laundering statute makes is unlawful to "transport[] . . . a monetary instrument or funds from a place in the United States to or through a place outside the United States. . . knowing that the monetary instrument or funds . . . represent the proceeds of some form of unlawful activity and knowing that such transportation . . . 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." 18 U.S.C. § 1956(a)(2)(B)(i). The government must prove that the defendant knew "that the financial transactions in which [he] was engaged were 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.'" *United States v. Massac*, 867 F.2d 174, 177 (3d Cir. 1989).

II. The Court's Rule 29 ruling.

Without even having a proper motion before it, the district court granted a judgment of acquittal as to all of the money laundering counts against both defendants. The court concluded that the only purpose of transferring the proceeds of the scheme must have been to avoid subjecting it to the restrictions imposed by a preliminary injunction in the related civil case. Tr. 2276-77. The court commented,

> It may sound like the Catz & Jammer Kids out there. They may have done a lot of things. They may have violated Judge Bassler's Order.
>
> I'll tell you one thing. There is not sufficient proof to show any of the elements of money laundering. This circuitous route of the money going round the circle and ultimately going back home to roost to him -- while it makes no sense, this does not constitute money laundering, so far as this Court is concerned, and I'll dismiss all the money laundering counts.

Tr. 2287-90.

III. Why the Ruling Was Incorrect.

Levine's involvement in setting up offshore corporations and offshore bank accounts and in mischaracterizing transfers of large amounts of money among those accounts as "funds paid to employees and others," combined with the proof that he knew the funds were the proceeds of a mail fraud scheme, was sufficient to establish that he committed the crime of money laundering. The district court's fundamental misunderstanding of the elements of the offense was revealed by his repeatedly asking the prosecutor how there could be a crime when the source of the money originally was Weingold, and at the end of the series of transfers, the money was returned to Weingold. As the judge saw it, "He goes round and round the mulberry bush and brings the money back to him. In his hands clearly traceable to him. Not to a third party source. Not to a fake company some place. Not to a pseudo name in Liberia. It comes back to the United States in his hands." Tr. 2276-77.

The statute requires proof that the defendant moved the proceeds of a crime in and out of the United States with the intent "to conceal or disguise the nature, the location, the source, the ownership, or the control" of those proceeds. This scheme was not a particularly sophisticated one and it was not ultimately a successful one, but the defendants did manage to direct the proceeds of a mail fraud scheme into bank accounts in the names of dummy corporations in the Cayman Islands and then to move the funds back into accounts Weingold controlled in the United States. The district court's belief that laundered money must end up in the hands of a third party was simply wrong.

IV. Harm Due to the Ruling.

The district court's misinterpretation of the law resulted in an unreviewable decision acquitting the lawyer of all criminal responsibility for his role in this scheme and relieving Weingold, the architect of the fraudulent scheme, of legal liability for laundering the proceeds of that scheme.

V. Appendix

Transcripts of proceedings on April 18, 2001, April 20, 2001, and April 23, 2001, concerning motions for judgment of acquittal at the close of the government's proofs.

1

IN THE UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF NEW JERSEY
CRIMINAL NO. 98-483

3

4 UNITED STATES OF AMERICA :
:
-vs- : TRANSCRIPT OF PROCEEDINGS
5 :
HAROLD WEINGOLD and : TRIAL TRANSCRIPT
6 MICHAEL LEVINE, :
: VOLUME 12
7 Defendants. :
- -

8

9 Newark, New Jersey
April 20, 2001

10 B E F O R E:

11 THE HONORABLE NICHOLAS H. POLITAN, U.S.D.J.
AND A JURY

12

A p p e a r a n c e s:

13

ROBERT J. CLEARY, U.S. Attorney,
14 BY: LORRAINE S. GERSON and
CARLOS F. ORTIZ,
15 Assistant U.S. Attorneys,
For the Government.

16

HAROLD WEINGOLD, Pro se

17

MICHAEL PEDICINI, ESQ.,
18 Standby Counsel for Harold Weingold

19 MICHAEL LEVINE, Pro se.

20

21

Pursuant to Section 753 Title 28 United States Code
22 the following transcript is certified to be an accurate
record as taken stenographically in the above-entitled
23 proceedings.

24 Stanley B. Rizman
Official Court Reporter

25

1 THE COURT: Please be seated. Good morning.

2 MR. ORTIZ: Good morning.

3 THE COURT: I'd like to give you my ruling first.

4 MS. GERSON: Your Honor --

5 MR. LEVINE: With respect to the motion to dismis

6 the three remaining counts against me. Prosecutorial

7 misconduct.

8 With respect to procuring knowingly perjurious

9 testimony by Ms. Archer and the government's failure to

10 disclose to me that Mr. Kuhnemund had, in fact, revealed t

11 them he was in the office prior to the time he was there,

12 as well as failing to turn over to me documentary evidence

13 in which the government's knowledge establishes that -- I

14 have read the government's responding letter in which Ms.

15 Gerson claimed there was no Brady violation because she

16 turned over notes of an interview with Mr. Zimmermann wher

17 he said he didn't participate in the preparation of the

18 Archer deposition and, additionally, that this LEXIS

19 research was part of the materials that the government

20 photocopied and turned over to me; therefore, I should hav

21 known there was no Brady violation.

22 I think that is absolutely absurd, your, Honor fo

23 the following reason.

24 Number one, even if Mr. Zimmermann indicated he

25 was present for the preparation of the witness, that is

1 understand them, unless there is something I don't
2 understand here, that I -- in 1993 --
3 THE COURT: Sit down.
4 What are the allegations of money laundering here
5 MR. ORTIZ: With respect to the money laundering,
6 the allegations are --
7 THE COURT: I'd like to deal with both, if you
8 would. Not together. But I want to hear what the money
9 laundering allegations are.
10 MR. ORTIZ: The money laundering. The allegation
11 are that Mr. Levine was involved in setting up a dummy
12 corporation in the Cayman Islands. That is, Island
13 Keypunch, specifically, Limited.
14 The money that -- the $400,000 that went from the
15 UJB account of Tower that was transferred four days after
16 the preliminary injunction in the civil case; that occurr
17 on January 14th, 1994.
18 On January 19, 1994, 200,000 gets wired to the
19 Bank of Butterfield account.
20 The next day, the 19th -- the 20th. I'm sorry,
21 Judge -- another 200,000 gets wired to the Cayman account
22 the Bank of Butterfield.
23 THE COURT: That is not Island Keypunch.
24 MR. ORTIZ: No.
25 What happens, your Honor, is that $200,000 of t

1 money goes from the Bank of Butterfield KGB account to the
2 Cayman National Bank account that was opened up in the name
3 of Island Keypunch.
4 There is testimony in this Court from Marie Dorse
5 there was no legitimate purpose whatsoever for the creatio
6 of Island Keypunch, Ltd.. She was on paper --
7 THE COURT: Didn't she say -- my recollection is
8 that the reason the corporation was formed was because she
9 thought "Doc Weingold was going to put me in business
10 offshore instead of onshore and I had no objection to it."
11 MR. ORTIZ: That was her understanding of what th
12 business would be for.
13 With respect to what really happened for Island
14 Keypunch.
15 The only purpose for that company was to move the
16 $200,000 that was in that Bank of Butterfield account, the
17 KGB account, into the Cayman National Bank account and the
18 back to Winston List, which was under the control of Mr.
19 Weingold.
20 There was, I think, $50,000 which was moved to, I
21 believe, Tower, also.
22 THE COURT: What does Winston List have to do wi
23 this?
24 MR. ORTIZ: The only purpose for that -- that wa
25 Winona Atkinson.

1 THE COURT: I know.

2 MR. ORTIZ: The only purpose that occurred was

3 just to get money to Mr. Weingold. To pay expenses for

4 him. It was expenses that were paid at his behest. He

5 controlled that money.

6 THE COURT: I understand that. That is what I

7 thought the transactions were.

8 But what is the money laundering?

9 In other words, you might say that even though he

10 took 200,000 and 400,000, whatever it is, he transferred i

11 to KGB, which is a terrible name.

12 MR. ORTIZ: Right.

13 THE COURT: He transfers it to KGB and it goes

14 through Island Keypunch, which is his other employee's

15 company.

16 Then it goes to Winston List, which is his other

17 employee's thing, and then it goes back to him.

18 Where is the money laundering? That is my

19 question.

20 In other words, where is the disguise, if you

21 would, as to the true intent that it came from -- first o

22 all, what is the illegal place it came from? What is the

23 illegality?

24 Second of all, what is the concealment or

25 disguise, the nature and location of the source and

1 ownership and control, if he ends up with the money?

