18 U.S.C. §371

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Conspiracy / Statute of Limitations

CONSPIRACY / STATUTE OF LIMITATIONS

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ATTORNEY WORK PRODUCT

Memorandum **Office of the Independent Counsel**

DRAFT

To : T. J. Mayopoulos Date 3/23/95

From : E. H. Jaso

Subject: Conspiracy (18 U.S.C. 371) statute of limitations--overt acts of concealment

Issue: Whether an act done to conceal a past crime may be viewed as an overt act in furtherance of an ongoing conspiracy for the purposes of tolling the statute of limitations.

Short answer: Under the facts present here, yes. Where the unlawful object of the conspiracy itself is to conceal information from the Government, acts of concealment may be viewed as overt acts reasonably contemplated in the course of the conspiracy.

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Analysis

Statute of limitations for conspiracy under § 371

The five-year statute of limitations applicable to conspiracy under 18 U.S.C. § 371 (conspiracy to defraud the Federal Government) runs from the date the last overt act committed in furtherance of the conspiracy occurs. Grunewald v. U.S., 353 U.S. 391, 396-97 (1957), see also Buford v. Tremayne, 747 F.2d 445, 447 (8th Cir. 1984). As pertains to any particular defendant, the commission of such an overt act by any of the co-conspirators brings that defendant's crime within the limitations period unless that defendant can prove he withdrew from the conspiracy prior to the running of the limitations period. See U.S. v. Edwards, 994 F.2d 417, 421 (8th Cir. 1993) (conspiracy "presumed to exist until there has been an affirmative showing that it has terminated, and its members continue to be conspirators until there has been an affirmative showing that they have withdrawn") (citations omitted), cert. denied, 114 S. Ct. 701 (1994); U.S. v. Lash, 937 F.2d 1077, 1083 (6th Cir.) ("[w]ithout affirmative action to disavow or defeat the purposes of the conspiracy, liability continues for all actions in

furtherance of the conspiracy by the other conspirators"), cert. denied, 502 U.S. 949 (1991); see also, e.g., U.S. v. Hauck, 980 F.2d 611, 614 (10th Cir. 1992) (even where defendant did no further business with co-conspirators within limitations period, defendant still liable where fraudulent sales that defendant conspired to facilitate continued into limitations period, and defendant had taken no affirmative steps to withdraw from conspiracy).

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Concealment as an "overt act"

Grunewald held that, in most instances, subsequent acts undertaken to conceal a conspiracy may not be considered acts "in furtherance of" the conspiracy.

> "[A]fter the central criminal purposes of a conspiracy have been attained, a subsidiary conspiracy to conceal may not be implied from circumstantial evidence showing merely that the conspirators took care to cover up their crime in order to escape detection and punishment." 353 U.S. at 401-02.

However, the Court distinguished "acts of concealment done in furtherance of the main conspiracy" from "acts of concealment done after these central objectives have been attained, for the purpose only of covering up after the crime". Id. at 405. Where "the successful accomplishment of the crime necessitates concealment", acts of concealment may be viewed as overt acts in furtherance of the conspiracy. Id.

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which under Grunewald may not constitute an "overt act" in furtherance of the original conspiracy.

In anticipating and successfully countering both objections, the Government must draft its indictment, and prosecute its case,

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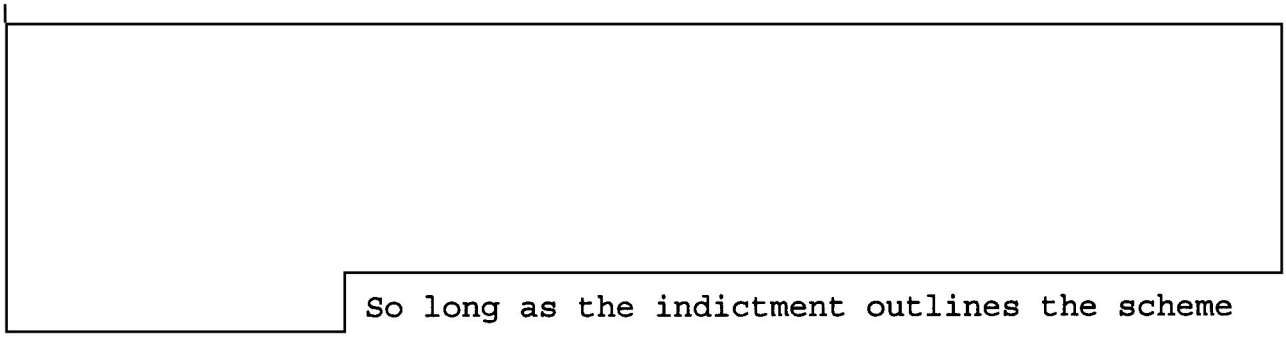

So long as the indictment outlines the scheme in this fashion (and the Government is able to prove the initial agreement was made) the statute casts a broad net: even where the underlying overt acts are technically legal (not the case here), a conviction may be had under § 371 so long as the object of the conspiracy is illegal. See, e.g., U.S. v. Bucey, 876 F.2d 1297, 1312 (7th Cir.) (under § 371, "the government need not charge or prove that [defendant] agreed to commit, or actually did commit a substantive offense. He merely must have agreed to interfere with or obstruct one of the government's lawful functions by deceit, craft or trickery, or at least by means that are dishonest"), cert. denied, 493 U.S. 1004 (1989).

A situation similar on its facts was at issue in U.S. v. Walker, 871 F.2d 1298 (6th Cir. 1989). The defendant, a bank president, arranged for loans to be approved in the name of a third party, but with the intention that the proceeds go to his

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[1] Once the conspiracy is hatched (that is, by the existence of an agreement and the commission of at least one overt act in furtherance thereof), co-conspirators are liable for all illegal acts related to the conspiracy. See U.S. v. Gleason, 616 F.2d 2, 17 (2d Cir. 1979) ("If, in the course of the conspiracy, there occur other illegal acts not specifically contemplated by an individual conspirator but reasonably akin to the anticipated illegality and in furtherance or in consequence of the scheme, the conspirator may not on that account escape liability for participation in the conspiracy"), cert. denied, 444 U.S. 1082 (1980).

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own use and benefit. To this end, Walker (among other acts) denied on an FDIC "questionnaire" (apparently a bank certification) that the bank had made "extensions of credit made . . . for the accommodation of others than those whose names appear on bank's records or on credit instruments in connection with such extension". 871 F.2d at 1300. Defendant was charged with conspiracy to make false entries in bank records under § 371, and (in a separate count) making false statements to the FDIC under § 1005. While the court did not squarely address whether the false certification to the FDIC constituted an "overt act" in furtherance of the conspiracy alleged,[2] it nonetheless seemed to consider that act one in the continuing series of acts defendant did in perpetration of the crime. In rejecting Walker's argument that his conspiracy count be dismissed as time-barred, his contention being that the crime was complete with the issuing of the loans, the court noted: "[a]lthough the loans . . . were made in 1981, Walker continuously attempted to conceal his interest in them. . . . The government thus established that repayment of the loans and concealment of Walker's interest in them were objectives of the conspiracy". Thus, while the case does not squarely address the legal issue at hand, the facts are quite similar, and the court seemed to consider the false certification as one of many acts in furtherance of the

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[2] The false certification only was raised as an issue where defendant argued (unsuccessfully) that he had answered the questionnaire "truthfully", since he claimed to believe the question as to whether such loans existed "since the last bank examination" included state examinations. 871 F.2d at 1307.

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conspiracy.

Also similar on its facts was U.S. v. Gleason, 616 F.2d 2 (2d Cir. 1979), cert. denied, 444 U.S. 1082 (1980). There, officers of the Franklin National Bank ("FNB"), in an effort to conceal heavy losses from creditors and from the Government in order to obtain financing and government approval for an acquisition, falsified bank financial statements and other records. The defendants were convicted under 18 U.S.C. §§ 371, 1001, and 1014. As in Walker, the court did not directly address the question at hand, but it did note, in the context of challenged jury instructions regarding the conspiracy charge and a sufficiency-of-the-evidence argument, that each falsification of bank records constituted an overt act for which each of the co-conspirators was liable. The court stated:

> "It hardly necessitated any great mental gymnastics for any reasonable person logically to conclude in the present case that when a bank officer participated in the falsification of bank entries . . . he did so for the purpose of enabling the bank to falsify its quarterly financial statement, not for his own edification or to alter the bank's internal bookkeeping system but to mislead others who would normally rely on the statement as a true representation of the

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bank's financial picture. Any major participant aware of the ultimate objective and its achievement through one type of false entry could also reasonably foresee that other types of entry falsification . . . might well be used to achieve that goal." 616 F.2d at 18.

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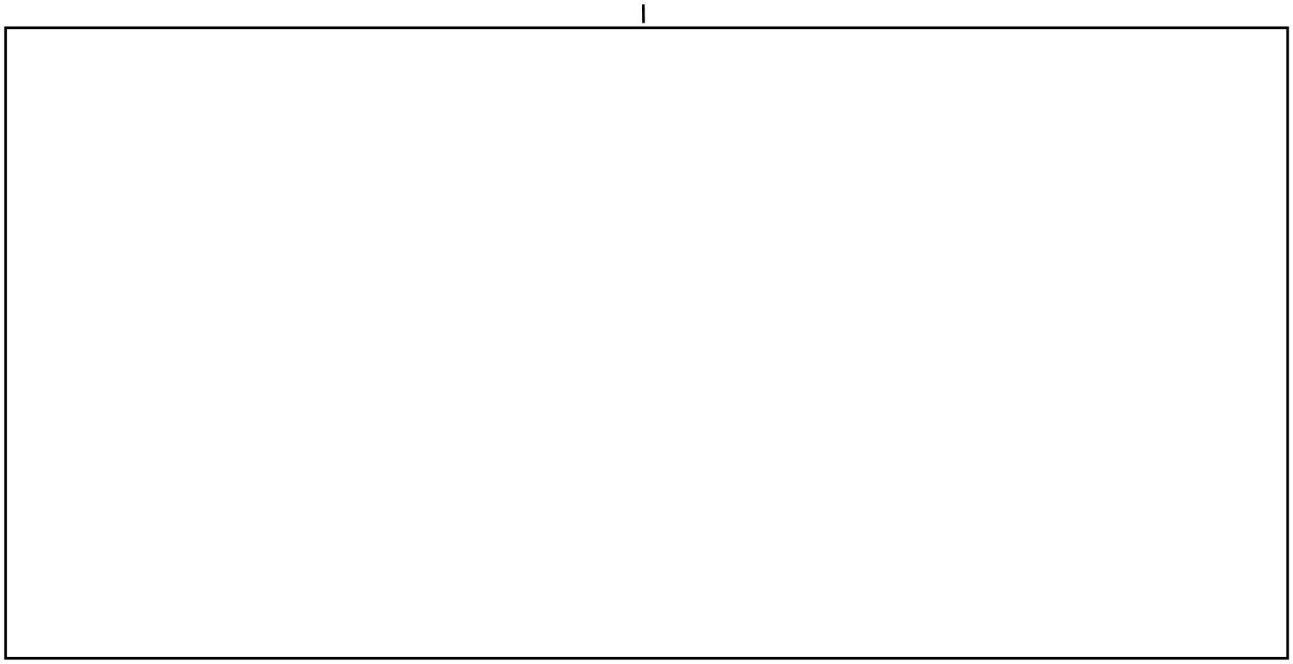

Perhaps the best legal and factual analogy can be drawn to cases involving tax evasion, which are commonly prosecuted as conspiracies to defraud the Government under § 371. As in this case, tax evasion is a crime of concealment, concealment of money (and, more importantly, information) from the Government. Tax evasion defendants have typically argued that the applicable statute of limitations (six years) has elapsed since all or some

[3] See also n.1, supra.

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of the tax returns in question had been filed longer than six years ago. The Eighth Circuit carved out a broad exception to Grunewald in U.S. v. Gleason, 766 F.2d 1239 (8th Cir. 1985), cert. denied, 474 U.S. 1058 (1986), a tax case where defendant sought reversal on the ground that co-conspirator statements regarding a "cover-up" of the crime had been improperly admitted as hearsay exceptions. The court distinguished Grunewald, quoting its exception for crimes where "the successful accomplishment of the crime necessitates concealment", 766 F.2d at 1242 (quoting Grunewald, 353 U.S. at 405) and holding that "a conspiracy covered by 18 U.S.C. § 371, such as the one charged here, necessarily contemplates acts of concealment to accomplish its objectives", id. (citing cases) (emphasis added). The holding is broad indeed, considering that § 371 plainly applies to more than tax evasion cases, but is principled to the extent that the crime of defrauding the Government "necessarily" involves concealment; nothing about tax fraud suggests the principle should not apply to other contexts of defrauding the Government.[4]

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[4] Other courts have held similarly. See, e.g., U.S. v. Bucey, 876 F.2d 1297, 1313 (7th Cir.) (failure to file CTRs and falsification of filed CTRs part of "overall scheme to circumvent the currency reporting laws and to prevent the IRS from collecting accurate data, reports and income taxes"), cert. denied, 493 U.S. 1004 (1989); U.S. v. Mackey, 571 F.2d 376, 383 (7th Cir. 1978) ("the indictment alleged and the prosecution proved a broad effort to evade taxes which by its nature required a substantial effort at concealment"); U.S. v. Diez, 515 F.2d 892, 897-98 (5th Cir. 1975) ("in the present case the central aim of the conspiracy was to deceive officials of the Internal Revenue Service, there inducing them to accept fraudulent tax returns as truthful and accurate. In light of the substantial possibility that the returns would be audited and investigated, the filing of the returns did not fully accomplish the purpose of

One additional line of cases which may be of use arises in the context of mail and wire fraud. In these cases, the courts have held that, where defendant has perpetrated a fraud, additional mailings or communications intended to "lull" the victim into a false sense of security or confidence, such that the victim does not discover the fraud or initiate investigation, constitute criminal acts of fraud rather than subsequent acts of concealment. See, e.g., U.S. v. Lane, 474 U.S. 438, 452-53 (1986) ("[m]ailings occurring after the receipt of goods obtained by fraud are within the statute if they 'were designed to lull the victims into a false sense of security, postpone their ultimate complain to the authorities, and therefore make the apprehension of the defendants less likely than if no mailings had taken place'") (quoting U.S. v. Maze, 414 U.S. 395, 403 (1974)). This principle has been applied to the context of conspiracy, where defendant argued (citing Grunewald) that his

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the main conspiracy, which, by its very nature, called for concealment") (citing the exception in Grunewald) (quoted in Gleason, 766 F.2d at 1242 (8th Cir.)), cert. denied, 423 U.S. 1052 (1976). Tax evasion has also been considered a "continuing conspiracy" wherein the object is not only to conceal income by filing false tax returns, etc. but also to evade detection, e.g., by lying to auditors, falsifying government documents, etc. See, e.g., U.S. v. Pinto, 838 F.2d 426, 435 (10th Cir. 1988) ("the indictment was based on one continuing conspiracy, the central object of which was not merely to evade taxes on marijuana income in 1978, but rather to immunize defendants from prosecution for tax evasion") (distinguishing Grunewald); U.S. v. Feldman, 731 F. Supp. 1189, 1195 (S.D.N.Y. 1990) ("the government alleges an ongoing course of conduct that constitutes the affirmative act of [tax] evasion. In essence, that course of conduct consisted of a series of lies and acts of concealment. . . . The government is not required by the statute of limitations to parse out that course of conduct in order to find the date of the first misstatement to an accountant").

subsequent acts of concealment were not overt acts falling within the statute of limitations. See U.S. v. Rogers, 9 F.3d 1025, 1029-30 (2d Cir. 1993) ("the conspiracy to commit wire fraud . . . was not complete until after the [fraudulent] June 1985 telexes were submitted. . . . As such, the June 1985 communications . . . were overt acts of the conspiracy that took place within the statute of limitations"), cert. denied, 115 S. Ct. 95 (1994).

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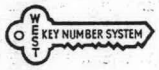
ORDER DENYING PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

Feb. 2, 1994.

(No. 93–1602)

The suggestion for rehearing en banc is denied.

[17] The petition for rehearing by the panel is also denied with the following explanation. In its petition for rehearing, Black Hills Institute of Geological Research (Black Hills) relies on *United States v. Good*, —— U.S. ——, 114 S.Ct. 492, 126 L.Ed.2d 490 (1993), for the claim that it was entitled to an adversary hearing before the Department of Justice seized the fossil "Sue" from it. In *Good*, it was undisputed that Good owned the real property that the government had seized without first providing Good with an adversary hearing. *See id.* at ——-——, 114 S.Ct. at 496. This fact distinguishes *Good* from the instant case, where the panel determined that Black Hills did not own the property in question. *See Black Hills Inst. of Geological Research v. United States Dep't of Justice*, 12 F.3d 737, 742–43 (8th Cir.1993).



UNITED STATES of America, Plaintiff–Appellee,

v.

Arthur James WESSELS, Defendant–Appellant.

No. 93–2678.

United States Court of Appeals, Eighth Circuit.

Submitted Nov. 11, 1993.

Decided Dec. 16, 1993.

Rehearing and Suggestion for Rehearing En Banc Denied Feb. 9, 1994.

Defendant was convicted in the United States District Court, Southern District of Iowa, Charles R. Wolle, Chief Judge, of conspiracy to distribute marijuana, of conspiracy to distribute methamphetamine, and of using and carrying firearm in relation to drug trafficking crime, and he appealed. The Court of Appeals, Susan Webber Wright, District Judge, sitting by designation, held that: (1) evidence supported convictions; (2) indictment was not fatally defective; (3) no double jeopardy violation occurred; (4) defendant was not entitled to jury instruction on abandonment of conspiracy; (5) statutory penalties were properly applied; but (6) court should not have taken judicial notice of type of methamphetamine involved.

Affirmed and remanded for further findings.

1. Conspiracy ⇐24.15

Mere inactivity does not end a conspiracy.

2. Conspiracy ⇐44.2

Defendant has burden to withdrew from conspiracy.

3. Conspiracy ⇐47(12)

Substantial evidence supp sion that defendant had not wit conspiracy to distribute meth and, thus, supported conviction fendant's contention that, by the arrested all other participants h rested, had ceased their activi withdrawn from conspiracy; sea fendant's dwelling revealed mar notes, scale, and several weapons participants were in custody or h tively withdrawn from conspiracy first search.

4. Weapons ⇐17(4)

Substantial evidence suppor tion for carrying and using firearms in relation to drug trafficking offense; during searches of defendant's dwelling, police found marijuana, drug notes, scale, and three loaded firearms, one of which was located about three feet away from the marijuana.

5. Criminal Law ⇐1144.13(3), 1159.2(5)

Jury verdict must be sustained if there is substantial evidence, taking view most favorable to government, to support it.

6. Indictment and Information ⇐176

There was no fatal variance between indictment which charged defendant with using and carrying firearms in relation to drug trafficking offense on one date and evidence at trial that defendant had carried firearms on other occasions during course of same drug offense; evidence of additional instances of gun use during the offense did not prove "materially different" facts from those alleged in indictment and, thus, did not amount to "variance."

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

7. Indictment and Information ⇐55

Indictment is sufficient on its face if it contains all essential elements of offense defendant of alleges sufficient to plead subsequent ordinarily is effective that it ble construction defendant

n ⇐121.1(1)

f particulars e of charges minimize element of particulars is not to be e of govern-

⇐171

"Variance between indictment and proof," which does not require reversal if variance is harmless, occurs when essential elements of offense set forth in indictment are left unaltered but evidence offered at trial proves facts materially different from those alleged in the indictment.

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

10. Criminal Law ⇐1167(1)

Variance between indictment and proof is harmless if it is minor and fairly apprised defendant of charges against him.

11. Criminal Law ⇐814(3)

Defendant was not entitled to instruction on theory of case which lacked evidentiary support.

12. Criminal Law ⇐772(6)

Defendant is entitled to have jury instructed on his theory of defense if proposed instruction correctly states applicable law and is supported by evidence.

13. Criminal Law ⇐863(1)

District court has wide discretion in deciding which supplemental instructions to submit to jury.

14. Double Jeopardy ⇐151(2)

Prosecution for conspiracy to distribute methamphetamine did not violate right against double jeopardy of defendant who had pled guilty to conspiracy to distribute marijuana, even though defendant was charged with conspiracy to distribute marijuana or methamphetamine; since defendant had pled guilty to marijuana charge, jury was only required to determine whether methamphetamine was also an object of the conspiracy and, therefore, verdict on each allegation was unanimous and independent of the other. U.S.C.A. Const.Amend. 5.

15. Double Jeopardy ⇐131

Government may bring alternative charges against defendant, and conviction for both charges does not violate prohibition against double jeopardy, so long as verdict on each allegation is unanimous and independent of the other. U.S.C.A. Const.Amend. 5.

16. Criminal Law ⇐1206.3(1)

Sentencing enhancement provision contained in Comprehensive Drug Abuse Prevention and Control Act of 1970 for defendants with prior drug convictions applies to defendants convicted of drug conspiracies. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(b), 406, 21 U.S.C.A. §§ 841(b), 846.

17. Criminal Law ⇐273.1(2)

Government's withdrawal of consent to oral plea agreement to move for reduction of sentence did not entitle defendant to relief from sentence imposed; whatever benefits

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defendant intended to reap from agreement were entirely contingent upon district court's approval and acceptance thereof.

18. Criminal Law ⇐1237

District court sentencing defendant for conspiracy to distribute methamphetamine and marijuana could use sentencing provisions penalties applicable to methamphetamine as opposed to those applicable to marijuana, where indictment for conspiracy to distribute each substance was not duplicitous. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(b), 406, 21 U.S.C.A. §§ 841(b), 846.

19. Conspiracy ⇐51

District court sentencing defendant for conspiracy to distribute methamphetamine and marijuana could base computation of statutory penalties on amount of drugs attributable to entire conspiracy, rather than on greatest amount of drugs involved in any single transaction in course of the conspiracy. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(b), 21 U.S.C.A. § 841(b).

20. Conspiracy ⇐51

In computing statutory penalties for defendant convicted of conspiracy to distribute drugs, district court may include not only amount of drugs involved in transactions which were known to defendant, but also amount of drugs involved in transactions which were reasonably foreseeable to defendant. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(b), 21 U.S.C.A. § 841(b).

21. Conspiracy ⇐51

Evidence supported district court's determination that, for purposes of sentencing defendant for conspiracy to distribute methamphetamine, defendant was responsible for three and one-half pounds of methamphetamine; coconspirator testified that he had personally supplied defendant with three and one-half to four pounds of methamphetamine during course of conspiracy. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(b), 21 U.S.C.A. § 841(b).

22. Criminal Law ⇐304(1), 1311

District court sentencing defendant under Sentencing Guidelines for conspiracy to distribute methamphetamine should not have taken judicial notice of type of methamphetamine involved; government had burden of proof on that issue, since it affected length of sentence to be imposed. U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.App.

Dean Stowers, Des Moines, IA, argued, for defendant-appellant.

Counsel who presented argument on behalf of the appellee was Clifford D. Wendel, Des Moines, IA, argued (Christopher D. Hagen and Ronald M. Kayser, on the brief), for plaintiff-appellee.

Before FAGG and WOLLMAN, Circuit Judges and WRIGHT,* District Judge.

SUSAN WEBBER WRIGHT, District Judge.

Arthur James Wessels pleaded guilty to conspiracy to distribute marijuana and was convicted of conspiracy to distribute methamphetamine and of using and carrying a firearm in relation to a drug trafficking crime. He was sentenced to 240 months in prison on the conspiracy count and sixty months in prison on the firearms count, the terms to be served consecutively. He now appeals both the judgment of conviction and the sentence. We affirm his conviction on both counts and remand for further findings on the type of methamphetamine involved.

I.

On December 17, 1992, the grand jury filed a two-count indictment charging Wessels with conspiracy to distribute marijuana or methamphetamine and with using and carrying a firearm in relation to a drug trafficking crime. The indictment provided as follows:

Count 1

From on or about the 1st day of January, 1989 up to and including the 17th day of December, 1992, the exact dates to the Grand Jury unknown, in the Southern District of Iowa and elsewhere, two or more persons, known and unknown to the Grand Jury, including ARTHUR JAMES WESSELS, did conspire to commit an offense against the United States, namely to knowingly and intentionally distribute marijuana, a Schedule I controlled substance or a mixture or substance containing methamphetamine, a Schedule II controlled substance in violation of Title 21, United States Code, Section 841(a)(1).

This is a violation of Title 21, United States Code Section 846.

THE GRAND JURY FURTHER CHARGES:

Count 2

That from on or about the 1st day of January, 1989 up to and including the 17th day of December, 1992, the exact dates to the grand jury unknown, in the Southern District of Iowa and elsewhere, defendant, ARTHUR JAMES WESSELS did knowingly and unlawfully during and in relation to a drug trafficking crime, to wit: conspiracy to distribute marijuana, a Schedule I controlled substance or a mixture or substance containing methamphetamine, a Schedule II controlled substance, use or carry a firearm.

This is a violation of Title 18, United States Code, Section 924(c).

Wessels was arraigned on January 4, 1993, and pleaded not guilty. On March 1, 1993, he entered a guilty plea to the marijuana conspiracy and went to trial on the methamphetamine portion of count 1 and on the weapons count. The jury found Wessels guilty on both counts and the district court sentenced and entered judgment against Wessels on June 22, 1993.

II.

For his first point on appeal, Wessels challenges his conviction under count 2 of the indictment. He contends there was insufficient evidence to convict him of use of a firearm in relation to a drug conspiracy and that the indictment was vague and testimony was admitted in violation of the bill of particulars. He also argues the district court erred in failing to instruct the jury on abandonment of a conspiracy.

Upon Wessels' motion and pursuant to an order of the district court, the government filed a bill of particulars on the weapons count. This bill of particulars provided the following with regard to Wessels' use of a firearm:

1. Each and every time the defendant, Arthur James Wessels sold methamphetamine or marijuana to Steven Grade, Brett Rork or Sharon Jones, he had a gun present.

2. During the search of his residence on or about February 25, 1992, guns were found during the search of the defendant's residence and cabin.

On the eve of trial, the government provided Wessels with a memorandum which set forth further details as to its witnesses' expected testimony concerning possession of firearms during various drug transactions. The memorandum stated:

2. Steve Grade will testify that between the first of January, 1990, and June 26, 1991, when he was arrested, he and Art Wessels trafficked in methamphetamine on the average of one to two times per week. Fifty percent of the time, Grade would travel to Kirkville, Iowa. Wessels always travelled with a weapon under his seat. Grade believes the firearm was a large caliber revolver. Wessels kept a loaded rifle by the door at his cabin in Eddyville as did he likewise at his house in R.R. Oskaloosa. In the winter of 1990, Wessels arrived at Grade's house carrying two MAC 10 semi automatic weapons strapped around his neck. On that occasion, Wessels and Grade did a methamphetamine transaction.

3. Further, Sharon Jones will likewise testify about the incident in the winter of 1990 when Wessels arrived at the Grade residence in possession of the MAC 10 semi automatic weapon.

*The HONORABLE SUSAN WEBBER WRIGHT, United States District Judge for the Eastern District of Arkansas, sitting by designation.

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Wessels' motion to dismiss count 2 for failure to comply with the court's order granting a bill of particulars and for variance between the bill of particulars and the indictment was denied.[1]

[1–4] At trial, the evidence showed that numerous firearms were seized in the search of Wessels' residence on February 26, 1992, and that he was in possession of an automatic weapon in the winter of 1990 at the trailer home of friends in Kirkville, Iowa. Wessels argues there was insufficient evidence to show that these firearms were used in the alleged drug conspiracy and that all the major players except for himself had been arrested or had dropped out of the conspiracy by the summer of 1991. The government maintains, and this court agrees, that mere inactivity does not terminate a conspiracy and that Wessels has the burden of proving withdrawal from a conspiracy. *United States v. Askew*, 958 F.2d 806, 812 (8th Cir. 1992) (quoting *United States v. Boyd*, 610 F.2d 521, 528 (8th Cir.1979)). Wessels did not present evidence that he had affirmatively withdrawn from the conspiracy. He took the position that because all of his alleged co-conspirators had withdrawn, abandoned, or ceased their activities by the summer of 1991 there was no conspiracy.

[5] A jury verdict must be sustained if there is substantial evidence, taking the view most favorable to the government, to support it. *United States v. Sileven*, 985 F.2d 962, 967 (8th Cir.1993). This Court finds that substantial evidence supports the jury verdict. In addition to the search of Wessels' residence which revealed marijuana, drug notes, and a scale, the evidence showed that while several members of the conspiracy had been apprehended, not all of the participants were in custody or affirmatively out of the conspiracy at the time of the search. At the February 26 search, a loaded derringer was found on a shelf in Wessels' basement, a loaded .38 caliber revolver was found two to three feet from marijuana, and another loaded revolver was found in his garage. From this evidence, the jury could reasonably conclude not only that the conspiracy was still in existence but also that the firearms were used in connection with the conspiracy.

[6] Wessels also contends that the firearms possession at the trailer in the winter of 1990 was neither presented to the grand jury nor specified in the bill of particulars. He argues the indictment was unconstitutionally vague and that evidence outside the scope of the indictment and the bill of particulars was submitted to the petit jury.

[7, 8] An indictment is legally sufficient on its face if it contains all of the essential elements of the offense charged, fairly informs the defendant of the charges against which he must defend, and alleges sufficient information to allow a defendant to plead a conviction or acquittal as a bar to a subsequent prosecution. *United States v. Young*, 618 F.2d 1281, 1286 (8th Cir.), *cert. denied*, 449 U.S. 844, 101 S.Ct. 126, 66 L.Ed.2d 52 (1980). An indictment will ordinarily be held sufficient unless it is so defective that it cannot be said, by any reasonable construction, to charge the offense for which the defendant was convicted. *Id.* Likewise, the primary purpose of a bill of particulars is to inform the defendant of the nature of the charges against him and to prevent or minimize the element of surprise at trial. *United States v. Garrett*, 797 F.2d 656, 665 (8th Cir.1986). A bill of particulars, however, is not a proper tool for discovery, *United States v. Hester*, 917 F.2d 1083, 1084 (8th Cir.1990); it is not to be used to provide detailed disclosure of the government's evidence at trial. *United States v. Automated Medical Laboratories, Inc.*, 770 F.2d 399, 405 (4th Cir.1985).

[9, 10] Wessels urges that the grand jury did not hear the same evidence as the petit jury. The only evidence presented to the grand jury, Wessels argues, was that firearms were discovered at his house on February 26, 1992; yet the indictment alleges weapon possession from January 1989 to December 1992. He contends the government was erroneously allowed to broaden the indictment to include events other than those of February 1992.

> [T]he acts proved at trial may not vary from those charged in the indictment. A variance 'occurs when the essential elements of the offense set forth in the indictment are left unaltered but the evidence offered at trial proves facts materially different from those alleged in the indictment.' Reversal is not required if the variance is harmless, that is, if 'the indictment fully and fairly apprised the defendant of the charges he or she must meet at trial.'

United States v. Huntsman, 959 F.2d 1429, 1435 (8th Cir.1992) (quoting *United States v. Begnaud*, 783 F.2d 144 (8th Cir.1986)).

> Tests of fatal variance are: Was defendant misled? Will defendant be protected against a future proceeding? 'Upon the question of variance between indictment and proofs, the controlling consideration should be whether the charge was fairly and fully enough stated to apprise defendant of what he must meet, and to protect him against another prosecution, and whether those particulars in which the proof may differ in form from the charge support the conclusion that respondent could have been misled to his injury.'
>
> [T]he 'true inquiry ... is not whether there has been a variance in proof, but whether there has been such a variance as to 'affect the substantial rights' of the accused.'

United States v. West, 549 F.2d 545, 552 (8th Cir.1977) (citations omitted). *See also United States v. Yeo*, 739 F.2d 385, 387 (8th Cir.1984) (where there is a variance between the facts alleged in the indictment and the evidence offered at trial, the issue is one of fairness, and actual prejudice must be considered).

The grand jury was presented evidence of gun possession acquired through the search of Wessels' residence in February 1992; this evidence was sufficient to support the indictment. The bill of particulars set out that each and every time Wessels sold methamphetamine or marijuana to Grade, Rork, or Jones, he had a gun present and that guns were found in the search of his residence in February 1992. The government subsequently presented to the petit jury evidence showing additional instances of gun use during the conspiracy, i.e., the winter 1990 gun possession. This does not amount to a "variance" as the evidence did not prove facts "materially different" from those alleged in the indictment but did prove other facts in addition to those presented to the grand jury. The indictment and the bill of particulars fully and fairly apprised Wessels of the charges he would face at trial. In addition, Wessels failed to show how he was actually prejudiced.

[11–13] Wessels further argues that the district court erred in not giving his proposed jury instruction concerning abandonment of a conspiracy. Criminal defendants are entitled to an instruction on their theory of defense if the proposed instruction is a correct statement of the applicable law and is supported by the evidence. *United States v. Austin*, 915 F.2d 363, 365 (8th Cir.1990). The district court has wide discretion in deciding which supplemental instructions to submit to the jury. *United States v. Blumberg*, 961 F.2d 787, 790 (8th Cir.1992). Wessels' abandonment theory was based upon his argument that there was no conspiracy because there were no remaining active co-conspirators. The evidence, however, was not sufficient to allow a reasonable jury to find Wessels had abandoned the conspiracy, and we find the district court committed no error in denying the instruction.

III.

[14] For his second point, Wessels argues the district court violated his Fifth Amendment right against double jeopardy by allowing the government to proceed with a trial on the methamphetamine portion of count 1 after he had pleaded guilty to conspiracy to distribute marijuana under count 1. Wessels contends his right against double jeopardy was violated because he was convicted twice on the same count: once when the court accepted his guilty plea to conspiracy to distribute marijuana and again when he was tried on conspiracy to distribute methamphetamine. He argues that a count can-

1. Wessels had earlier moved to dismiss count 2 under Fed.R.Crim.P. 12(b)(2), arguing that the indictment was vague.

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not contain more than one charge, and that the guilty plea should therefore have disposed of count 1 entirely.

In support of his argument, Wessels cites *United States v. Owens*, 904 F.2d 411 (8th Cir.1990) (*Owens*). The indictment in *Owens* charged the defendant with conspiracy to distribute and possess with intent to distribute "methamphetamine/amphetamine." The jury instructions repeated the ambiguous designation "methamphetamine/amphetamine" and the jury returned a general verdict of guilty. The problem then arose as to which substance should be used by the district court in determining the correct sentencing range. The guidelines provided disparate sentencing ranges for amphetamine and methamphetamine, with amphetamine having the lower range and the jury did not indicate which drug was the object of the conspiracy. Nevertheless, the district court concluded that methamphetamine was the object of the conspiracy and sentenced the defendant on that basis.

On appeal, we held that the sentence should have been calculated on the basis that the drug involved was amphetamine. *Id.* at 413–14. We concluded that by instructing the jury on an "either/or" basis with respect to the two substances and by failing to enable the jury to indicate by use of a special verdict form which of the two substances it found the conspiracy to have involved, the district court elicited an ambiguous verdict of guilty. *Id.* at 414. Under such circumstances, the court erred in sentencing the defendant based on the alternative which yielded a higher sentencing range. *Id.* at 414–15.

[15] Wessels' reliance on *Owens* is misplaced. *Owens* does not prohibit the government from charging a defendant in the alternative so long as the verdict on each allegation is unanimous and independent of the other. 904 F.2d at 414; *see also United States v. Page-Bey*, 960 F.2d 724, 727–728 (8th Cir.1992) (special verdict form not required where indictment charged defendant with conspiracy to distribute both cocaine and heroin when evidence indicated defendant supplied both and it would have made no difference in defendant's sentence) (per curiam). Here, there is no ambiguity in the jury's verdict. Because Wessels had already pleaded guilty to the marijuana conspiracy, the jury only needed to determine whether methamphetamine was also an object of the conspiracy, which it did. Accordingly, there was no violation of Wessels' Fifth Amendment rights.

IV.

[16] For his final point, Wessels raises several challenges to his sentence. He first argues that the enhancement provision for prior drug convictions set forth in 21 U.S.C. § 841(b) does not apply to persons convicted under the drug conspiracy statute, 21 U.S.C. § 846. Citing *Bifulco v. United States*, 447 U.S. 381, 100 S.Ct. 2247, 65 L.Ed.2d 205 (1980), Wessels argues that only the penalties applicable to the offense that was the object of the conspiracy, and not those applicable to the offender, apply by reference from § 846. This argument is without merit. As we noted in *United States v. Askew*, 958 F.2d at 812, the drug conspiracy statute has been amended since *Bifulco* to expressly provide that convicted drug conspirators are "subject to the same penalties as those prescribed for the [underlying substantive] offense." Thus, the enhancement provision of § 841(b) applies whether the conviction was for violating the substantive statute or for conspiring to violate the substantive statute.

[17] Wessels also argues the district court should not have applied the penalty enhancement because of an oral plea agreement upon which he detrimentally relied. Apparently, Wessels and the government had entered into an oral agreement whereby in exchange for Wessels' cooperation, the government would move for a reduction in Wessels' sentence. However, the government subsequently informed Wessels that it would not go through with the agreement and proceeded to file a notice of enhancement after learning that Wessels had a prior felony drug conviction. Wessels argues that the government breached the plea agreement, and in so doing, engaged in misconduct, gained an unfair advantage, and deprived him of due process and the effective assistance of counsel.

Wessels is not entitled to relief due to the government's withdrawal of its consent to the plea agreement. Whatever benefits Wessels intended to reap as a result of the agreement were entirely contingent upon the approval of the district court. *United States v. Walker*, 927 F.2d 389, 390 (8th Cir.1991).

> Surely neither party contemplates any benefit from the agreement unless and until the trial judge approves the bargain and accepts the guilty plea. Neither party is justified in relying substantially on the bargain until the trial court approves it. We are therefore reluctant to bind them to the agreement until that time. As a general rule, then, we think that either party should be entitled to modify its position and even withdraw its consent to the bargain until the plea is tendered and the bargain as it then exists is accepted by the court.

United States v. McGovern, 822 F.2d 739, 744 (8th Cir.) (*quoting United States v. Ocanas*, 628 F.2d 353, 358 (5th Cir.1980)), *cert. denied*, 484 U.S. 956, 108 S.Ct. 352, 98 L.Ed.2d 377 (1987).

Wessels was not justified in relying on the terms of the plea agreement because it had not been approved and accepted by the district court.[2] In addition, he has not shown that the government gained an unfair advantage over him in withdrawing its consent to the agreement, such as by the use at trial of statements made during the course of the plea negotiations, nor has he shown a deprivation of due process in his subsequent trial. Wessels was not prejudiced by the government's withdrawal of its consent to the plea agreement and the district court committed no error when it increased the statutory penalty on account of Wessels' prior felony drug conviction.

[18] Wessels next argues the indictment was duplicitous and that the district court thus erred in utilizing the statutory penalties applicable to the conspiracy to distribute methamphetamine charge as opposed to those applicable to the marijuana conspiracy. In support of this argument, Wessels again cites *Owens*. However, we have already determined there was no ambiguity in the jury's verdict and that the jury properly determined that methamphetamine was an object of the conspiracy. Accordingly, the district court did not err in utilizing the penalties applicable to the charge of conspiracy to distribute methamphetamine.

[19] Wessels next argues the district court erred in determining that the penalties set forth in § 841(b) are based upon the amount of drugs attributable to the entire conspiracy. He argues that the penalty should be determined by using the greatest amount of any single transaction in the course of the conspiracy rather than by aggregating small amounts involved in numerous transactions. He additionally argues that the district court erred in determining the quantity of drugs involved based of the testimony of witness Steve Grade. We reject both of these arguments.