2 In other words, it took a circuitous route for --

3 whatever reason, okay?

4 There is no question. I don't think there is any

5 dispute in the record as to what happened.

6 MR. ORTIZ: Right. There is none.

7 THE COURT: No dispute. But the $400,000 -- put

8 aside the whole question of the Jamaica purchase. Let's

9 put that over here. I'm not even going to talk about that

10 MR. ORTIZ: Exactly.

11 THE COURT: Assume that wasn't in existence.

12 He goes round and round the mulberry bush and

13 brings the money back to him. In his hands clearly

14 traceable to him. Not to a third party source. Not to a

15 fake company some place. Not to a pseudo name in Liberia.

16 It comes back to the United States in his hands.

17 How does that constitute a crime?

18 It may be stupid. It may be -- I don't know what

19 you would call it. It might even be tax evasion.

20 I'm not talking about that now. I'm talking abou

21 the money laundering.

22 What does it all mean? When we end -- up at the

23 end of the day we end up with his $400,000 having gone th

24 circuitous route from one of his corporations to KGB

25 Island Keypunch to Winston List and back to him.

1 MR. ORTIZ: Right.

2 THE COURT: You know, I'm surprised.

3 Why wasn't Ms. Atkins indicted? Why wasn't Ms.

4 Dorsey indicted?

5 I mean, you indicted Dembia. Why didn't they

6 indict those two people? Those two people did about as

7 much as Dembia did, if not more. They actually did more.

8 They were aware. They were actually in cahoots.

9 I don't mean that -- I don't want to use -- the

10 wrong word. Scratch that word.

11 They were allies of Weingold. They knew more

12 about his business than Dembia did, I think. Why weren't

13 they indicted?

14 And they weren't given free-pass letters. If th

15 is a money laundering scheme, they're in.

16 They entered into it voluntarily. They signed

17 their name to things.

18 Winona Atkinson. I remember her. She was cryin

19 on the stand. She thought she was in trouble.

20 What did she do? She said, "The money came. It

21 was Dr. Weingold's money. When he told me to give it to

22 him, I gave it to him.

23 "Did you give him all the money deposited in th

24 account?

25 "Yeah."

1 I have very great difficulty understanding this i
2 a money laundering case.
3 I'm not commenting on the other parts of the case
4 but the money laundering; where is it?
5 MR. ORTIZ: That is part of it for creating this
6 big circle. The money starts with, I believe, Helen Arche
7 and, I believe, Fight Back and Holy Trinity -- the money
8 starts from money received from solicitations. From there
9 that money goes into -- it then goes to Tower Mail Room.
10 All of these companies are Mr. Weingold. Tower i
11 Mr.
12 Weingold. I-Deck is all Mr. Weingold. All under his
13 control.
14 The whole purpose of setting up -- having it go
15 from Helen Archer or Holy Trinity, these companies, into
16 Tower Mail Room and into the KGB account.
17 Judge, if the money had just stayed in the KGB
18 account -- maybe that was the sole purpose, to build the
19 house in Jamaica. That is why it was leaving the countr
20 Easier to buy in Jamaica if the money is in the Cayman
21 Islands.
22 I can see that is a purpose that looks legitima
23 And there is a reason for doing those transactions. It
24 not to conceal that the money is really from the fraud.
25 they moved out of the country with the intent to concea

1 where it came from --

2 THE COURT: That was the fraud.

3 MR. ORTIZ: The next act is probably the most

4 critical evidence with respect to the fraud. That is,

5 creating Island Keypunch -- not only creating Island

6 Keypunch, but moving the money from the Bank of Butterfiel

7 to Cayman National Bank.

8 A lot of steps taken which have no legitimate

9 purpose whatsoever.

10 THE COURT: What is the legitimate purpose?

11 To take the money, starting with the mail fraud

12 money, to the Cayman Islands and then back to Mr. Weingold

13 THE COURT: They certainly didn't do it smartly.

14 If you talk about getting it back to Mr. Weingol

15 what they did was they took it from Island Keypunch, Mari

16 Dorsey. and they sent it to Winona Atkinson, his employe

17 because these were employees. He was doing a fakery with

18 them.

19 It's like they do in the U.S. Attorney's office.

20 Give you a title and don't give you money.

21 That is what he's doing. Giving all these peop

22 titles. He's a con man.

23 I don't mean it in that sense. He deals with

24 employees. He deals with employees' heads.

25 If I want to promote somebody, I give them a

1 promotion and no money.

2 These people were workers. They were workers.

3 I'm sorry. I can't conceive of them as entrepreneurs.

4 They never had another customer.

5 MR. ORTIZ: I agree with your Honor completely.

6 There is no dispute with that, your Honor.

7 F&A Data was purely Mr. Weingold's business. As

8 was having been done here --

9 THE COURT: He was using these employees.

10 But what I'm saying is he goes the circuitous

11 route and has all the money back in his hands again.

12 How does that clean the money up or launder it?

13 MR. ORTIZ: It gets it from -- he can't pay the

14 money directly to himself from Helen Archer.

15 At that point there is a preliminary injunction i

16 January of 1994. Then there is an injunction and court

17 Orders.

18 THE COURT: What does the Order say?

19 MR. ORTIZ: The preliminary injunction, I believe

20 says you cannot -- the funds -- the Court wants to be awar

21 of all this money, where it goes. It can't be disbursed

22 other than reasonable expenses, without having it in front

23 of me.

24 That is why there is the money -- but that i--

25 THE COURT: It might have been -- I'm not

1 expressing an opinion on it. It might have been a
2 violation of Judge Bassler's order. They might have been
3 subject to contempt because he was trying to get the money
4 back to him.
5 MR. ORTIZ: Right. The money starts with Helen
6 Archer. It can't come directly from Helen Archer to him.
7 That is a blatant Archer.
8 Those companies are named in the court order.
9 Tower Mail Room is not listed as a defendant in
10 that action. So there is a technical defense to them. Th
11 money goes to Tower Mail Room. Tower Mail Room wires that
12 money -- not a coincidence.
13 THE COURT: Why didn't anybody bring a contempt
14 motion before Judge Bassler?
15 MR. ORTIZ: Your Honor -- I can't explain, your
16 Honor, why actions were done or not done. We're here with
17 a criminal case at this point.
18 THE COURT: I know what we're here with. I've
19 been here four or five weeks and two years before that.
20 know what I'm here for.
21 MR. ORTIZ: I understand that, your Honor. I
22 understand completely.
23 But, your Honor, that action, Island Keypunc --
24 purpose whatsoever other than to move money back to the
25 United States. Not just back to Mr. Weingold in his own

1 name directly back into a personal account or to one o[illegible]h
2 accounts or even back into Levine & Dembia. Back to -
3 another.
4 MR. LEVINE: You said it came out of my trust
5 account.
6 MR. ORTIZ: No, I didn't say that. It didn't go
7 there.
8 It went back to another entity, Winston List.
9 50,000 went back to Tower. But 150,000 came back to
10 Winston List, which was another company.
11 Granted, it wasn't the smartest scheme in the
12 world.
13 THE COURT: This reminds me of the gang that
14 couldn't shoot straight.
15 MR. ORTIZ: Some of the solicitations were not th
16 smartest thing in the world. Some were blatantly false.
17 Coming back, your Honor, to that. It was the
18 setting up of that business that both Mr. Levine and Mr.
19 Weingold are involved in. The Island Keypunch.
20 THE COURT: How do you get -- all right. Let's
21 talk about Levine now for a second.
22 Levine sets up or causes to be set up by that ma
23 who is on television here, Mr. Matthew, the Island Keypun
24 Company.
25 Did he ever -- is there an allegation that he

1 handled some of this money?

2 MR. ORTIZ: No.

3 THE COURT: He never handled any of the money,

4 right?

5 MR. ORTIZ: No. He never made the deposits.

6 He did the same thing that Mr. -- the guy who was

7 allegedly dying.

8 MR. LEVINE: Kamin, your Honor.

9 THE COURT: He did the same thing that Mr. Kamin

10 did. Why didn't you indict Mr. Kamin?

11 MR. ORTIZ: I don't know why we didn't indict Mr.

12 Kamin. I don't know what the proofs are with respect to

13 him.

14 Mr. Levine knew on paper Marie Dorsey was the

15 president of Island Keypunch. He knew she had no

16 involvement whatsoever.

17 He represented to Mr. Matthew his client had

18 affirmatively decided not to bank at the Bank of

19 Butterfield and wanted a separate bank account.

20 THE COURT: You can ascribe that to Mr. Weingold

21 based upon the testimony of Ms. Dorsey?

22 MR. ORTIZ: Perhaps Mr. Weingold told him that.

23 There is no evidence, your Honor, that Mr. Weingold told

24 Mr. Levine that.

25 THE COURT: Ms. Dorsey didn't tell him.

1 MR. ORTIZ: Ms. Dorsey is on paper as being the
2 owner. Mr. Levine knows that.
3 He signs the name as president when in the Cayman
4 Islands on July 7, '94. He knows she's the president of
5 the company and she has no involvement. The only
6 involvement was with respect to the bank accounts.
7 Granted, Mr. Levine had no involvement with movin
8 money into the account, the Weingold wire transfers.
9 He clearly had involvement in setting up the bank
10 account and making sure that the Bank of Butterfield was
11 not used. A different bank was not used. Probably not a
12 tremendous mastermind scheme.
13 THE COURT: I've had other money laundering c[illegible]s
14 The one I tried with Smith. Smith, for example, comes to
15 mind.
16 By the way, the Court of Appeals said that I
17 shouldn't sentence under the money laundering statute,
18 which I did, and then the Sentencing Commission reversed
19 the Third Circuit and said it should be money laundering.
20 In the Smith case what there was, in the Smith
21 case, were kickbacks that were going to Mr. Smith, which
22 was the illegal act, and what he did was or what the
23 record, I think, showed is he told the person that was
24 making the kickback to him to pay for the fence -- pay the
25 money for the fence, pay the money for the horse, for the

1 cattle, whatever it was.
2 So that you got a disguised situation where there
3 was a clear run to third parties. Never touching the
4 defendant Smith.
5 So Smith was like this. In fact, it was his mone
6 that he routed out to somebody else which could not be
7 traceable to him, per se. It could not.
8 There was testimony in the case that there was
9 some legitimacy to whatever it was. Be that as it may,
10 that was the money laundering or the money laundering wher
11 the drug money comes in. I had that case.
12 Millions of dollars come in. They take it. They
13 go to the banks. They convert it into $9,900 money orders
14 or something. Then they do something else and ship it out
15 to Colombia.
16 Clearly, again, a case where the money is illega
17 and the knowledge of the money being illegal. The
18 illegality of the money is that it is drug money.
19 In this case it is kickback money.
20 Here we have money which comes about, which was
21 collected, in the first instance, before the injunction
22 based upon whatever solicitation they made. Those 12
23 solicitations, whatever they are.
24 The money was collected, put in an account and
25 is there. Then he transfers it blah, blah, blah.

1 Okay.

2 MR. ORTIZ: Your Honor, specifically the Islan

3 Keypunch. There is no purpose whatsoever for setting up

4 that account but to create another layer or level to try t

5 conceal the money that will allegedly come back to Mr.

6 Weingold.

7 THE COURT: For the purpose of what? Evading the

8 injunction of Judge Bassler?

9 MR. ORTIZ: Correct.

10 THE COURT: That is not money laundering. That

11 may be contempt of Judge Bassler's Order.

12 In other words, let's assume I go with your entir

13 thesis that there was a prohibition against his gettin

14 money directly from Helen Archer, Inc., or whatever it was

15 called. Holy Trinity. I don't care which one it was.

16 There was a prohibition in place by Judge Bassler's Order.

17 Let's assume that to be so.

18 What he does in order to get the money -- he take

19 the circuitous route. It comes back in his hands. That

20 may very well be a blatant violation of Judge Bassler's

21 order.

22 How does that convert into what we call -- a

23 special thing called money laundering?

24 MR. ORTIZ: To establish money laundering as

25 charged in the Indictment the United States has to

1 establish money from UJB was transferred overseas. It was
2 done to conceal the purpose of that money. We've done
3 that.
4 Your Honor, the money was not sent over as Helen
5 Archer money to the Cayman Islands. It was not sent over
6 as Fight Back money or Holy Trinity money to the Cayman
7 Islands. Had that been the case, there would be no
8 concealment whatsoever of the source of the money.
9 Here it goes into Tower and then gets wired out t
10 another company. Then it gets wired out.
11 THE COURT: The money apparently comes to Tower
12 Mail Room, Inc. from Helen Archer, Inc., Holy Trinity
13 Society, Inc. and Fight Back International on the 14th.
14 On the 18th and the 19th the 400,000 of it, at
15 least -- the 400,000 -- I don't know how they got 400,000
16 because it doesn't show what was in before. There is only
17 260,000 on deposit the day before.
18 I'm sorry. Here's money. 50,000 from Helen
19 Archer.
20 Let's start with that. Let's start with page 1.
21 I'm looking at Government Exhibit 41.5.
22 MR. ORTIZ: That is what I have, your Honor.
23 THE COURT: They open an account. This is
24 11-23-93. There is no Judge Bassler Order. There is no
25 nothing. There may be an investigation going on, but the

1 is nothing.

2 He opens an account called "Tower Mail Room, I

3 He puts $50,000 in it in November. Another 150,000 in

4 December. Okay.

5 When was Judge Bassler's Order entered?

6 MR. ORTIZ: January 14th.

7 THE COURT: The same day of the Order, apparently

8 he makes these deposits. The Order was entered in the

9 afternoon.

10 MR. LEVINE: Yes.

11 THE COURT: What time were the deposits made?

12 They had to be made by the closing of banking business,

13 which was three o'clock.

14 MR. ORTIZ: Correct.

15 MR. LEVINE: Please?

16 THE COURT: Shut up.

17 THE COURT: Then he makes a deposit of 260.

18 Two days later he does the Kinetic Group. KGB.

19 Another day later the KGB. Then from KGB it goes through

20 circuitous route which ultimately ends up in his hands.

21 Ultimately in what company?

22 MR. ORTIZ: 150,000 ends up back in Winston Lis

23 50,000 ultimately, at least, in KBB. Another back to

24 Tower.

25 THE COURT: Goes back to Tower?

1 MR. ORTIZ: Yes. It does go back to Tower.
2 50,000 goes back to Tower.
3 THE COURT: I heard enough.
4 All right. The Court is satisfied insofar as the
5 money laundering aspects --
6 MR. ORTIZ: Your Honor --
7 THE COURT: -- are concerned, there is no basis
8 upon which a jury verdict could be sustained.
9 It may sound like the Catz & Jammer Kids out
10 there. They may have done a lot of things. They may have
11 violated Judge Bassler's Order.
12 I'll tell you one thing. There is not sufficient
13 proof to show any of the elements of money laundering.
14 This circuitous route of the money going around the circle
15 and ultimately going back home to roost to him -- while it
16 makes no sense, this does not constitute money laundering,
17 so far as this Court is concerned, and I'll dismiss all the
18 money laundering counts.
19 MR. WEINGOLD: Does that include me, your Honor?
20 THE COURT: That includes you, too, sir.
21 There is no more money laundering in this case.
22 We are now left with the case of twelve counts of fraud and
23 one count of tax evasion, I think. Is that it? One count
24 of perjury.
25 MR. PEDICINI: One false tax return.

1 THE COURT: Four counts. There is the mail fraud.
2 There is the tax fraud. There is a mail fraud. There is
3 tax evasion. There is the subscribing of the false tax
4 returns and perjury in Count 15.
5 So -- do you want to make that Rule 29 motion?
6 MR. LEVINE: Yes, your Honor.
7 THE COURT: You're gone. You're out of here.
8 MR. LEVINE: I thought you meant formally on the
9 record.
10 THE COURT: You're out of here.
11 What motion do you want to make, Mr. Pedicini?
12 MR. PEDICINI: Judge, Rule 29(c). I make a motio
13 on the mail fraud.
14 There has been conflicting testimony even by the
15 people who were brought here as witnesses. Some of them
16 testified that they were dissatisfied.
17 THE COURT: As to all the counts. So you know, a
18 to all of the counts that I have dismissed, as we've gone
19 through this case, judgments of acquittal should be noted
20 on the record as being such.
21 Go ahead.
22 MR. PEDICINI: There were people who testified --
23 the alleged victims of this fraud who testified.
24 I think a couple of them testified they asked for
25 refunds. They submitted the refund request right about th

1 IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
2 CRIMINAL NO. 98-483

3 UNITED STATES OF AMERICA :
:
4 -vs- : TRANSCRIPT OF PROCEEDINGS
:
5 HAROLD WEINGOLD and : TRIAL TRANSCRIPT
MICHAEL LEVINE, :
6 : VOLUME 13
Defendants. :
7 - - - - - - - - - - - - - - - - - -

8 Newark, New Jersey
April 23, 2001
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B E F O R E:
10
THE HONORABLE NICHOLAS H. POLITAN, U.S.D.J.
11 AND A JURY

12 A p p e a r a n c e s:

13 ROBERT J. CLEARY, U.S. Attorney,
BY: LORRAINE S. GERSON and
14 CARLOS F. ORTIZ,
Assistant U.S. Attorneys,
15 For the Government.