[20] One of the measures employed in determining the severity of a drug conspiracy offense is the amount of narcotics involved in the entire conspiracy. *United States v. Savage*, 891 F.2d 145, 151 (7th Cir.1989). Indeed, the amount of narcotics considered in sentencing for conspiracy includes not only the amount involved in the transactions that were known to the defendant but also those that were reasonably foreseeable, reflecting the fact that each conspirator is responsible for the acts and offenses of each one of his co-conspirators committed in furtherance of the conspiracy. *Id. See also United States v. Tolson*, 988 F.2d 1494, 1502 (7th Cir.1993) (finding that the defendant may be held responsible for all marijuana transactions [18,500 pounds] from 1986 through 1988 that were reasonably foreseeable to him). Wessels cites no authority requiring the court to determine the penalty by using only the greatest amount of any single transaction in the course of the conspiracy and nothing in § 841(b) imposes such a requirement. The district court properly determined that the

2. The district court denied Wessels' pretrial motion to enforce the plea agreement, stating that it cannot accept a plea of guilty based upon a plea agreement that asserts the court knows to be false, and that it would not have accepted the plea agreement in this case because it omitted the notice of prior conviction.

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penalties set forth in § 841(b) are based upon the amount of drugs attributable to the entire conspiracy.

[21] In addition, the district court did not commit error in its determination that Wessels was responsible for three and one-half pounds of methamphetamine. The court credited Grade's testimony that he personally supplied Wessels with three and one-half to four pounds of methamphetamine during the course of their drug trafficking activities. Grade's testimony, which was based upon his own personal knowledge, clearly established the amount of drugs involved. *See United States v. Galvan*, 961 F.2d 738, 740 (8th Cir.1992) (trial testimony used to estimate the amount of uncharged drugs must clearly establish either the dates of the transactions or the amounts of drugs involved) (citations omitted). Although Wessels argues that Grade's testimony should not have been credited, witness credibility is an issue for the sentencing judge that is virtually unreviewable on appeal. *United States v. Candie*, 974 F.2d 61, 64 (8th Cir.1992) (citations omitted). We conclude that the district court's findings regarding the quantity of methamphetamine involved were reasonably supported by the evidence and are not clearly erroneous.

[22] However, we do find the district court erred in taking judicial notice that the methamphetamine involved in this case was D-methamphetamine rather than L-methamphetamine.[3] The court acknowledged at the sentencing hearing that the government failed to present evidence on this issue but noted that it had been involved in some 50 methamphetamine cases in the State of Iowa, none of which involved L-methamphetamine. Stating that under such circumstances the defense was obligated to do more than simply say the government had not proven that the substance was D-methamphetamine, the court, over Wessels' objections, took judicial notice that the methamphetamine involved was D-methamphetamine. This was error. While irrelevant to the question of guilt, the type of methamphetamine involved was essential to the calculation of the proper sentence, and the government rather than Wessels carried the burden of producing evidence on this issue. *United States v. Patrick*, 983 F.2d 206, 208 (11th Cir.1993) (citations omitted). *See also United States v. Koonce*, 884 F.2d 349, 353 (8th Cir.1989). Because the district court did not receive any evidence as to the type of methamphetamine involved, we remand for further findings on this issue.

3. Under the sentencing guidelines, the involvement of D-methamphetamine requires a sentence that is significantly more severe than that for an equal quantity of L-methamphetamine. U.S.S.G. § 2D1.1. *See United States v. Koonce*, 884 F.2d 349, 352 (8th Cir.1989).

V.

In sum, we affirm Wessels' conviction on both counts and remand for further proceedings consistent with this opinion.

KEY NUMBER SYSTEM

J.B. HICKEY, Appellant,

v.

Sgt. REEDER; Pulaski County Jail, Little Rock, Arkansas; Deputy Marin, Jailor, Pulaski County Jail, Little Rock, Arkansas; Cpt. Carlton, Pulaski County Jail, Little Rock, Arkansas, Appellees.

No. 92-3737.

United States Court of Appeals, Eighth Circuit.

Submitted June 18, 1993.

Decided Dec. 20, 1993.

Rehearing Denied Feb. 1, 1994.

Inmate brought civil rights action against jail officials who shot him with stun gun when he refused to clean his cell. The United States District Court for the Eastern District of Arkansas, Jerry W. Cavaneau, United States Magistrate Judge, entered judgment for jail officials, and inmate appealed. The Court of Appeals, Beam, Circuit Judge, held that use of stun gun to enforce order to sweep violated inmate's constitutional right to be free from cruel and unusual punishment.

Reversed and remanded.

Bowman, Circuit Judge, filed dissenting opinion.

1. Federal Courts ⇐776

Whether conduct, if done with required culpability, is sufficiently harmful to be cruel and unusual punishment in violation of Constitution is objective or legal determination which Court of Appeals decides de novo. U.S.C.A. Const.Amend. 8.

2. Federal Courts ⇐776

If objective element of harm is established to meet Eighth Amendment standard, actors' subjective state of mind becomes relevant and is question of fact which Court of Appeals reviews de novo. U.S.C.A. Const. Amend. 8.

3. Criminal Law ⇐1213.10(4)

Being shot with stun gun by jail officials supported objective pain component of inmate's claim under cruel and unusual punishment clause of Constitution. U.S.C.A. Const. Amend. 8.

4. Criminal Law ⇐1213.10(1)

Every malicious push or shove by jail officials does not amount to deprivation of inmate's constitutional rights to be free from cruel and unusual punishment. U.S.C.A. Const.Amend. 8.

5. Criminal Law ⇐1213.10(1)

Pain maliciously inflicted by jail officials on inmate must be significant to violate constitutional prohibition of cruel and unusual punishment clause. U.S.C.A. Const.Amend. 8.

6. Civil Rights ⇐135

District court's finding that stun gun was used in good faith by jail officials against inmate to avoid violence was clearly erroneous, where officials used gun to force inmate to clean his cell, and inmate did not make any threats to physically assault officers. U.S.C.A. Const.Amend. 8.

7. Criminal Law ⇐1213.10(4)

Use of stun gun by jail officials against inmate to enforce order to sweep his cell violated his right to be free of cruel and unusual punishment. U.S.C.A. Const. Amend. 8.

8. Criminal Law ⇐1213.10(1, 4)

In reviewing inmate's cruel and unusual punishment claims, Court of Appeals extends wide ranging deference to judgment and policies of prison officials who must maintain internal order and discipline in prisons and who often make snap decisions in volatile and dangerous situations. U.S.C.A. Const. Amend. 8.

9. Criminal Law ⇐1213.1

Obdurate, wanton, or intentional inflictions of unnecessary pain, not mere inadvertence or good faith mistakes as to amount of force reasonably called for, violate cruel and unusual punishment clause of Constitution. U.S.C.A. Const.Amend. 8.

10. Criminal Law ⇐1213.10(1, 4)

Whether pain is wantonly and unnecessarily inflicted on inmate by prison officials depends, at least in part, on whether force could have plausibly been thought to be necessary to maintain order in institution and to maintain safety of prison personnel or inmates. U.S.C.A. Const.Amend. 8.

11. Prisons ⇐13(4)

Law does not authorize day-to-day policing of prisons by stun gun.

12. Prisons ⇐13(2)

Summary applications of force are constitutionally permissible when prison security and order, or safety of other inmates or officers, has been placed in jeopardy. U.S.C.A. Const.Amend. 8.

Howard B. Eisenberg, Little Rock, AR, argued, for appellant.

David M. Fuqua, North Little Rock, AR, argued, for appellees.

Before BOWMAN, Circuit Judge, HEANEY, Senior Circuit Judge, and BEAM, Circuit Judge.

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them unduly burdensome. The procedures severely penalize him, he argues, because they are excessively elaborate and costly given the fact he will be the *only* bidder at the impending sale. *See supra* note 1.

We disagree. The bidding procedures established by the bankruptcy court are the sort that routinely govern estate sales. Moreover, the court adopted those procedures precisely because of the perceived collusion between Fisher and Gould in crafting the bogus second offer. Fisher's attack on the rebidding procedures is largely a roundabout attack on the (unappealable) May 1989 order. The issue is not *whether* the property should be rebid, but *how* it will be rebid. Again, if Fisher believed that rebidding would be futile because he was the only potential bidder, the time to make that argument was in an appeal of the May 1989 order. Furthermore, we are not in a position on this record to say whether the location of the 7.5 acre parcel does in fact limit bids to the Weavers and Fisher. The bankruptcy court, fully apprised of the facts, attempted to find an equitable solution to the defects that infected both the first and second attempts to sell the property. Indeed, by establishing a procedure for claims resolution, the bankruptcy court took pains not to leave anyone, including Fisher, without recourse for damages resulting from the vacated sale; although Fisher complains that the rebidding procedures will prove time-consuming and costly, we cannot say, under the circumstances, that it was an abuse of discretion to adopt this approach.

[5] Finally, Fisher challenges the bankruptcy court's determination that he did not hold a claim for breach of warranty against Gould. Whether he did or not turns on whether the original sale was a judicial sale under Indiana law, *see, e.g., Vonderahe v. Ortman*, 128 Ind.App. 381, 147 N.E.2d 924, 926 (1958), or a sale in the ordinary course of business under the Bankruptcy Code. *See, e.g., In re Canyon Partnership*, 55 B.R. 520, 524 (Bankr. S.D.Cal.1985). The district court declined to address that issue, concluding that it was an integral part of the claims resolution process established by the bankruptcy court. We agree. As noted, the bankruptcy court specifically ordered that all proceeds from the sale of the 7.5 acre parcel be subject to the court's jurisdiction for distribution to potential claimants. Whether Fisher is entitled to recover for breach of warranty is properly left for that stage of the litigation.

AFFIRMED.

* Case number 91-2586, Roger Curry's appeal, was not argued but was submitted on the record and briefs.

UNITED STATES of America, Plaintiff-Appellee,

v.

Timothy S. CURRY, Samuel T. Harding, Don J. Leinenbach, Robert Holland and Roger S. Curry, Defendants-Appellants.

Nos. 91-2550, 91-2556, 91-2578, 91-2579 and 91-2586.

United States Court of Appeals, Seventh Circuit.

Argued May 21, 1992.*

Decided Sept. 24, 1992.

Rehearing and Rehearing In Banc Denied Oct. 23, 1992 in Nos. 91-2578 and 91-2579.

Rehearing and Rehearing En Banc Denied Oct. 28, 1992 in No. 91-2586.

Defendants were convicted in the United States District Court for the Southern District of Indiana, Gene E. Brooks, Chief Judge, of, inter alia, conspiracy to manufacture and possess with intent to distribute in excess of 50 kilograms of marijuana, and they appealed. The Court of Appeals, Cummings, Circuit Judge, held that: (1) joinder of one defendant's perjury counts with other defendants' conspiracy counts was proper; (2) expert testimony regarding eyewitness identification was properly excluded; (3) evidence was sufficient to support finding that each defendant participated in single, ongoing conspiracy; (4) certain testimony was properly admitted under exceptions to hearsay rule; and (5) sentences were not improper.

Affirmed.

1. Indictment and Information ⇐124(4)

Under rule permitting multiple defendants to be tried together only if their charged conduct arose from "same act or transaction" or "same series of acts or transactions," acts or transactions are considered part of "same series" if they are performed pursuant to common scheme or plan. Fed.Rules Cr.Proc.Rule 8(b), 18 U.S.C.A.

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

2. Indictment and Information ⇐124(5)

Joinder of perjury counts with other defendants' conspiracy counts was proper under rule allowing multiple defendants to be tried together if charged conduct arose from same series of acts or transactions, in prosecution arising from alleged conspiracy to grow marijuana, regardless of number of years between end of alleged conspiracy and subsequent alleged perjury. Fed. Rules Cr.Proc.Rule 8(b), 18 U.S.C.A.

3. Indictment and Information ⇐124(4)

Conspiracy and its cover-up are considered parts of common plan, for purposes of rule allowing multiple defendants to be tried together if charged conduct arises from common scheme or plan. Fed.Rules Cr.Proc.Rule 8(b), 18 U.S.C.A.

4. Criminal Law ⇐620(6)

Defendants in prosecution alleging conspiracy to grow marijuana were not entitled to severance of one defendant's perjury charges, even if trial were severed, testimony regarding perjury defendant's role in drug conspiracy would have been relevant and admissible to show that he committed perjury and, although evidence relating to perjury may not have been admissible in separate conspiracy trial, there was no severe prejudice. Fed.Rules Cr. Proc.Rule 14, 18 U.S.C.A.

5. Criminal Law ⇐469.1

Expert testimony is generally admissible under Federal Rule of Evidence 702 if it will assist trier of fact to understand evidence or to determine fact in issue, but district judge has broad discretion to exclude relevant evidence that is confusing or redundant under Rule 403. Fed.Rules Evid.Rules 403, 702, 28 U.S.C.A.

6. Criminal Law ⇐338(7), 474.3(2)

Exclusion of expert testimony regarding reliability of eyewitness identifications was proper, whether under Rule of Evidence 702, governing expert testimony, or under Rule 403, governing exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time; intrusion of expert to comment on what was minor issue was not necessary, especially when record revealed that vigorous cross-examinations by defendants exposed weaknesses of identifications; moreover, defendants gave government only four days' notice of intent to call expert. Fed.Rules Evid.Rules 403, 702, 28 U.S.C.A.

7. Conspiracy ⇐48.2(2)

Multiple conspiracy instruction was not required in prosecution of several defendants alleging conspiracy to manufacture, and to possess with intent to distribute, marijuana; defendants failed to show that they had been prejudiced by alleged variance between indictment and proof.

8. Conspiracy ⇐24(1)

Essence of conspiracy is agreement; to join conspiracy is to join agreement, not group.

9. Conspiracy ⇐24(2)

Multiple conspiracies exist when there is no agreement toward common goal, and

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each conspirator's agreement constitutes end unto itself.

10. Conspiracy ⇐24(3)

Participants in conspiracy need not know all other members or participate in every aspect of conspiracy.

11. Conspiracy ⇐24(1), 24.5

Proof of conspiracy requires substantial evidence that particular defendant knew of illegal objective of conspiracy and agreed to participate in its achievement.

12. Conspiracy ⇐24(1), 47(2)

Because of secretive nature of conspiracies, formal agreement need not be proven; jury may infer agreement based solely on circumstantial evidence regarding relationship of parties and their overt acts.

13. Conspiracy ⇐24(3)

Parties may join or withdraw from conspiracy at any time without altering fundamental nature of conspiracy.

14. Conspiracy ⇐40

"Employee" of conspiracy is participant in conspiracy, since employee has agreed to perform certain duties in furtherance of conspiracy and because employee materially benefits from success of conspiracy.

15. Conspiracy ⇐47(12)

Evidence in prosecution for conspiracy to manufacture and possess with intent to distribute marijuana was sufficient to support finding that defendant whose agreed duties were limited to tending marijuana plants and participating in harvest was participant in overall conspiracy. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(a)(1), 21 U.S.C.A. § 841(a)(1).

16. Conspiracy ⇐47(12)

Evidence in prosecution for conspiracy to manufacture and possess with intent to distribute marijuana was sufficient to support conclusion that attorney, who was involved in planting, harvesting, drying, packing, inspecting, and transplanting marijuana, joined the conspiracy alleged. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(a)(1), 21 U.S.C.A. § 841(a)(1).

17. Conspiracy ⇐47(12)

Evidence in prosecution for conspiracy to manufacture and possess with intent to distribute marijuana was sufficient to support finding that owner of farm where marijuana was grown joined in the conspiracy alleged; although there was no evidence that defendant participated in harvesting, manicuring, or distributing marijuana, there was evidence that he harvested corn on his farm at night when others were harvesting marijuana, and that he had conversations with other defendants indicating his awareness of the marijuana-growing; jury was entitled to infer that defendant was compensated for allowing portion of land to be used for growing marijuana. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(a)(1), 21 U.S.C.A. § 841(a)(1).

18. Criminal Law ⇐417(15)

There is no need to redact inculpatory portion of hearsay admitted under exception for admissions against penal interest as long as that portion is closely related to incriminatory portion of statement, and other requirements of rule are met. Fed. Rules Evid.Rule 804(b)(3), 28 U.S.C.A.

19. Criminal Law ⇐422(5), 662.10

Testimony by government informant about codefendant's statements that inculpated defendant was properly admitted under exception to hearsay rule for admissions against penal interest, and admission of testimony did not violate confrontation clause, in prosecution arising from alleged conspiracy to grow marijuana; statements, which were not made in attempt to curry favor with law enforcement officers but were made to acquaintance, were sufficiently reliable. Fed.Rules Evid.Rule 804(b)(3), 28 U.S.C.A.; U.S.C.A. Const. Amend. 6.

20. Criminal Law ⇐662.60

Reading of codefendant's grand jury testimony to jury did not violate defendant's confrontation clause rights under *Bruton*, in prosecution for conspiracy to manufacture and possess with intent to distribute marijuana; codefendant's grand jury testimony did not directly implicate any other defendant. U.S.C.A. Const. Amend. 6.

21. Criminal Law ⇐662.10

Admission of codefendant's statement to coconspirator that government had made mistake in indicting one person who had not even lived in Indiana did not, under *Bruton*, violate confrontation rights of defendant, whom jury allegedly knew was from Indiana, in prosecution arising from alleged conspiracy to grow marijuana; statement did not directly incriminate defendant, but at best, exculpated one defendant who was not from Indiana.

22. Criminal Law ⇐422(1)

Hearsay statement related to concealment activity begun while conspiracy was still ongoing was admissible under rule defining as nonhearsay those statements made by coconspirators within scope of conspiracy, in prosecution arising from alleged conspiracy to grow marijuana. Fed. Rules Evid.Rule 801(d)(2)(E), 28 U.S.C.A.

23. Criminal Law ⇐1166.22(4)

Any erroneous comments to jury by trial judge regarding evidence of marijuana-cultivating endeavors did not warrant reversal of convictions in prosecution arising out of alleged conspiracy to grow marijuana, even though comments were somewhat confusing and failed to distinguish clearly between two different hearsay exceptions.

24. Conspiracy ⇐24.15, 27

In conspiracy prosecution, government is not required to prove any overt acts with regard to particular defendant within limitations period; instead, government is required to prove that conspiracy existed into limitations period and that defendants did not withdraw before that period.

25. Constitutional Law ⇐268(10)
Witnesses ⇐88

District court was not required under due process clause to inquire specifically whether defendant was knowingly and intelligently waiving right to testify at trial. U.S.C.A. Const.Amends. 5, 14.

26. Criminal Law ⇐1177

It is only when it can be said with certainty that acceptance of responsibility has been shown that reversal of district court's denial of reduction under Sentencing Guidelines for acceptance of responsibility is warranted. U.S.S.G. § 3E1.1, 18 U.S.C.A.App.

27. Criminal Law ⇐1252

Denial of reduction under guidelines for acceptance of responsibility was proper in prosecution for making false declarations before federal grand jury; sentencing judge made specific findings that defendant did not voluntarily withdraw from criminal activities in timely fashion, did not provide voluntary assistance to officials, and stated that he felt "pressured." U.S.S.G. § 3E1.1, 18 U.S.C.A.App.

28. Perjury ⇐41

Defendant convicted for making false declarations before federal grand jury in connection with investigation into alleged marijuana-growing conspiracy was not illegally sentenced under guidelines as accessory after fact, even though defendant was principal in conspiracy; defendant was trying to protect others and not himself, as he was immunized for his testimony. U.S.S.G. §§ 2J1.3(c)(1), 2X3.1, 18 U.S.C.A.App.

29. Criminal Law ⇐1210(4)

Consecutive sentences for conviction on count of conspiracy to manufacture and possess with intent to distribute in excess of 50 kilograms of marijuana and count alleging manufacturing in excess of 50 kilograms of marijuana were permissible.

30. Criminal Law ⇐986(3)

District court did not err in sentencing defendant simply because it did not mention every mitigating factor listed in presentence report, especially when they were not mentioned by defendant or counsel at sentencing.

Melanie Conour (argued), C. Joseph Russell, Asst. U.S. Attys., Office of U.S. Atty., Indianapolis, Ind., for U.S.

Roger S. Curry, pro se.

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Spiros P. Cocoves (argued), Toledo, Ohio, for Robert C. Holland.

Glenn A. Grampp (argued), Evansville, Ind., for Don J. Leinenbach.

Michael J. McDaniel (argued), New Albany, Ind., for Samuel T. Harding.

Robert Canada, Evansville, Ind., Daniel C. Hale, Miller, Hale & Harrison, Boulder, Colo., James W. Lawson (argued), Oteri, Weinberg & Lawson, Boston, Mass., for Timothy S. Curry.

Before CUMMINGS and FLAUM, Circuit Judges, and WOOD, Jr., Senior Circuit Judge.

CUMMINGS, Circuit Judge.

A jury found defendants Timothy Curry ("Tim"), Roger Curry ("Roger"), Don Jeffrey Leinenbach, and Samuel T. Harding guilty of conspiracy to manufacture and possess with intent to distribute in excess of fifty kilograms of marijuana in violation of 21 U.S.C. § 846. Tim, Roger, and Harding were also found guilty of manufacturing in excess of fifty kilograms of marijuana, in violation of 21 U.S.C. § 841(a)(1). The jury found defendant Robert Holland guilty of making false declarations before a federal grand jury in violation of 18 U.S.C. § 1623. The defendants raise a number of issues regarding the propriety of their convictions and sentences. We affirm.

I.

Co-conspirators Mary Lynch and Brenton Long provided the details surrounding the defendants' conspiracy to manufacture and possess with intent to distribute marijuana. Long testified at trial for the government under a grant of immunity. Defendant Lynch pleaded guilty pursuant to a plea agreement limiting her prison term to no more than three years, and was obligated to testify under the agreement.

In late 1982, Lynch and Long helped Tim and his wife, defendant Joyce Curry (who has not appealed from her conviction), and others hang marijuana to dry in the basement of Tim's Niwot, Colorado, residence. After the marijuana was dry, Lynch "manicured" (prepared) some of it for sale, earning $10.00 per hour from Tim. Tim told her that the marijuana came from Indiana.

In the spring of 1983, Tim hired Lynch and Long to help clone marijuana plants in his residence. After Tim taught them how to clone the plants, they (primarily Long) produced approximately 2,500 new marijuana plants from thirty to fifty mother plants. Long agreed to work for Tim in transporting, planting, and harvesting the marijuana. Tim, Long, defendant Holland, and another individual brought the new marijuana plants first to Nebraska, where they planted 500 of the plants, and then to Jasper, Indiana. In Jasper, Long met Tim's brother, Roger, and Long, Tim, Roger, and Holland subsequently planted the remaining 2,000 plants on defendant Leinenbach's farm in Otwell, Indiana. Long met and had conversations with Leinenbach in the spring of 1983, but Leinenbach did not participate directly in any of the planting activity. The spring planting was completed by June 21, 1983.

A person named "Rich Kelly" was mentioned on numerous occasions during trial. Testimony at trial indicated that Kelly is a fictional character created by the defendants to take blame for their marijuana growing, although at least some of the defendants apparently still contend that he is an actual person. A "Rich Kelly" purchased a farm in Velpen, Indiana, from the Jasper State Bank in September 1983. According to the Bank's president Joseph Miller, Roger vouched for Kelly, stating that he had known Kelly since boyhood. Miller testified that the real estate transaction with Kelly was "highly unusual" because no financial statement, credit report, or employment verification of Kelly was ever done. A checking account was opened in Kelly's name which listed Roger as the person who would know Kelly's location. In addition, Lynch testified that she, Tim, Roger, and Holland discussed the use of a fictitious person named Kelly during the summer of 1985. Lynch also testified that the continued use of a "Richard Kelly" as a scapegoat was discussed by Holland, Joyce, and herself in 1987, and by Tim and herself

in 1989. In the spring of 1983, Tim had asked Long to play the role of Rich Kelly, in whose name certain property in Indiana was to be purchased, but Long refused.

During the fall of 1983, Long, Roger, Tim, and Holland harvested marijuana at Leinenbach's farm. To avoid detection, the marijuana was harvested at night while Leinenbach harvested the surrounding corn crop. The harvested marijuana was transported to the Velpen farm where it was hung to dry. When the marijuana was dry, Tim, Roger, Long, and Joyce packed it into over 100 boxes. At Tim's request, Long drove 56 of the boxes to Colorado. The boxes were eventually stored at Tim's home. The marijuana was transferred over a period of time to Lynch's home in Boulder, Colorado, where Lynch and others manicured it for sale in late 1983 and early 1984. Approximately 1,000 pounds of finished marijuana were produced for sale. Tim told Long that he (Tim) had made over one million dollars between the 1983 marijuana project and a "spec house" that he had built.

In May 1984, an electric company employee discovered hundreds of small marijuana plants growing in containers near the Velpen farmhouse. In June 1984, Roger asked Dennis Mehringer to estimate the cost of plumbing repairs at the Velpen farmhouse. Merhinger was introduced to a Richard Kelly at the farmhouse. Around September 1984, defendant Steven Bush (who was found not guilty at trial) showed Jeff Griffith where marijuana was growing at Leinenbach's farm. Griffith returned to Leinenbach's farm and stole marijuana at least three times in 1984. Bush told Griffith that the people who were growing the marijuana included Roger and Holland. In the fall of 1984, Tim again asked Lynch to manicure some of the marijuana from Indiana. She and others processed approximately 250 to 300 pounds of saleable marijuana in Colorado. Tim indicated that this was only part of the harvest.

In the spring of 1985, "Richard Kelly" purchased a farm in rural Martin County, Indiana, from Mark and Cindy Hewitt. The closing was attended by "Kelly," Tommy and Thelma Crane, Mark and Cindy Hewitt, and two realtors. Mark Hewitt identified Tim as the person who introduced himself as Kelly at the closing. One of the realtors and Thelma Crane reaffirmed their previous selections of Tim's photograph as Kelly, although neither could make a certain in-court identification. Thelma Crane noted that Kelly's hair was shorter and he did not have glasses. Lynch had earlier testified that Tim's hair was darker than usual and that he had not worn glasses previously. One of the previous residents at the Martin County farm testified that she saw Tim and Roger walking around the farm twice before the sale of the farm, and that Tim's hair had been lighter and he was not wearing glasses. Another previous resident also identified Tim as one of the two persons at the farm. This resident saw Roger at the farm after it was sold, and talked to Tim and defendant Samuel Harding. A neighbor also saw Harding at the Martin County farm.

In the summer of 1985, Tim offered Lynch $15,000 to come to the Martin County farm and "weed" marijuana because Harding had hurt his back. Lynch agreed and came to Jasper, where she met Holland and went to Roger's law office to get keys to the Martin County farm. She saw the marijuana growing room at the Velpen farmhouse while she was in Indiana, and helped Roger clean the house. During her visit, Holland helped Lynch weed around the marijuana plants, Tim gave her money for expenses, and Roger visited her.

Harding's former wife, Joan Hylinski, testified that Harding went to Jasper, Indiana, in May 1985, telling her that he was going to help some friends on a farm. In July of that year, Hylinski traveled to Jasper and stayed with Harding for approximately 10 days at the Martin County farm, helping Harding pull weeds from the marijuana fields there. Hylinski also went to Leinenbach's farm with Harding and Roger where they inspected the marijuana plants. Hylinski, Harding, and Roger transplanted marijuana plants in the growing room of the Velpen farmhouse.

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In September 1985, Lynch, Tim, Roger, Harding, Holland, and one other person harvested the marijuana at the Martin County farm. Lynch acted as a lookout for the operation. She also assisted Tim, Harding, and others with the preparation of the barn for harvest, including putting plastic on the floors, stringing twine between the walls, cutting a ventilation hole in the side of the barn, and getting a large propane heater to dry the marijuana. When the marijuana from the Martin County farm was hung to dry, Tim, Roger, Harding, and Holland went to harvest Leinenbach's farm. They returned, however, and said the marijuana had been stolen.

To avoid discovery by police, the harvesters dismantled the growing room at the Velpen farm. The valuable items were returned to Colorado, as were some marijuana plants and some dried marijuana from the Martin County farm. During the clean-up of the Velpen farmhouse, Lynch used the central vacuum system at the house, but the bag was never emptied. Lynch returned to Colorado, where she and others manicured marijuana for approximately one month, producing about 250 pounds of saleable marijuana. Lynch sold some of this marijuana and observed Tim sell a "large portion" of it in late 1985. Tim paid Lynch $10,000 in cash and marijuana for her part in the undertaking.

In October 1985, Jeff Griffith told police about the marijuana operation and took police officers to Leinenbach's farm and the Velpen farm. Police officers found approximately 2,500 to 3,000 cut marijuana stalks among the corn plants and approximately 97 marijuana plants at Leinenbach's farm. At the Velpen farm, officers found personal documents related to Roger and Holland, high-intensity light fixtures, horticultural literature, handwritten notes regarding plant care, watering pipes, shears, and marijuana, including some found in the bag from the house's central vacuum system.

Also in October, Tim told Lynch that he was going to clean out the Martin County farm. Apparently before he was able to do so, police officers located the farm from documents found at the Velpen farmhouse and found approximately 5,000 cut marijuana stalks amid corn plants, noticed twine strung in the barn, and found personal documents relating to Lynch and Hylinski.

In 1987, at Tim's request, Lynch cloned approximately 250 marijuana plants for Tim and another 500 or so marijuana plants for Roger. In October 1988, Tim delivered approximately 900 pounds of marijuana to Lynch for manicuring.

On September 8, 1989, Holland appeared before a federal grand jury for the Southern District of Indiana pursuant to a grant of formal immunity. Roger, Tim, and Long were targets of the grand jury's investigation. Holland testified under oath that he had no knowledge that Roger, Tim, or Long were involved in the marijuana operation. After the indictment in this case was returned in September of 1990, Holland met with Lynch and attempted to give her a copy of the indictment with notes written on it, requesting Lynch to conform any statements she made to authorities to the notes.

An indictment was returned on September 13, 1990, charging Tim, Roger, Joyce, Don Jeffrey Leinenbach, Lynch, Charles E. Leinenbach, Harding, and Bush in Count I with conspiracy to manufacture and possess with intent to distribute in excess of fifty kilograms of marijuana, from about March or April 1983 through at least October 31, 1985. Count II alleged that Don Jeffrey Leinenbach's farm was forfeitable to the United States. Count III charged Tim, Roger and Harding with manufacturing in excess of fifty kilograms of marijuana in or about October 1985. Counts IV through VI charged Holland with making false declarations before the federal grand jury. Counts VII and VIII charged Roger with filing false federal income tax returns. A second superseding indictment was returned on February 19, 1991.

Lynch entered a plea of guilty pursuant to a plea agreement, and the remaining defendants pleaded not guilty. The district court severed Counts VII and VIII relating to Roger's alleged filing of false income tax returns. Trial began on February 25,

1991. At the end of the government's case, the court granted Charles E. Leinenbach's motion for judgment of acquittal. On April 6, 1991, the jury found all defendants guilty of all counts except Bush, who was found not guilty. Jeff Leinenbach's property was found to be forfeitable. Tim and Roger were each sentenced to 20 years with three years parole; Harding was sentenced to serve 12 years with three years parole; Jeff Leinenbach was sentenced to serve 18 months; and Holland was sentenced to serve 78 months.

II.

The defendants raise a number of issues, and all adopt issues raised by their co-defendants as applicable. Unless otherwise mentioned, the issues discussed below apply to all defendants.

A. *Joinder of Holland's Perjury Counts*

Defendants argue that Counts IV through VI of the superseding indictment, relating to Holland's perjury before the grand jury in 1989, were improperly joined with Counts I through III, which dealt with a marijuana conspiracy from 1983 to 1985. Rule 8(b) of the Federal Rules of Criminal Procedure provides that:

> Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. * * * [A]ll of the defendants need not be charged in each count.

"Rule 8 is construed broadly to allow liberal joinder and thereby enhance the efficiency of the judicial system." *United States v. Isaacs*, 493 F.2d 1124, 1158 (7th Cir.1974), certiorari denied, 417 U.S. 976, 94 S.Ct. 3184, 41 L.Ed.2d 1146. Joint trials are beneficial because they increase court efficiency, limit inconvenience to witnesses, and avoid delays in bringing defendants to trial. *United States v. Sophie*, 900 F.2d 1064, 1083 (7th Cir.1990), certiorari denied, — U.S. —, 111 S.Ct. 124, 112 L.Ed.2d 92. Joint trials may also be beneficial in presenting the "total story" to one jury, as opposed to bits and pieces of a story being presented to several juries. *Id.*

[1] Nevertheless, in order to avoid undue prejudice, under Rule 8(b) multiple defendants may be tried together only if their charged conduct arose from the "same act or transaction" or the "same series of acts or transactions." Acts or transactions are considered part of the "same series" if they are performed pursuant to a common scheme or plan. *United States v. Velasquez*, 772 F.2d 1348, 1353 (7th Cir.1985), certiorari denied, 475 U.S. 1021, 106 S.Ct. 1211, 89 L.Ed.2d 323. We decide this question based on the allegations in the indictment, not on the evidence adduced at trial. *Id.* at 1354 ("Rule 8 on its face is about pleading rather than proof, and there are practical reasons for maintaining the distinction").

[2, 3] The joinder of Holland's perjury counts with the other defendants' conspiracy counts was proper under Rule 8(b). Holland is prominently mentioned in the "overt acts" section of the superseding indictment as an unindicted coconspirator in the marijuana growing enterprise. Most pertinently, it is alleged that Holland and several of the defendants discussed the creation of a fictional character to be known as "Richard Kelly." Holland's perjury counts quote the statements that he made before the grand jury which indicate that Rich Kelly was the leader of the conspiracy. Although the indictment could have been clearer in spelling out the link, we think that the perjury counts sufficiently communicate that Holland's statements before the grand jury were made pursuant to a preconceived plan to cover up the identity of the conspirators. A conspiracy and its cover-up are considered parts of a common plan. *Velasquez*, 772 F.2d at 1354. Finally, the main allegation of perjury against Holland relates to his statements that Long, Tim, and Roger were not involved in the marijuana conspiracy. Therefore joinder is proper here because proof that these statements were false required proof of Long's, Tim's, and Roger's involvement in

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the marijuana conspiracy, so that there is considerable overlap of evidence.[1]

The defendants argue that the conspiracy counts and the perjury counts were not part of a common plan because the perjury occurred almost four years after the end of the conspiracy alleged in Counts I and III. Counts may be joined under Rule 8(b) even if they could not have been charged as one conspiracy. *Sophie*, 900 F.2d at 1084. Indeed, several courts have specifically held that perjury counts may be considered part of the same series of acts or transactions as the underlying conduct which was misrepresented. *Isaacs*, 493 F.2d at 1159; *United States v. Swift*, 809 F.2d 320, 322 (6th Cir.1987); *United States v. Moeckly*, 769 F.2d 453, 465 (8th Cir.1985), certiorari denied, 475 U.S. 1015, 106 S.Ct. 1196, 89 L.Ed.2d 311; *United States v. Dekle*, 768 F.2d 1257, 1261–1262 (11th Cir.1985).[2] The number of years between the end of the alleged conspiracy and the subsequent alleged perjury is in our view irrelevant.

[4] Defendants' argument that the district court should have exercised its discretion to sever the counts relating to Holland pursuant to Rule 14 is also without merit.[3] "[S]evere prejudice is required for an order of severance and the trial judge's refusal to sever is rarely reversed." *Velasquez*, 772 F.2d at 1352. Holland is the only defendant who specifically argues that he was unduly prejudiced by joinder here for the purposes of Rule 14. We conclude that no defendant was unduly prejudiced, however. Holland only argues that the jury would have been confused and prejudiced by the numerous allegations in the indictment and the testimony regarding Holland's role in the conspiracy. But if his trial were severed, this testimony would have been relevant and admissible to show that he committed perjury. Furthermore, although evidence relating to Holland's perjury may not have been admissible in a separate conspiracy trial, there was no severe prejudice because Holland's grand jury testimony did not directly implicate any of the other defendants. Therefore the district court correctly denied defendants' motion to sever Holland's perjury counts.

B. *Exclusion of Expert Testimony Regarding Eyewitness Identification*

[5] The first in a number of evidentiary objections made by defendants relates to the decision by the district court to exclude the expert testimony of Dr. Elizabeth Loftus, a recognized authority on the issue of eyewitness identifications. Expert testimony is generally admissible under Federal Rule of Evidence 702 if it "will assist the trier of fact to understand the evidence or to determine a fact in issue * * *." However, "a district judge has broad discretion to exclude relevant evidence that is confusing or redundant" under Federal Rule of Evidence 403. *Krist v. Eli Lilly and Co.*, 897 F.2d 293, 298 (7th Cir.1990). For the reasons given below, we conclude that the district judge did not abuse his discretion here.

Dr. Loftus' testimony was offered to rebut the testimony of several witnesses who identified Tim, Roger, or Harding around the time of the purchase of the Martin County farm. In particular, Thelma Crane testified that she met a person introducing himself as Rich Kelly at the Martin County closing. She identified a photograph of Tim Curry as Rich Kelly about three years later. At trial, about six years after the closing, she was unable certainly to identify Tim as Kelly. Mark Hewitt was also present at the closing and identified Tim as Kelly at trial. Cynthia Hawkins testified that around the time of the closing, she saw on two different occasions two men examine the Martin County farm where she lived. At trial she identified Tim and Roger as these two men. Cynthia's husband Robert Hawkins testified that he talked to two men at the Martin County property in the spring of 1985. At trial he identified Tim and Harding as the men he had seen. Hewitt, Cynthia Hawkins, and Robert Hawkins all viewed photograph arrays and had identified photographs on one or more occasions before trial.

Dr. Loftus would have testified on a number of issues relating to the accuracy of these identifications. Among the propositions discussed in her offer of proof that are arguably beyond the understanding of an average person are: 1) witnesses invariably overestimate the duration of their observation of an individual; 2) a witness' confidence in his identification bears little or no relationship to the accuracy of the identification; 3) memory fades at a geometric rather than an arithmetic rate; 4) "post-event phenomena" may distort or supplant original memory, and memory is easily distorted by leading questions or other manipulations; 5) prior photographic identifications increase the likelihood that later in-person identifications will be erroneous; and 6) social alcohol and marijuana use hinders the ability of an individual to retain information.

The district court entered a written order denying the admissibility of Dr. Loftus' testimony, concluding that:

> [S]uch testimony may be properly excluded where the testimony addresses an issue of which the jury is generally aware. In the present controversy the jury was questioned during *voir dire* about recall and the ability to identify persons they had seen only briefly, or had not seen for a period of time. Additionally, all of the witnesses who identified defendants were thoroughly cross examined about the reliability of their identification, the length of time they saw the defendant, the conditions under which they saw the defendant, the length of time which elapsed between the witness seeing the defendant and the photos or the defendant in person, the number of times the witness saw the photo arrays, and when the witness was shown the photo array. Thus, the jury was made aware of many of the factors which may effect [sic] perception, retention and recall. * * * Thus, although the jury may not understand the intricacies of perception, recall and retention, the jury is generally aware of the problems with identification.

Government's Br.App. at 7. The district court's focus on what the jury is "generally aware" of could be a finding that Dr. Loftus' testimony would not assist the trier of fact under Rule 702, or it could be considered a finding that her testimony would be unduly confusing or a waste of time under Rule 403.[4] As has been noted, "The Rule 702 analysis * * * incorporates to some extent a consideration of the dangers, particularly the danger of unfair prejudice, enumerated in Fed.R.Evid. 403." *United States v. Downing*, 753 F.2d 1224, 1242 (3rd Cir.1985). The "helpfulness factor" under Rule 702 involves consideration whether the expert testimony would be misleading or confusing in the context of the trial. See *id.* at 1237.

[6] Dr. Loftus' testimony may not have been totally unhelpful; as the court noted, most persons do not understand the intricacies of perception, retention, and recall. The district court also apparently had no quarrel with her competency to testify or with the reliability of her scientific testimo-

1. The defendants argue that the district court erred by finding only a "logical relationship" between the conspiracy counts and the perjury counts. It is true that a mere "logical relationship" between counts cannot support the joinder of multiple defendants in a single trial. The district court here, however, specifically noted that "Holland is alleged to have been involved in the conspiracy * * *. It is about this very conspiracy which defendant Holland is alleged to have provided false testimony during the grand jury proceeding." Timothy Curry's Br.App. at 22.