16 HAROLD WEINGOLD, Pro se

17 MICHAEL PEDICINI, ESQ.,
Standby Counsel for Harold Weingold
18

19

20
Pursuant to Section 753 Title 28 United States Code, the
21 following transcript is certified to be an accurate record as
taken stenographically in the above-entitled proceedings.
22
____
Stanley B. Rizman
23 Official Court Reporter

24

25

THE CORBY GROUP 1-800-255-5040 LASER STOCK FORM B

1 (The following occurs in the jury room.)

2 THE COURT: Do you have a problem?

3 MR. PEDICINI: Judge, Dr. Weingold has permitted me to

4 talk with respect to the charges.

5 The government's presumption of -- reasonable doubt

6 charge I object to. I have a charge that I submitted for the

7 Court's consideration which I think is a little bit neutral. I

8 always hated that language.

9 THE COURT: Which number of theirs?

10 THE CLERK: Page 17.

11 THE COURT: Where is my reasonable doubt charge? My

12 standard charge.

13 I'll give you whatever I give every defendant. I don't

14 know whether it is different from this or exactly that. I don't

15 know.

16 MS. GERSON: The same.

17 MR. PEDICINI: That is what you get.

18 You know what language I hate.

19 Again, in this courthouse it is given pretty routinely.

20 No. 18. If that were the rule, few persons would ever

21 be convicted, however guilty they might be.

22 I never liked it. I always objected to it, frankly. I

23 don't think I ever won.

24 THE COURT: Just that I have a standard front and back

25 charge which I normally give. Then I go to the substantive

1 MS. GERSON: I gave it to you.

2 MR. PEDICINI: My mistake. I'll give you the bold. If

3 there is any problem, raise them?

4 THE COURT: Raise them tomorrow morning, first thing.

5 MR. PEDICINI: Judge, I think we're done with this.

6 I have a motion I'd like to make. If I could be heard?

7 THE COURT: Now?

8 MR. PEDICINI: Or I can do it tomorrow, if you want.

9 THE COURT: What do you want to do?

10 MR. PEDICINI: I want to move for mistrial for a

11 variety of reasons.

12 I didn't do any research on this. I gave it a lot of

13 thought during the weekend. I spoke to Doc Weingold, who has

14 authorized me to articulate my reasons for the motion and to

15 argue it.

16 If you want to hear me now, I can lay it out to the

17 Court, if you want.

18 I'll raise it tomorrow.

19 THE COURT: Does a motion for mistrial impact double

20 jeopardy?

21 MR. PEDICINI: I believe it would in this case. I

22 believe it would because part of the basis for the motion for

23 mistrial are events that have occurred as a result -- counts

24 that have been dismissed.

25 THE COURT: Why can't I hear that -- why can't I hear

1 that, reserve on that and hear that in the event there is a
2 conviction and you move either for a new trial and for a
3 directed verdict?
4 MR. PEDICINI: You can, Judge.
5 THE COURT: Any reason why I can't do it that way?
6 I'll reserve your right. You moved for it. I've
7 delayed you. I said wait until the jury comes back.
8 MR. PEDICINI: I don't think there is an impediment on
9 doing that.
10 THE COURT: Do we agree? That doesn't affect his
11 substantive right to make the motion?
12 MR. ORTIZ: It does not, your Honor.
13 THE COURT: You said "mistrial."
14 MR. PEDICINI: Mistrial.
15 THE COURT: I'll reserve on that motion with your right
16 to renew it in the event there is a guilty verdict, together
17 with your motion for directed verdict and motion for new trial.
18 Post-trial motions.
19 MR. PEDICINI: I think we preserved all the Rule 29
20 motions.
21 THE COURT: Yes. They're preserved.
22 MR. PEDICINI: This would be an additional different
23 motion. I'm raising it now. It is on the record.
24 THE COURT: It is on the record.
25 I'll not hear it at this point. I'll hear it in full

1 if it is fully briefed. After a conviction -- if there is no
2 conviction, it is moot.
3 MR. WEINGOLD: What about a motion to dismiss the
4 remaining counts?
5 THE COURT: I've reserved on that, Doctor.
6 MR. WEINGOLD: Based on pretty much the same logic?
7 THE COURT: I reserved on that. I will reserve on that
8 pending the jury determination.
9 MR. WEINGOLD: That means we can make two motions?
10 THE COURT: You can make three motions. You're obliged
11 to make one.
12 MR. WEINGOLD: Can we make it based on the same logic?
13 THE COURT: Put them together any way you want. Or it
14 may warrant a new trial. It may warrant a new trial.
15 I don't know what you'll say. I don't know what the
16 jury is going to say. All I can tell you is when we come back,
17 if there is a conviction, you have the right to make three
18 motions that I'm aware of any and number of motions you want to
19 make. Mistrial, renewal of the mistrial motion, directed
20 verdict notion and motion for new trial.
21 Mr. Pedicini is very --
22 MR. WEINGOLD: And motion to dismiss the charges?
23 THE COURT: That is a directed verdict. That is
24 directed verdict. Dismissal of the charges is directed verdict.
25 MR. ORTIZ: Two things, your Honor.

1 One, I've advised counsel and your clerk, your Honor,
2 on its own motion at this time the United States would move to
3 dismiss Counts 10 and 11.
4 THE COURT: Are they in their own --
5 MR. ORTIZ: I took them out. Two mail fraud counts.
6 Upon my review of the evidence over the weekend, the
7 United States hasn't established the necessary elements for that
8 to go to the jury.
9 THE COURT: You're better than the judge.
10 I say you did better than the judge. You reviewed it.
11 MR. ORTIZ: Your Honor, with respect to the motion --
12 the Rule 29 motion with respect to Mr. Levine, the United States
13 requests the opportunity to reargue that.
14 THE COURT: It is done. Finished. Judgment of
15 acquittal. It is gone.
16 I know what I'm doing. I recognized what I was doing.
17 I recognized what I was doing.
18 MR. ORTIZ: Can I ask --
19 THE COURT: You can't. Jeopardy has attached.
20 Once I enter judgment of acquittal at the end of the
21 government's case or the end of the whole case, that is the end
22 of the jeopardy that the person is put in.
23 You can't reargue that. You can't appeal. You can't
24 do anything with it. I'm aware of that.
25 On that motion, if I set aside a guilty verdict, if

1 there be a guilty verdict against Dr. Weingold, and I set it
2 aside either by directed verdict, mistrial or otherwise, you
3 have the absolute right to appeal to reinstate the jury verdict.
4 MR. ORTIZ: I ask the Court to reconsider.
5 THE COURT: I don't think I'm legally permitted to do
6 it. No.
7 I don't think -- frankly, my own research and my own
8 understanding is if I grant a motion -- if I grant a Rule 29
9 motion at those two stages, that is the end of it, I think.
10 Unless you show me to the contrary. If you can show me a case
11 to the contrary --
12 MR. ORTIZ: There is some case law. If there was error
13 and the Court did it, would consider -- the Court grants a Rule
14 29 and comes back before any event that occurs before the jury
15 and the Court has decided to reconsider.
16 THE COURT: I'm not going to reconsider it.
17 MR. PEDICINI: The only thing that remains --
18 THE COURT: I'm not reconsidering the Rule 29 motion
19 that I granted on behalf of Weingold. I'm not considering
20 reconsidering the 29 motion I granted on Levine's money
21 laundering charge -- the money laundering charge is the only
22 one. Obviously, the other ones were gone at the end of the
23 government's case.
24 MR. ORTIZ: Okay.
25 MR. PEDICINI: The only thing I think Doc Weingold has

1 to do in front of the jury -- he formally rested. There were
2 three or four documents that I used and need introduced into
3 evidence. One, two, three we can do that.
4 THE COURT: Put it in.
5 MR. WEINGOLD: I have two housekeeping matters.
6 One is I'd like the record to note that I object to the
7 judge barring Mr. Levine from the courthouse -- from the
8 courtroom.
9 THE COURT: Let me say this. I'm going to straighten
10 that out right now.
11 I feel that the presence of Mr. Levine in this
12 courtroom, after I granted a judgment of acquittal to him on the
13 money laundering and mail fraud cases, is extremely prejudicial,
14 is tangential and he should not and will not be here. He has
15 nothing to do with it.
16 The jury can draw no inference from his lack of
17 presence, which I will instruct them as to, number one.
18 Number two, I wouldn't want his presence in the
19 audience sitting out there watching or sitting at counsel table,
20 which I don't think he could do. I think it is extremely,
21 extremely prejudicial to the case. It could be extremely
22 prejudicial to you.
23 MR. WEINGOLD: I don't see that, your Honor.
24 THE COURT: Well, you're not seeing it in the eyes of a
25 man who has been doing this business for 40 years.

EXHIBIT I

ATTACHMENT "A"

PROPOSED AMENDMENTS TO 2002 VERSION OF RULE 29

Rule 29. Motion for a Judgment of Acquittal

(a) Before Submission to the Jury.

After the government closes its evidence or after the close of all the evidence, the ~~court on the~~ defendant ~~'s motion must enter~~may move for a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction. The court may ~~on its own consider whether the evidence is insufficient to sustain a conviction~~deny the motion, or reserve decision on the motion, but the court may not grant the motion prior to the jury's return of a verdict of guilty. If the court denies a motion for a judgment of acquittal at the close of the government's evidence, the defendant may offer evidence without having reserved the right to do so.

(b) Reserving Decision.

~~The~~If the court ~~may~~ reserves decision on the motion, the court must proceed with the trial ~~(where the motion is made before the close of all the evidence)~~, submit the case to the jury, and decide the motion ~~either before~~after the jury returns a verdict ~~or after it returns a verdict~~ of guilty ~~or is discharged without having returned a verdict~~. If the court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved.

(c) After Jury Verdict ~~or Discharge~~.

(1) ***Time for a Motion.*** ~~A~~Within 7 days after a guilty verdict, or within any other time the court sets during the 7-day period, a defendant may move for a judgment of acquittal, or renew such a motion, ~~within 7 days after a guilty verdict~~ or ~~after~~ the court ~~discharges the jury, whichever is later, or within any other time the court sets during the 7-day period.~~ on its own motion may grant a judgment of acquittal, if the evidence is insufficient to sustain the guilty verdict.

(2) ***Ruling on the Motion.*** ~~If~~After the jury has returned a guilty verdict, the court may set aside the verdict and enter

an acquittal. ~~If the jury has failed to return a verdict, the court may enter a judgment of acquittal.~~

(3) ***No Prior Motion Required.*** A defendant is not required to move for a judgment of acquittal before the court submits the case to the jury as a prerequisite for making such a motion after jury ~~discharge~~verdict.

(d) Conditional Ruling on a Motion for a New Trial.

(1) ***Motion for a New Trial.*** If the court enters a judgment of acquittal after a guilty verdict, the court must also conditionally determine whether any motion for a new trial should be granted if the judgment of acquittal is later vacated or reversed. The court must specify the reasons for that determination.

(2) ***Finality.*** The court 's order conditionally granting a motion for a new trial does not affect the finality of the judgment of acquittal.

(3) ***Appeal.***
(A) *Grant of a Motion for a New Trial.* If the court conditionally grants a motion for a new trial and an appellate court later reverses the judgment of acquittal, the trial court must proceed with the new trial unless the appellate court orders otherwise.
(B) *Denial of a Motion for a New Trial.* If the court conditionally denies a motion for a new trial, an appellee may assert that the denial was erroneous. If the appellate court later reverses the judgment of acquittal, the trial court must proceed as the appellate court directs.

ATTACHMENT "B"

PROPOSED AMENDMENT TO 2002 VERSION OF RULE 29

Rule 29. Motion for a Judgment of Acquittal

(a) Before Submission to the Jury. After the government closes its evidence or after the close of all the evidence, the defendant may move for a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction. The court may deny the motion or reserve decision on the motion, but the court may not grant the motion prior to the jury's return of a verdict of guilty. If the court denies a motion for a judgment of acquittal at the close of the government's evidence, the defendant may offer evidence without having reserved the right to do so.

(b) Reserving Decision. If the court reserves decision on the motion, the court must proceed with the trial, submit the case to the jury, and decide the motion after the jury returns a verdict of guilty. If the court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved.

(c) After Jury Verdict.

(1) ***Time for a Motion.*** Within 7 days after a guilty verdict, or within any other time the court sets during the 7-day period, a defendant may move for a judgment of acquittal, or renew such a motion, or the court on its own motion may grant a judgment of acquittal, if the evidence is insufficient to sustain the guilty verdict.

(2) ***Ruling on the Motion.*** After the jury has returned a guilty verdict, the court may set aside the verdict and enter an acquittal.

(3) ***No Prior Motion Required.*** A defendant is not required to move for a judgment of acquittal before the court submits the case to the jury as a prerequisite for making such a motion after jury verdict.

(d) Conditional Ruling on a Motion for a New Trial.

(1) ***Motion for a New Trial.*** If the court enters a judgment of acquittal after a guilty verdict, the court must also

conditionally determine whether any motion for a new trial should be granted if the judgment of acquittal is later vacated or
reversed. The court must specify the reasons for that determination.

(2) ***Finality.*** The court 's order conditionally granting a motion for a new trial does not affect the finality of the judgment of acquittal.

(3) ***Appeal.***
(A) *Grant of a Motion for a New Trial.* If the court conditionally grants a motion for a new trial and an appellate court later
reverses the judgment of acquittal, the trial court must proceed with the new trial unless the appellate court orders otherwise.
(B) *Denial of a Motion for a New Trial.* If the court conditionally denies a motion for a new trial, an appellee may assert that the denial was erroneous. If the appellate court later reverses the judgment of acquittal, the trial court must proceed as the appellate court directs.

EXHIBIT J

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professor Dave Schlueter, Reporter**

RE: **Revised Draft of Rule 29; Including Waiver Provisions**

DATE: **April 27, 2004**

Tab II-C-2 of the agenda book for the meeting in Monterey includes three drafts of amendments to Rule 29:

- Exhibit A: Proposed Rule and Committee Notes
- Exhibit B: Comparison of the Proposed Rule to Department's Proposal at Oregon Meeting
- Exhibit C: Deadlocked Jury Proposal

Those three drafts were prepared by the Department of Justice in response to the discussion at the Committee's fall 2003, meeting in Oregon. The Department did not prepare a draft amendment that would address the problem of granting a partial judgment of acquittal in multi-count or multiple defendant cases.

Judge David Levi, Chair of the Standing Committee, proposed in an e-mail that perhaps one avenue for addressing the problem of deadlocked juries and the multi-count cases would be to include waiver provisions. You should have received copies of those e-mails last week.

In response to his suggestion, I prepared yet another version of possible amendments to Rule 29—Version 3. That draft, below, presents the amendments in the more traditional format of "strike-throughs" and underlines to show the new and deleted language. This draft also includes "waiver" language, which might address concerns raised by both members of the Committee and the Department.

I am also attaching a very helpful memo prepared by Ms. Brooke Coleman, a law clerk for Judge Levi, who graciously agreed to do some research (on very short notice).

The waiver language in this version draws on similar language in Rule 11.

If the Committee decides to proceed with amendments to Rule 29 and propose that the amendments be published for public comment this summer, I will draft a Committee Note, which blends portions of the draft submitted by the Department of Justice, and portions of Ms. Coleman's memo.

RULE 29: VERSION NO. 3
(April 22, 2004)

Proposed Amendments to Rule 29, including language addressing deadlocked juries and multi-count cases. This version includes waiver provisions for both of those scenerios. And this version also includes the language from the pending amendment to Rule 29(c)(1).

1 **Rule 29. Motion for a Judgment of Acquittal**

2 **(a) Motions Made Before Submission to the Jury.** After the government
3 closes its evidence or after the close of all the evidence, the defendant may move
4 for a judgment of acquittal of any offense. ~~the court on the defendant's motion~~
5 ~~must enter a judgment of acquittal of any offense for which the evidence is~~
6 ~~insufficient to sustain a conviction. The court may on its own consider whether~~
7 ~~the evidence is insufficient to sustain a conviction.~~ If the court denies a motion for
8 a judgment of acquittal at the close of the government's evidence, the defendant
9 may offer evidence without having reserved the right to do so.

10 **(b) Reserving Decision.**

11 *(1) In general.* Except as provided in Rule 29(b)(2) [and (c)(2)],
12 the court must proceed with the trial, submit the case to the jury, and reserve its
13 decision until after the jury returns a verdict of guilty. ~~The court may reserve~~
14 ~~decision on the motion, proceed with the trial (where the motion is made before~~
15 ~~the close of all the evidence), submit the case to the jury, and decide the motion~~
16 ~~either before the jury returns a verdict or after it returns a verdict of guilty or is~~
17 ~~discharged without having returned a verdict.~~ If the court reserves decision, it
18 must decide the motion on the basis of the evidence at the time the ruling was

19 reserved. The court must set aside the verdict and enter an acquittal if the
20 evidence is insufficient to sustain the guilty verdict.