2. The defendants rely on *United States v. Grey Bear*, 863 F.2d 572 (8th Cir.1988), where an equally divided *en banc* court affirmed the district court's decision to allow joinder. We believe that the facts in that case (which is without precedential value) are distinguishable in that the government did not allege any conspiracy.

3. Rule 14 of the Federal Rules of Criminal Procedure provides in pertinent part that:

> If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

4. In an oral decision to deny reconsideration of his earlier written order, the district judge explicitly stated that the basis of his ruling was *both* Rule 702 and Rule 403. Tr. at 2503.

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ny.[5] We conclude, however, that the district court's decision to exclude Dr. Loftus' testimony was a proper exercise of its discretion, whether under Rule 702 or Rule 403. The eyewitness testimony was far from the only evidence against the defendants. Indeed, as noted above, the bulk of testimony came from two government witnesses and co-conspirators, Brenton Long and Mary Lynch. The testimony of Joan Hylinski was also important. Although the eyewitness testimony bolstered the government's theory that there was no real Rich Kelly, it can fairly be described as minor and amounted to only one day in a four-week trial. The intrusion of an expert to comment on this minor testimony was not necessary, especially when the record reveals that vigorous cross-examination by the defendants exposed the weakness of the identifications.

In addition, the defendants gave the government only four days' notice of their intent to call Dr. Loftus. The Third Circuit held that it was not an abuse of discretion to exclude expert testimony when only five days' notice of a proposed proffer was given. *United States v. Dowling*, 855 F.2d 114, 118 (3d Cir.1988), affirmed, 493 U.S. 342, 110 S.Ct. 668, 107 L.Ed.2d 708.

Defendants' reliance on our decision in *Krist* is misplaced. In *Krist*, we specifically noted that "in routine cases the trial judge is not required to allow wide-ranging inquiry into the mysteries of human perception and recollection." 897 F.2d at 298. *Krist* was not a routine case because it involved an individual's recollection of the color of pills she took forty years ago. Our case, on the other hand, *is* routine—the identifications were not of pills and took place no more than six years after the events in question. Although it is likely that it was within the discretion of the trial court to allow the eyewitness expert testimony here, we decline to hold that the court was required to do so.

C. *Sufficiency of the Evidence/Multiple Conspiracy Challenges*

[7–13] The defendants challenge the sufficiency of the evidence to support the finding that each participated in a single, ongoing conspiracy to manufacture and possess with an intent to distribute marijuana. Their challenge is sometimes styled as an allegation that the evidence at trial showed only multiple conspiracies, not a single conspiracy, and that there was therefore a fatal variance between the indictment and proof. In addition, they assert as unlawful the district court's decision not to give a multiple conspiracy instruction.

We initially reject the defendants' argument that the district court was required to give a multiple conspiracy instruction. The defendants cite *United States v. Kendall*, 665 F.2d 126, 136 (7th Cir.1981), certiorari denied, 455 U.S. 1021, 102 S.Ct. 1719, 72 L.Ed.2d 140, where we stated that "if the possibility of multiple conspiracies exists, the trial judge must so instruct the jury." We have carefully limited this statement in more recent cases. In *United States v. Townsend*, 924 F.2d 1385, 1410 (1991), we noted that "[t]he failure to give a proposed multiple conspiracy instruction cannot, then, be error unless the defendants demonstrate that they have been prejudiced by the variance itself." Similarly, in *United States v. Grier*, 866 F.2d 908, 934 (1989), we stated that "[w]hile the district court could properly have instructed the jury on the possibility of multiple conspiracies, it was not required to do so." These cases teach that the lack of a multiple conspiracy instruction is simply one of several factors to be considered when deciding if a defendant has been prejudiced by a variance. Thus the district court did not err by failing to give a multiple conspiracy instruction.

5. Although we make no specific assertion as to its reliability or general acceptance, a number of cases indicate that Dr. Loftus' field of study is now well accepted. See *Krist*, 897 F.2d at 296–297 (specifically citing work by Loftus); *United States v. Moore*, 786 F.2d 1308, 1312 (5th Cir. 1986) ("The scientific validity of the studies confirming the many weaknesses of eyewitness identification cannot be seriously questioned at this point."); *United States v. Smith*, 736 F.2d 1103, 1107 (6th Cir.1984) (suggesting that eyewitness expert testimony is generally accepted), certiorari denied, 469 U.S. 868, 105 S.Ct. 213, 83 L.Ed.2d 143.

Before examining the sufficiency of the evidence with regard to particular defendants, we briefly delineate some basic principles of conspiracy law. "A conspiracy consists of a combination or confederation between two or more persons formed for the purpose of committing, by their joint efforts, a criminal act." *United States v. Mealy*, 851 F.2d 890, 895 (7th Cir.1988) (citations omitted). The essence of a conspiracy is an agreement; to join a conspiracy is to join an agreement, not a group. *Townsend*, 924 F.2d at 1390.

"It is the nature and scope of the agreement that is the determinative factor in distinguishing between single and multiple conspiracies." *United States v. Sababu*, 891 F.2d 1308, 1322 (7th Cir.1989). Multiple conspiracies exist when there is no agreement toward a common goal, and each conspirator's agreement constitutes an end unto itself. *United States v. Paiz*, 905 F.2d 1014, 1020 (7th Cir.1990), certiorari denied, — U.S. —, 111 S.Ct. 1319, 113 L.Ed.2d 252. However, it is clear that the participants in a conspiracy need not know all the other members or participate in every aspect of the conspiracy. *Id.* at 1323. Indeed, the whole point of a conspiracy, and the reason why it is punished separately as a crime, is to enable several persons to cooperate and split duties in order to facilitate the object of the conspiracy. *Townsend*, 924 F.2d at 1394.

In evaluating a sufficiency of the evidence challenge, we review the evidence in the light most favorable to the government. If any rational jury could have found the defendant guilty beyond a reasonable doubt, the conviction will be affirmed. *United States v. Burrell*, 963 F.2d 976, 987 (7th Cir.1992). We require "substantial evidence that a particular defendant knew of the illegal objective of the conspiracy and agreed to participate in its achievement." *Id.* Because of the secretive nature of conspiracies, a formal agreement need not be proven. A jury may infer an agreement based solely on circumstantial evidence regarding the relationship of the parties and their overt acts. *Mealy*, 851 F.2d at 896.

It should be stressed that the conspiracy alleged in this case is not a complex distribution scheme encompassing wholesalers, middlemen, and retailers, nor is it one where persons who are arguably competitors (such as competing retailers) are alleged to be co-conspirators because of occasional cooperation. Instead, this case involves a conspiracy to manufacture and possess with an intent to distribute marijuana. In other words, the common purpose of the defendants in this case is clear—to grow marijuana and make money selling it. Cf. *Burrell*, 963 F.2d at 989 ("In the instant case, however, it is easier to establish mutual benefit and cooperation because the defendants were acting as a single economic unit—large-scale purchasers of narcotics.").

We reject an argument that the proof at trial showed three separate conspiracies each lasting one year. The defendants point to evidence that certain defendants explicitly agreed to work for one year, and that some defendants were paid for work done in a particular year. Defendants' argument is based on a fundamental misunderstanding of conspiracy law. Parties may join or withdraw from a conspiracy at any time without altering the fundamental nature of the conspiracy. *Sababu*, 891 F.2d at 1322. Furthermore, the fact that certain parties were paid for a year's work is only of marginal relevance. It would be artificial to divide a conspiracy to grow marijuana into several conspiracies simply because marijuana growing is seasonal in nature. Here, a core group of persons grew marijuana in the same general area over a number of years. A farmer does not start anew his or her farming business every year when the new crops are planted—it is the same farming business as the one initially started.

We now turn to an examination of the evidence, viewed in the light most favorable to the government, relating to each defendant (except Holland, who was not convicted on a conspiracy count) in order to

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determine if it supports a joining of the conspiracy alleged here.

1. Timothy S. Curry

Tim makes no specific argument that the evidence is insufficient to support a finding that he joined the conspiracy. Indeed, the evidence strongly suggests that he was the leader of the conspiracy, and the other defendants point to him in this regard. There is no need to recount the numerous facts that support the jury's verdict as to Tim.

2. Samuel T. Harding

[14, 15] Harding states that he "was engaged as an employee of the conspiracy and his agreed duties were limited to tending the marijuana plants and participating in the harvest." Harding Br. at 8. We agree that the record supports this characterization, except for the suggestion that these duties were in any sense limited. Harding is apparently arguing that only "managers," and not "employees," are considered members of a conspiracy. An "employee" of a conspiracy, however, is in fact a participant in the conspiracy, since the employee has agreed to perform certain duties in furtherance of the conspiracy and because the employee materially benefits from the success of the conspiracy.[6]

Harding stresses his role as a "manufacturing employee" because he thinks the evidence cannot support the finding that he agreed to join any conspiracy to *distribute* marijuana. Count I of the indictment charged a conspiracy "to manufacture, and possess with intent to distribute marijuana, a Schedule I Non–Narcotic Controlled Substance, in a quantity of greater than fifty (50) kilograms." It would seem that manufacturing with the intent to distribute marijuana implies possession with an intent to distribute, since the cultivation of marijuana necessarily encompasses its possession.[7] In any event, Harding was involved not only with the harvesting of the marijuana but also with the drying and cultivating of the marijuana. The record, when read in a light favorable to the government, supports the conclusion that Harding joined the conspiracy and agreed to its underlying goals, which obviously included the distribution of marijuana at a profit.

Harding wisely does not argue that he should not be considered part of the alleged conspiracy because he did not join it until 1985. As has been noted, a party may join a conspiracy at any time during its life span.

3. Roger S. Curry

[16] Roger, an attorney, suggests that he did no more than act as legal counsel to some of the defendants. Roger's hands are literally much dirtier than that. In 1983, he and others planted around 2,000 plants at Leinenbach's farm. He was also involved in harvesting, drying, and packing the marijuana at Leinenbach's farm. In 1985, the evidence indicates that Roger inspected the marijuana plants at Leinenbach's farm, transplanted marijuana plants at the Velpen farmhouse, and harvested the marijuana at the Martin County farm and was prepared to harvest the marijuana at Leinenbach's farm.

This evidence, standing alone, would support the jury's conclusion that he joined the conspiracy alleged. Roger's argument that he only agreed to two smaller, stand-alone conspiracies in 1983 and 1985 has already been rejected. Even if Roger withdrew from the conspiracy in 1984 and rejoined the next year, his conspiracy conviction is sustainable. Although not necessary, the record supports the conclusion that Roger did not withdraw from the conspiracy in 1984. In that year, Roger asked a plumbing contractor to go to the Velpen farm house for a repair estimate. There is also hearsay testimony (the admissibility of which is discussed below) that Roger was involved with the 1984 operation at Leinenbach's farm. In sum, the conspiracy conviction against Roger is supported by substantial evidence.

4. Don Jeffrey Leinenbach

[17] The government's case against Leinenbach is arguably the weakest. Leinenbach owned the farm where marijuana was grown in 1983, 1984, and 1985. It is also apparent that he knew of and supported the growing of marijuana on his farm. For example, he harvested the corn on his farm at night at the same time others were harvesting marijuana. He also had a number of conversations with the other defendants in this case that indicated his awareness of the marijuana-growing, including conversations where the best method of harvesting the marijuana was discussed. There is no evidence, however, that he participated in the harvesting, manicuring, or distribution of the marijuana.

We conclude that there is substantial evidence that Leinenbach joined the conspiracy as alleged. The jury was entitled to infer that Leinenbach was compensated for giving up a portion of his land, which could have been used to grow corn, to allow the other defendants to grow marijuana. This is especially true since Leinenbach allowed the marijuana-growing to occur for at least three years. The opposite inference would call for an unusual amount of generosity on Leinenbach's part.

D. *Admissibility of Hearsay Evidence/Application of the Bruton Rule*

Roger's brief identifies, in a somewhat confusing manner, testimony that he believes is unlawfully admitted hearsay. The other defendants adopt Roger's arguments, but some of them are applicable only to Roger. The discussion below is aimed at Roger but applies to all defendants as necessary. Roger objects to the following testimony:

1. Jeffrey Griffith's Statements

[18, 19] Government informant Griffith testified that Bush told him in 1984 that he (Bush) was working for people who had marijuana for him to sell and also told him that the main person was Roger Curry. Griffith also testified that in 1985 Bush told him that "those guys" were hiding marijuana from him, and that those guys included Roger Curry. The district court allowed this testimony as admissions against penal interest under Federal Rule of Evidence 804(b)(3).[8] Roger does not argue that Bush's statements do not meet the requirements of this rule; rather, he argues that the statements relating to his involvement in the conspiracy should have been redacted or otherwise not allowed in as evidence. In its order, the district court decided that all of Bush's statements could come in, except that under Rule 403 there could be no reference to Roger as the "ringleader." The court also noted that the jury would be instructed that the testimony was admissible only against Bush.

We recently examined the relationship between the Confrontation Clause of the Sixth Amendment and Rule 804(b)(3) in some detail in *United States v. York*, 933 F.2d 1343 (7th Cir.1991), certiorari denied, — U.S. —, 112 S.Ct. 321, 116 L.Ed.2d 262. York was on trial for mail fraud and arson. Two associates of York's partner (who was killed in the fire) testified at trial that she had told them of a plan concocted by York and herself to blow up the business and collect the insurance pro-

6. Arguably, a more appropriate distinction is not between employee and manager, but between employee and independent contractor (unlike employees, independent contractors are not considered part of the organization for which they work).

7. It appears that the government crafted the indictment in this manner to avoid a possible statute of limitations problem. Federal criminal charges, unless otherwise specifically provided by law, must be brought within five years after the offense was committed. 18 U.S.C. § 3282. The original indictment here was returned on September 13, 1990, very close to five years from the end of the conspiracy alleged in the indictment (October 31, 1985). There is substantial evidence to support a finding that the 1985 harvest was in process after September 13; it is undisputed, however, that this marijuana was manicured for distribution ("possessed") after that date.

8. This rule provides in relevant part that:
A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true.

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ceeds. *Id.* at 1360. This testimony was allowed in without redaction pursuant to Rule 804(b)(3). Faced with a confrontation clause challenge, we initially stated that the confrontation clause question and the Rule 804(b)(3) question were really one question, not two:

> To be admissible under rule 804(b)(3), then, the inculpatory portion of a statement against interest must be sufficiently reliable to satisfy the confrontation clause. There seems little reason to treat the requirement of reliability differently in each context. Such an approach would be needlessly complex, requiring two bodies of case law where one will do.

Id. at 1361. The decision in *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476, was not considered dispositive, since the ruling in that case rested upon the *inadmissibility* of the inculpatory confession against the defendant. *Id.* at 1362. We concluded that there is no need to redact the inculpatory portion of hearsay admitted under Rule 804(b)(3) as long as that portion is closely related to the incriminatory portion of the statement and the other requirements of Rule 804(b)(3) are met. *Id.* at 1364.

The facts in this case are similar to those in *York*, and we likewise affirm the district court's decision to allow all portions of Griffith's statement in as evidence. As in *York*, the statements by Bush to Griffith were not made in an attempt to curry favor with law enforcement officers but were made to an acquaintance. "[T]he advisory committee used that scenario as an example of an inculpatory statement that 'would have no difficulty in qualifying' for admission under 804(b)(3)." *Id.* at 1363. Because they were sufficiently reliable, Bush's inculpatory statements were admissible under Rule 804(b)(3) and did not violate Roger's rights under the Confrontation Clause.[9]

2. Holland's Grand Jury Testimony

[20] Roger also objects to the reading of Holland's grand jury testimony to the jury, claiming again that his rights under *Bruton* are implicated.[10] We disagree.

Holland's grand jury testimony was not facially inculpatory of any defendant. Indeed, the intent behind the government's perjury charge was to show that Holland was *lying* when he denied on numerous occasions Roger's and Tim's involvement in the marijuana manufacturing conspiracy and instead placed the blame on Rich Kelly. Roger points out that Holland admitted before the grand jury that he was friends with Roger and Tim, and that Roger had visited him at the Velpen farm house on up to ten occasions, and that Roger had lent him money. Contrary to Roger's assertions, these statements would not have supported a jury verdict against him. Instead, we agree with the government that "Holland's grand jury testimony did no more than put the government to its proof that Tim, Roger and Long were participants in the conspiracy as charged." Plaintiff's Br. at 26.

Because Holland's grand jury testimony does not directly implicate any other defendant, "the *Bruton* rule does not come into play." *United States v. Briscoe*, 896 F.2d 1476, 1501 (7th Cir.1990), certiorari denied, — U.S. —, 111 S.Ct. 173, 112 L.Ed.2d 137. The fact that Roger asked

9. We decline Roger's invitation to overrule *York*, based on his reading of *Idaho v. Wright*, 497 U.S. 805, 110 S.Ct. 3139, 111 L.Ed.2d 638; *Vincent v. Parke*, 942 F.2d 989 (6th Cir.1991); and *United States v. Gomez-Lemos*, 939 F.2d 326 (6th Cir.1991). Our decision in *York* is not inconsistent with *Wright*, which indeed was discussed in *York*. The Sixth Circuit cases are clearly distinguishable, in that one involved inculpatory statements made to a police officer and the other involved Rule 804(b)(5), not Rule 804(b)(3).

Griffith violated the court's order against referring to Roger as the ringleader when he testified that Bush told him that Roger was the "main person." The district court did not abuse its discretion when it denied Roger's motion for a mistrial and instead cautioned the jury that the statements of Bush may only be held against him and not any of the other defendants.

10. The district court instructed the jury to consider the grand jury testimony only against Holland. At Roger's request, the jury was instructed to consider it with respect to his case also. It was not to be considered against or for any other defendant.

the jury to consider the transcript as to him supports a conclusion that it was not facially incriminatory to him. In addition, any statements that become incriminatory only when linked with other evidence do not fall under the *Bruton* rule. *Id.* at 1503. Thus Leinenbach's claim that Holland's statement regarding an "Otwell" farm incriminated him fails because it depends on evidence that Leinenbach was the owner of the Otwell farm.

3. Holland's Post–Conspiracy Statement

[21] Lynch testified that Holland told her after the first indictment came down that the government had made a mistake in indicting one of the people, who had not even lived in Indiana. Roger's *Bruton* challenge to this testimony, based on the fact that the jury knew he was from Indiana, fails for the same reason as his challenge to Holland's grand jury testimony. Simply put, Holland's statement does not directly incriminate Roger. At best, the statement objected to exculpated one of the defendants who was not from Indiana. But that does not mean that the remaining defendants are thereby incriminated. Since no defendant is specifically mentioned, and it is not obvious that any particular defendant is being singled out as being guilty, Roger's *Bruton* challenge to this statement is without merit.

4. Admission of Other Hearsay Under Rule 801(d)(2)(E)

[22] In scattershot fashion, Roger argues that a number of statements were erroneously admitted under Federal Rule of Evidence 801(d)(2)(E), which defines as non-hearsay statements made by co-conspirators within the scope of the conspiracy. Under Rule 801(d)(2)(E), "a statement by a coconspirator of a party during the course and in furtherance of the conspiracy" is not considered hearsay. To the extent that Roger's argument rests on the proposition that the proof at trial showed multiple conspiracies and not one single conspiracy, it fails for the reasons stated above.

Roger objects to a number of hearsay statements that occurred either before the beginning of the alleged conspiracy or after its end, contending that these statements do not fall within Rule 801(d)(2)(E). It is true that such statements could not be in furtherance of a conspiracy not in existence, and thus were not admissible under Rule 801(d)(2)(E). However, the statements were not admitted on the basis of that rule. Instead, it is clear that the statements were admitted pursuant to Rule 801(d)(2)(A) as admissions of party opponents.[11]

[23] In general, Roger complains that the limiting instructions regarding Rules 801(d)(2)(A) and 404(b) evidence were incomplete. Specifically, Roger complains that no contemporaneous limiting instructions were given regarding evidence of 1982, 1987, and 1988 marijuana-cultivating endeavors. The comments by the district judge at trial regarding this evidence were somewhat confusing, and failed to distinguish clearly between Rule 801(d)(2)(E) statements applicable to all defendants and Rule 801(d)(2)(A) statements applicable only to the person making the statement. For example, the district court stated at one point:

> [If] the witness says that one of the defendants told them something, it only applies to that particular defendant and it doesn't implicate the rest of them. These eight people here are separate * * * and if that defendant makes a statement or allegedly makes a statement and a witness testifies, you can only consider that evidence to that particular defendant and none other, unless it implicates another defendant. You can judge it based upon what they testify to and don't take that and use it to try to implicate the rest of the defendants.

Tr. at 1392. The phrase "unless it implicates another defendant" seems to contradict the rest of the instruction and caused

11. One hearsay statement objected to by Roger related to concealment activity begun while the conspiracy was still on-going and was thus admissible under Rule 801(d)(2)(E). *United States v. Doerr*, 886 F.2d 944, 951 (7th Cir.1989).

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Roger's counsel at trial to object again (the nature of the objection is not on the record, but this is the only part of the instruction not favorable to the defendants). A similar confusing contemporaneous instruction is in the record.

We conclude that any erroneous comments to the jury do not warrant reversal of the convictions. Detailed testimony by Lynch and Long spelled out the involvement of the various defendants in the conspiracy, the existence of which is corroborated by substantial physical evidence. In addition, the final instructions given to the jury lessen the impact of any error here. Instruction Number 34 stated that:

> You have heard evidence of acts alleged against several defendants other than those acts alleged in the indictment. You may consider this evidence only on the question of intent, preparation, plan, knowledge, absence of mistake, or accident. This evidence is to be considered by you only for these limited purposes, and only as to the defendants against whom it was offered.

Instruction Number 44 contains similar language. The judge recognized that his extemporaneous comments were not particularly helpful, and specifically told the jury on several occasions that they would be receiving final instructions in which matters would be clarified. Viewing the record as a whole, therefore, we conclude that the district court committed no reversible error.

E. *Leinenbach—Statute of Limitations*

[24] Leinenbach argues that he should have been dismissed from the case because there is no evidence to support a finding that he committed an overt act in furtherance of the conspiracy after September 13, 1985, and therefore the five-year statute of limitations was not satisfied as to him (see *supra* note 7). Leinenbach misstates the law. The government is not required to prove any overt acts with regard to a particular defendant within the limitations period; instead, the government is required to prove that the conspiracy existed into the limitations period and that the defendants did not withdraw before that period. *United States v. Read*, 658 F.2d 1225, 1232–1233 (7th Cir.1981). Leinenbach has not met his initial burden to produce some evidence of withdrawal, *id.* at 1234, and therefore no error has been committed.[12]

F. *Arguments Raised by Holland*

1. Conviction

[25] Holland raises two specific objections to his conviction. He first contends that the district court was required, under the Due Process clause in the Constitution, to inquire specifically whether he was knowingly and intelligently waiving his right to testify at trial. We have rejected this identical claim on numerous occasions. See, *e.g.*, *United States v. Brimberry*, 961 F.2d 1286, 1289–1290 (1992); *United States v. Thompson*, 944 F.2d 1331, 1345 (1991), certiorari denied, — U.S. —, 112 S.Ct. 1177, 117 L.Ed.2d 422. Holland does not give a persuasive reason for overruling these cases. Holland also claims error in that the second superseding indictment, returned less than a week before trial, changed certain dates relevant to him from 1984 to 1983. Holland does not rebut the government's assertion that these were clerical errors of which Holland should have been aware, and does not explain why he was prejudiced by the amendment. Therefore his claim of error is without merit.

2. Sentence

[26, 27] Holland also raises a number of issues regarding his sentence, which was calculated in accordance with the Sentencing Guidelines. He first argues that the district court erred by denying him a two-point reduction for acceptance of responsibility under Guidelines Section 3E1.1. Holland suggests that Judge Brooks did not properly exercise his discretion but rather "reject[ed] his plea out of hand" (Holland's Br. at 10). The record rebuts this contention. Judge Brooks accepted and evaluated both written and oral statements from Holland. The judge made specific findings that Holland did not voluntarily withdraw from his criminal activities in a timely fashion; he did not provide voluntary assistance to officials; and he stated that he felt "pressured." Holland's App. at 57–58. Holland's brief on appeal states that "it cannot be said with certainty that Mr. Holland is entitled to a reduction" (Holland's Br. at 10). Yet it is only when it *can* be said with certainty that acceptance of responsibility has been shown that reversal of a district court's denial is warranted. Judge Brooks' findings are not "without foundation," see *United States v. Delgado*, 936 F.2d 303, 308 (7th Cir.1991), certiorari denied, — U.S. —, 112 S.Ct. 972, 117 L.Ed.2d 137; § 3E1.1, app. note 5, and we therefore affirm the district court's decision to deny Holland credit for acceptance of responsibility.[13]

Holland also argues that his due process rights were violated because the judge made a finding regarding the number of plants involved in the conspiracy under a preponderance of evidence standard, rather than submitting the question to the jury under a reasonable doubt standard. This Court has rejected this claim, however, *United States v. McNeese*, 901 F.2d 585, 605 (1990); *United States v. Reynolds*, 900 F.2d 1000, 1003–1004 (1990), and we decline to revisit the question at this time, especially since Holland did not raise this issue in the district court.[14]

[28] Finally, Holland claims that he was illegally sentenced as an accessory after the fact under Sections 2J1.3(c)(1) and 2X3.1 of the Guidelines, because as a principal in the marijuana-growing conspiracy he could not also be sentenced as an accessory. *United States v. Huppert*, 917 F.2d 507 (11th Cir.1990), is cited as authority for this proposition. Huppert was convicted of two counts of obstructing justice in connection with the investigation of a money-laundering scheme in which he was engaged, and was sentenced pursuant to Section 2J1.2(c)(1), which like Section 2J1.3(c)(1) contains a cross-reference to Section 2X3.1. The court concluded that Huppert could not be sentenced as an accessory after the fact because he was protecting himself, not others, and it was clear that he was a principal in the money-laundering scheme. *Id.* at 510–511. See also *United States v. Pierson*, 946 F.2d 1044 (4th Cir. 1991) (affirming district court's decision not to apply Section 2X3.1 where defendant was convicted of perjury but acquitted of the substantive underlying offense; defendant obviously perjured to protect himself). Holland's case is different than *Huppert* and *Pierson*, because he was clearly trying to protect others, and not himself—he was immunized for his testimony, and thus had no reason to protect himself. We conclude that the analysis in those cases has no relevance here.[15]

G. *Non–Guidelines Sentencing Objections*

The other defendants received non-guideline sentences, since the conspiracy of

12. Similarly, application of 21 U.S.C. § 853, which was enacted on October 12, 1984, to Leinenbach does not create any *ex post facto* concerns because there is no evidence that he withdrew from the conspiracy before that date.

13. Holland's sentence was also enhanced for obstruction of justice under Section 3C1.1, because of his attempt to mold Lynch's testimony to be consistent with his grand jury testimony. Holland argues that "he merely attempted to determine the extent of her knowledge in the conspiracy and what information would be expected to be contained in her testimony." It was appropriate for the judge to reject this spin on the facts.

Application note 4 of Section 3E1.1 states that application of the obstruction of justice section "ordinarily indicates that the defendant has not accepted responsibility for his criminal conduct. There may, however, be extraordinary cases in which adjustments under both §§ 3C1.1 and 3E1.1 apply." There is nothing exceptional from Holland's case supporting the district court's decision to deny him credit for acceptance of responsibility.

14. In the case relied upon by Holland, *United States v. Rigsby*, 943 F.2d 631 (6th Cir.1991), certiorari denied, — U.S. —, 112 S.Ct. 1269, 117 L.Ed.2d 496, the court followed its own precedent and declined to hold that the jury must pass on the question of the number of plants involved in the narcotics conviction, although it expressed dissatisfaction with having to reach that result.

15. Holland does not raise on appeal the issue whether it was proper to sentence him as an accessory after the fact for an offense for which he had received immunity against his will, an issue he argued at sentencing.

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which they were convicted ended in October 1985, before the adoption of the Guidelines. Roger and Harding raise issues regarding their sentences. Because neither claims that the sentences imposed were outside the statutory limit, the sentences will not be vacated "unless the sentencing judge relied upon improper considerations or unreliable information in exercising his discretion or failed to exercise any discretion at all in imposing the sentence." *Briscoe*, 896 F.2d at 1519. We now examine their claims of error.

1. Roger Curry

[29, 30] Roger was sentenced to 10 years under Count I, 10 years under Count III, to be served consecutively, and a special parole term of three years.[16] He argues that the court relied on "inaccurate information and erroneous assumptions" in deciding a proper sentence. We have carefully reviewed the record and conclude that the supposed errors are either taken out of context or were clearly not the basis for the court's ruling. For example, Roger argues that there is no evidence that he had a "special skill" which was used in connection with the purchase of the Velpen property. However, the district court specifically stated that "I don't think it would fit under special skills. I am not going to consider that in the sentencing in this matter." Roger's App. at 25. Other comments by the judge that may have been erroneous were in fact made in a question-and-answer fashion, and were not in the nature of findings.

Roger also contends that the district court "improperly" exercised its discretion for failing to consider mitigating factors, giving him consecutive sentences, blindly accepting government testimony, and handing out grossly disparate sentences for the various defendants. These arguments are without merit. First, Judge Brooks considered as a mitigating factor a number of letters he received from Roger's clients and also noted that he was a skilled and hard-working attorney. Roger notes on appeal that he had no prior record, had the possibility of rehabilitation, showed remorse, and supported a wife and two children. However, there is no indication that the judge did not read the presentence report or consider these factors. We cannot hold that a district court erred simply because it did not mention every mitigating factor listed in the report, especially when they were not mentioned by Roger or his counsel at sentencing. It was also permissible for the district court to hand down consecutive sentences for Counts I and III. *United States v. Cerro*, 775 F.2d 908, 910 (7th Cir.1985). Finally, we find that the judge adequately supported the different sentences the various defendants received; indeed, we find the judge's version of the equities more plausible than Roger's proffered version.[17] In summary, the district court did not abuse its discretion in sentencing Roger.[18]

Finally, Roger argues that the district court failed to comply with Federal Rule of Criminal Procedure 32(c)(3)(D), which states that:

> If the comments of the defendant and the defendant's counsel or testimony or other information introduced by them allege any factual inaccuracy in the presentence investigation report * * *, the court shall, as to each matter controverted, make (i) a finding as to the allegation, or (ii) a determination that no such finding is necessary because the matter controverted will not be taken into account in sentencing.

Roger points to three alleged Rule 32 errors. The first related to an allegation of Roger's special skills, which, as noted above, the district court specifically found would not be considered in sentencing. Apparently Roger's argument is that the allegation of special skills has not been totally expunged from his presentence report, as the district court ordered. Since it has offered to ensure that the corrections have been made, we direct the United States Attorney's Office for the Southern District of Indiana to do so. Roger's second argument relates to a statement in the presentence report that he obstructed justice by filing a lawsuit against a government witness. Again, the district court agreed with the substance of Roger's criticisms, and held that the characterization of Roger's lawsuit as an "obstruction of justice" was not a "fact" but a legal conclusion, and ordered Roger's interpretation of the suit to be included in the presentence report. Finally, with regard to the pounds of marijuana involved, the district court indicated that it would not consider that information in its sentencing decision, in accordance with part (ii) of Rule 32(c)(3)(D).

2. Samuel T. Harding

Harding was sentenced to consecutive 6-year terms under Counts I and III, with a special parole term of three years with regard to Count III. Harding's arguments about the propriety of his sentence are not materially different than Roger's arguments, and fail for the reasons noted above. It should be noted that his attempt to compare his sentence to Lynch's, who entered into a plea agreement, is without merit, because her plea was conditioned on the express promise that her sentence not exceed three years.

III.

For the foregoing reasons, the convictions and sentences of all defendants are affirmed.

16. He was also sentenced to serve three years for his income tax violations, to be served concurrently with his 20-year sentence under Counts I and III, after pleading guilty to severed Counts VII and VIII.

17. To cite one example, Roger states that Harding was equally culpable with himself even though Roger was involved for three years and Harding was involved only in 1985.

18. Roger also argues that Holland's guideline sentence was improper, and that his sentence was improperly compared to Holland's. Holland's sentence was affirmed above, so this argument has no merit. Roger argues that Holland's sentence was invalid because the sentencing court used the number of plants as opposed to the dry weight of the marijuana in arriving at Holland's base offense level. Even assuming Roger has standing to make this argument (which was not advanced by Holland), it fails on the merits. *United States v. Haynes*, 969 F.2d 569 (7th Cir.1992).

UNITED STATES of America, Plaintiff-Appellee,

v.

Henry J. CENTRACCHIO and Thomas E. Guth, Defendants-Appellants.

Nos. 91-1742, 91-1750.

United States Court of Appeals, Seventh Circuit.

Argued June 4, 1992.

Decided Oct. 2, 1992.

Defendants were convicted in the United States District Court for the Northern District of Illinois, Brian Barnett Duff, J., of narcotics offenses, and they appealed. The Court of Appeals, Harlington Wood, Jr., Senior Circuit Judge, held that: (1) evidence at sentencing hearing was sufficient to establish that cocaine transaction involved four to five kilograms of cocaine, and (2) remand was required for determination of whether defendant's conduct continued beyond effective date of Sentencing Guidelines.

Affirmed in part, vacated in part and remanded.

1. Criminal Law ⇐1158(1)

Court of Appeals will uphold sentences imposed under the Sentencing Guidelines, assuming Guidelines apply to conduct in case, if Guidelines are applied to factual conclusions that are not clearly erroneous. U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.App.

2. Criminal Law ⇐1158(1)

District court's determination of quantity of drugs involved in offense for sentencing purposes is factual determination subject to clearly erroneous standard. U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.App.

3. Drugs and Narcotics ⇐133

Evidence at sentencing hearing was sufficient to establish that cocaine transac-

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FLINTKOTE COMPANY,
Plaintiff–Appellant,

v.

UNITED STATES of America,
Defendant–Appellee.

No. 91–16618.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted March 11, 1993.

Decided Oct. 18, 1993.

Taxpayer sued for refund of federal income taxes paid after Internal Revenue Service (IRS) disallowed business expense deduction based upon taxpayer's payment of settlement monies with respect to civil antitrust claims. The United States District Court for the Northern District of California, Fern M. Smith, J., entered judgment in favor of government. Taxpayer appealed. The Court of Appeals, Cynthia Holcomb Hall, Circuit Judge, held that: (1) civil and criminal antitrust actions against taxpayer concerned same antitrust violation so that civil settlement could not be deducted from taxpayer's income as business expense, and (2) conspiracy to which taxpayer admitted by his nolo contendere plea was continuing conspiracy coextensive in time with conspiracy alleged in civil actions, and thus, five-year statutory period for criminal prosecution did not commence until conspiracy's end.

Affirmed.

1. Internal Revenue ⇐3358

Civil and criminal antitrust actions against taxpayer concerned same antitrust violation, and thus, civil settlement amount could not be deducted from taxpayer's income as business expense, where taxpayer pled nolo contendere in criminal case to single, continuing conspiracy which occurred during time period coextensive with conspiracy alleged in civil suits. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2; 26 U.S.C.A. § 162(g).

2. Criminal Law ⇐150

Antitrust conspiracy to which taxpayer admitted by his nolo contendere plea was continuing conspiracy coextensive in time with conspiracy alleged in civil antitrust actions, and thus, five-year statutory period for bringing criminal prosecutions against taxpayer did not commence until conspiracy's end. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2; 18 U.S.C.A. § 3282.

3. Criminal Law ⇐150

As long as some part of antitrust conspiracy continued into five-year period preceding indictment, five-year statute of limitations for bringing criminal prosecution did not insulate taxpayer from criminal liability for actions taken more than five years prior to time of indictment. 18 U.S.C.A. § 3282.

4. Conspiracy ⇐24.15

Although five-year statute of limitations for criminal prosecutions for noncapital offense limits how much time government has to indict alleged violator once conspiracy is complete, it does not limit temporal scope of conspiracy for which violator is liable. 18 U.S.C.A. § 3282.

5. Internal Revenue ⇐3358

Civil and criminal antitrust actions against taxpayer concerned same antitrust violations so that civil settlement could not be deducted from taxpayer's net income as business expense, even though civil suits alleged violations of several, distinguishable antitrust provisions while criminal indictment charged violation of § 1 of Sherman Act where same conduct affecting single product market was alleged to violate different statutes, civil plaintiffs suffered single antitrust harm, and there was no practical method of tracing amount of settlement payment attributable to each alleged offense. 26 U.S.C. § 162(g); Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2.

6. Monopolies ⇐29

Offenses under § 1 and § 2 of Sherman Act are legally distinct even though they may overlap. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2.

Norman W. Goldin and Joseph A. Rieser, Jr., Reed Smith Shaw & McClay, Washington, DC, James P. Kleier, Morrison & Foerster, San Francisco, CA, for plaintiff-appellant.

Teresa E. McLaughlin, Tax Div., Dept. of Justice, Washington, DC, for defendant-appellee.

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

Before: NORRIS, HALL and FERNANDEZ, Circuit Judges.

OPINION

CYNTHIA HOLCOMB HALL, Circuit Judge:

The Flintkote Company ("Flintkote") appeals from the district court's judgment in favor of the government following cross-motions for summary judgment in this action for refund of federal income taxes plus interest paid by Flintkote for the years 1970–73. Flintkote contests the Internal Revenue Service's ("IRS") partial disallowance of Flintkote's deduction of $3.5 million paid to settle a large number of civil antitrust treble damage actions. The parties to this action dispute whether, within the meaning of 26 U.S.C. § 162(g), the civil suits involved the same violation as was charged in a subsequent criminal indictment against Flintkote.

The district court had jurisdiction under 28 U.S.C. § 1346(a)(1), and this court has jurisdiction of this timely appeal under 28 U.S.C. § 1291. We affirm.

1. The actual text of section 162(g) relevant to this action provides:

> If in a criminal proceeding a taxpayer is convicted of a violation of the antitrust laws, or his plea of guilty or nolo contendere to an indictment or information charging such a violation is entered or accepted in such a proceeding, no deduction shall be allowed under subsection (a) for two-thirds of any amount paid or incurred—
>
> (2) in settlement of any action brought under [section 4 of the Clayton Act] on account of such violation or related violation.

I.

In 1973, Flintkote agreed to settle a large number of civil antitrust treble damage actions brought in the late 1960s against it and other manufacturers of gypsum wallboard. Flintkote paid $3.5 million as its share of the settlement payment, and then deducted that amount from its federal income taxes as a business expense. Relying on 26 U.S.C. § 162(g), the IRS disallowed $ 2,013,809 of that deduction. The disallowance was based on the fact that a month after the civil settlement became final, a grand jury in Pennsylvania handed down a criminal indictment against Flintkote which raised factual allegations essentially identical to those in the civil complaints. Flintkote pled nolo contendere to the indictment. In this action, Flintkote contests the disallowance.

This case requires us to interpret section 162(g), which provides that a taxpayer who is convicted of a criminal antitrust violation (or who pleads guilty or nolo contendere to an indictment charging such) may not deduct two-thirds of any civil antitrust damages or settlement monies paid on account of "such violation or any related violation." [1] This provision is an exception to the general rule that damages or settlement payments are deductible as business expenses.

II.

We review the district court's grant of summary judgment de novo. *Maisano v. U.S.*, 908 F.2d 408, 409 (9th Cir.1990). Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Id.*

26 U.S.C. § 162(g).

Only two reported cases interpret section 162(g); neither answers the question presented in this appeal. *See Federal Paper Board Co., Inc. v. Commissioner of Internal Revenue*, 90 T.C. 1011, 1988 WL 46843 (1988), and *Fisher Companies, Inc. v. Commissioner of Internal Revenue*, 84 T.C. 1319, 1985 WL 15365 (1985), aff'd mem., 806 F.2d 263 (9th Cir.1986).

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III.

The question we consider is whether the IRS properly disallowed under section 162(g) Flintkote's deduction for money paid to settle civil antitrust actions on the ground that the settlement concerned the same violation to which Flintkote pled nolo contendere in a criminal antitrust action.[2]

Flintkote advances two principal arguments to support its assertion that the civil antitrust actions and the criminal indictment did not concern the same violations. Flintkote first contends that because the statute of limitations for criminal antitrust actions is five years,[3] Flintkote's conviction on the criminal indictment only concerned conduct within the five-year period preceding the 1973 return of the indictment. Thus, for purposes of calculating the disallowance, the settlement payment, which released Flintkote of liability for alleged conspiratorial conduct lasting from the late 1950s until 1973, should be apportioned between the five-year statutory period (1968–1973) and the years prior to that.[4] Flintkote asks this court to hold that a deduction should be allowed for the portion of the settlement payment attributable to the prior years. Essentially, Flintkote argues that because it was not criminally liable for conduct beyond the five-year statutory period, it was not convicted of any violation occurring in the years before 1968 and thus the pre–1968 violations on which the civil settlement was based were not the same as any criminal violation.

Flintkote's second argument is that because the civil suits alleged violations of several separate antitrust laws, including section 1 of the Sherman Act, and the criminal indictment charged only a violation of section 1, a portion of the settlement payment should be allocated to violations other than of section 1 and a deduction permitted for that portion. In other words, Flintkote asserts that section 162(g) should not apply to the portion of the settlement payment attributable to violations of statutory provisions not alleged in the criminal indictment.

A. Were the violations not the same because they involved different time periods?

[1] The district court found that the indictment charged misconduct occurring during the same time period as that alleged in the civil cases. The court found further that by pleading nolo contendere to the indictment, Flintkote admitted every essential element of the offense pleaded in the indictment, including the allegation that the conspiracy extended back to the early 1960s.[5]

2. Section 162(g) permits disallowance on settlement monies paid on either the same *or* related violations. A "related" violation within the meaning of this section is governed by Treasury Regulation 1.162–22(c) (stating that a violation of the Federal antitrust laws is related to a subsequent violation if 1) with respect to the subsequent violation the United States obtains both a judgment in a criminal proceeding and an injunction against the taxpayer, and 2) the taxpayer's actions which constituted the prior violation would have contravened such injunction if such injunction were applicable at the time of the prior violation). Under this specific definition, both parties agree that the settlement clearly arose out of violations that were *not* "related" to the violation charged against Flintkote in the subsequent criminal indictment. Thus, the question presented is whether the settlement was on account of the same violation—i.e. "such violation"—as that charged in the criminal indictment.

3. 18 U.S.C. § 3282, which applies here, provides: "Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed."

4. In Flintkote's opening brief, it argued that the settlement only covered conduct continuing up until 1968, and that the time periods covered by the criminal indictment and by the civil settlement were therefore completely distinct. In Flintkote's reply brief, however, it acknowledged in a footnote that "pursuant to the settlement agreement, the antitrust plaintiffs released all claims they had against Flintkote up to July 1, 1973, the date of that agreement." Flintkote conceded that section 162(g) thus applies to the settlement payment to the extent that it is attributable to violations within the five-year period preceding the indictment. The question remains, however, whether the indictment actually covered the entire alleged conspiracy or just conduct from 1968 to 1973.

5. Specifically, the indictment stated in the section titled "Offense Charged" that the antitrust conspiracy counted "beginning sometime prior to or to 1960 and continuing thereafter at least until sometime in 1973." In the section titled "Jurisdiction and Venue" the indictment stated that the "aforesaid combination and conspiracy was carried out . . . within five years next preceding the return of this indictment."

Noting that the criminal antitrust laws have a five-year limitations period, the court concluded that Flintkote's present troubles are traceable to its own mistake in failing to limit the scope of its nolo contendere plea to its post–1968 activities. The court found that Flintkote had "ample opportunity, in 1973, to consider the tax consequences of its plea and adjust its plea accordingly," but instead chose not to contest the allegations in the indictment. The district court held that by not raising the affirmative defense of statute of limitations when entering its plea, Flintkote waived that defense for future proceedings.

The district court correctly determined that the violations alleged in the civil suits and charged in the criminal indictment were the same, but erred in focussing on the question of waiver in reaching that result. Flintkote is not arguing after the fact that prosecution was barred by the statute of limitations—that is, Flintkote is not trying to raise in this action a limitations defense to the form of indictment or the conviction. Moreover, as discussed below, Flintkote never had a statute of limitations defense to begin with, thus no affirmative defense existed for it to raise or waive at the plea hearing. The question here is not whether Flintkote can now limit its conviction by invoking the statute of limitations. Rather, Flintkote raises the question of what the scope of its conviction was in the first place. We can answer this question without considering waiver doctrine.

[2] Flintkote argues that by pleading nolo contendere it only admitted allegations of conduct within the five years preceding the return of the indictment, because under the statute of limitations that is the only time period for which it could possibly have been criminally liable. *See United States v. Heller*, 579 F.2d 990, 998 (6th Cir.1978) (by plea of nolo contendere appellant admitted every essential element of the offense well pleaded in indictment). Flintkote's argument fails because the conspiracy to which it admitted by its plea was a *continuing* conspiracy (coextensive in time with the conspiracy alleged in the civil actions),[6] and therefore the five-year statutory period did not commence until the conspiracy's *end*.

[3, 4] As long as *some* part of the conspiracy continued into the five-year period preceding the indictment, the statute of limitations did not insulate Flintkote from criminal liability for actions taken more than 5 years prior to the time of indictment. *See United States v. Dynalectric Co.*, 859 F.2d 1559, 1563–65 (11th Cir.1988), *cert. denied*, 490 U.S. 1006, 109 S.Ct. 1641, 104 L.Ed.2d 157 (1989); *United States v. United States Gypsum Co.*, 600 F.2d 414, 417–18 (3d Cir.), *cert. denied*, 444 U.S. 884, 100 S.Ct. 175, 62 L.Ed.2d 114 (1979); *United States v. Walker*, 653 F.2d 1343, 1347 (9th Cir.1981), *cert. denied*, 455 U.S. 908, 102 S.Ct. 1253, 71 L.Ed.2d 446 (1982); *United States v. Inryco, Inc.*, 642 F.2d 290, 293 (9th Cir.1981), *cert. dismissed*, 454 U.S. 1167, 102 S.Ct. 1045, 71 L.Ed.2d 324 (1982). In other words, although the statute limits how much time the government has to indict an alleged violator once a conspiracy is complete, it does not limit the temporal scope of a conspiracy for which a violator is liable. *See United States v. All Star Industries*, 962 F.2d 465, 476–77 (5th Cir.) (statute of limitations does not limit antitrust defendants' liability for restitution to losses occurring within five years preceding indictment; defendants ordered to pay restitution for losses from entire conspiracy), *cert. denied*, — U.S. —, 113 S.Ct. 377, 121 L.Ed.2d 288 (1992).

Because Flintkote pled nolo contendere to a single, continuing conspiracy which occurred during a time period co-extensive with the conspiracy alleged in the civil suits, we conclude that the civil and criminal actions

6. As the government points out, the Supreme Court held in *United States v. Kissel*, 218 U.S. 601, 607–08, 31 S.Ct. 124, 125–26, 54 L.Ed. 1168 (1910), that a conspiracy in violation of the Sherman Act is a single event that has "continuance in time," and is not a "cinematographic series of

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against Flintkote concerned the same antitrust violation.

B. Were the violations not the same because they involved different antitrust laws?

[5, 6] Flintkote asserts that the civil suits alleged violations of several separate, distinguishable antitrust provisions,[7] while the criminal indictment only charged a violation of section 1 of the Sherman Act. Flintkote accurately notes that offenses under section 1 and section 2 of the Sherman Act are legally distinct even though they may overlap. *See American Tobacco Co. v. United States*, 328 U.S. 781, 788, 66 S.Ct. 1125, 1128, 90 L.Ed. 1575 (1946) (section 1 and section 2 are separate statutory offenses and "require proof of conspiracies which are reciprocally distinguishable from and independent of each other although the objects of the conspiracies may partially overlap"); *United States v. Socony–Vacuum Oil Co.*, 310 U.S. 150, 226 n. 59, 60 S.Ct. 811, 846 n. 59, 84 L.Ed. 1129 (1940) ("the crime under § 1 is legally distinct from that under § 2 . . . though the two sections overlap in the sense that a monopoly under § 2 is a species of restraint of trade under § 1"). The government argues in response that though the various antitrust laws are separately punishable, they overlap significantly, and conduct that violates section 1 of the Sherman Act can violate other provisions as well.

Because the civil suits alleged separate violations of the antitrust laws, Flintkote's argument that section 162(g) should be applied only to the portion of the settlement payment attributable to a violation of section 1 of the Sherman Act has some surface appeal. However, Flintkote has not suggested any method by which the settlement payment could be apportioned. Flintkote cites *Federal Paper Board*, 90 T.C. at 1011, 1988 WL 46843, for the proposition that the settlement payment should be allocated among the various alleged statutory violations, but the differences between that case and this one highlight the problem inherent in Flintkote's position.

In *Federal Paper Board*, the company was indicted for antitrust violations involving price-fixing in the market for folding cartons and settled civil litigation in which it was alleged to have conspired to fix prices of both folding cartons and milk cartons. The Tax Court determined that the violation giving rise to the criminal action was not the same in all material respects as that giving rise to the civil actions. The court therefore allocated the company's settlement payment between milk carton claims and folding carton claims, based on the aggregate sales by all the settling defendants to the settling plaintiffs in the civil class action. The court held that section 162(g) applied only to the portion of the payment allocable to the folding carton claims.

In the circumstances of *Federal Paper Board*, the antitrust harms to the folding carton and milk carton markets were distinct, and by comparing sales and purchases in each market, the court could readily ascertain an actual proportion to use in allocating the settlement payment. Federal Paper Board's misconduct in each of the different product markets was, in effect, different misconduct, even though the civil plaintiffs alleged a single conspiracy. In Flintkote's situation, however, the same conduct affecting a single product market was alleged to violate different statutes. Though the civil plaintiffs alleged separate offenses, they suffered a single antitrust harm. Thus, we see no practical method of tracing the amount of the settlement payment attributable to each alleged offense. Moreover, the various claims in the civil case were, essentially, different ways of characterizing the results of a single set of core activities in which the conspirators engaged. We see no legal justification for allocating the damages even if an allocation could somehow be approximated.

We conclude that even though the civil actions alleged violations of antitrust laws in addition to section 1 of the Sherman Act, those actions alleged a single conspiracy arising from a single set of facts—the same conspiracy and facts which formed the basis of the criminal indictment. Flintkote has presented no basis for determining that the civil actions and criminal indictment involved different violations.

IV.

We hold that the IRS properly disallowed Flintkote's deduction for money paid to settle civil antitrust actions on the ground that the settlement concerned the same violation to which Flintkote pled nolo contendere in a criminal antitrust action. The violations alleged in the civil suits and charged in the criminal indictment resulted from the same continuing conspiracy, and therefore did not involve different time periods. In addition, the civil and criminal violations were the same because both involved section 1 of the Sherman Act, and because the additional statutory offenses alleged in the civil actions are not practicably separable from the section 1 offense.

AFFIRMED.

7. Flintkote states that "[a]lthough the civil complaints claimed a violation of section 1 of the Sherman Act, many of them also alleged claims of monopolization and attempts to monopolize in violation of section 2 of the Sherman Act, restrictive dealing arrangements in violation of section 3 of the Clayton Act, and price discrimination in violation of the Robinson–Patman Act." *Id.* at 607, 31 S.Ct. at 125.

KEY NUMBER SYSTEM

Charles H. HENDERSON, Petitioner,

v.

FEDERAL AVIATION ADMINISTRATION; National Transportation Safety Board, Respondents.

No. 91–70511.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted March 3, 1993.

Decided Oct. 18, 1993.

Helicopter pilot sought review of suspension of license by National Transportation Safety Board. The Court of Appeals, Poole, Circuit Judge, held that: (1) aerial photography exception to Part 135 regulations was applicable even though, after flight commenced, pilot learned that passengers desired a landing as well as the opportunity to take photographs; (2) evidence sustained finding that pilot operated helicopter below minimum safe altitude, regardless of the likelihood of a power unit failure; and (3) evidence sustained finding that pilot did not use reasonable judgment in flying the helicopter very low at a slow speed over congested area.

Affirmed in part and reversed in part.

1. Aviation ⇐35

Court's review of National Transportation Safety Board's decisions is narrow and court will uphold them unless they are arbitrary, capricious, an abuse of discretion, or not otherwise in accordance with the law; NTSB factual findings are conclusive when support by substantial evidence in the record, but purely legal questions are reviewed de novo.

2. Aviation ⇐33

If pilot knows, prior to departure, that passengers desire landing in addition to aerial photography, flight is not exempt from Part 135 regulations governing altitude for helicopters in congested areas but, where pilot hired for aerial photography finds out only in the air that the passengers desire landing, the aerial photography exception applies.

3. Aviation ⇐33

When plans for landing in addition to aerial photography are unknown to helicopter pilot before departure, pilot is exempt from Part 135 regulations governing altitude no matter when during the flight the pilot learns of the plans to land.

4. Aviation ⇐33

Fact that news photographers told pilot that they did not need to have door removed from helicopter and that they would shoot through the window did not show that helicopter pilot knew before departure that photographers would desire a landing in addition to aerial photography so as to prevent appli-

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ing a lower rate to customers who would not otherwise be steam heat customers was rationally related to the legitimate goal of ensuring the economic viability of the steam loop.

[7] Besides helping ensure the survival of the steam loop, the classification was also rationally related to another legitimate governmental purpose: promoting the loop's efficiency. Customers who have on-premises boilers have the ability to provide their own heat without using the steam loop. For this reason, the interruptible rate service agreements, unlike the standard rate agreements, contained a provision granting Bi–State the right to terminate steam service for any reason on ten days' notice. This provision allowed Bi–State to continue to attract new customers while retaining the ability to ration steam in the event of a shortage; during periods where steam usage is extremely high, for example, Bi–State can satisfy the needs of standard rate customers by terminating service to interruptible rate customers. We need not speculate, as BLF would have us do, about whether there will ever be such a shortage of steam heat. The salient point is that Bi–State could have believed that offering a lower rate to customers with boilers in exchange for the right to interrupt service at will would encourage supply to meet demand while at the same time ensuring necessary flexibility in the system. Thus, interruptible rate customers received a lower rate for two good reasons: they would not have become Bi–State's customers otherwise at a time when the steam loop needed new customers to survive and, unlike the standard rate customers, they could tolerate service interruptions in the event of an emergency. For this reason, the classification is immunized from BLF's equal protection challenge.

BLF's final claim is that Bi–State and Thermal arbitrarily applied the interruptible rate. It argues that Thermal amended the interruptible rate service agreements of "certain customers" by eliminating the provision granting Bi–State and Thermal authority to terminate service on ten days' notice. Appellant's Br. at 15. Under the amended agreements, these customers retained the immediate right to become standard rate customers in the event of a steam shortage, eliminating the possibility of a service disruption. The only customers who BLF claims received such favorable treatment, however, were interruptible rate customers in the first place. If BLF is arguing that it was treated differently to the extent Thermal did not offer it an amended interruptible rate agreement, we reject such a claim because BLF did not qualify for the interruptible rate and thus is not similarly situated to those customers who negotiated amended agreements. *See E & T Realty v. Strickland*, 830 F.2d 1107, 1109 (11th Cir.1987) (explaining that "[d]ifferent treatment of dissimilarly situated persons does not violate the equal protection clause"), *cert. denied*, 485 U.S. 961, 108 S.Ct. 1225, 99 L.Ed.2d 425 (1988).

Alternatively, BLF could be arguing that the amended agreements undermine the efficiency rationale behind the dual rate system. As to customers with amended interruptible rate service agreements, Bi–State cannot terminate their service selectively in the event the steam loop is overextended because they may elect to become standard rate customers and continue service. Thus, BLF asserts, these customers did not receive a lower rate in exchange for Bi–State's right to interrupt service at will; rather, they impermissibly received a lower rate than standard rate customers whose service contracts were functionally identical.

[8] We have already explained, however, that the Constitution does not prohibit the government from charging different rates for the same service if there is a rational basis for doing so. Even absent the contract provision allowing service interruption at the discretion of Bi–State, a rational basis existed for offering the lower rate to these customers: the need to attract new customers and preserve the steam loop. If anyone has a right to complain about the amended agreements, it is the similarly situated interruptible rate customers who are still subject to service termination on ten days' notice. That several interruptible rate customers had contracts eliminating the risk of service interruption, however, does not render Bi–State's application of the dual rate system arbitrary or irrational as to BLF. *Cf. Mahone v. Addicks Util. Dist. of Harris County*, 836 F.2d 921, 932–33 (5th Cir.1988) (applying rationality test to claim that government selectively imposed additional requirements on some applicants seeking land annexation).

[9] At bottom, BLF's claim is that it had a right to the same rate for steam heat as customers with gas-fired boilers. The Constitution accords it no such right. Under rational basis review, the government has wide latitude to distinguish between different groups to further legitimate interests. Here, Bi–State and Thermal could have believed that distinguishing between steam customers who had gas-fired boilers and those who did not would allow the steam loop to survive for the refuse-to-energy plan and to function efficiently. Whether or not these objectives actually motivated defendants to develop the dual rate system, we cannot say that the classification was irrational on its face or that Bi–State and Thermal applied it arbitrarily as to BLF. Thus, we hold that defendants are entitled to summary judgment on BLF's equal protection claim.

B. Attorney's Fees

Bi–State and Thermal claim that they are entitled to attorney's fees under 42 U.S.C. § 1988. Under § 1988, "the court, in its discretion, may allow the prevailing party [in a § 1983 action], other than the United States, a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988(b). To the extent defendants request attorney's fees for services performed in connection with the proceedings in district court, we reject such a claim. They cite no authority for the proposition that the court of appeals may in the first instance award attorney's fees for legal services performed in district court.

[10, 11] We may, however, award attorney's fees to the prevailing party on appeal for legal services performed in connection with the appeal. *See Reel v. Arkansas Dep't of Correction*, 672 F.2d 693, 699 (8th Cir. 1982). A prevailing defendant-appellee is entitled to attorney's fees "only if the plaintiff's appeal is frivolous, unreasonable or without foundation, even though not brought in subjective bad faith." *Munson v. Friske*, 754 F.2d 683, 698 n. 10 (7th Cir.1985). Although BLF did not have a strong claim, we cannot say that its appeal was frivolous, unreasonable or without foundation. BLF had plausible, though unavailing, legal arguments. This is not "one of the few cases where defendant-appellees [are] entitled to attorney['s] fees for appellate work." *Id.*

III. CONCLUSION

We affirm the district court's order granting summary judgment to Bi–State and Thermal and deny defendants' request for attorney's fees under § 1988.

KEY NUMBER SYSTEM

UNITED STATES of America, Appellee,

v.

Daniel Anthony FETLOW, Appellants.

UNITED STATES of America, Appellee,

v.

Winston G. MORRISON, Appellant.

UNITED STATES of America, Appellee,

v.

Robert Mark FERGUSON, Appellant.

UNITED STATES of America, Appellee,

v.

Bernard Anthony VALENTINE, Appellant.

Nos. 93–2377, 93–2536, 93–2558 and 93–2763.

United States Court of Appeals, Eighth Circuit.

Submitted Dec. 16, 1993.

Decided April 7, 1994.

Rehearing Denied June 24, 1994 in Nos. 93–2558, 93–2763.

Defendants were convicted in the United States District Court for the Eastern District

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titioner suffer a fraud unique from other accountholders by Franklin's assurances that its certificates would be collateralized by government securities. The record establishes that at least one other accountholder, the Benedictine Sisters of the Annunciation, received similar assurances.

Finally, there is no equitable basis for the Petitioner's argument that it deserves priority over other accountholders because it stands to suffer the most substantial loss. We simply can find no basis in equity for giving the Petitioner a disproportionate advantage over other Franklin shareholders who also suffered losses.

IV.

Based on the foregoing, we conclude that the Petitioner was properly classified as a member to the extent of its uninsured shares and that it is not entitled to the imposition of a constructive trust in its favor. Accordingly, the judgment of the National Credit Union Board is affirmed.

UNITED STATES of America, Appellee,

v.

Raul Leyja GALVAN, Appellant.

UNITED STATES of America, Appellee,

v.

Enrique Ruiz SILVA, Appellant.

Nos. 91-2444, 91-2445.

United States Court of Appeals, Eighth Circuit.

Submitted Dec. 12, 1991.

Decided April 9, 1992.

Defendants were convicted in the United States District Court for the Southern District of Iowa, Charles R. Wolle, J., of conspiracy to distribute cocaine, and aiding and abetting the distribution of cocaine. Defendants appealed. The Court of Appeals, Magill, Circuit Judge, held that: (1) district court did not err in calculating defendant's offense level as 26 under Sentencing Guidelines; (2) defendants' conviction for conspiracy was supported by evidence; and (3) prosecutor's remarks during closing argument did not infringe on defendant's right not to testify.

Affirmed.

1. Criminal Law ⇐1158(1)

When appeal is based on factual grounds, Court of Appeals reverses sentence imposed by district court only if it concludes that factual findings on which district court relied are clearly erroneous.

2. Criminal Law ⇐1158(1)

Whether uncharged drugs are part of common scheme or plan is factual finding subject to clearly erroneous standard.

3. Criminal Law ⇐1244

Where uncharged drugs are found to be part of common scheme or plan, sentencing court is not limited by amount seized and may sentence according to estimation based upon trial testimony; however, trial testimony used to estimate amount of uncharged drugs must clearly establish either dates of transactions or amounts of drugs involved.

4. Drugs and Narcotics ⇐133

When conviction for violating federal drug statutes is involved, trial court may consider amounts of drugs involved in conviction of coconspirators.

5. Drugs and Narcotics ⇐133

Calculation of defendant's base offense level as 26 was supported by testimony which clearly attributed at least 19 ounces of cocaine to defendant. U.S.S.G. § 2D1.1(c)(9), 18 U.S.C.A.App.

6. Criminal Law ⇐1144.13(8), 1159.2(10)

In reviewing conspiracy conviction for sufficiency of evidence, Court of Appeals views evidence in light most favorable to government, giving it benefit of all reasonable inferences drawn from evidence that supports jury's verdict; evidence need not exclude every reasonable hypothesis except guilt, and jury's verdict must be upheld if there is interpretation of evidence which would allow a reasonable-minded jury to conclude guilt beyond reasonable doubt.

7. Conspiracy ⇐24(1), 27

"Conspiracy" consists of agreement between two or more people to violate law and overt act in furtherance of conspiracy; person becomes member of conspiracy when he knowingly contributes his efforts to conspiracy's objective.

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

8. Conspiracy ⇐47(12)

Defendants' convictions for conspiracy to distribute cocaine were supported by evidence that defendants were roommates in two different places for over one year, that both defendants sold cocaine, that defendants traveled together to Chicago for purpose of buying cocaine, that defendants gave one another money from sales of cocaine, and that both frequently had large sums of money at their disposal.

9. Drugs and Narcotics ⇐123(3)

Defendant's conviction for aiding and abetting distribution of cocaine was supported by evidence that defendant and codefendant engaged in conspiracy to distribute cocaine and that defendant directed drug enforcement agent disguised as prospective buyer to codefendant for purchase of cocaine.

10. Conspiracy ⇐24(8)

Jury could convict defendant of conspiracy with his girlfriend, even though grand jury knew about her and did not name her as unindicted coconspirator; grand jury may not name unindicted coconspirator in indictment.

* THE HONORABLE DANIEL M. FRIEDMAN, Senior United States Circuit Judge for the Federal Circuit, sitting by designation.

1. Galvan was also convicted of distribution of cocaine and carrying a firearm during a drug trafficking crime. He does not contest his convictions on these charges.

2. The Honorable Charles R. Wolle, United States District Judge for the Southern District of Iowa.

11. Criminal Law ⇐721(6)

Prosecutor's statement during closing argument that codefendant had not called "mutual friend or mutual employee" to testify regarding alleged romantic relationship between codefendant and government informant did not infringe on defendant's right not to testify, even though defendant was only person who was both mutual friend and mutual employee; prosecutor's remark was directed to codefendant's failure to call witness who could substantiate his claim that he had romantic relationship with informant, and judge properly instructed jury that defense did not have burden of proof or burden to produce evidence.

Mark Godwin, Des Moines, Iowa, argued (Karla Fultz, on the briefs), for appellants.

Stephen Patrick O'Meara, Asst. U.S. Atty., Des Moines, Iowa, argued, for appellee.

Before JOHN R. GIBSON, Circuit Judge, FRIEDMAN,* Senior Circuit Judge, and MAGILL, Circuit Judge.

MAGILL, Circuit Judge.

Raul Leyja Galvan and Enrique Ruiz Silva appeal their convictions for conspiracy to distribute cocaine.[1] Silva also appeals his conviction for aiding and abetting the distribution of cocaine. On appeal, Galvan argues that: (1) the evidence was insufficient to support the district court's[2] finding of the amount of cocaine involved; (2) the evidence was insufficient to support his conspiracy conviction; (3) the district court erred when it failed to give a requested jury instruction; and (4) the government, in its closing argument, impermissibly shifted the burden of proof by alluding to the fact that Galvan did not testify. Silva argues that the evidence is insufficient to support both his conspiracy and his aiding and abet-

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ting conviction, and he adopts all other arguments made by Galvan. We affirm.

I.

A. Amount of Cocaine[3]

[1–5] Galvan claims that the district court erred in calculating his offense level as 26 under § 2D1.1 of the Sentencing Guidelines because there was insufficient evidence to support the district court's findings that thirty-eight ounces of cocaine were attributable to him.[4] When an appeal is based on factual grounds, we reverse the sentence imposed by the district court only if we conclude that the factual findings on which the court relied are clearly erroneous. *United States v. Pou*, 953 F.2d 363, 370 (8th Cir.1992) (citing 18 U.S.C. § 3742(e) (1988); *United States v. Lawrence*, 915 F.2d 402, 406 (8th Cir.1990)). Whether uncharged drugs are part of a common scheme or plan is also a factual finding subject to the clearly erroneous standard. *Lawrence*, 915 F.2d at 406. Where uncharged drugs are found to be part of a common scheme or plan, the sentencing court is not limited by the amount seized and may sentence according to its estimation based on trial testimony. *United States v. Duckworth*, 945 F.2d 1052, 1054 (8th Cir.1991) (citing *United States v. Evans*, 891 F.2d 686, 687 (8th Cir.1989), *cert. denied*, 495 U.S. 931, 110 S.Ct. 2170, 109 L.Ed.2d 499 (1990)). Trial testimony used to estimate the amount of uncharged drugs, however, must clearly establish either the dates of the transactions or the amounts of drugs involved. *United States v. Hewitt*, 942 F.2d 1270, 1274 (8th Cir.), *reh'g denied*, No. 90–5578 (8th Cir. Oct. 1 1991); *United States v. Phillippi*, 911 F.2d 149, 151 (8th Cir.1990), *cert. denied*, — U.S. —, 111 S.Ct. 702, 112 L.Ed.2d 691 (1991). In this case, trial testimony clearly attributed at least nineteen ounces (538.65 grams) of cocaine to Galvan. Because a base offense level of twenty-six applies to amounts of at least 500 grams but less than two kilograms of cocaine, U.S.S.G. § 2D1.1(c)(9), we do not need to reach the question of whether the government proved the additional amounts. *United States v. Regan*, 940 F.2d 1134, 1136 (8th Cir.1991); *see also Phillippi*, 911 F.2d at 151 (erroneous inclusion of drugs harmless error where base offense level remained the same after improperly included amounts omitted). We conclude the district court correctly assigned Galvan a base offense level of twenty-six.

B. Conspiracy

Galvan and Silva both argue that there was insufficient evidence of a conspiracy.[5] They claim that the evidence failed to show that an agreement existed, with each other or with others, to distribute cocaine. Galvan claims that there was no proof that anyone else had a stake in the outcome of his actions or got paid for participating in his distribution of cocaine. Silva argues that the government did not show that he "knowingly contributed [his] efforts in the furtherance" of selling cocaine, *United States v. Mims*, 812 F.2d 1068, 1075 (8th Cir.1987), or that he was a party to any actual agreement, tacit or explicit, to distribute cocaine.

[6, 7] In reviewing a conspiracy conviction for sufficiency of the evidence, the court views the evidence in the light most favorable to the government, giving it the benefit of all reasonable inferences drawn from the evidence that support the jury's verdict. *Duckworth*, 945 F.2d at 1053; *United States v. Newton*, 756 F.2d 53, 54 (8th Cir.1985). The evidence need not exclude every reasonable hypothesis except guilt. *Newton*, 756 F.2d at 54. The jury's verdict must be upheld if there is an interpretation of the evidence that would allow a reasonable-minded jury to conclude guilt beyond a reasonable doubt. *United States v. Rodriguez*, 812 F.2d 414, 416 (8th Cir. 1987). A conspiracy generally consists of an agreement between two or more people to violate the law and an overt act in furtherance of the conspiracy. *United States v. Watts*, 950 F.2d 508, 512 (8th Cir.1991). A person becomes a member of a conspiracy when he knowingly contributes his efforts to the conspiracy's objectives. *Duckworth*, 945 F.2d at 1053; *Mims*, 812 F.2d at 1075.

[8] Here, there was sufficient evidence that a conspiracy existed between Galvan and Silva to sustain the conviction. They were roommates in two different places for over a year. Brad Wiegand, a former customer, testified that several times when he had taken people to buy cocaine from Galvan, Silva answered the door and told them Galvan was not there. After some discussion, however, Silva would sell them cocaine. In addition, Wiegand testified that once, when he went to buy from Galvan, Silva was present and Galvan gave Silva the money from the sale. Deborah Benninger, Galvan's ex-girlfriend, testified that she bought cocaine from both men. She also testified that Galvan sometimes sent her to Silva to buy cocaine when he needed more to distribute. Benninger stated that Silva had been present sometimes when Galvan sold cocaine to other people, and that she had overheard conversations between the two men about cocaine and how much money they made. She said that she had seen them counting large amounts of money. She also testified about a trip to Chicago she had taken with Galvan, Silva and another man called Tito. They went to a bar called "Cerveza Frio." Tito and Galvan went into the back room, where Silva joined them briefly. They left the bar almost immediately after the three men rejoined her. When they got into the car, Galvan stuffed something between the seats. Then, they all "did" some cocaine. When they arrived home, Galvan left, announcing that he was going to go make money. Benninger understood that to mean that he was going to sell cocaine because he was unemployed at the time and she believed the trip had been for the purpose of buying drugs. Stacy Williams, a government informant, testified that on one occasion when she went to make a buy from Galvan, he went into the bedroom with Silva and another man for a few minutes, then called her to the bedroom door and sold her the cocaine she wanted. On another buy, she went to the apartment looking for Galvan, and Silva told her Galvan had just left to meet her.

We believe that the evidence, taken in the light most favorable to the government, is sufficient to allow a jury to find that Galvan and Silva conspired with each other to distribute cocaine. Therefore, we affirm their convictions.

C. Aiding and Abetting

[9] Silva argues that the evidence is insufficient to support his conviction of aiding and abetting. The government claims that Silva aided and abetted the distribution of cocaine to a drug enforcement agent. Stacy Williams testified that she had made arrangements to meet Galvan at a motel to introduce him to a buyer, who was really a drug enforcement agent. When Galvan did not arrive at the agreed time, she and the agent drove to Galvan's apartment. Silva answered the door and told her that Galvan had just left to meet her.

Although we agree that, standing alone, this would not be sufficient to sustain a conviction, we must look to the evidence as a whole to determine whether a reasonable jury could have found that Silva aided and abetted Galvan in this sale. Given the evidence of conspiracy, and the fact that the jury found there was a conspiracy, the verdict was reasonable. We affirm.

D. Jury Instruction

[10] Galvan contends that the district court erred because it failed to give a jury instruction he requested. The instruction would have told the jury that they could not convict him of conspiracy with Ben-

3. Silva adopted this argument and the arguments addressed in Parts D and E of this opinion by reference pursuant to Rule 28(i) of the Federal Rules of Appellate Procedure. Because we find that the district court did not err, we do not address these issues separately for Silva.

4. When a conviction for violating federal drug statutes is involved, the trial court may consider amounts of drugs involved in the conviction of co-conspirators. *United States v. Holland*, 884 F.2d 354, 358 (8th Cir.), *cert. denied*, 493 U.S. 997, 110 S.Ct. 552, 107 L.Ed.2d 549 (1989).

5. Because appellants' arguments on this point are so similar, we address them together.

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ninger because the grand jury knew about her and did not name her as an unindicted co-conspirator. He argues that the government suggested that Benninger was a co-conspirator, and that the jury may have convicted him of conspiring with her rather than with Silva. He admits, however, that he could be indicted and convicted for conspiring with unnamed co-conspirators if the grand jury did not know their identity.

Galvan's position is without legal merit. The case he relies on for support, *United States v. Briggs*, 514 F.2d 794 (5th Cir. 1975), is directly opposed to his proposition. In that case, the court held that the grand jury could never name an unindicted co-conspirator in an indictment. Any unindicted co-conspirators must remain unnamed. *Id.*[6]

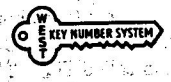
E. Comment on Failure to Testify

[11] Galvan's last argument is that the government impermissibly shifted the burden of proof to the defense, constituting an infringement of his Fifth Amendment right not to testify. *Griffin v. California*, 380 U.S. 609, 615, 85 S.Ct. 1229, 1233, 14 L.Ed.2d 106 (1965); *United States v. Neumann*, 887 F.2d 880, 887 (8th Cir.1989). Both Galvan and Silva met Stacy Williams, the government informant, prior to 1990 through work. Williams had been hospitalized with mental and emotional problems during 1989 due to the breakup of a past relationship. Silva testified that he had had a romantic relationship with her during most of 1990.[7] He claimed that Williams had threatened him when they broke up, saying "I'll see you soon." He testified that he believed Williams was trying to get revenge. During closing argument, the government attorney said, "The defendant [Silva] has brought no one of what might be [sic] their mutual friend [sic] or mutual employees to tell you about their relationship." Galvan claims that because he was the only person the jury knew about who was both a mutual friend and a mutual employee, the government was impermissibly pointing out the fact that he had not testified.

Galvan's right not to testify was not infringed by the prosecutor's remark in this case. We have read the prosecutor's remarks with great care. The remark was directed to defendants' failure to call a witness in the context of discussing Silva's credibility. The prosecutor used the disjunctive "or" in his remark. His comment simply pointed out that, in considering Silva's credibility, the jury should remember that no one who knew both Williams and Silva, either as a friend or as a co-worker, had testified that there had been a romantic relationship between the two. In addition, the judge properly instructed the jury, both in the final instructions and at the time of the remark, that the defense did not have a burden of proof or a burden to produce evidence. Given the context and the phraseology of the remark, and the judge's instructions to the jury, we do not think that the remark was improper. *See Neumann*, 887 F.2d at 887; *Moore v. Wyrick*, 760 F.2d 884 (8th Cir.1985) (prosecutor's inviting jury to draw adverse inference from defendant's failure to call certain witnesses did not deprive defendant of a fair trial).

II.

Because we find no errors of fact or law, we affirm the district court.



6. Galvan also relies on *Rogers v. United States*, 340 U.S. 367, 71 S.Ct. 438, 95 L.Ed. 344 (1951). This case does not stand for his proposition either. It simply notes, in dicta, that a person can be convicted of conspiracy with an unnamed person. *Id.* at 375, 71 S.Ct. at 443.

7. Williams denied having any such relationship with Silva.

UNITED STATES of America, Appellee,

v.

Roderick L. GARRETT, Appellant.

UNITED STATES of America, Appellee,

v.

Joe Louis WILLIAMS, Appellant.

Nos. 90-3092, 91-1016.

United States Court of Appeals, Eighth Circuit.

Submitted Jan. 7, 1992.

Decided April 9, 1992.

Defendants were convicted of drug and firearm offenses, following jury trial in the United States District Court for the Western District of Missouri, D. Brook Bartlett, J., and they appealed. The Court of Appeals, Arnold, Chief Judge, held that: (1) disruptive and unorthodox trial tactics of codefendant did not entitle defendant to mistrial or severance; (2) sufficient evidence connected defendant with cocaine and gun found in car in which he was riding; and (3) trial court could deny untimely motions to suppress evidence.

Affirmed.

1. Criminal Law ⇐1166(6)

Denial of severance is not grounds for reversal unless clear prejudice and abuse of discretion are shown.

2. Criminal Law ⇐622.2(6, 7, 11)

Mere fact that there is hostility among defendants, or one defendant may try to save himself at expense of another, or that evidence against one defendant is more damaging than evidence against another, is not sufficient grounds to require separate trials.

3. Criminal Law ⇐622.2(8)

In order to justify severance, defendant must make showing of real prejudice by demonstrating that jury was unable to compartmentalize evidence as it related to him and his codefendant.

4. Criminal Law ⇐622.2(7, 8, 12)

Defendant was not entitled to severance, even though codefendant's counsel conducted noisy, disruptive, unorthodox defense and introduced incriminating testimony concerning defendant, where defendant was represented by professional, highly effective counsel, defendant's defense of general denial did not conflict with that of codefendant, and trial involved only two defendants and five counts and lasted only three and one-half days; danger that jurors would be unable to compartmentalize the evidence was minimal.

5. Weapons ⇐17(4)

Constructive possession of firearm need not be proved by direct evidence, but rather may be premised upon circumstantial evidence.

6. Criminal Law ⇐552(4)

Circumstantial evidence is intrinsically as probative as direct evidence.

7. Drugs and Narcotics ⇐123(2)
Weapons ⇐17(4)

Evidence supported convictions for possession with intent to distribute cocaine base, and firearms offenses, despite contention that nothing connected defendant with crack cocaine and gun found in car in which he was riding, where defendant was located right next to arm rest containing crack cocaine and directly in front of area of dashboard in which gun was hidden, and defendant would not respond to police officer's commands to get out of vehicle for approximately 15 to 45 seconds, during which time he was seen bending forward in car towards area where gun was hidden. 18 U.S.C.A. §§ 922(g)(1), 924(a)(2); Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(a)(1), (b)(1), (b)(1)(A, B), 21 U.S.C.A. § 841(a)(1), (b)(1), (b)(1)(A, B).

8. Criminal Law ⇐394.6(3)

Defendant was not entitled to grant of his untimely motions to suppress evidence, where defendant presented no valid reason why motions were not filed on time. Fed. Rules Cr.Proc.Rule 12(c, f), 18 U.S.C.A.

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taxpayer a tax advantage over others who have not merged. We conclude that petitioner is not entitled to a carry-over since the income against which the offset is claimed was not produced by substantially the same businesses which incurred the losses.[9]

The judgment of the Court of Appeals is

Affirmed.

MR. JUSTICE DOUGLAS dissents.

MR. JUSTICE WHITTAKER took no part in the consideration or decision of this case.

Statute of limitations issue --

FOIA(b)(7) - (C)

[redacted]

[9] We do not pass on situations like those presented in *Northway Securities Co.* v. *Commissioner*, 23 B. T. A. 532; *Alprosa Watch Corp.* v. *Commissioner*, 11 T. C. 240; *A. B. & Container Corp.* v. *Commissioner*, 14 T. C. 842; *W A G E, Inc.* v. *Commissioner*, 19 T. C. 249. In these cases a *single* corporate taxpayer changed the character of its business and the taxable income of one of its enterprises was reduced by the deductions or credits of another.

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GRUNEWALD *v.* UNITED STATES.

NO. 183. CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.*

Argued April 3–4, 1957.—Decided May 27, 1957.

1. The three petitioners were convicted in a federal district court of violating 18 U. S. C. § 371 by conspiring to defraud the United States by preventing the criminal prosecution of certain taxpayers for fraudulent tax evasion. They had succeeded in obtaining "no prosecution" rulings from the Bureau of Internal Revenue in 1948 and 1949, and their subsequent activities were directed at concealing the irregularities through which these rulings were obtained. They were not indicted until October 25, 1954. *Held:* If the main objective of the conspiracy was to obtain the "no prosecution" rulings, petitioners' prosecution was barred by the three-year statute of limitations, since no agreement to conceal the conspiracy after its accomplishment was shown or can be implied on the record in this case to have been a part of the conspiracy. Pp. 399–406.