21 *(2) Ruling on Motion Before Verdict with Consent of Defendant.*
22 The court may rule on the motion with regard to some or all of the
23 charges, or with regard to some or all of the defendants, before the jury
24 returns a verdict, if:

25 (A). the court [places the defendant under oath, and]
26 informs the defendant personally in open court that a pre-verdict
27 ruling that grants the motion, would normally deprive the
28 government of the right to appeal that ruling on Double Jeopardy
29 grounds, but that the defendant may nonetheless waive that
30 constitutional protection; and

31 (B) after being so apprised, the defendant consents on the
32 record and in writing to a pre-verdict ruling.

33 **(c) Motions Made After Jury Verdict or Discharge.**

34 ***(1) Time for a Motion.*** Within 7 days after a guilty verdict, or after
35 the court discharges a jury because it cannot agree on a verdict, a
36 defendant may move for a judgment of acquittal, or renew such a motion,
37 or the court may make its own motion for a judgment of acquittal. ~~A~~
38 ~~defendant may move for a judgment of acquittal, or renew such a motion,~~
39 ~~within 7 days after a guilty verdict or after the court discharges the jury,~~
40 ~~whichever is later, or within any other time the court sets during the 7-day~~
41 ~~period.~~

42 *(2) Ruling on the Motion.*

43 After the jury has returned a guilty verdict, the court must set aside
44 the verdict and enter an acquittal, if the evidence is insufficient to sustain
45 the guilty verdict. If the jury has been discharged because it cannot agree
46 on a verdict, the court may enter an acquittal if the evidence is insufficient
47 to sustain a conviction and:

48 (A). the court [places the defendant under oath,] informs
49 the defendant personally in open court that a ruling that grants the
50 motion after the jury has been unable to reach a verdict could
51 subject the defendant to another trial and normally deprive the
52 government of the right to appeal that ruling on Double Jeopardy
53 grounds, but that the defendant may nonetheless waive that
54 constitutional protection; and

55 (B) after being so apprised, the defendant consents on the
56 record and in writing to a ruling granting the motion.

57 ~~If the jury has returned a guilty verdict, the court may set aside the~~
58 ~~verdict and enter an acquittal. If the jury has failed to return a verdict, the~~
59 ~~court may enter a judgment of acquittal.~~

60 ***(3) No Prior Motion Required.*** A defendant is not required to
61 move for a judgment of acquittal before the court submits the case to the
62 jury as a prerequisite for making such a motion after jury discharge.

63 **(d) Conditional Ruling on a Motion for a New Trial.**

64 *(1) **Motion for a New Trial.*** If the court enters a judgment of acquittal
65 after a guilty verdict, the court must also conditionally determine whether any
66 motion for a new trial should be granted if the judgment of acquittal is later
67 vacated or reversed. The court must specify the reasons for that determination.

68 *(2) **Finality.*** The court's order conditionally granting a motion for a new
69 trial does not affect the finality of the judgment of acquittal.

70 *(3) **Appeal.***

71 (A) *Grant of a Motion for a New Trial.* If the court
72 conditionally grants a motion for a new trial and an appellate court
73 later reverses the judgment of acquittal, the trial court must
74 proceed with the new trial unless the appellate court orders
75 otherwise.

76 (B) *Denial of a Motion for a New Trial.* If the court
77 conditionally denies a motion for a new trial, an appellee may
78 assert that the denial was erroneous. If the appellate court later
79 reverses the judgment of acquittal, the trial court must proceed as
80 the appellate court directs.

MEMORANDUM

To: Professor David Schlueter
Reporter, Advisory Committee on Criminal Rules
From: Brooke Coleman
Date: April 27, 2004
Re: Proposed Fed.R.Crim.P. 29

****

Under Federal Rule of Criminal Procedure 29, a court may acquit a criminal defendant on its own or upon defendant's motion either before the jury returns a verdict, after a hung jury, or after the jury returns a guilty verdict. Fed.R.Crim.P. 29(a) – (d). While the government can appeal a Rule 29 acquittal in the latter case, it cannot appeal from a Rule 29 acquittal in the first two situations. *United States v. Ball*, 163 U.S. 662, 672, 16 S.Ct. 1192 (1896); *Fong Foo v. United States*, 369 U.S. 141, 142-43 (1962); *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 97 S.Ct. 1349, 1356 (1977). The Double Jeopardy Clause prohibits such appeals because, unlike the case where a jury has rendered a verdict and an acquittal is then granted, a pre-verdict acquittal does not provide a readily available verdict to reinstate if the acquittal is overturned on appeal. Without this verdict, a defendant would have to stand trial once again. Richard Sauber and Michael Waldman, *Unlimited Power: Rule 29(a) and the Unreviewable Ability of Directed Judgments of Acquittal,* 44 AM.U.L.REV. 433, 451 (1994); 18 U.S.C. § 3731.

The unavailability of appellate review has historically concerned the Department of Justice ("DOJ").[1] In response to that concern, Rule 29 was amended in 1994, giving courts the discretion to delay any Rule 29 decision until after a verdict.[2] 1994 Advisory Committee Note. Some appellate courts have suggested that deferral of ruling is the better practice, but it is still only permissive under the current rule. Sauber and Waldman, *supra*, at 460.

Since the 1994 amendment, courts have continued to grant pre-verdict Rule 29 acquittals, albeit infrequently, and government attorneys continue to express concern over their inability to appeal those decisions. Sauber and Waldman, *supra*. Proponents of a rule allowing for appeal of Rule 29 acquittals claim that the current system engenders a lack of judicial accountability, resulting in diminished trust and a perception of inaccuracy in the system. Poulin, *supra*, at 954-55, 958-60; Sauber and Waldman, *supra*, at 452-456; Alogna, *supra*, at 1133, 1140-41. In addition, they argue that an inability to appeal defeats the public's interest in fully prosecuting defendants, results in the possible release of dangerous defendants, and squanders already scarce government resources.

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[1] *See* Anne Bowen Poulin, *Double Jeopardy and Judicial Accountability: When is an Acquittal Not an Acquittal?*, 27 ARIZ.ST.L.J. 953, 954 (1995); Sauber and Waldman, *supra*, at 444; Forrest G. Alogna, *Double Jeopardy, Acquittal Appeals, and the Law-Fact Distinction,* 86 CORNELL L.REV. 1131 (2001).

[2] However, in order to maintain a defendant's right to refrain from presenting evidence that risked supporting the government's case, the court could still base its decision solely on the evidence presented by the government, and any appellate review could only be based on that evidence as well. 1994 Advisory Committee Note.

Id.; Joshua Steinglass, *The Justice System in Jeopardy: The Prohibition on Government Appeals of Acquittals*, 31 IND.L.REV. 353, 370-71 (1998).

In September 2003, given the DOJ's continuing concerns, the Advisory Committee on Criminal Rules of Procedure (the "Committee") agreed to consider whether the government's ability to appeal should be absolutely maintained under Rule 29. The DOJ's proposed draft rule would still allow a pre-verdict Rule 29 motion to be made, but the court's decision on the motion could not be made until after the verdict. Proposed DOJ Amendment to Rule 29. However, this proposal raised competing concerns. Granting a pre-verdict acquittal allows the court to relieve the defendant of unnecessary adjudication, including the burden and possible self-incrimination from presenting a defense, and it provides a check on the government's power to bring unwarranted charges against a defendant. Sauber and Waldman, *supra* at 458-60.

In light of these competing concerns, the Committee requested research to determine how often pre-verdict Rule 29 acquittals actually occur. The researchers found that of the approximately 80,000 defendants docketed during fiscal year 2002, a Rule 29 pre-verdict acquittal was entered in cases involving less than 0.05% of those defendants. Results of Rule 29 Analysis at 2.

At Judge Levi's request, you have asked me to research whether a pre-verdict Rule 29 acquittal could be maintained along side a government appeal of any such decision. This proposal requires a defendant to waive any double jeopardy claims before a Rule 29 motion can be acted upon prior to verdict. This would affect the two situations that have been of concern under the DOJ proposal: (1) where there is a hung jury and the court determines an acquittal is proper and (2) where there are multiple defendants and/or counts and the court determines that certain of those defendants and/or counts should be eliminated. While this proposal addresses the competing concerns discussed above, it presents its own set of issues -- for example, whether waiver of double jeopardy would be effective and, if so, what procedures the rule should require in order to provide for a sufficient waiver. In order to address these issues, this memorandum reviews: (1) waiver of double jeopardy in other contexts, (2) the rule that double jeopardy bars appeals following acquittals, (3) potentially analogous waivers of constitutional rights, and (4) the intersection of policy arguments for double jeopardy, the prohibition of appeals after an acquittal, and the proposals before the Committee.