   (a) After the central criminal purposes of a conspiracy have been attained, a subsidiary conspiracy to conceal the crime may not be implied from circumstantial evidence showing merely that the conspiracy was kept a secret and that the conspirators took care to cover up their crime in order to escape detection and punishment. *Krulewitch* v. *United States*, 336 U. S. 440; *Lutwak* v. *United States*, 344 U. S. 604. Pp. 399–402.

   (b) On the record in this case, nothing more is shown than (1) a criminal conspiracy carried out in secrecy, (2) a continuation of the secrecy after accomplishment of the crime, and (3) attempts to cover up after the crime began to come to light. Pp. 402–404.

   (c) The duration of a conspiracy cannot be lengthened indefinitely for the purpose of the statute of limitations merely because the conspiracy is kept secret and the conspirators take steps to bury their traces, in order to avoid detection and punishment after the central criminal purpose has been accomplished. Pp. 399, 404–405.

2. The judge's charge to the jury was not adequate to justify petitioners' conviction on the theory that the main objective of the conspiracy was not merely to obtain the initial "no prosecution"

*Together with No. 184, *Halperin* v. *United States*, and No. 186, *Stassi* v. *United States*, also on certiorari to the same court.

rulings but to obtain *final immunity* of the taxpayers from criminal prosecution by preventing their prosecution until after expiration of the six-year statute of limitations applicable to their tax-evasion offenses, which did not expire until less than three years before petitioners were indicted for conspiracy—since the judge's charge left it open for the jury to convict even though it found merely (1) that the central aim of the conspiracy was accomplished in 1949, and (2) that the subsequent acts of concealment were motivated exclusively by petitioners' fear of a conspiracy prosecution. Pp. 406–415.

3. Petitioner Halperin was also convicted on other counts of the indictment charging him with violating 18 U. S. C. § 1503 by endeavoring corruptly to influence certain witnesses before a grand jury which was investigating matters involved in the conspiracy. At his trial, he answered certain questions in a manner consistent with innocence and then, over his objection, was subjected to cross-examination which revealed that he had refused to answer the same questions, on grounds of possible self-incrimination, while he was appearing before a grand jury, under subpoena, without benefit of counsel, without the right to summon witnesses and without any opportunity to cross-examine witnesses testifying against him. *Held:* In the circumstances of this case, it was prejudicial error for the trial judge to permit cross-examination of Halperin on his plea of the Fifth Amendment privilege before the grand jury. *Raffel* v. *United States*, 271 U. S. 494, distinguished. Pp. 415–424.

233 F. 2d 556, reversed and remanded.

Edward J. Bennett argued the cause for petitioner in No. 183. With him on the brief was *Harold H. Corbin.*

Henry G. Singer argued the cause for petitioner in No. 184. With him on the brief was *Harry Silver.*

Rudolph Stand argued the cause for petitioner in No. 186. With him on the brief was *Frank Aranow.*

John F. Davis argued the cause for the United States. With him on the brief were *Solicitor General Rankin, Assistant Attorney General Olney* and *Beatrice Rosenberg.*

MR. JUSTICE HARLAN delivered the opinion of the Court.

The three petitioners were convicted on Count 1 of an indictment brought under 18 U. S. C. § 371 [1] for conspiracy to defraud the United States with reference to certain tax matters. Petitioner Halperin was also convicted on Counts 5, 6, and 7 of the same indictment, charging him with violating 18 U. S. C. § 1503 [2] by endeavoring corruptly to influence certain witnesses before a grand jury which was investigating matters involved in the conspiracy charged in Count 1 of the indictment. Each petitioner was sentenced to five years' imprisonment and fined under Count 1. On each of Counts 5, 6, and 7, Halperin was sentenced to two years' imprisonment and a fine of $1,000, the prison sentences on these Counts and that on Count 1 to run concurrently. The Court of Appeals for the Second Circuit affirmed, with the late Judge Frank dissenting. 233 F. 2d 556. We granted certiorari, 352 U. S. 866, in order to resolve important questions relating to (a) the statute of limitations in conspiracy

[1] This section provides: "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

[2] 18 U. S. C. § 1503 provides, in relevant part: "Whoever corruptly . . . endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States . . . in the discharge of his duty . . . or corruptly . . . influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both." Grunewald and Bolich were acquitted on these Counts.

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prosecutions, as to which the decision below was alleged to be in conflict with this Court's decisions in *Krulewitch* v. *United States*, 336 U. S. 440, and *Lutwak* v. *United States*, 344 U. S. 604; and (b) the use on Halperin's cross-examination of his prior claim of the Fifth Amendment's privilege against self-incrimination before a grand jury. For the reasons discussed hereafter, we conclude that these convictions must be reversed, and the petitioners granted a new trial.

On October 25, 1954, a grand jury returned an indictment, Count 1 of which charged petitioners and others with conspiring among themselves and with others "to defraud the United States in the exercise of its governmental functions of administering the internal revenue laws and of detecting and prosecuting violations of the internal revenue laws free from bribery, unlawful impairment, obstruction, improper influence, dishonesty, fraud and corruption . . . ." The indictment further charged that a part of the conspiracy was an agreement to conceal the acts of the conspirators.[3] Overt acts within three years of the date of the indictment were charged. Counts 5, 6, and 7 of the indictment charged petitioners with violating 18 U. S. C. § 1503 in the manner already indicated.

The proofs at the trial presented a sordid picture of a ring engaged in the business of "fixing" tax fraud cases

[3] Paragraph 7 of the indictment alleged: "It was a part of the conspiracy that the defendants and co-conspirators would make continuing efforts to avoid detection and prosecution by any governmental body . . . of tax frauds perpetrated by the defendants and co-conspirators, through the use of any means whatsoever, including but not limited to, bribery, improper influence and corruption of government employees, the giving of false testimony, [etc.] . . . ."

Paragraph 13 alleged: "It was further a part of the conspiracy that the defendants and co-conspirators at all times would misrepresent, conceal and hide and cause to be misrepresented, concealed and hidden, the acts done pursuant to and the purposes of said conspiracy."

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by the use of bribes and improper influence. In general outline, the petitioners' scheme, which is set forth in more detail in the Court of Appeals' opinion,[4] was as follows:

In 1947 and 1948 two New York business firms, Patullo Modes and Gotham Beef Co., were under investigation by the Bureau of Internal Revenue for suspected fraudulent tax evasion. Through intermediaries, both firms established contact with Halperin, a New York attorney, and his associates in law practice. Halperin in turn conducted negotiations on behalf of these firms with Grunewald, an "influential" friend in Washington, and reported that Grunewald, for a large cash fee, would undertake to prevent criminal prosecution of the taxpayers. Grunewald then used his influence with Bolich, an official in the Bureau, to obtain "no prosecution" rulings[5] in the two tax cases. These rulings were handed down in 1948 and 1949. Grunewald, through Halperin, was subsequently paid $60,000 by Gotham and $100,000 by Patullo.[6]

Subsequent activities of the conspirators were directed at concealing the irregularities in the disposition of the Patullo and Gotham cases. Bolich attempted to have the Bureau of Internal Revenue report on the Patullo case "doctored," and careful steps were taken to cover up the traces of the cash fees paid to Grunewald. In 1951 a congressional investigation was started by the King Committee of the House of Representatives; the conspirators felt themselves threatened and took steps to hide their traces. Thus Bolich caused the disappearance

[4] 233 F. 2d, at 559–562.

[5] A "no prosecution" ruling is an internal decision by the investigative branch of the Bureau of Internal Revenue not to press criminal charges against a taxpayer.

[6] The payments were made in cash. In order to raise the money and leave no traces, the taxpayers made unrecorded sales, the profits of which were again unreported income. Further large fees were paid to Halperin and his associates.

of certain records linking him to Grunewald, and the taxpayers were repeatedly warned to keep quiet. In 1952 the taxpayers and the conspirators were called before a Brooklyn grand jury. Halperin attempted to induce the taxpayers not to reveal the conspiracy, and Grunewald asked his secretary not to talk to the grand jury. These attempts at concealment were, however, in vain. The taxpayers and some of Halperin's associates revealed the entire scheme, and petitioners' indictment and conviction followed.[7]

The first question before us is whether the prosecution of these petitioners on Count 1 of the indictment was barred by the applicable three-year statute of limitations.[8]

The indictment in these cases was returned on October 25, 1954. It was therefore incumbent on the Government to prove that the conspiracy, as contemplated in the agreement as finally formulated, was still in existence on October 25, 1951, and that at least one overt act in furtherance of the conspiracy was performed after that date.[9] For where substantiation of a conspiracy charge

[7] Petitioner Bolich was also convicted on Count 2 of the indictment, which charged him and two other Bureau of Internal Revenue employees with conspiracy in violation of 26 U. S. C. § 4047 (e)(4). He was sentenced to three years' imprisonment and a $5,000 fine on this Count, the prison sentence to run concurrently with the five-year sentence on Count 1. The Court of Appeals held that both Counts related to the same conspiracy, and set aside the separate fine on Count 2.

[8] The governing statute was 18 U. S. C. § 3282, which provided: "Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found . . . within three years next after such offense shall have been committed."

[9] On September 1, 1954, the statute of limitations was amended to provide for a five-year limitation period. 68 Stat. 1145, 18 U. S. C. (Supp. III) § 3282. Since the amending statute was by its terms made applicable to offenses not barred on its effective date, that is,

requires proof of an overt act, it must be shown both that the conspiracy still subsisted within the three years prior to the return of the indictment, and that at least one overt act in furtherance of the conspiratorial agreement was performed within that period. Hence, in both of these aspects, the crucial question in determining whether the statute of limitations has run is the scope of the conspiratorial agreement, for it is that which determines both the duration of the conspiracy, and whether the act relied on as an overt act may properly be regarded as in furtherance of the conspiracy.[10]

Petitioners, in contending that this prosecution was barred by limitations, state that the object of the conspiratorial agreement was a narrow one: to obtain "no prosecution" rulings in the two tax cases. When these rulings were obtained, in October 1948 in the case of Gotham Beef, and in January 1949 in the case of Patullo Modes, the criminal object of the conspiracy, petitioners say, was attained and the conspirators' function ended. They argue, therefore, that the statute of limitations started running no later than January 1949, and that the

September 1, 1954, it would seem that in fact the crucial date here is September 1, 1951, rather than October 25; in other words, if the conspiracy was still alive after September 1, it was not barred. However, the case was tried on the theory that October 25 was the crucial date, and we so treat it in this opinion. The error, of course, was favorable to the petitioners and was therefore harmless. On the other hand, since we hold that petitioners must have a new trial, the error may be corrected.

[10] See, in general, *Lutwak* v. *United States*, 344 U. S. 604; *Krulewitch* v. *United States*, 336 U. S. 440; *Bollenbach* v. *United States*, 326 U. S. 607; *McDonald* v. *United States*, 89 F. 2d 128; *United States* v. *Manton*, 107 F. 2d 834; Cousens, Agreement as an Element in Conspiracy, 23 Va. L. Rev. 898; Sayre, Criminal Conspiracy, 35 Harv. L. Rev. 393; Note, 62 Harv. L. Rev. 276; Note, 56 Col. L. Rev. 1216.

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prosecution was therefore barred by 1954, when the indictment was returned.[11]

The Government counters with two principal contentions: First, it urges that even if the main object of the conspiracy was to obtain decisions from the Bureau of Internal Revenue not to institute criminal tax prosecutions—decisions obtained in 1948 and 1949—the indictment alleged,[12] and the proofs showed, that the conspiracy also included as a subsidiary element an agreement to conceal the conspiracy to "fix" these tax cases, to the end that the conspirators would escape detection and punishment for their crime. Says the Government, "from the very nature of the conspiracy . . . there had to be, and was, from the outset a conscious, deliberate, agreement to conceal . . . each and every aspect of the conspiracy . . . ." It is then argued that since the alleged conspiracy to conceal clearly continued long after the main criminal purpose of the conspiracy was accomplished, and since overt acts in furtherance of the agreement to conceal were performed well within the indictment period, the prosecution was timely.

Second, and alternatively, the Government contends that the central aim of the conspiracy was to obtain

[11] In support of this theory, petitioners point to evidence showing that the administrative practice of the Bureau of Internal Revenue was that only recommendations to prosecute would be reviewed at a higher echelon, whereas a determination of no prosecution would, for all practical purposes, end the case. They also emphasize that payment to Grunewald was made under the terms of an escrow which released the money when the "no prosecution" rulings came down.

Petitioners further urge that the acts of concealment occurring after 1949 show at most that a new and separate agreement to conceal was entered into after 1949, an agreement which was not charged in the indictment. Cf. *United States* v. *Siebricht*, 59 F. 2d 976. In view of our disposition of the case, we need not deal with this contention.

[12] See n. 3, *supra*.

for these taxpayers, not merely a "no prosecution" ruling, but absolute immunity from tax prosecution; in other words, that the objectives of the conspiracy were not attained until 1952, when the statute of limitations ran on the tax cases which these petitioners undertook to "fix." The argument then is that since the conspiracy did not end until 1952, and since the 1949–1952 acts of concealment may be regarded as, at least in part, in furtherance of the objective of the conspirators to immunize the taxpayers from tax prosecution, the indictment was timely.

For reasons hereafter given, we hold that the Government's first contention must be rejected, and that as to its second, which the Court of Appeals accepted, a new trial must be ordered.

I.

We think that the Government's first theory—that an agreement to conceal a conspiracy can, on facts such as these, be deemed part of the conspiracy and can extend its duration for the purposes of the statute of limitations—has already been rejected by this Court in *Krulewitch* v. *United States*, 336 U. S. 440, and in *Lutwak* v. *United States*, 344 U. S. 604.

In *Krulewitch* the question before the Court was whether certain hearsay declarations could be introduced against one of the conspirators. The declarations in question were made by one named in the indictment as a co-conspirator after the main object of the conspiracy (transporting a woman to Florida for immoral purposes) had been accomplished. The Government argued that the conspiracy was not ended, however, since it included an implied subsidiary conspiracy to conceal the crime after its commission, and that the declarations were therefore still in furtherance of the conspiracy and binding on

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co-conspirators. This Court rejected the Government's argument. It then stated:

> "Conspirators about to commit crimes always expressly or implicitly agree to collaborate with each other to conceal facts in order to prevent detection, conviction and punishment. Thus the [Government's] argument is that even after the central criminal objectives of a conspiracy have succeeded or failed, an implicit subsidiary phase of the conspiracy always survives, the phase which has concealment as its sole objective.
>
> "We cannot accept the Government's contention. . . . The rule contended for by the Government could have far-reaching results. For under this rule plausible arguments could generally be made in conspiracy cases that most out-of-court statements offered in evidence tended to shield co-conspirators. We are not persuaded to adopt the Government's implicit conspiracy theory which in all criminal conspiracy cases would create automatically a further breach of the general rule against the admission of hearsay evidence." [13]

Mr. Justice Jackson, concurring, added:

> "I suppose no person planning a crime would accept as a collaborator one on whom he thought he could not rely for help if he were caught, but I doubt that this fact warrants an inference of conspiracy for that purpose. . . .
>
> "It is difficult to see any logical limit to the 'implied conspiracy,' either as to duration or means . . . . On the theory that the law will impute to the confederates a continuing conspiracy to defeat justice, one conceivably could be bound by

[13] 336 U. S., at 443–444.

> another's unauthorized and unknown commission of perjury, bribery of a juror or witness, [etc.] . . . .
>
> "Moreover, the assumption of an indefinitely continuing offense would result in an indeterminate extension of the statute of limitations. If the law implies an agreement to cooperate in defeating prosecution, it must imply that it continues as long as prosecution is a possibility, and prosecution is a possibility as long as the conspiracy to defeat it is implied to continue." [14]

The *Krulewitch* case was reaffirmed in *Lutwak* v. *United States, supra.* Here again the question was the admissibility of hearsay declarations of co-conspirators after the main purpose of the conspiracy had been accomplished; again the Government attempted to extend the life of the conspiracy by an alleged subsidiary conspiracy to conceal. Although in *Lutwak,* unlike in *Krulewitch,* the existence of a subsidiary conspiracy to conceal was charged in the indictment, the Court again rejected the Government's theory, holding that no such agreement to conceal had been proved or could be implied.

The Government urges us to distinguish *Krulewitch* and *Lutwak* on the ground that in those cases the attempt was to *imply* a conspiracy to conceal from the mere fact that the main conspiracy was kept secret and that overt acts of concealment occurred. In contrast, says the Government, here there was an *actual* agreement to conceal the conspirators, which was charged and proved to be an express part of the initial conspiracy itself.

We are unable to agree with the Government that, on this record, the cases before us can be distinguished on such a basis.

The crucial teaching of *Krulewitch* and *Lutwak* is that after the central criminal purposes of a conspiracy have

[14] *Id.*, at 455–456.

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been attained, a subsidiary conspiracy to conceal may not be implied from circumstantial evidence showing merely that the conspiracy was kept a secret and that the conspirators took care to cover up their crime in order to escape detection and punishment. As was there stated, allowing such a conspiracy to conceal to be inferred or implied from mere overt acts of concealment would result in a great widening of the scope of conspiracy prosecutions, since it would extend the life of a conspiracy indefinitely. Acts of covering up, even though done in the context of a mutually understood need for secrecy, cannot themselves constitute proof that concealment of the crime after its commission was part of the initial agreement among the conspirators. For every conspiracy is by its very nature secret; a case can hardly be supposed where men concert together for crime and advertise their purpose to the world. And again, every conspiracy will inevitably be followed by actions taken to cover the conspirators' traces. Sanctioning the Government's theory would for all practical purposes wipe out the statute of limitations in conspiracy cases, as well as extend indefinitely the time within which hearsay declarations will bind co-conspirators.

A reading of the record before us reveals that on the facts of this case the distinction between "actual" and "implied" conspiracies to conceal, as urged upon us by the Government, is no more than a verbal tour de force. True, in both *Krulewitch* and *Lutwak* there is language in the opinions stressing the fact that only an *implied* agreement to conceal was relied on.[15] Yet when we look to the facts of the present cases, we see that the evidence from which the Government here asks us to deduce an "actual" agreement to conceal reveals nothing beyond that adduced in prior cases. What is this evidence?

[15] See 336 U. S., at 444, 455–458; 344 U. S., at 616.

First, we have the fact that from the beginning the conspirators insisted on secrecy. Thus the identities of Grunewald and Bolich were sedulously kept from the taxpayers; careful steps were taken to hide the conspiracy from an independent law firm which was also working on Patullo's tax problems; and the taxpayers were told to make sure that their books did not reflect the large cash payments made to Grunewald. Secondly, after the "no prosecution" rulings were obtained, we have facts showing that this secrecy was still maintained. Thus, a deliberate attempt was made to make the above-mentioned independent law firm believe that it was *its* (quite legitimate) efforts which produced the successful ruling. Finally, we have the fact that great efforts were made to conceal the conspiracy when the danger of exposure appeared. For example, Bolich got rid of certain records showing that he had used Grunewald's hotel suite in Washington; Patullo's accountant was persuaded to lie to the grand jury concerning a check made out to an associate of the conspirators; Grunewald attempted to persuade his secretary not to talk to the grand jury; and the taxpayers were repeatedly told by Halperin and his associates to keep quiet.

We find in all this nothing more than what was involved in *Krulewitch*, that is, (1) a criminal conspiracy which is carried out in secrecy; (2) a continuation of the secrecy after the accomplishment of the crime; and (3) desperate attempts to cover up after the crime begins to come to light; and so we cannot agree that this case does not fall within the ban of those prior opinions.

In effect, the differentiation pressed upon us by the Government is one of words rather than of substance. In *Krulewitch* it was urged that a continuing agreement to conceal should be implied out of the mere fact of conspiracy, and that acts of concealment should be taken as overt acts in furtherance of that implied agreement to

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conceal. Today the Government merely rearranges the argument. It states that the very same acts of concealment should be used as circumstantial evidence from which it can be inferred that there was from the beginning an "actual" agreement to conceal. As we see it, the two arguments amount to the same thing: a conspiracy to conceal is being implied from elements which will be present in virtually every conspiracy case, that is, secrecy plus overt acts of concealment.[16] There is not a shred of direct evidence in this record to show anything like an express original agreement among the conspirators to continue to act in concert in order to cover up, for their own self-protection, traces of the crime after its commission.

Prior cases in this Court have repeatedly warned that we will view with disfavor attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions.[17] The important considerations of policy behind such warnings need not be again detailed. See Jackson, J., concurring in *Krulewitch* v. *United States*, *supra*. It is these considerations of policy which govern our holding today. As this case was tried, we have before us a typical example of a situation where the Government,

[16] One might cite as an example Grunewald's attempt at influencing his secretary not to talk to the grand jury, accompanied by an offer to "pay her expenses." Under the Government's *Krulewitch* theory, the argument would have been (in Mr. Justice Jackson's words) that the "law will impute to the confederates a continuing conspiracy to defeat justice," and that therefore the other confederates are "bound by another's unauthorized and unknown . . . bribery of a juror or witness." But no different result is achieved by saying that the attempted bribe of the witness is evidence from which one can infer an "actual" conspiracy to "defeat justice." In both cases the essential missing element is a showing that the act was done in furtherance of a prior criminal agreement among the conspirators.

[17] *Delli Paoli* v. *United States*, 352 U. S. 232; *Lutwak* v. *United States*, *supra*; *Krulewitch* v. *United States*, *supra*; *Bollenbach* v. *United States*, 326 U. S. 607.

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faced by the bar of the three-year statute, is attempting to open the very floodgates against which *Krulewitch* warned. We cannot accede to the proposition that the duration of a conspiracy can be indefinitely lengthened merely because the conspiracy is kept a secret, and merely because the conspirators take steps to bury their traces, in order to avoid detection and punishment after the central criminal purpose has been accomplished.

By no means does this mean that acts of concealment can never have significance in furthering a criminal conspiracy. But a vital distinction must be made between acts of concealment done in furtherance of the *main* criminal objectives of the conspiracy, and acts of concealment done after these central objectives have been attained, for the purpose only of covering up after the crime. Thus the Government argues in its brief that "in the crime of kidnapping, the acts of conspirators in hiding while waiting for ransom would clearly be planned acts of concealment which would be in aid of the conspiracy to kidnap. So here, there can be no doubt that . . . all acts of concealment, whether to hide the identity of the conspirators or the action theretofore taken, were unquestionably in furtherance of the initial conspiracy . . . ." We do not think the analogy is valid. Kidnapers in hiding, waiting for ransom, commit acts of concealment in furtherance of the objectives of the conspiracy itself, just as repainting a stolen car would be in furtherance of a conspiracy to steal; in both cases the successful accomplishment of the crime necessitates concealment.[18] More closely analogous to our case would be conspiring kidnapers who cover their traces after the main conspiracy is finally ended—*i. e.*, after they have abandoned the kidnaped person and then take care to escape detection. In the latter case, as here, the acts of covering up can by

[18] See *Rettich* v. *United States*, 84 F. 2d 118; *McDonald* v. *United States*, 89 F. 2d 128.

themselves indicate nothing more than that the conspirators do not wish to be apprehended—a concomitant, certainly, of every crime since Cain attempted to conceal the murder of Abel from the Lord.

We hold, therefore, that, considering the main objective of the conspiracy to have been the obtaining of "no prosecution" rulings, prosecution was barred by the three-year statute of limitations, since no agreement to conceal the conspiracy after its accomplishment was shown or can be implied on the evidence before us to have been part of the conspiratorial agreement.

II.

In view of how the case was submitted to the jury, we are also unable to accept the Government's second theory for avoiding the statute of limitations. This theory is (1) that the main objective of the conspiracy was not merely to obtain the initial "no prosecution" rulings in 1948 and 1949, but to obtain *final immunity* for Gotham and Patullo from criminal tax prosecution; (2) that such immunity was not obtained until 1952, when the statute of limitations had run on the tax-evasion cases which the petitioners conspired to fix;[19] (3) that the conspiracy therefore did not end until 1952, when this object was attained; (4) that the acts of concealment within the indictment period were overt acts in furtherance of this conspiracy; and (5) that the prosecution was thus timely.[20] In short, the contention is that the agreement

[19] The tax evasion cases were governed by a six-year statute of limitations, 26 U. S. C. (1940 ed.) § 3748, which began to run when the last return, pertaining to the year 1946, was filed by the taxpayers.

[20] The Government also suggests a further theory under which this conspiracy could be deemed to have lasted into the indictment period. Under this theory, the central aim of the conspiracy was not specifically to "fix" the tax troubles of Gotham and Patullo, but to engage in the continuing business of fixing any and all tax-fraud

to conceal was to protect the *taxpayers* rather than the *conspirators*, and as such was part of the main conspiracy rather than a subsidiary appendage to it, as under the Government's first theory.

The Court of Appeals accepted this theory of the case in affirming these convictions. It stated:

> "What the fixers had to sell was freedom from criminal prosecution for tax frauds. What the taxpayers bargained for was protection from a tax evasion prosecution.
>
> . . . . .
>
> "This conspiracy is wholly unlike the ordinary illegal scheme in that the jury may well have inferred that the official announcement that there would be no criminal prosecution of the taxpayers

cases. If this were the aim of the conspiracy, acts of concealment could have been in furtherance of this aim by enabling the ring to stay in business so that it could get new cases. Evidence supporting this theory, says the Government, is that in 1950, after the "no prosecution" rulings in the Patullo and Gotham cases, Halperin engaged in negotiations with another firm which was in tax difficulties. Although these negotiations came to nothing, due to disagreement about the fee to be paid to the conspirators, the incident is presented as evidence that the conspirators were actively soliciting future tax clients in 1950 and were thus still "in business."

We cannot accept this theory of the Government. The trouble is not only that the theory was never submitted to the jury, but that no overt act done to further the purpose of engaging in "new" business was charged or proved to have occurred after October 25, 1951. If one of the purposes of the conspiracy was to engage in the business of fixing tax cases generally, it must be deemed to have been abandoned in 1951, when investigations of the petitioners started in Congress, since the 1951 and 1952 activities of the conspirators consisted merely of covering up old ventures rather than seeking new ones, and since there is no indication that there was an intent to resume operations after the investigations had ended. Indeed, upon the oral argument the Government seemed to abandon this theory.

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was merely the delivery of a substantial installment of what appellants agreed to deliver for the huge sums paid. The six-year Statute of Limitations . . . did not run in favor of the taxpayers until some time after the commission of the overt acts relied upon. In the interval there was no assurance, other than continuing efforts by Grunewald, Bolich and the others, that the whole nefarious business might not be brought to light, followed by the revocation of the decision not to criminally prosecute the taxpayers. This is a significant element in the proofs adduced by the government, as concealment of the conspiratorial acts was necessary not only to protect the conspirators from a conspiracy prosecution but also to protect the taxpayers from a tax evasion prosecution." 233 F. 2d, at 564–565.

We find the legal theory of the Court of Appeals unexceptionable. If the central objective of the conspiracy was to protect the taxpayers from tax-evasion prosecutions, on which the statute of limitations did not run until 1952, and if the 1948 and 1949 "no prosecution" rulings were but an "installment" of what the conspirators aimed to accomplish, then it is clear that the statute of limitations on the conspiracy did not begin to run until 1952, within three years of the indictment.[21]

Furthermore, we agree with the Court of Appeals that there is evidence in this record which would warrant submission of the case to the jury on the theory that the central object of the conspiracy was not attained in 1948 and 1949, but rather was to immunize the taxpayers completely from prosecution for tax evasion and thus continued into 1952. The many overt acts of concealment occurring after 1949 could easily have been motivated at

[21] The indictment was clearly sufficient to cover submission of this theory to the jury. See n. 3, *supra*.

least in part by the purpose of the conspirators to deliver the remaining "installments" owing under the bargain—to wit, the safeguarding of the continued vitality of the "no prosecution" rulings.[22] Furthermore, there is evidence showing that from the beginning the aim of the scheme was not restricted to the merely provisional and necessarily precarious "fixing" of the taxpayers' troubles which was achieved in 1948 and 1949.[23] A jury might therefore

[22] One might cite as a typical example an incident in the record occurring in November 1949, 10 months after the "no prosecution" ruling was handed down in the Patullo case. The Special Agent who had been working on the case wrote a final report on it, which stated that Patullo was not prosecuted solely because of Bolich's decision. This report was sent to Bolich, who thereupon called the Chief of the Conference Section and asked him to write an explanatory memorandum on the case so as to "take a little heat off the situation." This attempt to "doctor" the report might easily have been motivated not only by fear for himself, but by a purpose to safeguard the "no prosecution" ruling from change in order to maintain the immunity of the taxpayers.

[23] The negotiations between Halperin and his associates and the taxpayers were never very specific as to what exactly was to be accomplished. The tenof of the discussions was that if the taxpayers would hire the mysterious "influential" man in Washington, the matter "would be ended," the "prosecution end of the case" would be avoided, the matter would be settled "in a civil way without criminal prosecution." In the same tenor, the accountant of Gotham Beef testified that "nothing at all was to be paid unless the criminal prosecution had been eliminated. It was further understood that they were not at all concerned with the amount of the tax that might result by way of assessment, but it was either that they were completely successful in eliminating criminal prosecution . . . or there would be no fee at all." In other words, there is little indication that it was the specific and narrow end of obtaining the "no prosecution" rulings which was to be the *quid pro quo*.

This is further buttressed by the fact that the taxpayers were well aware of the precarious nature of the 1948 and 1949 rulings; it is quite clear that they realized that this did not "end" the danger of criminal prosecution. Thus the Patullo taxpayers were aware that the continued investigation of their books for the purposes of civil

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fairly infer that it was part of the conspiratorial agreement that Grunewald and Bolich would make continuing efforts to safeguard the fruits of the partial victories won in 1948 and 1949 by trying to immunize the "no prosecution" rulings from change. In other words, we think a jury could infer from this evidence that the conspirators were prepared and had agreed to engage in further frauds and bribery if necessary in order to maintain in effect the tentative rulings obtained in 1948 and 1949.[24]

tax liability exposed them to constant danger of "tipping the applecart." They were warned to "keep their mouths shut," and a further payment of $25,000 was made for the "boys in New York" so that no one would "raise a fuss about the phony deal that had been put through." Another Patullo officer testified that, after the "no prosecution" ruling, "we still were not at ease about the thing. We knew that we were elated over the results, but we still were worried about it. There was cooperation to take care of. We had to make this payoff for the New York boys. We were not through with it at that time. We never knew when something else was going to come up. We weren't through at all. . . . For two years after that we still weren't through with the thing." And, referring to the payment for the "New York boys" in 1949: "[W]e never felt too sure about anything because the civil settlement still had to be made and we knew there were people that had to go through it and pass on it and everything, and while this was going on we were told that we would have to get up some more money."

A jury could thus easily infer that the conspirators' function did not end in January 1949, and that the conspiratorial agreement contemplated further efforts to immunize the taxpayers from tax prosecution.

[24] It should be mentioned that the Court of Appeals was unanimous in finding that there was sufficient evidence in the record to warrant the submission of the case to the jury on the theory that the central objectives of the conspiracy were not achieved until the statute of limitations ran on the tax-evasion charges. Judge Frank, while dissenting on the ground that the charge to the jury was inadequate in putting the case to the jury on this basis—a view which we share, see *infra*, p. 413—agreed that under a proper charge the jury might infer that the conspiracy was still alive through 1951. See 233 F. 2d, at 592–596.

If, therefore, the jury could have found that the aim of the conspiratorial agreement was to protect the taxpayers from tax prosecution, and that the overt acts occurring in the indictment period were in furtherance of that aim, we would affirm. We do not think, however, that we may safely assume that the jury so found, for we cannot agree with the Court of Appeals' holding that this theory of the case was adequately submitted to the jury.

The trial judge's charge on the problem of the scope and duration of the conspiracy was as follows:

> "You will recall that the indictment states, among other things, that it was part of the conspiracy that the defendants and co-conspirators would make 'continuing efforts to avoid detection and prosecution by any governmental body, executive, legislative, and judicial of tax frauds perpetrated by the defendants and co-conspirators through the use of any means whatsoever including but not limited to . . . the influencing, intimidating, and impeding of prospective witnesses to refrain from disclosing the true facts.' In other words, the indictment alleges that the conspiracy comprehended within it a conspiracy to conceal the true facts from investigation, should investigation thereafter eventuate. This is an important element of the first count of the indictment which you must take into consideration, inasmuch as the Statute of Limitations on the charge of criminal conspiracy is three years and unless the conspiracy was continuing to a period within three years prior to the date of the indictment, October 25, 1954, and some overt act was performed within that three-year period, the crime, if any, alleged in the first count of the indictment would be outlawed. It is the contention of the government that the conspiracy did not end when the

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taxpayers were advised that there would be no criminal prosecution recommended by the Special Agent's office, but that an integral part of the entire conspiracy was an agreement to conceal the acts of the conspirators and that when thereafter an investigation was started by Congress and by the Grand Jury in the Eastern District of New York, the conspirators performed overt acts in pursuance of the original conspiracy designed to conceal the true facts; and that these acts occurred within three years prior to the date of the indictment. On this issue, it will be necessary for you to determine whether, beyond a reasonable doubt, you can conclude that the conspiracy was of the nature described in the first count of the indictment and comprehended an agreement to conceal and whether some overt act took place in the period of three years prior to October 25, 1954 to carry out such purpose of the conspiracy.

. . . . .

"To determine whether certain of the alleged overt acts were in furtherance of the object of the conspiracy, you have to determine the duration of the conspiracy. Did it end when the Pattullo [*sic*] Modes people and the Gotham Beef people received an assurance of no prosecution from the Bureau of Internal Revenue, or was a part of the conspiracy a continuing agreement to conceal the acts done pursuant thereto? In determining whether a part of the conspiracy was an agreement to continue to conceal the illegal acts after their consummation, you may not imply that such an agreement was part of the conspiracy. You would have to find from the evidence of the acts and declarations of the co-conspirators that there was an understanding or agreement to conceal the conspiracy. If you find that

such an agreement or understanding to conceal the conspiracy was not a part of the conspiracy to defraud the government, but no more than an afterthought brought to the surface when the co-conspirators were confronted with the Grand Jury and King Committee investigations, then you must find, as a matter of law, that the defendants are not guilty of the crime charged in the first count of the indictment. If you find that the evidence shows, beyond a reasonable doubt, that as a part of a conspiracy to defraud the government, there was an agreement or understanding to conceal the illegal acts and that this too was an objective or part of the conspiracy, then you may find that such understanding was a part of the conspiracy. However, you must additionally determine whether this objective of the conspiracy was known to the defendants. If this objective was known originally by only part of the conspirators but thereafter during the existence of the conspiracy, the scope of the conspiracy was extended so as to include such an agreement to conceal, and if you find that some of the defendants did not know of the expansion to include the agreement to conceal, you may not impute to them the knowledge of their co-conspirators and they could not be found guilty of the crime charged in Count One."

We are constrained to agree with Judge Frank that this charge did not adequately enlighten the jury as to what they would have to find in order to conclude that the conspiracy was still alive after October 25, 1951. For the charge as given failed completely to distinguish between concealment in order to achieve the central purpose of the conspiracy (that is, the immunization of the taxpayers from tax-evasion prosecution), and concealment intended solely to cover up an already executed crime

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(that is, the obtaining of the "no prosecution" rulings). The jury was never told that these overt acts of concealment could be taken as furthering the conspiracy only if the basic criminal aim of the conspiracy was not yet attained in 1949. On the charge as given, the jury might easily have concluded that the petitioners were guilty even though they found merely (1) that the central aim of the conspiracy was accomplished in 1949, and (2) that the subsequent acts of concealment were motivated exclusively by the conspirators' fear of a conspiracy prosecution. As far as we know, therefore, the present convictions were based on the impermissible theory discussed in the first part of this opinion—namely, that a subordinate agreement to conceal the conspiracy continued after the central aim of the conspiracy had been accomplished.

Furthermore, if the convictions were based on a finding that the overt acts of concealment were done with the single intention of protecting the conspirators' own interests, then it is irrelevant that these acts in fact happened to have the effect also of protecting the taxpayers against revocation of the "no prosecution" rulings. For overt acts in a prosecution such as this one are meaningful only if they are within the scope of the conspiratorial agreement. If that agreement did not, expressly or impliedly, contemplate that the conspiracy would continue in its efforts to protect the taxpayers in order to immunize them from tax prosecution, then the scope of the agreement cannot be broadened retroactively by the fact that the conspirators took steps after the conspiracy which incidentally had that effect.

We thus find that the judge's charge left it open for the jury to convict even though they found that the acts of concealment were motivated purely by the purpose of the conspirators to cover up their already accomplished crime. And this, we think, was fatal error. For the facts in this record are equivocal. The jury might easily have

concluded that the aim of the conspiracy was accomplished in 1949, and that the overt acts of concealment occurring after that date were done pursuant to the alleged conspiracy to hide the conspirators. As we have said, a conviction on such a theory could not be sustained. Under such circumstances, therefore, it was essential for the judge to charge clearly and unequivocally that on these facts the jury could not infer a continuing conspiracy to conceal the conspiracy, whether actual or implied. Further, it was incumbent on the judge to charge that in order to convict the jury would have to find that the central aim of the conspiracy was to immunize the *taxpayers* from tax prosecution, that this objective continued in being through 1951, and that the overt acts of concealment proved at trial were at least partly calculated to further this aim.

Since, under the judge's charge, the convictions on Count 1 might have rested on an impermissible ground, we conclude that they cannot stand, and the petitioners must be given a new trial as to this Count.

III.

What we have held as to the statute of limitations disposes of the conviction of the three petitioners under Count 1, but does not touch Halperin's conviction on Counts 5, 6, and 7 for violating 18 U. S. C. § 1503.[25] As to those Counts, Halperin, who took the stand in his own defense at the trial, contends (a) that the Government was improperly allowed to cross-examine him as to the assertion of his Fifth Amendment privilege before a grand jury investigating this conspiracy, before which he had been called as a witness,[26] and (b) that the evidence did

[25] See n. 2, *supra*.

[26] Grunewald and Bolich also make this contention on their own behalf.

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not justify his conviction on these Counts. For the reasons given hereafter we think that the first contention is well taken, but that the second one is untenable.

In 1952 Halperin was subpoenaed before a Brooklyn grand jury which was investigating corruption in the Bureau of Internal Revenue. Testimony had already been received by the grand jury from the Patullo and Gotham taxpayers, which linked Halperin with the tax-fixing ring. Halperin was asked a series of questions before the grand jury, including, among others, such questions as whether he knew Max Steinberg (an employee of the Bureau of Internal Revenue and a co-defendant in the charge under Count 1); whether he knew Grunewald; whether he had held and delivered escrow money paid to Grunewald by Gotham after the "no prosecution" ruling; and whether he had phoned Grunewald to arrange a meeting between one of his own associates and Bolich. Halperin declined to answer any of these questions, on the ground that the answers would tend to incriminate him and that the Fifth Amendment therefore entitled him not to answer. He repeatedly insisted before the grand jury that he was wholly innocent, and that he pleaded his Fifth Amendment privilege only on the advice of counsel that answers to these questions might furnish evidence which could be used against him, particularly when he was not represented by counsel and could not cross-examine witnesses before the grand jury.

When the Government cross-examined Halperin at the trial some of the questions which he had been asked before the grand jury were put to him.[27] He answered

[27] The questions were: (1) Whether petitioner held escrow money which was subsequently delivered to Grunewald; (2) whether petitioner knew Grunewald; (3) whether petitioner made a telephone call to Grunewald relative to an appointment between Bolich and one Davis, a member of the conspiracy; (4) whether petitioner had

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each question in a way consistent with innocence. The Government was then allowed, over objection, to bring out in cross-examination that petitioner had pleaded his privilege before the grand jury as to these very questions. Later, in his charge to the jury, the trial judge informed them that petitioner's Fifth Amendment plea could be taken only as reflecting on his credibility, and that no inference as to guilt or innocence could be drawn therefrom as to Halperin or any co-defendant.[28]

filed a power of attorney in the Glover case; (5) whether he had ever met one Oliphant, an official in the Treasury; (6) whether he knew Steinberg; (7) whether he knew Tobias, the accountant of Gotham Beef; (8) whether he had ever met Grunewald in the Munsey Building in Washington.