Waiver of Double Jeopardy

Double jeopardy prevents a defendant from enduring the embarrassment, cost, and risk of multiple prosecutions. Steinglass, *supra*, at 356. Also, double jeopardy protection provides the defendant with a sense of finality because the defendant does not have to agonize over the possibility of repeated prosecutions. Id. at 357. Finally, the defendant has an interest in limiting the government to a single fact-finder. Id. This limit is particularly important because, if the government has repeated opportunities to present its case to different fact-finders, it is more likely to eventually obtain a guilty verdict, resulting in wrongful convictions. Poulin, *supra*, at 965; *Green v. United States*, 355

U.S. 184, 188, 78 S.Ct. 221 (1957) (government may continue to go after defendant so that "even though innocent, he may be found guilty").[3]

However, in spite of these safeguards, there are numerous cases where it appears that double jeopardy should apply, but where defendant's actions foreclose the assertion of a double jeopardy defense. *United States v. Scott*, 437 U.S. 82, 98-99, 98 S.Ct. 2187 (1978) (government was allowed to appeal the trial court's decision to dismiss certain counts because the defendant chose to terminate the proceedings against him based on an issue unrelated to his factual innocence or guilt (preindictment delay), barring any claim that he would suffer double jeopardy in a retrial); *Rickets v. Adamson*, 483 U.S. 1, 11, 107 S.Ct. 2680 (1987) (double jeopardy did not apply to defendant's trial for first degree murder where defendant breached plea agreement under which he had already been sentenced to a lesser charge); *Taylor v. Kincheloe*, 920 F.2d 599, 605-606 (9th Cir. 1990) (finding that defendant whose plea agreement was vacated could be subject to another trial since it was his choice to challenge that plea agreement); *United States v. Baggett* (11th Cir. 1990), 901 F.2d 1546, *cert. denied* (1990), 498 U.S. 862 (defendant did not cooperate under plea agreement so double jeopardy not implicated). It is also well-settled that if a mistrial is declared with the defendant's consent (and not due to "goading" by the prosecution) or if the court declares the mistrial out of "manifest necessity," then double jeopardy does not bar retrial of that defendant. *Oregon v. Kennedy*, 456 U.S. 667, 676, 102 S.Ct. 2083, 2089 (1982) (prosecutor called the defendant a "crook" before the jury and the judge granted the defendant's motion for a mistrial; however because overreaching by prosecutor was innocent in character, defendant was still subject to retrial); *United States v. Dinitz*, 424 U.S. 600, 96 S.Ct. 1075 (1976); *Wade v. Hunter*, 336 U.S. 684, 69 S.Ct. 834 (1949) (mistrial declared for "manifest necessity" caused by a hung jury). Finally, double jeopardy does not prevent a retrial where the defendant successfully appeals his own conviction. *United States v. Ball*, 163 U.S. at 672.

These decisions reflect the "interest in giving the prosecution one complete opportunity to convict those who have violated its laws." *Arizona v. Washington*, 434 U.S. 497, 509, 98 S.Ct. 824, 832, 54 L.Ed.2d 717 (1978). Where a defendant, of his own accord, avoids complete prosecution and then challenges the government's right to finally adjudicate guilt or innocence, double jeopardy generally does not apply.

Acquittal Bars Appeal

However, a pre-verdict Rule 29 acquittal is treated differently, in large part, because a defendant is formally acquitted of the charges against him. In all the cases listed above, the rejection of a defense of double jeopardy relies on the determination that the trial court did not make a finding of fact regarding a defendant's guilt or innocence. *See Martin Linen Supply Co.*, 430 U.S. at 1354-55 ("what constitutes an 'acquittal' is . . . whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged.") (citations

[3] Some commentators have also argued that an additional benefit includes double jeopardy's protection of adjudications involving nullification. Alogna, *supra*, at 1145; Steinglass, *supra*, at 357.

and quotations omitted). Therefore, once a defendant is "acquitted," double jeopardy prohibits any retrial of that defendant.[4] Steinglass, *supra*, at 356.

Because an acquittal under Rule 29 specifically calls for the court to determine whether "the evidence is insufficient to sustain a conviction," courts have generally held that a pre-verdict acquittal under Rule 29 causes jeopardy to attach, barring retrial and any appeal of the acquittal. Id. at 1356 (finding that where a verdict was not issued because of a hung jury and the court granted acquittal to the defendant under Rule 29, the government could not appeal that acquittal because it was barred by the defendant's double jeopardy defense); *United States v. Scott*, 437 U.S. at 91 ("A judgment of acquittal, whether based on a jury verdict of not guilty or on a ruling by the court that the evidence is insufficient to convict, may not be appealed and terminates the prosecution when a second trial would be necessitated by reversal."); Poulin, *supra*, at 971 ("Normally, any judicial determination that the government produced insufficient evidence is an acquittal and raises a Double Jeopardy bar, even if it flows from corruption or flagrant error.") (citations omitted). Therefore, for the government to maintain an appeal of a pre-verdict Rule 29 acquittal, it appears that the defendant would have to waive his double jeopardy defense prior to the decision on the Rule 29 motion.

Analogous Cases

I could not find any cases where a court required a party to waive its double jeopardy right so that it could rule upon a pre-verdict Rule 29 motion and still maintain the government's ability to appeal.[5] However, there is at least one analogous case. *United States v. Kington,* 801 F.2d 733 (5th Cir. 1986); *United States v. Kington,* 835 F.2d 106 (5th Cir. 1988). In *Kington I and II*, the defendants made a motion to suppress, but the court did not consider the motion until after the jury had been empaneled and sworn. *Kington II,* 835 F.2d at 107. The court granted the motion, but only after the defendants agreed to waive double jeopardy so that the government would be allowed to appeal. *Kington I,* 801 F.2d at 735-36. The government appealed the decision, and the

[4] This is, of course, subject to the exception for a post-verdict Rule 29 acquittal, where a jury's verdict can be reinstated if the appellate court overturns the acquittal (avoiding any retrial).

[5] I also found only one commentator that alluded to this approach; however, he did not discuss it in the context of pre-verdict Rule 29 appeals, but instead discussed appeals from mid-trial pro-defense evidentiary rulings. "One approach is to require the defendant to waiver his double jeopardy rights with respect to a certain evidentiary matter or forego consideration of the motion . . . [This approach] seems to flatly contradict the values underlying the Double Jeopardy Clause. Furthermore, even if otherwise proper, [this approach] requires the acquiescence of the trial judge, which may not be forthcoming." Steinglass, *supra*, at n 131. *See also* Scott J. Shapiro, *Reviewing the Unreviewable Judge: Federal Prosecution Appeals of Midtrial Evidentiary Ruling*, 99 Yale.L.J. 905, 915 (1990). The commentator addresses the government's inability to appeal mid-trial pro-defendant evidentiary rulings. He suggests that a defendant could have his evidentiary motion entertained, but the government could require the defendant to choose between waiving his double jeopardy rights (or electing a mistrial) and allowing the court to rule in favor of the government. His proposal would further require that only suppression of material evidence would be subject to appeal, and the government would be required to certify that its appeal was not intended to cause delay or to gain unfair advantage. He also states that "it is far from obvious that the above proposal is consistent with the [D]ouble [J]eopardy [C]lause since the defendant may be forced to waive his rights or refuse reprosecution." Id. at 916. However, he ultimately concludes that his proposal would not run afoul of double jeopardy protections. Id. at 924.

Fifth Circuit found jurisdiction to review the appeal under § 3731 because defendants had waived their double jeopardy objections. Id. The court further noted that the hearing regarding the motion to suppress had been conducted without the jury in attendance and that the judge, not the government, had proposed that defendants waive their rights. Id. The Fifth Circuit reversed the district court judge's determination on the motion to suppress, and the defendants challenged the sufficiency of their waiver of double jeopardy rights in a second case. *Kington II*, 835 F.2d at 107. The court reviewed the trial transcript where the defendants had agreed to waive their rights and found the waiver to be effective. Id.