[28] The charge as to this point was as follows:

"During the cross examination of one of the defendants, the government questioned the defendant as to his previous statements before the Brooklyn Grand Jury in which he refused to answer certain questions on the ground that answers to them might tend to incriminate him. These questions related to matters similar to those to which the defendant testified at this trial when he took the stand. No witness is required to take the stand or required to give testimony that might tend to incriminate him; but when a defendant takes the stand in his own defense at a trial, it is proper to interrogate him as to previous statements which he may have made under oath concerning the same matter, including his assertion of his constitutional privilege to refuse to testify as to those matters before a grand jury. You may use this evidence of a defendant's prior assertions of the Fifth Amendment for the sole purpose of ascertaining the weight you choose to give to his present testimony with respect to the same matters upon which he previously invoked his privilege.

"The defendant had the right of asserting the Fifth Amendment when he appeared before the Grand Jury, and I charge you that you are not to draw any inference whatsoever as to the guilt or innocence of the defendant in this case by reason of the fact that he chose to assert his unquestioned right to invoke the Fifth Amendment on that previous occasion. However, it was proper for the Government to question the defendant with respect to his previous invocation of the Fifth Amendment, but you may consider this evidence of

In thus allowing this cross-examination, the District Court relied on *Raffel* v. *United States*, 271 U. S. 494, where this Court held that a defendant's failure to take the stand at his first trial to deny testimony as to an incriminating admission could be used on cross-examination at the second trial, where he did take the stand, to impugn the credibility of his denial of the same admission. In upholding the District Court here, the Court of Appeals likewise relied on *Raffel*, and also on one of its own earlier decisions.[29] Halperin attacks these rulings on these principal grounds: (a) *Raffel* is distinguishable from the present case; (b) if *Raffel* permitted this cross-examination, then the trial court erred in refusing to charge, as Halperin requested, that "an innocent man may honestly claim that his answers may tend to incriminate him"; (c) in any case *Raffel* has impliedly been overruled by *Johnson* v. *United States*, 318 U. S. 189; and (d) compelling Halperin to testify before the grand jury, when he had already been marked as a putative defendant, violated his constitutional rights, so that, by analogy to the rule of *Weeks* v. *United States*, 232 U. S. 383, his claim of privilege could in no event be used against him. We find that in the circumstances presented here *Raffel* is not controlling, and that this cross-examination was not permissible.

It is, of course, an elementary rule of evidence that prior statements may be used to impeach the credibility of a criminal defendant or an ordinary witness. But this can be done only if the judge is satisfied that the prior statements are in fact inconsistent. 3 Wigmore, Evi-

his prior assertions of the Fifth Amendment only for the purpose of ascertaining the weight you choose to give to his present testimony with respect to the same matters upon which he previously asserted his constitutional privilege. It is not to be considered in a determination of the guilt or innocence of any co-defendant."

[29] *United States* v. *Gottfried*, 165 F. 2d 360, 367.

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dence, § 1040. And so the threshold question here is simply whether, in the circumstances of this case, the trial court erred in holding that Halperin's plea of the Fifth Amendment privilege before the grand jury involved such inconsistency with any of his trial testimony as to permit its use against him for impeachment purposes.[30] We do not think that *Raffel* is properly to be read either as dispensing with the need for such preliminary scrutiny by the judge, or as establishing as a matter of law that such a prior claim of privilege with reference to a ques-

[30] When the trial court first ruled that the Government could cross-examine as to petitioner's Fifth Amendment plea, it did not do so on the grounds of inconsistency reflecting on credibility. In fact the implication to be drawn from the record is that the court at that time felt that the jury might use this evidence for any purpose at all, including the drawing of inferences as to guilt or innocence. When the Government first embarked on this method of cross-examination, the judge overruled objections in these words:

"The Court: I know the Government's position. As I see it, Mr. Corbin [a defense attorney], no witness can be compelled to testify against himself. The witness is called before the grand jury and the answer was, I refuse to answer something on the ground that if I answer that question it will incriminate me.

"Mr. Corbin: Tend to incriminate.

"The Court: Or tend to incriminate. A witness can make that statement. No witness has to take the witness stand, as I understand the law and if a witness has so stated, then he could not be compelled to take the stand here, but if a witness voluntarily takes the stand and is asked in a previous proceeding did you say any testimony on this subject would incriminate you, that can be considered by the jury for such benefit or such worth as the jury may want to give it."

When the defendants asked that at the very least the use of this evidence be restricted to the question of credibility, the judge contented himself with asking for a memorandum of law on the subject. Thus, although later, in the charge to the jury, the matter was specifically restricted to the issue of credibility, there was no inquiry by the judge at the time of the initial admission of this evidence as to whether a sufficient showing of inconsistency had been made.

tion later answered at the trial is always to be deemed to be a prior inconsistent statement, irrespective of the circumstances under which the claim of privilege was made. The issue decided in *Raffel* came to the Court as a certified question in quite an abstract form,[31] and was really centered on the question whether a defendant who takes the stand on a second trial can continue to take advantage of the privilege asserted at the first trial. This Court held, in effect, that when a criminal defendant takes the stand, he waives his privilege completely and becomes subject to cross-examination impeaching his credibility just like any other witness: "His waiver is not partial; having once cast aside the cloak of immunity, he may not resume it at will, whenever cross-examination may be inconvenient or embarrassing." The Court, in *Raffel*, did not focus on the question whether the cross-examination there involved was in fact probative in impeaching the defendant's credibility. In other words, we may assume that under *Raffel* Halperin in this case was subject to cross-examination impeaching his credibility just like any other witness, and that his Fifth Amendment plea before the grand jury could not carry over any form of immunity when he voluntarily took the stand at the trial. This does not, however, solve the question whether in the particular circumstances of this case the cross-examination should have been excluded because its probative value on the issue of Halperin's credibility was so negligible as to be far outweighed by its possible impermissible impact on the jury.[32] As we consider that in the

[31] The certified question was: "Was it error to require the defendant, Raffel, offering himself as a witness upon the second trial, to disclose that he had not testified as a witness in his own behalf upon the first trial?" 271 U. S., at 496.

[32] In *Raffel* this Court assumed that the defendant's failure to testify at the first trial could not be used as evidence of guilt in the second trial, 271 U. S., at 497. The Court further stated that "the

circumstances of the present case, the trial court, in the exercise of a sound discretion, should have refused to permit this line of cross-examination, we are not faced with the necessity of deciding whether *Raffel* has been stripped of vitality by the later *Johnson* case, *supra*, or of otherwise re-examining *Raffel*.

We need not tarry long to reiterate our view that, as the two courts below held, no implication of guilt could be drawn from Halperin's invocation of his Fifth Amendment privilege before the grand jury. Recent re-examination of the history and meaning of the Fifth Amendment has emphasized anew that one of the basic functions of the privilege is to protect *innocent* men. Griswold, The Fifth Amendment Today, 9–30, 53–82. "Too many, even those who should be better advised, view this privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are either guilty of crime or commit perjury in claiming the privilege." *Ullmann* v. *United States*, 350 U. S. 422, 426. See also *Slochower* v. *Board of Higher Education*, 350 U. S. 551, when, at the same Term, this Court said at pp. 557–558: "The privilege serves to protect the innocent who otherwise might be ensnared by ambiguous circumstances."

When we pass to the issue of credibility, we deem it evident that Halperin's claim of the Fifth Amendment privilege before the Brooklyn grand jury in response to questions which he answered at the trial was wholly consistent with innocence. Had he answered the questions put to him before the grand jury in the same way he subsequently answered them at trial, this nevertheless

trial judge might appropriately instruct the jury that the failure of the defendant to take the stand in his own behalf is not in itself to be taken as an admission of the truth of the testimony which he did not deny." As already indicated, p. 418, *supra*, here the trial judge refused to charge that "an innocent man may honestly claim that his answers may tend to incriminate him."

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would have provided the Government with incriminating evidence from his own mouth. For example, had he stated to the grand jury that he knew Grunewald, the admission would have constituted a link between him and a criminal conspiracy, and this would be true even though he was entirely innocent and even though his friendship with Grunewald was above reproach. There was, therefore, as we see it, no inconsistency between Halperin's statement to the grand jury that answering the question whether he knew Grunewald would tend to furnish incriminating evidence against him, and his subsequent testimony at trial that his acquaintance with Grunewald was free of criminal elements. And the same thing is also true, as we see it, as to his claim of privilege with respect to the other questions asked him before the grand jury and his answers to those same questions when they were put to him at the trial. These conclusions are fortified by a number of other considerations surrounding Halperin's claim of privilege:

First, Halperin repeatedly insisted before the grand jury that he was innocent and that he pleaded his Fifth Amendment privilege solely on the advice of counsel.

Second, the Fifth Amendment claim was made before a grand jury where Halperin was a compelled, and not a voluntary, witness; where he was not represented by counsel; where he could summon no witnesses; and where he had no opportunity to cross-examine witnesses testifying against him. These factors are crucial in weighing whether a plea of the privilege is inconsistent with later exculpatory testimony on the same questions, for the nature of the tribunal which subjects the witness to questioning bears heavily on what inferences can be drawn from a plea of the Fifth Amendment. See Griswold, *supra*, at 62. Innocent men are more likely to plead the privilege in secret proceedings, where they testify without advice of counsel and without opportunity for cross-examination, than in open court proceedings, where cross-examination and judicially supervised procedure provide safeguards for the establishing of the whole, as against the possibility of merely partial, truth.

Finally, and most important, we cannot deem Halperin's plea of the Fifth Amendment to be inconsistent with his later testimony at the trial because of the nature of this particular grand-jury proceeding. For, when Halperin was questioned before the grand jury, he was quite evidently already considered a potential defendant. The taxpayers whose cases had been "fixed" by the conspiratorial ring had already testified before the grand jury, and they gave there largely the same evidence as they did later, at trial. The scheme was thus in essence already revealed when Halperin was called to testify. Under these circumstances it was evident that Halperin was faced with the possibility of an early indictment, and it was quite natural for him to fear that he was being asked questions for the very purpose of providing evidence against himself. It was thus quite consistent with innocence for him to refuse to provide evidence which could be used by the Government in building its incriminating chain. For many innocent men who know that they are about to be indicted will refuse to help create a case against themselves under circumstances where lack of counsel's assistance and lack of opportunity for cross-examination will prevent them from bringing out the exculpatory circumstances in the context of which superficially incriminating acts occurred.

We are not unmindful that the question whether a prior statement is sufficiently inconsistent to be allowed to go to the jury on the question of credibility is usually within the discretion of the trial judge. But where such evidentiary matter has grave constitutional overtones, as

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it does here, we feel justified in exercising this Court's supervisory control to pass on such a question. This is particularly so because in this case the dangers of impermissible use of this evidence far outweighed whatever advantage the Government might have derived from it if properly used. If the jury here followed the judge's instructions, namely, that the plea of the Fifth Amendment was relevant only to credibility, then the weight to be given this evidence was less than negligible, since, as we have outlined above, there was no true inconsistency involved; it could therefore hardly have affected the Government's case seriously to exclude the matter completely. On the other hand, the danger that the jury made impermissible use of the testimony by implicitly equating the plea of the Fifth Amendment with guilt is, in light of contemporary history, far from negligible. Weighing these factors, therefore, we feel that we should draw upon our supervisory power over the administration of federal criminal justice in order to rule on the matter. Cf. *McNabb* v. *United States*, 318 U. S. 332.

We hold that under the circumstances of this case it was prejudicial error for the trial judge to permit cross-examination of petitioner on his plea of the Fifth Amendment privilege before the grand jury, and that Halperin must therefore be given a new trial on Counts 5, 6, and 7.

Finally, we find no substance to Halperin's contention that he was in effect convicted for advising, as a lawyer, some of the witnesses before the grand jury that they had a right to plead their Fifth Amendment privilege. The evidence against Halperin under these Counts was quite sufficient to make out a case for submission to the jury.

For the reasons given we hold that the judgments below must be reversed, and the cases remanded to the District Court for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE BLACK, with whom THE CHIEF JUSTICE, MR. JUSTICE DOUGLAS, and MR. JUSTICE BRENNAN join, concurring.

I concur in the reversal of these cases for the reasons given in the Court's opinion with one exception.

In No. 184, the petitioner, Halperin, appeared before a grand jury in response to a subpoena. There he declined to answer certain questions relying on the provision of the Fifth Amendment that "No person . . . shall be compelled in any criminal case to be a witness against himself."

Later, at his trial, Halperin took the stand to testify in his own behalf. On cross-examination the prosecuting attorney asked him the same questions that he had refused to answer before the grand jury. This time Halperin answered the questions; his answers tended to show that he was innocent of any wrong-doing. The Government was then permitted over objection to draw from him the fact that he had previously refused to answer these questions before the grand jury on the ground that his answers might tend to incriminate him.

At the conclusion of the trial the judge instructed the jury that Halperin's claim of his constitutional privilege not to be a witness against himself could be considered in determining what weight should be given to his testimony—in other words, whether Halperin was a truthful and trustworthy witness. I agree with the Court that use of this claim of constitutional privilege to reflect upon Halperin's credibility was error, but I do not, like the Court, rest my conclusion on the special circumstances of this case. I can think of no special circumstances that would justify use of a constitutional privilege to discredit or convict a person who asserts it. The value of constitutional privileges is largely destroyed if persons can be penalized for relying on them. It seems peculiarly

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"overall scheme" to defraud Treasury & circumvent reporting laws (NB - even if underlying acts were legal)

RIES

oyer to continue in effect an actice that routinely results itral decisions," *Emporium Western Addition Commu-* U.S. 50, 68, 95 S.Ct. 977, d 12 (1975), we decline to or arbitration awards based this case. In concluding our he issue in *Honeywell*, we on.

occasion arise when an em- such expectations and delib- sts in conduct in clear viola- or arbitration award, which ion without an appropriate will have to face squarely of whether such circum- constitute an exception to of the *Steelworkers* trilogy. 28. Such an occasion does elf based on the facts of the The union has not alleged regious facts which can al- plant the arbitral process. believe that the district court l the union's motion for sum- nt. However, we want to that we are deciding solely the instant case and do not ossibility that a party could nt facts to avoid the arbitral ifferent situation.

IV.

on also argues that the court ting the defendants' motion judgment because there are of material fact. Specifical- laims that there is a genuine rial fact on the degree of between the instant dispute red by the Gibson and Sabel-

discussed above, the pres- ual dispute does not preclude gment "unless the disputed ne determinative under the ." *Egger*, 710 F.2d at 296. unable to establish that a e over the degree of factual g the awards is outcome de- nder the law. While we agree that the union has alleged that the factual basis of the arbitration awards in its favor are "substantially identical" to the facts in the instant dispute, it has failed to allege that the awards were intended to apply prospectively and that the companies' "conduct constitutes wilful and persistent disregard of the arbitration awards." *Honeywell*, 522 F.2d at 1227. Therefore, we believe the district court properly granted the companies' motion for summary judgment.[5]

V.

For all the foregoing reasons, the district court's judgment is

AFFIRMED.

WEST KEY NUMBER SYSTEM

UNITED STATES of America, Plaintiff–Appellee,

v.

Wesley BUCEY, Defendant–Appellant.

No. 88–1912.

United States Court of Appeals, Seventh Circuit.

Argued Jan. 11, 1989.

Decided June 8, 1989.

Rehearing and Rehearing En Banc Denied July 13, 1989.

Defendant was convicted in the United States District Court for the Northern District of Illinois, Ann C. Williams, J., of various offenses stemming from his participation in money laundering scheme. On appeal, the Court of Appeals, Cudahy, Circuit Judge, held that: (1) defendant did not violate substantive currency reporting statutes, and (2) evidence supported convictions for mail fraud and conspiracy.

Affirmed in part, reversed in part and remanded with directions.

1. United States ⇐34

Defendant accused of laundering money was not "financial institution," and thus could not be convicted for failing to file currency transaction reports upon receipt of currency in excess of $10,000; statute, defining "financial institution" as "agency, branch, or office" of person acting in one of listed capacities, was inapplicable to individual. 31 U.S.C.A. § 5313(a).

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

2. Fraud ⇐68.10(1)

Defendant accused of participating in money laundering scheme did not willfully conceal or falsify material fact when he listed himself on currency transaction report as individual conducting transaction with bank, though transaction may have been carried out on behalf of third party, in that it was defendant who was responsible for carrying out money laundering operation, who received commission for his services, who controlled bank account used, and who was solely authorized to make necessary deposits. 18 U.S.C.A. §§ 2(b), 1001.

3. Fraud ⇐68.10(1)
United States ⇐34

Defendant charged with participating in money laundering scheme was not re-

5. While appellant has raised an additional issue, whether the court erred in failing to enter judgment for it because the arbitration awards "draw their essence" from the collective bargaining agreement, we will not discuss this issue because it is lacking in merit. A court can review an arbitral award solely to determine if it "draws its essence from the collective bargaining agreement." *See United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597, 80 S.Ct. 1358, 1361, 4 L.Ed.2d 1424 (1960). However, neither party challenges the validity of either of the two, prior arbitration awards. Furthermore, the union never alleges that the defendants failed to comply with the terms of the Gibson and Sabella awards. The union does not dispute the fact that the defendants complied with the awards by paying the miners the appropriate back pay. Instead, appellant is asking us to enforce the prior awards in this subsequent dispute. As discussed throughout the text of this opinion, this is something we decline to do based on the facts of the instant case.

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quired to disclose source of funds involved in transaction on currency transaction report; defendant could reasonably believe that report requirement that he list "organization for whom this transaction was completed" could be satisfied by listing his own organization, whose bank account was being used. 18 U.S.C.A. §§ 2(b), 1001.

4. Post Office ⇐48(4)

Allegation that defendant charged with mail fraud in connection with money laundering devised scheme to deprive federal Government of tax dollars was sufficient to allege deprivation of money or property within meaning of mail fraud statute. 18 U.S.C.A. § 1341.

5. Post Office ⇐35(9)

Defendant could be convicted of mail fraud, based upon allegation that he schemed to deprive federal Government of tax revenues, though his tax evading "clients" were in fact undercover government agents and thus Government was not in fact deprived of tax revenues; statute punished scheme to defraud, with ultimate success of scheme being unnecessary to constitute violation. 18 U.S.C.A. § 1341.

6. Conspiracy ⇐43(12)

When indictment alleges conspiracy with multifarious objectives, conviction will be sustained so long as evidence is sufficient to show that defendant agreed to accomplish at least one of the alleged objectives. 18 U.S.C.A. § 371.

7. Conspiracy ⇐33(2)

Defendant charged with conspiracy in connection with his participation in money laundering scheme could be convicted of conspiracy to defraud Government, even if he did not violate substantive currency laws, where there was evidence that defendant and accomplice had engaged in overall scheme to circumvent currency reporting laws and prevent IRS from collecting accurate data, reports and income taxes. 18 U.S.C.A. § 371.

8. Obstructing Justice ⇐4

Defendant could be convicted of obstructing justice, though allegedly influenced grand jury witness was in fact undercover government agent; statute proscribed "endeavor" to influence witness regardless of defendant's ability to succeed. 18 U.S.C.A. § 1503.

9. Criminal Law ⇐16

Finding that defendant charged with obstructing grand jury possessed requisite corrupt intent to influence administration of justice was sufficiently supported by evidence that defendant, knowing of ongoing grand jury investigation, instructed witness to provide false and misleading testimony to grand jury. 18 U.S.C.A. § 1503.

10. Criminal Law ⇐338(4)

Evidence that money laundering defendant's "clients" were purportedly involved in narcotics trafficking was admissible as serving to explain purpose of and circumstances surrounding money laundering scheme.

Susan L. Satter, Chicago, Ill., for Wesley Bucey.

Anton Valukas, U.S. Atty., Chicago, Ill., David J. Stetler, Chief, Victoria J. Peters, and Howard M. Pearl, Deputy Chiefs, John S. Brennan, Asst. U.S. Atty., Criminal Receiving & Appellate Div., G. Roger Markley, Special Asst. U.S. Atty., Chicago, Ill., for U.S.

Before BAUER, Chief Judge, CUDAHY, Circuit Judge, and GRANT, Senior District Judge.*

CUDAHY, Circuit Judge.

Defendant-appellant Wesley Bucey was convicted of multiple related offenses arising out of an elaborate money laundering scheme designed to ostensibly "legitimize" the source of illegally obtained cash and to evade taxes. Bucey's conviction was based on a twelve-count indictment charging him with conspiracy, 18 U.S.C. section 371; mail and wire fraud, 18 U.S.C. sections 1341, 1343; failure to file currency transac-

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

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tion reports with the Internal Revenue Service ("IRS"), 31 U.S.C. sections 5313, 5322(b); causing false information to be provided to the IRS, 18 U.S.C. sections 2(b), 1001; and attempting to obstruct the administration of a grand jury, 18 U.S.C. section 1503. Bucey appeals his conviction on all counts. We affirm in part and reverse in part.

I.

This is a tale of an illicit money laundering enterprise engineered by defendant Bucey and Boston Witt, a former Attorney General of New Mexico.[1] We shall chronicle the facts, keeping in mind that all evidence and permissible inferences must be taken in the light most favorable to the government. *See United States v. Gimbel*, 830 F.2d 621, 622 (7th Cir.1987).

Bucey and Witt orchestrated a scheme with dual objectives: money laundering and tax evasion. The money laundering aspect of the operation was designed to provide a method for converting cash from unlawful activities, such as narcotics trafficking, into ostensibly legitimate business income. To carry out this scheme, Bucey set up a tax-exempt organization called the "Huguenot National Church," which was the conduit through which money was laundered.[2] Bucey and Witt charged a commission for these services rendered through the "church."

Bucey and Witt devised two methods for achieving the secondary objective of their scheme, tax evasion. First, they planned to use the Huguenot Church as a facade for directing their clients' illegally obtained cash overseas to the bank accounts of shell corporations. The clients could then spend this money in connection with the "business" of the foreign corporations, thereby avoiding taxation by the United States government. Bucey and Witt also arranged a second tax evasion strategem for persons seeking an illegal tax deduction to purchase art work through Bucey at an established price but to report the purchase at an inflated price through false documentation. Bucey would then accept the property as a sham donation to the Huguenot Church, enabling the purchaser to take an inflated charitable tax deduction.

Bucey and Witt's machinations were unveiled by an extensive undercover investigation. Undercover police officers, John and Don Smith, posed as drug dealers interested in laundering narcotics proceeds. In October 1985, Witt met the Smiths and advised them of a money laundering device by which they could transfer their cash overseas to a shell corporation and avoid paying taxes. Witt also discussed another mode of laundering the Smiths' cash through channels that would generate income purportedly earned by the Smiths for services provided to the Huguenot Church. All transactions would be supported by bogus documentation.

Following the October 1985 meeting, Witt contacted Bucey in Chicago and the two discussed the feasibility of exchanging the Smiths' cash for cashier's checks using the Huguenot Church account. Witt informed Bucey that the Smiths' cash was from a dubious source. Tr. at 221. On November 4, 1985, Witt met the Smiths in Las Vegas and discussed in more detail the money laundering operation. Witt explained Bucey's role in handling the cash and controlling the church's account. Witt proposed that the Smiths launder an initial deposit through a transaction conducted within the United States. Witt and Bucey viewed this as a step preparatory to generating cash for subsequent overseas transactions. *See* Tr. at 228. Witt instructed the Smiths to take their money to Chicago where Bucey would exchange it (minus a commission) for cashier's checks. Fraudulent documentation would identify the cash-

1. Boston Witt pleaded guilty and was a cooperating witness for the government in this case.

2. The church was an entity operated out of Bucey's home and had no edifice of its own. Upon searching Bucey's home, government agents discovered a "Huguenot National Church" file. Among other items, the file contained several newspaper articles about money laundering, including one entitled "Getting Dirty Money Squeaky Clean." *See* Government's Brief at 5 n. 4; Government's Exhibits 10A and 23–48; Tr. 1165–66.

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ier's checks as income from business activities carried out by the Smiths on behalf of the church.[3] An agreement was made to conduct an initial transaction involving $50,000 at Freedom Federal Savings and Loan ("Freedom Federal") in Chicago on January 6, 1986.

Witt and Bucey met the Smiths in Chicago on January 6 to carry out the laundering transaction at Freedom Federal. Prior to the transaction, Bucey and Witt received $8,000 as part of their 20% commission. Bucey and Don Smith then approached the teller, Smith counted the money, $42,000, and Bucey deposited it into the Huguenot Church account, informing the teller that the money was for medicine and supplies for Mexico earthquake victims. Bucey then drew a check on the church's account for $40,000 to pay for two cashier's checks that were given to the Smiths; $2,000 remained in the church account.[4] Bucey completed a Currency Transaction Report ("CTR") describing the cash deposit. On the CTR form, Bucey listed himself as the "individual conducting the transaction with the bank," and listed the Huguenot National Church as the "organization for whom this transaction was completed." *See* Appellant's App. at 58. Nowhere did he identify the Smiths as the source of the money.

As a result of the January 6 transaction, Bucey had converted $50,000 of the Smiths' purported drug proceeds into $40,000 in cashier's checks supported by false documentation legitimizing its source. While Bucey and Witt understood that the Smiths would be required to pay taxes on the $40,000, the remaining $10,000 of the Smiths' narcotics income would be unreported.

On January 23, 1986, Bucey and Witt arranged a similar transaction involving Dembitz, a third government agent posing as a drug-trafficking associate of the Smiths. The transaction was carried out at Freedom Federal on February 20, 1986. Bucey deposited $84,000 in the church account and completed a CTR again listing himself as the "individual conducting the transaction" and the Huguenot Church as the "organization for whom this transaction was completed." *See* Appellant's App. at 60. Bucey then drew three checks totaling $80,000 on the Huguenot Church account in exchange for three cashier's checks in the same amount, which were given to Dembitz. Afterwards, the transaction was similarly documented by false invoices.

This second transaction resulted in Bucey's converting $100,000 of purported drug income into $80,000 supported by documentation legitimizing its source. The remaining $20,000 of Dembitz' drug income was to go unreported.

On April 24, 1986, Dembitz introduced Bucey to a fourth undercover government agent, Ahern, who posed as an investor seeking to avoid taxes through illegal deductions. Bucey advised Ahern of an art donation scam in which Ahern would purchase art with a check for an inflated price and receive 80% back as a kickback in cash. He described how Ahern could then donate the art to Bucey's church and report a charitable deduction for the inflated amount of his cancelled check.[5] When Dembitz expressed concern about excluding Witt from the deal, Bucey responded reassuringly that he and Witt "are a team as far as that goes." Government's Brief

3. Witt and Bucey discussed the details of how the Smiths' money would be deposited in the church's bank account and portrayed as contributions to the church on behalf of earthquake disaster victims. Bucey was then to funnel the money back to the Smiths as a fee for services never rendered and provide the corresponding false documentation.

4. Later, Bucey described to the Smiths how the church insulated them from IRS detection. He explained that had the Smiths themselves simply brought in $40,000 and purchased cashier's checks for cash, the bank would be required to report that the Smiths purchased the checks. By writing a check on the church's account to pay for the cashier's checks, however, Bucey explained that there would be no report identifying the Smiths. Government's Brief at 11; Government's Exhibit 4A, at 20–21.

5. Ahern would retain possession of the art work, which would display a plaque stating that it was "on loan from the Huguenot National Church." *See* Government's Brief at 20; Government's Exhibit 13A, at 90.

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at 20; Government's Exhibit 8A, at 18. Bucey later discussed the art deal with Witt, who wanted to ensure that the transaction ran smoothly. Tr. at 764–65.

Witt was eventually arrested on charges involving cocaine trafficking. Thereafter, agent Dembitz notified Bucey by telephone that he had been served with a grand jury subpoena ordering him to produce documents relating to Bucey and the Huguenot Church. Bucey requested that Dembitz send him the subpoena. Bucey then advised Dembitz to rehearse his grand jury testimony with an attorney. Bucey instructed Dembitz that, "You will discuss with the attorney how you raised funds in dribs and drabs for the Huguenot Church and then went over—went over into Mexico and bought—bought goods for those earthquake victims with funds—you know, funds in Mexico, and that you got reimbursed—you brought in the money that you raised and got reimbursed for your out-of-pocket expenses by check from the Huguenot Church." Government's Brief at 22; Government's Exhibit 18A, at 4. In a later discussion, Bucey reiterated that Dembitz should adhere to the story that he had performed services on behalf of the church. *Id.* at 23; Tr. at 842.

Bucey's escapades led to a grand jury indictment on twelve counts: count 1—conspiracy; counts 2–5—mail fraud; counts 6–7—wire fraud; counts 8–9—failure to file CTRs in violation of 31 U.S.C. sections 5313 and 5322(b); counts 10–11—causing false information to be provided to the government in violation of 18 U.S.C. sections 2(b) and 1001; and count 12—attempting to influence, obstruct or impede the administration of a grand jury.

A jury convicted Bucey on all twelve counts. He was sentenced to five years' imprisonment on each of counts 1–9, to run concurrently, and two years' imprisonment on each of counts 10 and 11, to run concurrently with each other, but consecutively to the sentences on counts 1–9. On count 12, he was placed on probation for five years and fined $600.00. Bucey has appealed on all counts.

II.

A. *Failure to File CTRs*

Counts 8 and 9 charge, respectively, that on January 6, 1986, and February 20, 1986, Bucey and Witt, while acting in their capacity as a "financial institution," received currency in excess of $10,000 and knowingly and intentionally failed to file the required CTRs with the IRS in violation of 31 U.S.C. sections 5313 and 5322(b).[6] It is undisputed that on both occasions Bucey completed CTRs upon depositing the currency at Freedom Federal, which the bank then properly filed with the IRS. But, irrespective of those bank filings, the government contends that Bucey himself had an independent legal duty to file CTRs when he received the currency from the third-party government agents. These charges are predicated on the theory that Bucey is a "financial institution." Whether an individual acting in Bucey's capacity can be charged as a "financial institution" under the currency reporting laws is a question of first impression in this circuit.[7] The

6. With respect to the violation of 31 U.S.C. section 5322(b), a penalty enhancement provision, the indictment alleges that the failure to file CTRs offense was part of a pattern of illegal activity involving currency transactions exceeding $100,000, and was committed while violating another law of the United States, 18 U.S.C. section 1001.

Section 5322(b) states in pertinent part:

A person willfully violating this subchapter or a regulation prescribed under this subchapter ... while violating another law of the United States or as part of a pattern of illegal activity involving transactions of more than $100,000 in a 12-month period, shall be fined not more than $500,000, imprisoned for not more than five years, or both.

7. As a preliminary matter, we reject the government's argument that, because Bucey's tendered jury instructions defining "financial institution" were given to the jury without objection, Bucey has failed to preserve this issue for appeal. In a pretrial motion to dismiss the indictment, Bucey initially raised the issue whether, as a matter of law, he could be considered a "financial institution" under the currency reporting laws or regulations promulgated under them. Because the court rejected this challenge to the government's definition of "financial institution," it would have been futile for Bucey to object to the jury instruction. "If the problem has been brought to the attention of the court, and the court has indicated in no uncertain terms what its views

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sufficiency of the indictment under the currency reporting laws and regulations, of course, raises questions of law for our de novo review. *See United States v. Gimbel*, 830 F.2d 621 (7th Cir.1987); *United States v. Varbel*, 780 F.2d 758 (9th Cir. 1986).

To be valid, an indictment must allege acts which, if proven, would constitute an offense under the law that the defendant is charged with violating. If the indictment does not charge such a cognizable offense, of course, we must reverse any subsequent conviction based on that indictment. *Gimbel*, 830 F.2d at 624 (citing *McNally v. United States*, 483 U.S. 350, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987)). Accordingly, we must determine whether the acts alleged in counts 8 and 9 establish a violation of the currency reporting laws by a "financial institution."

We begin by examining the plain meaning of the statutes and regulations. "[I]n determining the scope of a statute, one is to look first at its language. If the language is unambiguous, ... it is to be regarded as conclusive unless there is a clearly expressed legislative intent to the contrary." *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 110, 103 S.Ct. 986, 74 L.Ed.2d 845 (1983), *reh'g denied*, 461 U.S. 911, 103 S.Ct. 1887, 76 L.Ed.2d 815 (1983).

The Currency Transactions Reporting Act, 31 U.S.C. section 5313, and its implementing regulations provide specific rules designating who is responsible for filing CTRs. *See California Bankers Ass'n v. Schultz*, 416 U.S. 21, 26, 94 S.Ct. 1494, 1500, 39 L.Ed.2d 812 (1974). Section 5313 authorizes the Secretary of the Treasury to require domestic financial institutions, and *any other participants that the Secretary may prescribe*, engaged in transactions for the payment, receipt or transfer of United States currency, to report this currency to the Secretary.[8] Pursuant to this authority there are Treasury regulations directing financial institutions to "file a report of each deposit [or] withdrawal ... which involves a transaction of more than $10,000." 31 C.F.R. § 103.22(a) (1986).[9] In 1986, when the acts charged in the indictment occurred, a financial institution subject to the reporting requirements was defined in 31 C.F.R. section 103.11(e) as follows:

> *Financial institution.* Each *agency, branch,* or *office* within the United States of any person doing business in one or more of the capacities listed below:
>
> (1) A bank ...;
>
> (2) A broker or dealer in securities;
>
> (3) A person who engages as a business in dealing in or exchanging currency as, for example, a dealer in foreign exchange or a person engaged primarily in the cashing of checks;
>
> (4) A person who engages as a business in the issuing, selling, or redeeming of travelers' checks, money orders or similar instruments ...;

Title 31 U.S.C. section 5312(a)(2) defines "financial institution" to include banks, thrifts, brokers, currency exchangers, travel agents, and other such establishments.

are, to require an objection would exalt form over substance." *United States v. Pirovolos*, 844 F.2d 415, 424 n. 8 (7th Cir.1988).

8. Title 31 U.S.C. section 5313(a) states in relevant part:

> When a domestic financial institution is involved in a transaction for the payment, receipt, or transfer of United States coins or currency ... in an amount ... prescribe[d] by regulation, the institution *and any other participant in the transaction the Secretary may prescribe* shall file a report on the transaction at the time and in the way the Secretary prescribes. A participant acting for another person shall make the report as the agent or bailee of the person and identify the person for whom the transaction is being made. [emphasis supplied].

9. 31 C.F.R. section 103.22, as in effect during the relevant time period, provided in part:

> (a) Each financial institution shall file a report of each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to such financial institution, which involves a transaction in currency of more than $10,000. Such reports shall be made on forms prescribed by the Secretary and all information called for in the forms shall be furnished.

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(5) A licensed transmitter of funds, or other person engaged in the business of transmitting funds abroad for others;

(6) A [licensed] casino....[10]

Id. (emphasis supplied).

The indictment alleges that Bucey and Witt were persons acting as a "financial institution" by engaging as a business in dealing in currency and in transmitting funds abroad for others. Indictment ¶ 1(c) at 1–2. Bucey claims that the indictment is legally deficient and, alternatively, that the evidence established at trial on this count was insufficient to support his conviction.

[1] There is little case authority directly establishing whether an individual acting in Bucey's capacity could be criminally prosecuted as a "financial institution" under the currency laws in effect at the time of the offense alleged here. Most cases involving money laundering operations have involved the separate issue whether an individual engaged in money laundering can be derivatively liable under 18 U.S.C. section 2(b)[11] for *causing* what is indubitably a "financial institution" to fail to file an accurate CTR as required by the currency reporting laws. Yet these cases are replete with intimations that an individual such as Bucey could not be prosecuted as a "financial institution." For example, in *United States v. Gimbel*, 830 F.2d 621 (7th Cir.1987), this court noted the government's concession that Gimbel, a lawyer who allegedly structured currency transactions for his clients in order to launder proceeds from narcotics trafficking and to conceal income from the IRS, had no independent duty to file a CTR reflecting the structured nature of the transactions. *See id.* at 624 n. 2. Instead, the government sought, albeit unsuccessfully, to convict Gimbel under 18 U.S.C. sections 2(b) and 1001[12] for causing a bank to conceal information, namely, CTRs, from the IRS.[13]

Likewise, in *United States v. Mastronardo*, 849 F.2d 799 (3d Cir.1988), defendants who had engaged in a multimillion dollar bookmaking and money laundering operation were charged with structuring currency transactions to avoid having financial institutions file CTRs. The defendants themselves were not charged as a "financial institution"; rather, the government charged them on a derivative theory for violating 18 U.S.C. sections 2(b) and 1001. The Third Circuit stated:

> conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

10. In 1987, the regulations defining a financial institution were amended to provide in pertinent part:

> *Financial institution.* Each agent, agency, branch, or office within the U.S. of any person doing business, whether or not on a regular basis or as an organized business concern, in one or more of the capacities listed below:
>
> . . . . . .
>
> (3) A currency dealer or exchanger, including a person engaged in the business of a check casher; ...
>
> . . . . . .
>
> (5) A licensed transmitter of funds, or other person engaged in the business of transmitting funds;....

See 52 Fed.Reg. No. 67, at 11436 (April 8, 1987). Of course, because this amendment was not in effect at the time Bucey committed the alleged violations, it is not controlling.

11. Title 18 U.S.C. section 2(b) establishes that a person who causes another to commit an offense against the United States is chargeable as a principal.

12. Title 18 U.S.C. section 1001 provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies,

13. In *Gimbel*, the defendant received funds from his clients in excess of $10,000 but then structured separate withdrawal and deposit transactions with the bank so that each transaction involved less than $10,000. Gimbel structured the transactions in this manner so that the bank would not be required to file CTRs under the currency reporting laws. The events in *Gimbel* arose before the Treasury Department promulgated new regulations requiring financial institutions to aggregate structured transactions of this sort. Because the bank had no duty, prior to these new regulations, to aggregate multiple deposits and withdrawals which exceeded $10,000 and to file the corresponding CTRs, this court concluded that Gimbel could not be liable for *causing* a financial institution to fail to disclose material facts on CTRs to the IRS. *See also United States v. Risk*, 843 F.2d 1059 (7th Cir.1988).

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> Although the statute authorizes the Secretary to draft regulations requiring "participants" in transactions to file CTRs, the Secretary did not do so. Rather, the Secretary enacted regulations which, by their explicit language place a duty to file CTRs only on financial institutions. The regulations do not even intimate that a bank customer might somehow be violating the law if he structures his transactions so as to avoid making a transaction in currency greater than $10,000.... "[T]he present ambiguity regarding coverage of the Reporting Act and its regulations has indeed been created by the government itself."

Id. at 804–05 (quoting *United States v. Varbel*, 780 F.2d 758, 762 (9th Cir.1986)). *See also United States v. Nersesian*, 824 F.2d 1294, 1311–12 (2d Cir.) (bank customer involved in money laundering scheme had no legal duty to file a CTR himself) (dicta), *cert. denied*, — U.S. —, 108 S.Ct. 357, 98 L.Ed.2d 382 (1987); *United States v. Heyman*, 794 F.2d 788, 790–91 (2d Cir. 1986) (government conceded, and court stated in dicta, that defendant, a Merrill Lynch account executive who devised scheme to structure customers' transactions in amounts less than $10,000 in circumvention of the currency reporting laws, had no legal duty to file CTRs), *cert. denied*, 479 U.S. 989, 107 S.Ct. 585, 93 L.Ed. 2d 587 (1986); *United States v. Varbel*, 780 F.2d 758, 762 (9th Cir.1986) (defendants engaged in money laundering had no duty to report currency transactions to or through the bank); *United States v. Denemark*, 779 F.2d 1559, 1561 (11th Cir.1986) (dicta); *United States v. Shearson Lehman Bros., Inc.*, 650 F.Supp. 490, 495, 500 (E.D.Pa.1986) (dicta), *aff'd in part and rev'd in part sub nom. United States v. Mastronardo*, 849 F.2d 799 (3d Cir.1988); *United States v. Richter*, 610 F.Supp. 480, 487 n. 4 (N.D. Ill.1985) (dicta), *aff'd without op. sub nom. United States v. Mangovski*, 785 F.2d 312 (7th Cir.), and *aff'd without op. sub nom. United States v. Konstantinov*, 793 F.2d 1296 (7th Cir.), *cert. denied*, 479 U.S. 855, 107 S.Ct. 191[illegible] L.Ed.2d 124 (1986).

The only case in this circuit directly re[illegible] solving this question is *United States v. Riky*, 669 F.Supp. 196 (N.D. Ill.1987). There, the defendant had engaged in a money laundering scheme in which he received commissions for assisting others in concealing the source of income from narcotics trafficking. Focusing on the opening language of 31 C.F.R. section 103.11(e),[14] the court held that, because the defendant was not an "agency, branch, or office" of any person doing business in one of the subsequently listed capacities, she was not a "financial institution." A later amendment to the regulation, adding the term "agent" to the definition of "financial institution," indicated that the government had not previously believed that the CTR filing obligation applied to individuals. *Id.* at 200. Accordingly, the court dismissed the indictment. *Id. See also United States v. Gimbel*, 632 F.Supp. 713, 721 n. 10 (E.D. Wis.1984), *rev'd on other grounds*, 830 F.2d 621 (7th Cir.1987) (the "plain meaning of the term 'financial institution,' as it is defined by statute and regulation, would be strained to cover a person such as Gimbel," who had engaged in a money laundering scheme) (dicta).

The First Circuit took a similar tack in *United States v. Anzalone*, 766 F.2d 676 (1st Cir.1985). There, the defendant "structured" transactions with the bank so that each involved less than $10,000; hence, the bank did not file CTRs. The First Circuit reversed his conviction and dismissed the indictment, which charged him personally with failing to file CTRs in violation of 31 U.S.C. section 5313, and causing the bank to fail to file CTRs in violation of 18 U.S.C. section 2(b) and with causing the bank to conceal material facts from the IRS in violation of 18 U.S.C. sections 2(b) and 1001. *See id.* at 679–8[illegible] The court concluded that, since the currency regulations limited application of the reporting requirements to financial institutions *only*, the defendant had no indepen[illegible]

14. *See supra* at 1302.

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dent duty to file CTRs. *Id.* at 681, 683.[15] *Cf. United States v. Robinson*, 832 F.2d 1165 (9th Cir.1987) (bank teller, who was acting as a private individual and was not charged with operating a currency exchange business, was not a financial institution within currency laws and, thus, had no duty to file CTRs).

However, several other circuits have disagreed. For example, in *United States v. Goldberg*, 756 F.2d 949 (2d Cir.), *cert. denied*, 472 U.S. 1009, 105 S.Ct. 2706, 86 L.Ed.2d 721 (1985), the Second Circuit held that three defendants engaged in money laundering, including two bank officers, constituted a "financial institution," namely, a partnership or joint venture engaged as a business in dealing in currency.[16] The court adverted to the legislative history of the Bank Secrecy Act, 31 U.S.C. section 5311 *et seq.*, which indicated a design to provide a sweeping law enforcement tool for locating large currency transfers of proceeds from unlawful transactions. *See id.* at 954–55 (citing H.R.Rep. No. 975, 91st Cong., 2d Sess. 11–12, *reprinted in* 1970 U.S.Code Cong. & Ad.News 4394, 4396–97). The court divined an intent to reach a vast range of criminal conduct and to grant the Secretary broad authority to impose reporting requirements. *Id.* at 954–55 (citing 116 Cong.Rec. 16957 (1970) (statement of Rep. Burton)). Relying on this legislative history, the court held that the defendants qualified as a "financial institution."

The Eighth, Ninth and Eleventh Circuits have also on occasion broadly construed the term "financial institution" in the money laundering context. In *United States v. Hernando Ospina*, 798 F.2d 1570 (11th Cir. 1986), the defendant, who provided a money laundering service in which he exchanged approximately $1.3 million for Colombian pesos for a total commission of $52,000, was deemed a "financial institution," namely, a "person who engages as a business in dealing in or exchanging currency." Likewise, in *United States v. Mouzin*, 785 F.2d 682 (9th Cir.), *cert. denied*, 479 U.S. 985, 107 S.Ct. 574, 93 L.Ed. 2d 577 (1986), the Ninth Circuit held that a defendant who participated in an extensive money laundering and cocaine conspiracy qualified as a "financial institution" by virtue of her role in transferring currency across the country and overseas in an ostensibly legitimate business venture. The *Mouzin* court focused on the language in 31 C.F.R. section 103.11, which relates the definition of a "financial institution" to a "person who engages as a business in dealing in or exchanging currency as, for example, a dealer in foreign exchange or a person engaged primarily in the cashing of checks" and a "person engaged in the business of transmitting funds abroad." *Id.* at 689. *See also United States v. Cuevas*, 847 F.2d 1417 (9th Cir.1988) (extensive money laundering operation with several international offices constitutes a "financial institution"), *cert. denied*, — U.S. —, 109 S.Ct. 1122, 103 L.Ed.2d 185 (1989); *United States v. Dela Espriella*, 781 F.2d 1432 (9th Cir.1986) (defendant, a kingpin of an intricate money laundering operation who delivered cash in excess of $10,000 to his couriers, qualified as a "financial institution" possessing a duty to file CTRs). *But cf. United States v. Rob-*

15. In addition, the court held that the regulations did not impose a duty on the defendant to inform the bank of the structured nature of his transactions. The court explained:

> Although this court, like all other institutions of the United States, is supportive of the law enforcement goals of the government and society, we cannot engage in unprincipled interpretation of the law, lest we foment lawlessness instead of compliance. *Kolender v. Lawson*, 461 U.S. 352, 361, 103 S.Ct. 1855, 1860, 75 L.Ed.2d 903 (1983). This is particularly so when the confusion and uncertainty in this law has been caused by the government itself, and when the solution to that situation, namely eliminating any perceived loop holes, lies completely within the government's control.

Anzalone, 766 F.2d at 682.

16. The court noted in dicta that even assuming that the indictment charged each defendant individually as a "financial institution," the defendants would be encompassed by the language of the regulations which specifically applied to "a person." Nevertheless, the court held that it need not decide that issue because, at the very least, the three defendants acted as a partnership and joint venture, an entity from which Congress sought to require CTRs. *See Goldberg*, 756 F.2d at 955.

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inson, 832 F.2d 1165 (9th Cir.1987); *United States v. Varbel*, 780 F.2d 758 (9th Cir. 1986). The Eighth Circuit has reflected a similar perspective. *See United States v. Hawley*, 855 F.2d 595, 602 (8th Cir.1988) (husband and wife team engaged in "warehouse banking" services constitute "financial institution"; "currency dealers or exchangers who act as middlemen between individuals and commercial banks can appropriately be defined as 'financial institutions' under section 103.11(e)(3), and convicted for failing to [file CTRs]"), *cert. denied*, — U.S. —, 109 S.Ct. 1141, 103 L.Ed.2d 202 (1989).

Some of these cases may be factually distinguishable; but, more importantly, none attempts to make sense of the directly operative "agency, branch, or office" language, which controls the definition contained in section 103.11(e). This language (which has subsequently been expanded) requires that, in order to qualify as a "financial institution," the defendant must be an "agency, branch, or office" of a person acting in one of the listed capacities. This language, which was relied upon in *Riky*, 669 F.Supp. 196 (N.D. Ill.1987), is clearly inapplicable to an individual. Moreover, our opinion in *Gimbel* is presumably premised on the assumption that an individual cannot be charged as a "financial institution." *See* 830 F.2d at 624 n. 2.

We are, of course, cognizant of the purpose underlying the Currency Transactions Reporting Act: "Congress recognized the importance of reports of large and unusual currency transactions in ferreting out criminal activity and desired to strengthen the statutory basis for requiring such reports." *California Bankers Ass'n v. Shultz*, 416 U.S. 21, 38, 94 S.Ct. 1494, 1506, 39 L.Ed.2d 812 (1974). Nonetheless, it is not the role of the judiciary to "strengthen" the basis for requiring CTRs beyond that expressly provided by statute and regulation.

> If the government wishes to impose a duty on customers, or "other participants in the transaction," to report [currency] transactions, let it require so in plain language. It should not attempt to impose such a duty by implication, expecting that the courts will stretch statutory construction past the breaking point to accommodate the government's interpretation.

United States v. Anzalone, 766 F.2d at 682.

It is clear from the language of 31 C.F.R. section 103.22 that only financial institutions as defined are required to file CTRs. Therefore, it would be improper for us to resort to the legislative history as a basis for applying the regulation to entities other than those specified in it. *Varbel*, 780 F.2d at 762.[17] Accordingly, we conclude that the terms of the statute and regulations in

17. In response to the apparent inefficacy of the Bank Secrecy Act as a basis for imposing criminal liability on individuals engaged in money laundering, Congress enacted the Money Laundering Control Act of 1986. *See* 18 U.S.C. §§ 1956, 1957; 31 U.S.C. § 5324. Among other things, the Money Laundering Act prohibits individual bank customers from structuring transactions to circumvent CTR filing requirements. *See* 31 U.S.C. § 5324. *See generally* Comment, *The Money Laundering Control Act of 1986: Tainted Money and the Criminal Defense Lawyer*, 19 Pac. L.J. 171 (1987).

It is also worth noting that, in the Internal Revenue Code, Congress has explicitly imposed an independent reporting burden on *individual persons* who receive in excess of $10,000. *See* 26 U.S.C. § 6050I (West Supp.1989). This section provides in pertinent part:

> (a) Cash receipts of more than $10,000.00
> —Any person—
> (1) who is engaged in a trade or business, and
> (2) who, in the course of such trade or business, receives more than $10,000 in cash in 1 transaction (or 2 or more related transactions),
> shall make the return described in subsection (b) with respect to such transaction (or related transactions) at such time as the Secretary may by regulations prescribe.

This statute specifically excludes financial institutions subject to the reporting requirements of title 31. *See* 26 U.S.C. § 6050I(c)(1). Of course this provision is inapplicable to the present case involving a conviction under 31 U.S.C. section 5313, a provision which does not by its express terms address the conduct of persons other than financial institutions. *See United States v. Denemark*, 779 F.2d 1559, 1563–64 (11th Cir.1986); *United States v. Perlmutter*, 656 F.Supp. 782, 788 (S.D.N.Y.1987), *aff'd without op.*, 835 F.2d 1430 (2d Cir.1987), *cert. denied*, — U.S. —, 108 S.Ct. 1110, 99 L.Ed.2d 271 (1988).

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existence at the relevant time did not impose a duty on Bucey to file CTRs.[18] To countenance the government's theory of prosecution imposing such a duty would deprive Bucey of his due process right to fair notice of the criminality of a failure to file. *See Kolender v. Lawson*, 461 U.S. 352, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983).[19] Hence, we conclude that the allegations contained in counts 8 and 9 of the indictment, charging Bucey as a "financial institution" with a duty to file CTRs, are legally insufficient to establish violations of 31 U.S.C. sections 5313 and 5322(b). Bucey's conviction on these counts must therefore be reversed and the indictment insofar as it relates to these counts dismissed.

B. *Concealing and Falsifying Material Facts on CTRs*

Counts 10 and 11 of the indictment charge Bucey with causing the concealment and falsification of material facts within the jurisdiction of the IRS in violation of 18 U.S.C. sections 2(b) and 1001.[20] Under section 1001, concealment violations "relate to the nondisclosure of statements required by statute, government regulation or form." *United States v. Tobon-Builes*, 706 F.2d 1092, 1096 (11th Cir.1983) (citations omitted). During each deposit transaction at Freedom Federal on January 6, 1986, and February 20, 1986, Bucey completed the required CTR on Form 4789, which was prescribed by the Secretary of the Treasury. *See* 31 C.F.R. § 103.25(a). Part I of Form 4789 requests the identity of the "individual conducting the transaction with the financial institution," while Part II requests the identity of the "individual or organization for whom this transaction was completed." *See* Appellant's App. at 58, 60.[21] Bucey listed himself as the individual conducting the transaction and Huguenot National Church as the individual or organization for whom the transaction was completed. *See id.* The indictment charges that, by completing the form in this manner, Bucey intentionally concealed the true identity of the individual who conducted the transaction and the individual for whom the transaction was completed. *See* Indictment ¶¶ 3, 4 at 25, ¶¶ 3, 4 at 26. In response to Bucey's motion to dismiss these counts of the indictment for failure to state an offense, the district court cursorily determined that the allegations of active concealment of material facts that were required to be disclosed sufficiently stated a criminal offense.

[2] The government submits that, based upon the evidence established at trial, a jury could have rationally concluded that the individual who conducted the transaction in each instance was the undercover agent, not Bucey, and that, therefore, Bucey had lied in completing Form 4789. The government relies primarily on the evidence that the agent physically carried the money into the bank, assisted in counting it, and received cashier's checks as a result of the transaction. We do not think these facts are probative. While the agent may have carried the money into the bank, it was Bucey who was responsible for carrying out the money laundering operation, who received a commission for his services, who controlled the Huguenot Church account and who was solely autho-

18. At the very least, we think that the language contained in the statute, regulations and legislative history is "ambiguous, leaving us unable to define the ambit of the criminal statute[; therefore,] the Rule of Lenity requires that we strictly construe the statute in favor of the defendant." *United States v. Lowe*, 860 F.2d 1370, 1376 (7th Cir.1988) (citing *United States v. Turkette*, 452 U.S. 576, 587 n. 10, 101 S.Ct. 2524, 2531 n. 10, 69 L.Ed.2d 246 (1981)), *cert. denied*, — U.S. —, 109 S.Ct. 1639, 104 L.Ed.2d 155 (1989).

19. Conceptually, the government's theory is somewhat anomalous. Essentially, the argument is that Bucey was a walking "financial institution" so that when he received the cash from the agents at Freedom Federal, a duty attached requiring him to file a CTR in addition to the one he would complete immediately upon depositing the money. We do not think the regulations contemplate such a scenario.

20. *See supra* notes 11–12.

21. This language resembles the language contained in 31 U.S.C. section 5313(a), which provides: "A participant acting for another person shall make the report as the agent or bailee of the person and identify the person for whom the transaction is being made."

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rized to make the necessary deposits. Therefore, we do not think a rational juror could have found beyond a reasonable doubt that Bucey willfully concealed or falsified a material fact when he listed himself as the individual conducting the transaction with the bank.

[3] A closer question is whether Part II of Form 4789 required Bucey to disclose that the agents were the "individual[s] or organization for whom this transaction was completed." In essence, the issue is whether Bucey had a duty to reveal the source of the funds involved in the transaction.

In *United States v. Gimbel*, 632 F.Supp. 713, 721 n. 10 (E.D. Wis.1984), *rev'd on other grounds*, 830 F.2d 621 (7th Cir.1987), the district court held that the law did not require the defendant, an attorney engaged in money laundering, to disclose on CTRs the real parties in interest in connection with currency transactions. In dismissing this count of the indictment, the court concluded:

> Under the plain meaning of the regulations implementing the Bank Secrecy Act, Gimbel and others similarly situated would not have notice that they must reveal the identities of the real parties in interest to domestic currency transactions made through their trust accounts.

Id. at 723.

Similarly, in *United States v. Murphy*, 809 F.2d 1427 (9th Cir.1987), the Ninth Circuit held that the law did not clearly impose a duty on the defendant to disclose the source of the funds on CTR Form 4789. In *Murphy*, the defendant was charged with conspiring to conceal and falsify material facts within the jurisdiction of the IRS by "falsely identifying the source of the deposited funds as ATC, although he knew the money came from undercover IRS agents." *Id.* at 1429. The court noted that ATC had an account at the bank where the money was deposited, and that an ambiguity in the instructions on the CTR could reasonably lead a depositor to fill out the form as the defendant did in the challenged transaction.[22] The court concluded that the directions on Form 4789 "could easily lead noncriminal participants in CTR transactions to believe that they were required only to name the holder of the account." *Id.* at 1431. As the *Murphy* court reasoned:

> Due process requires that penal statutes define criminal offenses with sufficient clarity that an ordinary person can understand what conduct is prohibited. *Kolender v. Lawson*, 461 U.S. 352, 357 [103 S.Ct. 1855, 1858, 75 L.Ed.2d 903] (1983). Section 5313 and its regulations do not clearly require depositors to identify the source of their funds. Therefore, the imposition of criminal sanctions on these facts would violate due process. *Cf. Varbel*, 780 F.2d at 762.

Murphy, 809 F.2d at 1431.

We agree with the reasoning and result of the Ninth Circuit in *Murphy* and the district court in *Gimbel*. Bucey deposited cash into the Huguenot Church account and, accordingly, listed the church as the "organization for whom this transaction was completed." We do not think the language of the statute, regulations or Form

> [B]efore effecting any transaction with respect to which a report is required the financial institution shall verify and record the name and address of the individual *presenting* a transaction, as well as record the identity, account number, and the social security or taxpayer identification number, if any, of any person or entity *for whose or which account* such transaction is to be effected. [emphasis supplied].

We think that the language contained in Part II was sufficiently ambiguous to preclude notice to a reasonable depositor of the duty to disclose the source of the funds.

22. The ambiguity arose out of language contained in the explanatory instructions to Part II, which referred to "the identity ... of the individual or organization *for whose account* the transaction is being made." *Murphy*, 809 F.2d at 1430. The court reasoned that the emphasized phrase could mean "for whose bank account," in which case the defendant truthfully responded "ATC," the nominal account holder. *Id.* These instructions were not introduced into evidence in the case at bar. *See* Tr. at 524. Nevertheless, the regulation in effect at the time of Bucey's actions contained the same language as that included on the form in *Murphy*. In a section labeled "Identification required," title 31 C.F.R. section 103.27 provided in pertinent part:

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4789 was sufficiently clear for an ordinary person to understand that listing the undercover agents was required. Thus, because neither Bucey nor the bank had a duty to report the source of the money in Part II of Form 4789, there was no concealment or falsification of material facts in violation of 18 U.S.C. sections 2(b) and 1001. Accordingly, Bucey's conviction for this offense must be reversed and counts 10 and 11 dismissed.

C. *Mail and Wire Fraud Counts*

Bucey raises two principal objections in connection with the mail and wire fraud counts.[23] First, he contends that the indictment is legally insufficient to allege a violation of the mail and wire fraud statutes because it does not adequately charge loss of property by the government. Alternatively, he argues that, even if the indictment sufficiently alleges violations of the mail and wire fraud statutes, the government failed to prove at trial that the government in fact did or would have lost income tax revenue as a consequence of Bucey's actions.

In *McNally v. United States*, 483 U.S. 350, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987), the Supreme Court held that the mail fraud statute is limited to schemes "aimed at causing deprivations of money or property." *Id.*, 107 S.Ct. at 2881. Hence, the *McNally* Court determined that the citizen's intangible right to honest government is not a protectible property right for purposes of mail fraud. The Court has since made clear, however, that "property" may comprise both tangible and intangible property rights. *See Carpenter v. United States*, 484 U.S. 19, 108 S.Ct. 316, 98 L.Ed.2d 275 (1987) (holding that confidential business information constitutes "property" protected by the mail and wire fraud statutes). Thus, the fact that the government's interest in unpaid taxes is intangible is no definitive obstacle to a mail or wire fraud conviction. *See United States v. Porcelli*, 865 F.2d 1352, 1360 (2d Cir.1989). The determinative inquiry is whether Bucey's money laundering scheme defrauded the federal government of a property right, thereby injuring the government in its role as a "property-holder." *See McNally*, 107 S.Ct. at 2882 n. 9.

With respect to the mail fraud counts, the indictment alleges that Bucey "devised and intended to devise a scheme and artifice to defraud the United States of money and property, that is, income taxes." Indictment ¶ 2 at 8. Bucey argues that this allegation does not satisfy the *McNally* standard because the federal government does not possess a cognizable "property interest" in income taxes due and owing.

In *United States v. Gimbel*, 830 F.2d 621, 627 n. 3 (7th Cir.1987), this court specifically left open the question whether a scheme to deprive the federal government of tax dollars is cognizable under *McNally*. The indictment in *Gimbel* did not charge that the defendant's scheme deprived the Treasury Department of money or property. Instead, the indictment alleged that the scheme consisted of depriving the Treasury Department of CTRs and other "accurate and truthful information and data." The government had argued that because Gimbel's scheme concealed information from the Treasury Department which, if disclosed, might have resulted in the Department's assessing tax deficiencies, Gimbel in effect deprived the Treasury of tax revenues. *Gimbel*, 830 F.2d at 626. This court rejected the government's theory, relying on the principle of *McNally* that the

23. The mail fraud statute, 18 U.S.C. section 1341, states in pertinent part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, ... for the purpose of executing such scheme or artifice or attempting so to do [uses the mails or causes them to be used,] shall be fined not more than $1,000 or imprisoned not more than five years, or both.

Our analysis of Bucey's conviction under the mail fraud statute, counts 2 through 5, also applies to his conviction on counts 6 and 7 under the corollary wire fraud statute, 18 U.S.C. section 1343. *See United States v. Gimbel*, 830 F.2d 621, 627 (7th Cir.1987) (citing *United States v. Feldman*, 711 F.2d 758, 763 n. 1 (7th Cir.), *cert. denied*, 464 U.S. 939, 104 S.Ct. 352, 78 L.Ed.2d 317 (1983)).

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mail fraud statute does not proscribe schemes to defraud entities of intangible rights. Because the jury was not required to find that the scheme resulted in the government's being deprived of money or property, the court reversed Gimbel's mail fraud conviction. *Id.* Likewise, in *United States v. Eckhardt*, 843 F.2d 989, 996 (7th Cir.), *cert. denied*, — U.S. —, 109 S.Ct. 106, 102 L.Ed.2d 81 (1988), this court concluded that an allegation that the defendant's scheme was devised "[t]o defraud the United States by impeding ... the functions of the Internal Revenue Service in the ascertainment, computation, assessment and collection of the revenue, to wit, income taxes" would not, in itself, satisfy *McNally*. However, the indictment in *Eckhardt* had alleged multiple objectives, one of which was "[t]o obtain money and property [from investors] by false and fraudulent representations and pretenses...." *Id.* Thus, this court concluded, "The failure of the indictment to allege an underlying scheme to defraud the *government* of money or property is not fatal because it does allege a scheme to defraud the *investors* of money or property." *Id.* at 997. Arguably, this language reflects the *Eckhardt* court's view that, had the indictment specifically alleged that the government was defrauded of money or property, it would have comported with the *McNally* standard.

In response to Bucey's motion to dismiss the mail and wire fraud counts of the indictment, the district court determined that the allegations sufficiently charged a cognizable loss of money or property. The district court relied on the general principle that the government has a property right in tax revenues on the date that they accrue. *See Manning v. Seeley Tube & Box Co.*, 338 U.S. 561, 566, 70 S.Ct. 386, 389, 94 L.Ed. 346 (1950) ("Congress intended the United States to have the use of money lawfully due when it became due."). Similarly, in *United States v. Doe*, 867 F.2d 986 (7th Cir.1989), we held that a scheme to deprive Cook County of its tax revenues satisfied the *McNally* money or property interest test. *See id.* at 989 ("Under Illinois law, Cook County has a property interest in its collected and uncollected tax revenues.").

Although no other circuit court has conclusively resolved this issue, the Fifth Circuit has stated in dicta that "[c]ertainly a scheme to defraud the United States of taxes would meet the 'money or property' requirement of *McNally*...." *United States v. Herron*, 825 F.2d 50, 56 (5th Cir.1987). Moreover, the district court in *United States v. Regan*, 699 F.Supp. 36, 40 (S.D.N.Y.1988), expressly held that the government did indeed have a *McNally* property interest in income taxes due and owing. The *Regan* court reasoned:

> The alleged purpose of the [defendant's] transactions was to defraud the [U.S.] government of tax revenue. The defendants argue that this cannot be characterized as a scheme to defraud the government of property, because the government's property interest in tax revenue does not vest until a tax deficiency is declared. Whether the government had a vested property interest during the life of the scheme is irrelevant. If the alleged scheme had been brought to fruition, it would have fraudulently deprived the government of tax receipts. That was the alleged purpose of the scheme. Surely that putative monetary detriment satisfies the *McNally* requirement.

699 F.Supp. at 40.

[4] The reasoning of *Regan* and *Doe* is sound and we affirm the determination of the district court that the allegation in the indictment charging Bucey with devising a scheme "to defraud the United States of money and property, that is, income taxes" satisfies the *McNally* "money or property" requirement.[24]

24. In *Gimbel*, we left open the issue whether a scheme to deprive the federal government of tax dollars is cognizable in light of footnote 4 of *McNally*, which states, "The Government concedes that it was error for the District Court to include the instruction on tax fraud in the substantive mail fraud instruction ... but the effect of that error is not now at issue." 107 S.Ct. at 2878 n. 4. We conclude that footnote 4 of *McNally* does not foreclose a mail fraud convic

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[5] Bucey's second objection to his conviction for mail and wire fraud is that there was insufficient proof at trial that the United States actually did lose or would have lost tax revenues. Obviously, since Bucey's tax-evading "clients" in this case were undercover government agents, the government was not *in fact* deprived of tax revenues. Nevertheless, since the mail fraud statute punishes the *scheme* to defraud, this court has reiterated on numerous occasions that the ultimate success of the fraud and the actual defrauding of a victim are not necessary prerequisites to a successful mail fraud prosecution. *See Moore v. United States*, 865 F.2d 149, 153 n. 1 (7th Cir.1989); *Ward v. United States*, 845 F.2d 1459, 1462 (7th Cir.1988); *United States v. Keane*, 522 F.2d 534, 545 (7th Cir.1975), *cert. denied*, 424 U.S. 976, 96 S.Ct. 1481, 47 L.Ed.2d 746 (1976). Consequently, the fact that the government was not actually deprived of tax revenues does not warrant reversal of Bucey's conviction.

tion based on a scheme to defraud the federal government of income taxes. In *McNally*, the district court had erroneously instructed the jury that, in order to convict for mail fraud, the jury had to find that the defendant impeded the IRS' collection of income taxes. This instruction was legally incorrect because the district court had previously dismissed those mail fraud counts alleging tax fraud objectives due to the government's failure to charge that the tax returns involved were fraudulent. Thus, footnote 4 is irrelevant to the issue at bar. *See McNally*, 107 S.Ct. at 2878 n. 2; *United States v. Gray*, 790 F.2d 1290, 1297–98 (6th Cir.1986), *rev'd sub nom. McNally v. United States*, 483 U.S. 350, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987); Brief of United States at 9–10 n. 9, *McNally v. United States*, 483 U.S. 350, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987); Brief of Gray at 7 n. 7, *McNally v. United States*, 483 U.S. 350, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987); *Cf. Doe*, 867 F.2d at 989.

25. In connection with the "money or property" element, the jury received the following instruction:

> As to Counts 2 through 7 only, the money and property in question is the income taxes that would be due and owing from an amount of income of $24,000, an amount of income earned by Don and John Smith and James Dembitz in their undercover roles.

Tr. at 1331. Apparently, the $24,000 figure was the difference between the amount purportedly earned by the agents in their drug-trafficking affairs and the amount they could declare as income to the IRS evidenced by bogus documentation prepared by Bucey and Witt. Tr. at 1136.

Bucey indicated on several occasions that the scheme was designed to "stick it back in Uncle Sam's ear" and to "screw the IRS." Moreover, the jury was specifically instructed that, in order to convict, it was required to find a scheme to defraud the government of money or property.[25] We think the evidence was sufficient in this case for the jury to find that Bucey and his partner, Witt, intended to defraud the government of money or property.

D. *Conspiracy*

Title 18 U.S.C. section 371, includes two prongs: it is a crime (1) to "conspire ... to commit any offense against the United States, or [2] to defraud the United States, or any agency thereof in any manner or for any purpose." *Id.* Count 1 of the indictment charges Bucey both with conspiracy to defraud the United States and with conspiracy to commit substantive offenses against the United States.[26] On appeal,

26. Specifically, count 1 of the indictment charges Bucey with conspiracy

> (A) to defraud the United States:
>
> (i) by impairing, obstructing and defeating the lawful functions of the Department of Treasury:
>
> (a) in the collection of accurate data and reports relating to currency transactions at financial institutions in excess of $10,000, for use in criminal, tax, and regulatory investigations and proceedings, and of the enforcement of those laws and regulations found in Title 31, U.S.C. section 5311 *et seq.*, and Title 31, C.F.R. section 103.11 *et seq.*...;
>
> (b) in the obtaining of accurate information and data for determining the sources and amounts of income; and
>
> (c) in the determination, assessment and collection of revenue, that is, income taxes; and
>
> (ii) by concealing the source of funds subject to forfeiture under the federal laws relating to narcotics;
>
> (B) to willfully counsel and advise the preparation and presentation of federal income tax returns, which returns were to be false and fraudulent as to the material matters of the source and amount of income, in violation of U.S.C. section 7206(2); and
>
> (C) to travel and cause travel in interstate commerce ... and [use the mails] with the intent to distribute the proceeds of an unlawful activity, and ... to perform acts of distri-

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Bucey asserts that the conspiracy conviction must be set aside because none of the acts comprising the conspiracy constitutes a criminal offense. He marshals his arguments challenging each alleged unlawful objective and then concludes that the only conspiracy proven was a conspiracy to conceal the source of currency, which, he submits, is not criminal.

The indictment charges a multi-faceted conspiracy aimed at attaining six separate but related objectives:

to defraud the United States by-

(1) impairing the Treasury Department's collection of accurate CTRs and enforcement of the currency laws;

(2) impairing the Treasury's collection of information to determine the correct sources and amounts of income;

(3) impairing the Treasury's assessment and collection of income taxes; and

(4) concealing the source of funds subject to forfeiture under the federal narcotics laws; and to commit the substantive offenses of—

(5) willfully advising the preparation of false income tax returns; and

(6) facilitating and distributing the proceeds of a narcotics distribution.

[6] It is a general tenet of conspiracy law that when an indictment alleges a conspiracy with multifarious objectives, a conviction will be sustained so long as the evidence is sufficient to show that the defendants agreed to accomplish at least one of the alleged objectives.[27] *See United States v. Soteras*, 770 F.2d 641, 646 (7th Cir.1985) (citing *United States v. Alvarez*, 735 F.2d 461, 465–66 (11th Cir.1984); *United States v. Mackey*, 571 F.2d 376, 387 n. 14 (7th Cir.1978); *United States v. James*, 528 F.2d 999, 1014 (5th Cir.), *cert. denied*, 429 U.S. 959, 97 S.Ct. 382, 50 L.Ed.2d 326 (1976)).

[7] Notwithstanding the absence of substantive currency law violations, Bucey's acts, when viewed as part of the overall illicit money laundering scheme, support a conviction for conspiracy to defraud the United States by impeding the lawful function of the Treasury Department as described in objectives (1) through (3).[28] In order to convict under the conspiracy to defraud clause of section 371, the government need not charge or prove that Bucey agreed to commit, or actually did commit a substantive offense. He merely "must have 'agreed to interfere with or obstruct one of [the government's] lawful functions by deceit, craft or trickery, or at least by means that are dishonest.'" *United States v. Richter*, 610 F.Supp. 480, 486 (N.D. Ill.1985) (Aspen, J.) (quoting *Hammerschmidt v. United States*, 265 U.S. 182, 188, 44 S.Ct. 511, 512, 68 L.Ed. 968 (1924)). "[A]cts which are in themselves legal lose their legal character when they become constituent elements of an unlawful scheme." *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 707, 82 S.Ct. 1404, 1415, 8 L.Ed.2d 777 (1962).

bution of said proceeds and facilitation of carrying on said unlawful activity, in violation of 18 U.S.C. section 1952(a)(1) and (3). Indictment ¶ 2 at 3–4.

27. In this connection, the court properly instructed the jury that, in order to convict Bucey of conspiracy, the jury had to find that Bucey conspired to commit at least one of the six alleged objectives. *See* Tr. at 1318. Because none of the objectives upon which the jury may have relied involves a legally invalid or unconstitutional basis for conviction, the general verdict form does not require reversal of Bucey's conspiracy conviction. *Contra Yates v. United States*, 354 U.S. 298, 312, 77 S.Ct. 1064, 1073, 1 L.Ed.2d 1356 (1957) (where a general verdict is supportable on one ground, but an alternative ground is invalid due to a statute of limitations bar, and it is impossible to tell which ground the jury selected, the verdict must be set aside), *overruled on other grounds by Burks v. United States*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978); *Feela v. Israel*, 727 F.2d 151, 154 (7th Cir.1984) ("Where a verdict is general, and conviction under one of several alternate theories would be unconstitutional, the conviction must be set aside lest the verdict rest on an unconstitutional basis."); *Cramer v. Fahner*, 683 F.2d 1376, 1380 (7th Cir.), *cert. denied*, 459 U.S. 1016, 103 S.Ct. 376, 74 L.Ed.2d 509 (1982); *United States v. Baranski*, 484 F.2d 556, 560–61 (7th Cir.1973). *Cf. United States v. Holguin*, 868 F.2d 201, 202–03 (7th Cir.1989).

28. Thus, under *Soteras*, we need not determine whether the conspiracy conviction may also be sustained on the basis of objectives (4) through (6).

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Although Bucey's failure to file CTRs and failure to disclose the source of currency on Form 4789 are not unlawful acts, these acts "lost their lawful character when considered as part of a scheme to intentionally deprive the government of material information it would otherwise receive." *Richter*, 610 F.Supp. at 487. Quite apart from the underlying substantive offenses, Bucey is liable for agreeing with Witt to obstruct by deceit, craft or trickery the lawful function of the Treasury in collecting accurate CTRs (objective 1). *See Richter*, 610 F.Supp. at 486; *United States v. Nersesian*, 824 F.2d 1294, 1313 (2d Cir. 1987).[29] In addition, the evidence sufficiently establishes that the Bucey–Witt confederacy aspired to impede the function of the Treasury in obtaining information concerning the sources and amounts of income (objective 2), and in assessing and collecting income taxes (objective 3). Bucey informed the agents that by using the Huguenot Church account as a conduit for the cash-for-cashier's-checks transactions, the identity of the agents would not be disclosed on CTRs filed by the bank with the IRS and, thus, their identity and drug income would be insulated from government detection. Government's Brief at 11; Government's Exhibit 4A, at 20–21. Bucey and Witt also agreed to provide bogus documentation to prevent the IRS from tracing the illicit source and amount of the agent's income. Moreover, Bucey expressed on several occasions their plot to "stick it back in Uncle Sam's ear" and "screw the IRS." *See* Government's Brief at 19; Tr. at 623. Considering the evidence in the light most favorable to the government, we think this overall scheme to circumvent the currency reporting laws and to prevent the IRS from collecting accurate data, reports and income taxes supports a conspiracy conviction regardless of the absence of substantive currency law violations. *Cf. United States v. Montalvo*, 820 F.2d 686, 690 (5th Cir.1987).[30]

E. *Obstructing the Grand Jury*

Count 12 of the indictment charges Bucey with violating 18 U.S.C. section 1503[31] on the grounds that Bucey "well knowing of the existence of said federal grand jury investigation did corruptly endeavor to influence, obstruct and impede the due administration of justice by advising, counseling and encouraging a person known to him as 'James O'Brien' to give false and misleading testimony when appearing before said grand jury." Indictment ¶ 3 at 27. Bucey's challenge is two-fold: (1) the government failed to prove that he had the requisite corrupt intent to impede a grand jury investigation; and (2) his actions were incapable of interfering with the adminis-

29. *Contra United States v. Murphy*, 809 F.2d 1427, 1432 (9th Cir.1987) (once court finds no violation of the currency laws, conspiracy to defraud IRS charge must also fail if it rests solely on the alleged violations of the currency laws); *United States v. Mastronardo*, 849 F.2d 799, 803–05 (3d Cir.1988).

30. Although at the time the acts arose in this case money laundering in itself was not a substantive criminal offense, courts have held that agreements to engage in such money laundering schemes may constitute criminal conspiracy under section 371. *See United States v. Jerkins*, 871 F.2d 598, 603–04, (6th Cir.1989); *United States v. Browning*, 723 F.2d 1544 (11th Cir. 1984) (laundering scheme aimed in part at thwarting IRS' identification of revenue and collection of taxes subject to criminal conspiracy conviction); *United States v. Enstam*, 622 F.2d 857 (5th Cir.1980) (defendants with intent to use the laundering scheme to obstruct the IRS' tax collecting function can be prosecuted for criminal conspiracy), *cert. denied*, 450 U.S. 912, 101 S.Ct. 1351, 67 L.Ed.2d 336 *cert. denied*, 451 U.S. 907, 101 S.Ct. 1974, 68 L.Ed.2d 294 (1981); *United States v. Richter*, 610 F.Supp. 480, 485–87 (N.D. Ill.1985).

After the conduct in this case arose, Congress enacted legislation making money laundering a substantive crime in the "Money Laundering Control Act of 1986," which is part of the Anti–Drug Abuse Act of 1986. *See* Pub.L. 99–570, 100 Stat. 3207 (Oct. 27, 1986) (codified at 18 U.S.C. §§ 1956, 1957; 31 U.S.C. § 5324).

31. Title 18 U.S.C. section 1503 provides in relevant part:

> Whoever corruptly or by threats of force, or by any threatening letter or communication, endeavors to influence, intimidate or impede any grand or petit juror ... or corruptly or by threats of force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

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tration of justice since the putative grand jury "witness" was a fictional character.

[8] To establish a violation of section 1503, the government must demonstrate that the "defendant knew of the pending judicial proceeding and specifically intended to impede its administration." *United States v. Guzzino*, 810 F.2d 687, 696 (7th Cir.) (citation omitted), *cert. denied*, 481 U.S. 1030, 107 S.Ct. 1957, 95 L.Ed.2d 529 (1987). Section 1503 is violated when a defendant interferes with the due administration of justice by tampering with a witness. *See United States v. Rovetuso*, 768 F.2d 809, 824 (7th Cir.1985), *cert. denied*, 474 U.S. 1076, 106 S.Ct. 838, 88 L.Ed.2d 809 (1986), *cert. denied*, 476 U.S. 1106, 106 S.Ct. 1951, 90 L.Ed.2d 360 (1986). We do not think the fact that O'Brien (agent Dembitz' pseudonym) was a "fictional" grand jury witness precludes an obstruction of justice conviction. The statute proscribes the *endeavor* to influence or obstruct the administration of justice; thus, "the impossibility of accomplishing the goal of an obstruction of justice does not prevent a prosecution for the endeavor to accomplish the goal." *United States v. Brimberry*, 744 F.2d 580, 583 (7th Cir.1984) (citing *Osborn v. United States*, 385 U.S. 323, 333, 87 S.Ct. 429, 435, 17 L.Ed.2d 394 (1966) (where defendant Osborn allegedly employed informer to contact prospective juror, fact that informer never intended to carry out scheme did not preclude defendant's conviction for endeavoring to bribe juror)). *See also United States v. Rosner*, 485 F.2d 1213, 1228 (2d Cir.1973), *cert. denied*, 417 U.S. 950, 94 S.Ct. 3080, 41 L.Ed. 2d 672 (1974). Thus, Dembitz' fictitious identity as a grand jury witness does not exonerate Bucey from his "endeavor" to influence the proper administration of the grand jury.

[9] In addition, viewing the evidence in the light most favorable to the government, we think it was sufficient for the jury to conclude that Bucey possessed the requisite corrupt intent to influence the administration of justice. This court elucidated the requisite intent element for obstruction of justice offenses in *United States v. Machi*, 811 F.2d 991 (7th Cir. 1987), and aligned itself with the Fourth Circuit:

> In our view, the defendant need only have had knowledge or notice that success in his fraud would have likely have [sic] resulted in an obstruction of justice. Notice is provided by the reasonable foreseeability of the natural and probable consequences of one's acts.