While this case is generally analogous to the proposal before the Committee, there are some differences. The defendants in *Kington* had not sought acquittal of the charges against them. Instead, their trial had barely begun. Also, the motion before the court was a matter of law, not involving their ultimate guilt or innocence. Therefore, given cases such as *United States v. Scott*, it is possible that waiver of double jeopardy was not required. In fact, the Fifth Circuit noted that it did not reach the issue of whether defendants' double jeopardy claims would have had merit in the absence of their waivers. Id. On the other hand, double jeopardy had clearly attached since the jury had been empaneled.[6] And perhaps the district court judge could not have relied on *Scott* and similar cases because it was the judge, and not the defendants, who forced the motion to be reviewed after trial had commenced.[7] Id. at 107.

Effective Waiver

Assuming that waiving a double jeopardy defense effectively preserves the government's ability to appeal in a pre-verdict Rule 29 acquittal, the question presented is how to best provide for that waiver. Constitutional rights, including double jeopardy objections, can be waived by an accused.[8] *United States v. Bascaro*, 742 F.2d 1335, 1365 (11th Cir. 1984) (absence of objection is waiver of double jeopardy defense), *cert. denied sub nom. Hobson v. United States*, 472 U.S. 1017 (1985). Courts have allowed the defense of double jeopardy to be waived, but as with any constitutional right, that waiver must be knowing, intelligent, and voluntary. *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019 (1938); *United States v. Morgan*, 51 F.3d 1105, 1110 (2d Cir. 1995) ("the act of waiver must be shown to have been done with awareness of its consequences."). Therefore, while there are cases holding that defendant's action or inaction can waive double jeopardy,[9] with respect to the proposal before the Committee, it seems more

[6] *Martin Linen Supply Co.*, 430 U.S. at 569 ("This state of jeopardy attaches when a jury is empaneled and sworn, or, in a bench trial, when the judge begins to receive evidence.").

[7] I also found a District Court case where a court agreed to sever related felon-in-possession claims once the defendant agreed to waive double jeopardy objections. *United States v. Capozzi*, 73 F.Supp.2d 75, 81-83 (D.Mass. 1999). Unfortunately, the court does not state how the double jeopardy objections were waived, and it also states that double jeopardy may not have even existed in the first place. Id. at 83

[8] *Campbell v. Blodgett*, 978 F.2d 1502, 1508-1509 (9th Cir. 1992) ("The most basic rights of criminal defendants are similarly subject to waiver.").

[9] "The protection embodied in the double Jeopardy Clause is a personal defense that may be waived or foreclosed by a defendant's voluntary actions, including a request for, or effectual consent to, a mistrial." *United States v. Newton*, 327 F.3d 17, 21 (1st Cir. 2003).

appropriate to require waiver both under the rule and explicitly on the record. *See United States v. Hudson,* 14 F.3d 536, 539 (10th Cir. 1994) (where consent order did not specifically state waiver of double jeopardy rights, no such waiver existed); *Morgan,* 51 F.3d at 1110 (civil settlement with the government not waiver of claim of double jeopardy defense where settlement agreement was not explicit, even if individual was aware of ongoing criminal investigation of his actions).

The defendant's waiver of his right to trial by jury presents an analogous situation to the one before the Committee. Like other waivers of constitutional rights, the waiver of a trial by jury must be made voluntarily, knowingly, and intelligently. *Patton v. United States,* 281 U.S. 276, 312-13, 50 S.Ct. 253, 263, 74 L.Ed. 854 (1930); *overruled on other grounds by Williams v. Florida,* 399 U.S. 78, 92, 90 S.Ct. 1893, 1901, 26 L.Ed.2d 446 (1970). Fed.R.Crim.P. 23(a) specifically provides for this waiver. In waiving a jury trial, the defendant is required to waive the right on the record and the government and court are required to consent. 2 CHARLES ALAN WRIGHT, NANCY KING, & SUSAN R. KLEIN, FEDERAL PRACTICE AND PROCEDURE, § 372 (3d ed. 2004). Further, the waiver must be "express and positive" and "in writing." Id. Often the waiver is done in open court, which is favored, but not required. Id. ("It is clearly the better practice for the court to interrogate the defendant personally, before accepting a waiver of jury trial, to be sure that the defendant understands his right to trial by jury and the consequences of a waiver."). The procedure for waiving a defendant's right to a jury trial is probably a good template for how to handle waiver of double jeopardy rights under Rule 29.

When the Fifth Circuit reviewed the waiver by defendants of their double jeopardy objections in *Kington II,* the court relied on the transcript of the trial proceedings. *Kington II,* 835 F.2d at 107. In those proceedings, the judge questioned the defendants regarding their understanding of what they were waiving. Id. The district court judge separately addressed the defendants, and each counsel subsequently agreed to waive their double jeopardy rights. In reviewing the sufficiency of the waiver, the court noted that one of the attorneys stated "we waive the issue of double jeopardy as a result of the second trial to the extent that any jeopardy may have already attached from the impaneling of this jury, and this waiver is made knowingly, intelligently, and freely." Id. The other attorney agreed to this stipulation. Id. at 109. Therefore, the court found that the waivers were effective. Id. A jury trial waiver like the one in *Kington II,* along with a rule-based provision for waiver, would be appropriate if the Committee adopts the proposed amendment.

Possible Coercion

While constitutional rights are generally subject to waiver, there is not exactly an on-point case that finds waiver of double jeopardy in the context of a pre-verdict Rule 29 acquittal. However, the *Kington* cases provide a closely analogous situation, and the waiver was upheld by that circuit court.

Another concern is that a waiver in this context may present a coercive situation for a defendant. Shapiro, *supra,* at 916. If the defendant wants the possibility of an

instant acquittal then the defendant must waive the constitutional protection of double jeopardy law. Otherwise, the defendant may make the motion under Rule 29, but the court must defer its ruling until the jury returns a verdict. While certainly presenting the defendant with a choice, the proposal also puts him in a better position than he would be without the choice under the current Rule 29 proposal that requires deferral of a decision in all cases. In a hung jury situation, a defendant is already subject to another trial regardless of whether the court grants an acquittal. In that case, a defendant will welcome the judge's acquittal because his position is not that different in either case. In the case of multiple defendants and counts, the argument is only slightly less persuasive. If the defendant waives double jeopardy, he may be subject to multiple trials, if the district court is overturned on appeal. However, if the court severed multiple counts, a defendant would similarly be subject to an additional trial. At least with an acquittal under Rule 29, the court could dispense with what it views as meritless claims before the trial proceeds, and the government may not decide to pursue those claims on appeal.

Unlike waiving a trial by jury, the proposed amendment provides the defendant with a benefit (albeit provisional) for waiving his constitutional rights. In that sense, the situation is much like a defendant entering into a guilty plea agreement. The defendant gains the immediate benefit of a certain sentence recommendation while waiving a range of constitutional rights. As some commentators have suggested, a defendant's right to a fair trial does not necessarily mean that a defendant is allowed to avoid making tough choices. Sauber and Waldman, *supra*, at 460.[10]

Therefore, it appears that a waiver would be effective in this context. Assuming that it is, the proposal strikes a meaningful compromise. The efficiencies of granting a pre-verdict Rule 29 motion, where appropriate, will be maintained.[11] At the same time, judges will be held accountable for those decisions, and therefore, trust in the judicial system will be improved. Courts will also maintain the ability to deter inadequate prosecutions. Finally, while the process may be lengthier in certain cases, accuracy will be served through the availability of the appellate process.

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[10] *See also* Shapiro, *supra*, at 924 (reviewing a similar proposal for the appeal of mid-trial pro-defense evidentiary rulings, he states that "unpleasant at this process might be, the accused must bear the weight of the Government's need to preserve its right to appeal just as he must pay the price for the overreaching of a zealous prosecutor [as allowed for in *Dinitz* and *Kennedy*].")

[11] Judicial efficiency/economy has been used as an argument for maintaining the status quo with respect to Rule 29 because courts are allowed to promptly dispense with claims that are without merit. However, in response, some have argued that while the trial judge may save time on his end of the process by granting a Rule 29 motion, the appellate courts end up losing this time by trying to decide whether an attempted appeal violates double jeopardy protections. Sauber and Waldman, *supra*, at 458-59; *U.S. v. Baggett*, 251 F.3d 1087, 1093 -1095 (6th Cir. 2001) (before court could review appeal, court engaged in lengthy determination of whether the trial court had granted a Rule 29 acquittal before the jury returned its verdict). If the most recent proposal before the Committee is put in place, the efficiency argument on both sides is addressed. The trial judge will still be permitted to act in what he believes is expeditious, while the appellate court will have a clear waiver of double jeopardy before it, barring any question of whether the appeal can be reviewed. Of course, this may increase the number of appeals, arguably an inefficient result. However, the number of pre-verdict acquittals is small.