Id. at 998 (quoting *United States v. Neiswender*, 590 F.2d 1269, 1273 (4th Cir.1979)).

Bucey, who had been apprised of the ongoing grand jury investigation and of the subpoena purportedly issued to Dembitz, counseled Dembitz on how to role-play his grand jury testimony with his attorney and instructed Dembitz to provide false and misleading testimony to the grand jury. We think a jury could readily infer that Bucey had knowledge or notice that the success of his fraudulent endeavor would likely influence the just administration of the grand jury proceedings. *See United States v. Shannon*, 836 F.2d 1125 (8th Cir.) (sustaining obstruction of justice conviction based upon defendant's advice to former bank teller, who was prospective grand jury witness, that it would be "in her best interest" to forget about any large currency transactions which she had processed), *cert. denied*, — U.S. —, 108 S.Ct. 2830, 100 L.Ed.2d 930 (1988).

F. *Prejudicial Reference to Drugs*

[10] The final issue in Bucey's barrage of challenges on appeal is whether the references to narcotics trafficking during the course of the trial were prejudicial to the defendant. In a pretrial motion, Bucey moved that the district court strike as surplusage all references to drug dealing in the indictment and bar all evidence pertaining to drug dealing at trial. Bucey contends that the district court's denial of that motion was in error and that, because there was no evidence that he had direct knowledge that the undercover agents were posing as drug dealers, admission of these references was unduly prejudicial. Because we agree fully with the district court's disposition of this issue, we do not

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think the court abused its discretion in denying Bucey's motion.

This court has stated that "evidence of other crimes may be presented when they are so blended or connected with the one on trial that proof of one incidently involves the other or explains the circumstances thereof or tends logically to prove any element of the crime charged." *United States v. Dorn*, 561 F.2d 1252, 1258 (7th Cir.1977). *See also United States v. Moreno-Nunez*, 595 F.2d 1186, 1188 (9th Cir. 1979); *United States v. Wilson*, 578 F.2d 67, 72 (5th Cir.1978). As the court below acknowledged, evidence of other acts may be admissible if it would assist the jury in understanding the factors surrounding the crime at issue and if the absence of evidence concerning the other acts would leave a "chronological and conceptual void" in the story. *See United States v. Hattaway*, 740 F.2d 1419, 1425 (7th Cir.), *cert. denied*, 469 U.S. 1089, 105 S.Ct. 599, 83 L.Ed.2d 708 (1984), *cert. denied*, 469 U.S. 1028, 105 S.Ct. 448, 83 L.Ed.2d 373 (1984). In the instant case, the references to narcotics trafficking in both the indictment and at trial served to explain the purpose of and circumstances surrounding the money laundering scheme. We do not think the risk of unfair prejudice arising from this evidence substantially outweighed its probative value.

III.

Accordingly, we reverse Bucey's conviction on counts 8–11 for violations of the currency reporting laws and dismiss the indictment on these counts. In addition, we affirm Bucey's conviction for conspiracy, mail and wire fraud and obstruction of justice, and, in accordance with our usual practice, we direct that he be resentenced. *See United States v. Holzer*, 840 F.2d 1343, 1352 (7th Cir.1988) (citing *United States v. Manzella*, 791 F.2d 1263, 1270 (7th Cir. 1986)).

AFFIRMED IN PART, REVERSED IN PART AND REMANDED WITH DIRECTIONS.

James F. SMITH, Plaintiff–Appellant,

v.

GENERAL SCANNING, INC., Defendant–Appellee.

No. 88–1917.

United States Court of Appeals, Seventh Circuit.

Argued Jan. 6, 1989.

Decided June 8, 1989.

Terminated employee brought action under the Age Discrimination in Employment Act against his former employer. The United States District Court for the Eastern District of Wisconsin, Terence T. Evans, J., granted summary judgment for employer, and employee appealed. The Court of Appeals, Manion, Circuit Judge, held that: (1) the fact that employee falsified his resume when applying for employment did not preclude him from establishing a prima facie case, and (2) lack of seniority and poor performance evaluations were legitimate, nondiscriminatory business reasons for discharging employee.

Affirmed.

1. Civil Rights ⇐44(6)

In reduction in force case under Age Discrimination in Employment Act, plaintiff can establish prima facie case by showing that he was within protected age group, that he was performing according to his employer's legitimate expectations, that he was terminated, and that others not in protected class were treated more favorably; if plaintiff makes this showing, rebuttable presumption of discrimination arises and burden of production shifts to defendant employer to articulate legitimate and nondiscriminatory reasons for discharge. Age Discrimination in Employment Act of 1967, §§ 2–17, 14(b), as amended, 29 U.S.C.A. §§ 621–634, 633(b).

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38 Fed. R. Evid. Serv. 472
(CITE AS: 994 F.2D 417)

UNITED STATES of America, Plaintiff-Appellee,
v.
Fred EDWARDS, Jr., Defendant-Appellant.
UNITED STATES of America, Plaintiff-Appellee,
v.
Michael JONES, Defendant-Appellant.
UNITED STATES of America, Plaintiff-Appellee,
v.
Herman McGEE, Defendant-Appellant.
UNITED STATES of America, Plaintiff-Appellee,
v.
Judy MASON, Defendant-Appellant.

Nos. 91-2611, 91-2612, 91-2677 and 91-2929.
United States Court of Appeals,
Eighth Circuit.
Submitted: Sept. 17, 1992.
Decided March 30, 1993.
Rehearing and Suggestion for
Rehearing En Banc Denied
Copr. (C) West 1995 No claim to orig. U.S. govt. works

Tapes of a conversation between Barnes and McGee on April 3, 1990 ("the McGee Tape"), and a conversation between Barnes and Jones on April 11, 1990 ("the Jones Tape"), were played at trial. The conversations described the roles of various conspirators and discussed who might have been responsible for the March 7 arrests. [FN2] McGee argues that he is entitled to a new trial because the Jones Tape was inadmissible hearsay, because the tapes were inaudible, and because the district court erred by allowing the prosecution to play only selected portions of the tapes.

FN2. Neither the tapes nor their transcripts are part of the record on appeal. The substance of the conversations has been gleaned from Barnes's testimony.

[4][5] A. The Conspirator Hearsay Issue. Statements made "by a coconspirator of a party during the course and in furtherance of the conspiracy" are not hearsay. Fed.R.Evid. 801(d)(2)(E). Using the procedure approved in United States v. Bell, 573 F.2d 1040, 1044 (8th Cir.1978), the district court conditionally admitted the tapes and then found at the close of the government's evidence that the government had proved the existence of the conspiracy at the time of the taped conversations by a preponderance of the evidence. We review this finding for clear error. See United States v.

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Meeks, 857 F.2d 1201, 1203 (8th Cir.1988). As our prior review of the evidence makes clear, the trial court's Bell ruling was not clearly erroneous.

McGee argues that the conversation recorded in the Jones Tape was not made "during the course of" the conspiracy because the conspiracy had ended by April 11, 1990. A CONSPIRACY "is presumed to exist until there has been an AFFIRMATIVE showing that it has terminated, and its members continue to be conspirators until there has been an AFFIRMATIVE showing that they have WITHDRAWN." United States v. Lewis, 759 F.2d 1316, 1343 (8th Cir.), cert. denied, 474 U.S. 994, 106 S.Ct. 407, 88 L.Ed.2d 357 (1985). To withdraw from a conspiracy, a conspirator *422 must "either [make] a clean breast to the authorities or [communicate] his withdrawal in a manner reasonably calculated to reach co-conspirators." Askew, 958 F.2d at 812-13. Here, there was overwhelming evidence that the conspiracy continued beyond April 11, 1990, and no evidence that McGee had affirmatively withdrawn.

[6] McGee also argues that the conversation was not "in furtherance of" the conspiracy. This term is interpreted broadly. See United States v. Johnson, 925 F.2d 1115, 1117 (8th Cir.1991). Statements are admissible under 801(d)(2)(E) if the overall effect of the conversation is to facilitate the conspiracy. See United States v. Leisure, 844 F.2d 1347, 1361-62 (8th Cir.), cert. denied, 488 U.S. 932, 960, 109 S.Ct. 324, 403, 102 L.Ed.2d 342 (1988). The Jones Tape conversation covered many subjects, including the

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identity of the informant responsible for the March 7 arrests, McGee's arrangements with Jones and Barnes, and McGee's relationship with Mason. The evidence establishes that much of this conversation was in furtherance of the cocaine conspiracy. See United States v. Krevsky, 741 F.2d 1090, 1095 (8th Cir.1984) (discussion of conspirators' duties and particulars of their operations); Meeks, 857 F.2d at 1203 (statements identifying a source of cocaine). Thus, the Jones Tape was properly admitted.

B. Issues of Audibility and Selective Playing. Prior to trial, the district court denied McGee's motion for a pretrial hearing to determine the audibility of some 32 tapes that the government might offer. At trial, the government first offered to play portions of the McGee Tape after it was identified by Barnes. The district court permitted the government to play selected portions of the tape but sustained defense objections to the use of government-prepared transcripts of the tape, explaining that, "I'm interested in what they [the jurors] hear." As the tapes were played, there was considerable sidebar colloquy about whether the listener was able to identify who was speaking and about the poor audibility of portions of the tapes. However, no defense counsel objected during trial that the tapes were so inaudible that they should not be played at all, or requested that portions in addition to those selected by the government also be played. During its deliberations, the jury asked to replay one of the tapes; the district court sustained defense objections to

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Tax cases.

consp. to defraud / tax evasions -- a continuing crime.

Citation
838 F.2d 426
61 A.F.T.R.2d 88-647, 88-1 USTC P 9154, 24 Fed. R. Evid. Serv. 720
(CITE AS: 838 F.2D 426)

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UNITED STATES of America, Plaintiff-Appellee,
v.
Arloha Mae PINTO, Defendant-Appellant.
UNITED STATES of America, Plaintiff-Appellee,
v.
Marcel Samuel LAMBERT, Defendant-Appellant.
Nos. 87-1023, 87-1045.
United States Court of Appeals,
Tenth Circuit.
Jan. 29, 1988.

Defendants were convicted in the United States District Court for the District of Kansas, Dale E. Saffels, J., of conspiring to defraud the United States and falsifying tax returns, and one defendant was additionally convicted of five counts of tax evasion, and defendants appealed. The Court of Appeals, Baldock, Circuit Judge, held that: (1) evidence was sufficient to support convictions; (2) there was sufficient evidence of existence of conspiracy to render coconspirator hearsay admissible; (3) there was no fatal variance between indictment and proof; (4) severance was not required; and (5) statute of limitations had not run on conspiracy count.

Affirmed.

[1] CONSPIRACY k47(6)
91k47(6)
There was sufficient evidence that defendant had substantial income from sale and distribution of marijuana to support taxpayer's convictions of conspiring to defraud the United States and of falsifying tax return, though IRS agents who testified were unable to state amount of taxpayer's income from drug trafficking. 18 U.S.C.A. ss 2, 371; 26 U.S.C.A. s 7206(1).

[1] INTERNAL REVENUE k5303
220k5303
There was sufficient evidence that defendant had substantial income from sale and distribution of marijuana to support taxpayer's convictions of conspiring to defraud the United States and of falsifying tax return, though IRS agents who testified were unable to state amount of taxpayer's income from drug trafficking. 18 U.S.C.A. ss 2, 371; 26 U.S.C.A. s 7206(1).

[2] CONSPIRACY k24(1)
91k24(1)
Formerly 91k24
Evidence in conspiracy prosecution must support finding that conspirators had unity of purpose or common design and understanding.

[3] CONSPIRACY k47(6)
91k47(6)
There was sufficient evidence that defendant knew of conspiracy to evade taxes on marijuana profits and knowingly participated in conspiracy to support her conviction for conspiring to defraud the United States, though majority of

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evidence regarding marijuana trafficking directly implicated only defendant's husband. 18 U.S.C.A. ss 2, 371.

[4] INTERNAL REVENUE k5303
220k5303
There was sufficient evidence that defendant did not have legitimate home mortgage and did not pay mortgage interest as stated on income tax return to support her conviction of falsifying tax return. 26 U.S.C.A. s 7206(1).

[5] INTERNAL REVENUE k5306
220k5306
There was sufficient evidence of opening net worth of taxpayer and probable source of income to support defendant's tax evasion convictions, using cash expenditure method of proof; opening worth of defendant, including cash on hand, did not have to be established by formal net worth statement, and accurate cash on hand figure did not have to be offered for beginning of each taxable year in indictment. 26 U.S.C.A. s 7201.

[6] CRIMINAL LAW k427(3)
110k427(3)
Challenged testimony concerning statements of codefendant, even assuming they were coconspirator hearsay, could have been conditionally admitted subject to being connected up, where statements were admitted before trial court found there was substantial evidence that conspiracy existed. Fed.Rules Evid.Rule 801(d)(2), 28 U.S.C.A.

[7] CRIMINAL LAW k427(2)
110k427(2)
Coconspirator hearsay is properly admitted if trial court makes factual determination that Government has established, by preponderance of evidence, that conspiracy existed, declarant and defendant were members of conspiracy, and hearsay statements were made in course and in furtherance of conspiracy. Fed.Rules Evid.Rule 801(d)(2), 28 U.S.C.A.

[7] CRIMINAL LAW k427(5)
110k427(5)
Coconspirator hearsay is properly admitted if trial court makes factual determination that Government has established, by preponderance of evidence, that conspiracy existed, declarant and defendant were members of conspiracy, and hearsay statements were made in course and in furtherance of conspiracy. Fed.Rules Evid.Rule 801(d)(2), 28 U.S.C.A.

[8] CRIMINAL LAW k427(5)
110k427(5)
There was sufficient evidence of existence of conspiracy to warrant admitting against defendant, as coconspirator hearsay, testimony of statement by codefendant; nonhearsay testimony linked defendant to drug trafficking, which was integral part of alleged conspiracy to evade taxes on income generated by sale and distribution of marijuana. Fed.Rules Evid.Rule 801(d)(2), 28 U.S.C.A.

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[9] INDICTMENT AND INFORMATION k171
210k171
Variance occurs when evidence presented at trial establishes facts different from those alleged in indictment.

[10] INDICTMENT AND INFORMATION k171
210k171
Pivotal inquiry, in assessing claim of fatal variance between indictment and proof, is whether there has been variance in proof which affects substantial rights of accused.

[11] CONSPIRACY k43(12)
91k43(12)
There was no fatal variance between conspiracy charged in indictment, to hide substantial income from sale and distribution of marijuana and to evade payment of taxes on that and other income, and proof at trial of conspiracy to possess, sell, and distribute marijuana; although defendant was not charged with conspiring to sell drugs, she could anticipate from indictment that evidence of her involvement in overt acts of possessing, selling, and distributing marijuana would be presented at trial. 18 U.S.C.A. ss 2, 371.

[12] CRIMINAL LAW k422(1)
110k422(1)
Presentation of evidence concerning codefendant's drug activities unrelated to joint charge of conspiring to defraud the United States did not result in transference of guilt affecting defendant's substantial rights; as to joint charge, evidence indicated that defendants acted in concert, to effectuate common illicit goal of evading taxes by concealing income derived from sale and distribution of marijuana. 18 U.S.C.A. ss 2, 371.

[13] CRIMINAL LAW k622.2(11)
110k622.2(11)
Quantitative disparity in evidence, without more, provides no justification for severance in conspiracy case.

[14] CRIMINAL LAW k622.2(1)
110k622.2(1)
Defendant was not entitled to severance of her and codefendant's conspiracy prosecutions, given Government's order of proof, trial court's continuous admonitions, and interests of judicial economy, notwithstanding disparity in weight of evidence and marital relationship between defendant and codefendant. 18 U.S.C.A. ss 2, 371.

[14] CRIMINAL LAW k622.2(11)
110k622.2(11)
Defendant was not entitled to severance of her and codefendant's conspiracy prosecutions, given Government's order of proof, trial court's continuous admonitions, and interests of judicial economy, notwithstanding disparity in weight of evidence and marital relationship between defendant and codefendant. 18 U.S.C.A. ss 2, 371.

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[15] CRIMINAL LAW k150
110k150
Object of defendants' conspiracy, concealment of income from sale and distribution of marijuana, did not end with filing of their income tax returns for specific year and, thus, statute of limitations for conspiracy did not begin to run upon such filing; filing of returns was but first step in process of evading taxes on income, with additional overt acts subsequently undertaken to conceal marijuana income in attempt to make evasion succeed. 18 U.S.C.A. ss 2, 371; 26 U.S.C.A. s 6531.

[16] CRIMINAL LAW k772(6)
110k772(6)
Defendant is entitled to instruction regarding his theory of defense, but trial court need not follow exact language in instruction tendered by defendant.

[16] CRIMINAL LAW k834(3)
110k834(3)
Defendant is entitled to instruction regarding his theory of defense, but trial court need not follow exact language in instruction tendered by defendant.

[17] CRIMINAL LAW k829(1)
110k829(1)
Substance of instruction tendered by defendants, which stated that jury had to find defendants not guilty if evidence failed to establish beyond reasonable doubt that defendants had taxable income from sales of marijuana, was contained in charge given to jury and, therefore, trial court was not required to give tendered instruction.

[18] CRIMINAL LAW k810
110k810
Trial court's instruction on cash expenditure method of proving tax evasion was neither confusing nor inconsistent, but rather properly directed jury to determine whether expenditures in excess of reported income could be accounted for by assets available at outset of prosecution period. 26 U.S.C.A. s 7201.

[18] INTERNAL REVENUE k5317
220k5317
Trial court's instruction on cash expenditure method of proving tax evasion was neither confusing nor inconsistent, but rather properly directed jury to determine whether expenditures in excess of reported income could be accounted for by assets available at outset of prosecution period. 26 U.S.C.A. s 7201.

*428 Linda L. Sybrant, Sp. Asst. U.S. Atty., Kansas City, Mo. (Benjamin L. Burgess, Jr., U.S. Atty., Kansas City, Kan., with her on the brief), for plaintiff-appellee.

James L. Eisenbrandt, Morris, Larson, King and Stamper, Overland Park, Kan., for defendant-appellant Arloha Mae Pinto.

Bruce C. Houdek, James, Millert, Houdek, Tyrl & Sommers, Kansas City, Mo., for

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defendant-appellant Marcel Samuel Lambert.

Before MOORE, McWILLIAMS and BALDOCK, Circuit Judges.

BALDOCK, Circuit Judge.

On April 1, 1986, defendant-appellant Marcel Samuel Lambert (Lambert) and his wife, defendant-appellant Arloha Mae Pinto (Pinto), were named in a seven-count indictment. They were jointly charged with one count of conspiring to defraud the United States, in violation of 18 U.S.C. s 371, and one count of falsifying a tax return, in violation of 26 U.S.C. s 7206(1) and 18 U.S.C. s 2. Defendant Lambert also was charged with five counts of tax evasion, in violation of 26 U.S.C. s 7201.

A jury found defendants guilty on all counts. The court sentenced defendant Lambert to seven consecutive two-year terms of imprisonment and defendant Pinto to concurrent three-year terms of imprisonment. Both defendants appeal, contending that: 1) the evidence was insufficient to support the convictions; 2) the trial court erroneously admitted co-conspirator hearsay; 3) there was a fatal variance, as to the conspiracy count, between the indictment and the evidence presented at trial; 4) the trial court erred in denying severance; 5) the conspiracy count should have been dismissed because the statute of limitations had expired; and 6) the trial court failed to give defendants' instruction regarding their theory of defense and improperly instructed the jury regarding the cash expenditure method of proving tax evasion. We affirm.

The rather complex factual background of these cases will be briefly summarized, with additional facts discussed as they pertain to the issues raised by defendants. At trial, the government presented its case in two parts, initially introducing evidence pertaining to the joint charges of conspiring to conceal taxable income derived from the sale and distribution of marijuana in 1977 and of claiming a false home mortgage interest expense on Pinto's 1980 tax return. The essence of the government's theory was that defendants concealed $150,000 in marijuana income by using cash to purchase the first in a series of three homes and later obtaining sham mortgages to create the appearance that the purchase money came from loans.

Marty Ritschel and Michael Bono testified that they purchased substantial quantities of marijuana from Lambert over an approximately two-year period commencing in 1976. Sally Robinson Wells testified that in September of 1977, Lambert "fronted" 300 pounds of marijuana to her former husband, Bruce Robinson, and another man. Robinson testified that the bales were weighed in defendants' basement and transported in Lambert's car to a "stash" house. The marijuana was then stolen. Soon after the theft was discovered, the parties to the transaction held a meeting, at which time Pinto demanded payment for the stolen marijuana and identified the lost $100,000 as hers.

Regarding the series of real estate transactions, it was revealed that during the final two months of 1977, Pinto took $149,000 in cash and purchased eighteen cashier's checks from sixteen different banks in the Kansas City area. With the cashier's checks, $1,154.66 in cash and a mortgage in favor of the builder, Pinto bought a $190,500 home in Leawood, Kansas. Neither Pinto nor Lambert reported the $150,000 on their respective 1977 income tax returns. In November of the following year, defendants sold the house. With the proceeds from that sale, plus an additional $31,960.19 in cash, Pinto purchased

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outright a *429 second home in Leawood for $220,050. On December 5, 1978, Pinto presented her realty company with a $150,000 note and mortgage, which had been executed in favor of a Cayman Islands corporation formed by Lambert, and requested that a lien be filed against the residence she had purchased outright the previous month.

In early 1980, defendants bought yet another residence, again in Leawood. The mortgage on the second home was rolled over into a new note in favor of the offshore corporation. On March 25, 1981, Pinto filed her 1980 income tax return and reported a deductible home mortgage interest expense of $20,424.00, an amount arrived at by computing interest on the $150,000 note. Defendants sold the third residence in November of 1985. On November 8, 1985, they gave the title insurance company a Deed of Release, dated November 20, 1984, which stated that the second mortgage was released "in consideration of the full payment" of the debt.

Following a summary of the evidence admitted on the joint charges, the government, employing the cash expenditure method of proof, endeavored to prove the tax evasion charges filed against Lambert. An analysis of defendants' financial activities for the years 1974 through 1978 established that they spent $115,913.96 more cash than they had available, signifying that Lambert did not have an appreciable amount of cash on hand in 1979, the beginning of the indictment period. The government then analyzed the tax years 1979 through 1983 and established that Lambert's cash expenditures far exceeded his reported income.

Additional evidence was presented to show that Lambert took steps to conceal income and thereby evade the payment of taxes. The government established that Lambert dealt almost exclusively in cash, and that among his sizeable cash expenditures were the purchases a number of automobiles, none of which were registered in his name or titled in the state of Kansas. In 1980, Lambert directed his brother, who was preparing their parents' estate tax returns, to report a non-interest bearing loan of $50,000, which Lambert represented their father had made to him in 1976, and also to report $60,000 cash on hand, an amount which Lambert represented had been given to him by their parents.

I.

Both defendants strenuously argue that the evidence was insufficient to support their convictions. Our standard for evaluating the sufficiency of the evidence is well established. We view all the evidence, both direct and circumstantial, together with the reasonable inferences to be drawn therefrom, in the light most favorable to the government. United States v. Hooks, 780 F.2d 1526, 1529 (10th Cir.), cert. denied, 475 U.S. 1128, 106 S.Ct. 1657, 90 L.Ed.2d 199 (1986). We then must determine whether a reasonable jury could find the defendants guilty beyond a reasonable doubt. Id. at 1531.

A.

Defendant Lambert claims that the evidence was insufficient to show that he had substantial income from the sale and distribution of marijuana. In a related argument, defendant Pinto asserts that the evidence was insufficient to show that she intended to join a conspiracy to evade taxes on that income.

[1] It is true, as defendants point out, that the Internal Revenue Service (IRS) agents who testified were unable to state the amount of defendants' income from drug trafficking. Nevertheless, there was substantial evidence to support the jury's conclusion that defendants derived a significant amount of

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income from the sale and distribution of marijuana. At one time, Lambert described himself as the "main man" for supplying marijuana in Kansas City. Ritschel testified that he had paid Lambert more than $200,000 for the marijuana that he had purchased between 1976 and 1978. Bono testified that he had purchased marijuana from Lambert on six occasions, each time buying quantities of twenty-five to fifty pounds at a price of $285 per pound. That testimony, along *430 with other evidence indicating that defendants dealt almost exclusively in cash and failed to report the $150,000 used to purchase the first residence, supports a reasonable inference that the funds used by Pinto to purchase the residence were derived from the sale of marijuana.

In arguing that the government failed to show that she had the requisite intent to join the conspiracy, defendant Pinto similarly alleges that there was no evidence of marijuana income, and in addition asserts that there was no evidence to show that she had knowledge of marijuana profits realized by Lambert or of the illegitimate nature of the two mortgages. We cannot agree. Contrary to Pinto's assertion, she does not stand convicted without proof of her knowledge of the conspiracy's objective or solely because of her relationship with Lambert. See, e.g., United States v. Jones, 808 F.2d 754, 756 (10th Cir.1987); United States v. McMahon, 562 F.2d 1192, 1196-97 (10th Cir.1977).

[2] "The essence of the crime of conspiracy is an agreement to violate the law." United States v. Troutman, 814 F.2d 1428, 1446 (10th Cir.1987). In a conspiracy prosecution, the evidence must support a finding that the conspirators had a unity of purpose or a common design and understanding. United States v. Kendall, 766 F.2d 1426, 1431 (10th Cir.1985), cert. denied, 474 U.S. 1081, 106 S.Ct. 848, 88 L.Ed.2d 889 (1986). The existence of an agreement to accomplish an unlawful objective "may be inferred from a 'development and a collocation of circumstances.' " United States v. Pack, 773 F.2d 261, 265-66 (10th Cir.1985) (quoting Glasser v. United States, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1942)).

[3] The government was required to show that Pinto knew of the conspiracy to evade taxes on marijuana profits and knowingly participated in the conspiracy. United States v. Kendall, 766 F.2d at 1431-32. Despite the fact that the majority of the evidence regarding the marijuana trafficking directly implicated only her husband, there was evidence which linked Pinto to the trafficking and thus supported a reasonable inference that she knew of the existence of profits derived from the sale of marijuana. For instance, it was shown that large quantities of marijuana were stored in the basement of the house where she lived with Lambert. When the $100,000 drug deal went awry, Pinto claimed ownership of the stolen marijuana and demanded payment of the money lost as a result of the theft. Her knowledge of both the existence of marijuana profits and the use of the sham mortagages to conceal those profits was demonstrated by the fact that her purchase of the first residence was, in effect, a cash transaction, the bulk of the purchase price having been comprised of cashier's checks which she had acquired earlier with $149,000 in cash. Moreover, as discussed below, there was other evidence which indicated that Pinto had knowledge of the illegitimate nature of the mortgages.

B.

[4] Both defendants assert that the government failed to prove either that Pinto did not have a legitimate home mortgage or that she did not pay mortgage

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interest as stated on her 1980 income tax return.

The nature of the purported mortgages and Pinto's failure to pay any mortgage interest can be inferred from the evidence presented. In the latter half of 1978, Lambert set up a corporation in the Bahamas, Luxaco Limited (Luxaco), and another corporation in the Cayman Islands, Yarrabee International Limited (Yarrabee). At that time, the secrecy laws of the Bahamas and the Cayman Islands prevented the United States government from investigating corporations established in those countries. Pursuant to a 1984 agreement between the United States and the Cayman Islands, the government obtained public records pertaining to Yarrabee as well as records kept by the law firm and the management company which represented the corporation. Those records revealed that Yarrabee was a subsidiary of Luxaco and that the corporation had issued only three shares of stock at a price of one dollar per share. No mortgages or schedules of payments were *431 found. A letter dated March 17, 1980, provided that there would be no further use for the corporation after the release of the mortgage had been finalized. The transcript also reflects the testimony of the designated agent for Yarrabee, a Kansas City attorney, who testified that Pinto made no interest payments to his law firm.

C.

[5] Defendant Lambert makes a three-pronged attack on the sufficiency of the evidence presented to show that he had taxable income in excess of that reported on his returns for the years 1979 through 1983. [FN1] He contends that the government failed to 1) show that he did not have cash on hand in 1979, 2) offer an accurate cash on hand figure for the beginning of each taxable year in the indictment period and 3) establish a likely source of income.

> FN1. During the indictment period, Lambert's cash expenditures far exceeded his reported income: in 1979, his income was $36,000, while cash expenditures totalled $132,098.31; in 1980, his income was $6,000, while cash expenditures totalled $134,265.44; in 1981, his income was $6,000, while cash expenditures totalled $100,820.79; in 1982, his income was $7,000, while cash expenditures totalled $34,160.21; and in 1983, his income was $30,000, while cash expenditures totalled $158,901.39.

The government employed the cash expenditure method of proof, which permits circumstantial proof of a defendant's taxable income in cases where the prosecution is unable to show directly specific items of such income. United States v. Bianco, 534 F.2d 501, 503 (2d Cir.), cert. denied, 429 U.S. 822, 97 S.Ct. 73, 50 L.Ed.2d 84 (1976).

Under the 'cash expenditures' method, after taking into account the amount of resources the taxpayer had on hand at the beginning of a period, the income received by the taxpayer for the same period is compared with his expenditures that are not attributable to his resources on hand or non-taxable receipts during the period. A substantial excess of expenditures over the combination of reported income, non-taxable receipts, and cash on hand may establish the existence of unreported income.

United States v. Citron, 783 F.2d 307, 310 (2d Cir.1986). The relevant issue is whether expenditures in excess of reported income can be accounted for by assets available at the outset of the prosecution period or non-taxable

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receipts during the period. Taglianetti v. United States, 398 F.2d 558, 565-66 (1st Cir.1968), aff'd, 394 U.S. 316, 89 S.Ct. 1099, 22 L.Ed.2d 302 (1969); see also United States v. Pack, 773 F.2d at 264-65 (establishing unreported income by cash expenditure method of proof).

While the opening net worth of the taxpayer, including cash on hand, must be demonstrated "to a reasonable certainty," it need not be established by a formal net worth statement. United States v. Citron, 783 F.2d at 315. Here, the government compared defendants' cash expenditures during the years 1974 to 1978 with the amount of income reported on their tax returns, plus other funds they had available, resulting in a showing that cash expenditures exceeded reported income and other funds by $115,913.96. See United States v. Terrell, 754 F.2d 1139, 1146-47 (5th Cir.), cert. denied, 472 U.S. 1029, 105 S.Ct. 3505, 87 L.Ed.2d 635 (1985). That comparison tended to show that defendant could not have had a significant amount of cash on hand and thus supports the jury's conclusion that Lambert had insufficient assets at the beginning of the prosecution period to have supported his expenditures in any of those years. [FN2] United States v. Bianco, 534 F.2d at 505.

FN2. In Bianco, the defendant's contention that the government failed to negate the possibility of a cash hoard was rejected because there was no evidence to indicate that the defendant had such a cache. United States v. Bianco, 534 F.2d at 505. As the court explained,
[o]f course, as in any criminal prosecution, the defendant is under no obligation to prove any particular set of facts, including the existence of a non-taxable source, such as a 'cash hoard' from which his expenditures were made. But once the government has introduced sufficient evidence from which the jury could conclude with reasonable certainty that no such assets existed, the defendant remains silent at his own peril.
Id. at 505-06 (citations omitted).

Nor was the government required to offer an accurate cash on hand figure, as *432 part of opening net worth, for the beginning of each taxable year in the indictment period. See United States v. Mastropieri, 685 F.2d 776, 784 (2d Cir.), cert. denied, 459 U.S. 945, 103 S.Ct. 260, 74 L.Ed.2d 203 (1982). In a cash expenditure case, reasonable certainty may be established without presenting opening net worth positions for each of the taxable years so long as the proof "makes clear the extent of any contribution which beginning resources or a diminution of resources over time could have made to expenditures." Taglianetti v. United States, 398 F.2d at 565. Thus, there need not be any formal opening net worth statement, which would include cash on hand, so long as sources of available funds are identified and quantified. Id. at 565 n. 7. The purpose of including an accurate identification of any diminution of resources is to enable the jury to determine if expenditures were financed by a liquidation of assets, depletion of a cash hoard or unreported income. United States v. Citron, 783 F.2d at 315. For example, if an asset is sold, an accounting must be made of that fact because the proceeds could be used to finance expenditures during the year in question. See Taglianetti v. United States, 398 F.2d at 564. The government accounted for the sale or disposal of assets during the indictment period, and none of the assets acquired by Lambert during that time were income-producing. The evidence

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presented was sufficient to enable the jury to determine whether the expenditures in excess of reported income could be accounted for by assets available at the opening of the prosecution period or by non-taxable receipts during the period. Id. at 565-66.

Defendant's final contention, that the government did not establish a probable source of income, is also unavailing. By presenting evidence pertaining to Lambert's involvement in marijuana and cocaine trafficking, the government met its burden of showing "at least one 'likely source' of taxable income." United States v. Bianco, 534 F.2d at 506; see United States v. Mastropieri, 685 F.2d at 784-86. Such evidence was sufficient to support the inference that the cash expenditures proved were attributable to currently taxable income. See United States v. Bianco, 534 F.2d at 506-07.

Upon a careful review of the record, we conclude that defendants' sundry claims are without merit and hold that the evidence was sufficient to support the jury's verdict.

II.

Defendant Pinto next asserts that the trial court erred in admitting certain hearsay statements. She argues that the court failed to follow the preferred order of proof for the admission of co-conspirator hearsay and erroneously found that the government had shown the existence of a conspiracy.

At the outset of the trial, Ritschel and Bono testified about their marijuana dealings with Lambert. During the testimony of Sally Wells, defense counsel objected to the admission of any statements made by Lambert to Wells concerning Lambert's involvement in marijuana trafficking and his identification of boxes in defendants' basement as containing marijuana. In allowing the testimony, the court apparently agreed with the government's argument that the statements were admissible as admissions made by Lambert and therefore were not hearsay. Rec. vol. III at 81-88; see Fed.R.Evid. 801(d)(2). Wells then testified that during the meeting about the stolen marijuana, Pinto identified the lost $100,000 as hers. Upon the succeeding direct examination of Wells' ex-husband, Bruce Robinson, a question was asked about Robinson's discussions with Lambert concerning marijuana distribution. Counsel for Pinto again objected on grounds of hearsay. The court found that there was substantial evidence, independent of the statements at issue, that a conspiracy existed, that both defendants were members of the conspiracy and that the statements were made during the course and in furtherance of the conspiracy. Rec. vol. III at 101. The court subsequently restated its finding that the government had shown the existence of a conspiracy. Rec. vol. VII at 789.

*433 [6] Defendant apparently is arguing that the court failed to follow the "preferred order of proof" [FN3] by admitting co-conspirator hearsay before finding the existence of a conspiracy. That argument fails, primarily because the hearsay statements offered in the course of direct examination of Wells were admitted as admissions by Lambert. Even assuming the statements were admitted as co-conspirator hearsay, they would have been conditionally admissible subject to being connected up. See United States v. Hernandez, 829 F.2d 988, 994 (10th Cir.1987). The other statements which defendant now contends were improperly admitted were allowed after the trial court had found the existence of a conspiracy.

FN3. This court recently clarified the meaning of the term "preferred

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order of proof" as it pertains to the admission of co-conspirator hearsay. In United States v. Hernandez, 829 F.2d 988 (10th Cir.1987), we stated that the "preferred order of proof" simply refers to the requirement that the trial court make the requisite factual determination of the existence of a conspiracy prior to allowing co-conspirator hearsay statements to be heard by the jury. Id. at 994 n. 6. We further stated that "this order of proof does not involve a right to a pretrial hearing on admissibility, and in no way precludes the trial judge from exercising his considerable discretion and conditionally admitting the statements subject to later being connected up." Id.

[7][8] Defendant further claims that the government had not shown the existence of the conspiracy as charged. Co-conspirator hearsay is properly admitted if the trial court makes a factual determination that the government has established, by a preponderance of the evidence, that: 1) a conspiracy existed; 2) the declarant and the defendant were members of the conspiracy; and 3) the hearsay statements were made in the course and in furtherance of the conspiracy. United States v. Esch, 832 F.2d 531, 537 (10th Cir.1987). There was substantial evidence of the existence of a conspiracy. Ritschel and Bono testified that they had purchased large quantities of marijuana from Lambert and each testified about obtaining marijuana which had been stored in defendants' basement. Wells then testified that Pinto claimed ownership of the stolen marijuana. Wells' testimony, which was not hearsay as to Pinto, linked Pinto to the drug trafficking, which was an integral part of the alleged conspiracy to evade taxes on income generated by the sale and distribution of marijuana. The trial court did not err in admitting the contested testimony.

III.

Defendant Pinto next claims that there was a fatal variance between the conspiracy as charged and the evidence adduced at trial, which she maintains indicated the existence of a second, uncharged conspiracy to possess, sell and distribute marijuana. Consequently, defendant argues, her convictions were based on a theory not charged in the indictment.

[9][10] A variance occurs when the evidence presented at trial establishes facts different from those alleged in the indictment. Dunn v. United States, 442 U.S. 100, 105, 99 S.Ct. 2190, 2193, 60 L.Ed.2d 743 (1979); United States v. Dickey, 736 F.2d 571, 581 (10th Cir.1984), cert. denied, 469 U.S. 1188, 105 S.Ct. 957, 83 L.Ed.2d 964 (1985). In assessing a claim of a fatal variance, the pivotal inquiry is whether there has been a variance in proof which affects the substantial rights of the accused. United States v. Morris, 623 F.2d 145, 149 (10th Cir.), cert. denied, 449 U.S. 1065, 101 S.Ct. 793, 66 L.Ed.2d 609 (1980). This court has previously stated that such a variance occurs when the accused could not have anticipated from the indictment what evidence would be presented at trial. Id. "Another source of prejudice is the transference of guilt to an accused from incriminating evidence presented in connection with the prosecution of another in the same trial for a crime in which the accused did not participate." Id.

[11] The indictment charged that "[t]he object of the defendants' conspiracy was to knowingly and willfully hide substantial income from the sale and distribution of marijuana and to evade the payment of taxes on that and other income," which was accomplished by creating the appearance that funds used to

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purchase the series of residences *434 came from loans when, as defendants knew, the funds came from the sale and distribution of marijuana. Rec. vol. I, doc. 1, at 2. In setting out the overt acts committed in furtherance of the conspiracy, the indictment alleged that during 1977, defendants possessed, sold and distributed, and aided and abetted in the possession, sale and distribution, of marijuana. Id. at 3. Although Pinto was not charged with conspiring to sell drugs, she could anticipate from the indictment what evidence would be presented at trial, in particular her involvement in the alleged overt act of possessing, selling and distributing marijuana. United States v. Morris, 623 F.2d at 149.

[12] Also meritless is Pinto's argument that she was prejudiced by an improper transference of guilt resulting from the evidence submitted on the tax evasion charges which indicated Lambert's post-1977 drug activities. As to the joint conspiracy charge, the evidence indicated that defendants acted in concert to effectuate the common illicit goal of evading taxes by concealing income derived from the sale and distribution of marijuana. See United States v. Dickey, 736 F.2d at 582. Pinto's allegation of prejudice arising from the evidence showing Lambert's likely source of income during the tax evasion indictment period is more pertinent to the issue of severance, and, in any event, the evidence of Lambert's post-1977 drug activities did not result in a transference of guilt affecting her substantial rights.

IV.

[13][14] Defendant Pinto next contends that the trial court committed reversible error in denying her motion for severance. She argues that she was prejudiced by the great disparity in the weight of the evidence admitted solely against Lambert, the disparity being exacerbated by the fact of their marital relationship.

The general rule in this circuit is that individuals jointly indicted should be jointly tried. United States v. Rinke, 778 F.2d 581, 590 (10th Cir.1985). The trial court's decision whether to sever is made within its sound discretion, and will not be reversed absent a strong showing of prejudice. United States v. Esch, 832 F.2d at 537. In ruling on a motion to sever, the trial court must weigh any potential prejudice caused by the joinder against considerations of economy and expedition in judicial administration. Id.; United States v. Rinke, 778 F.2d at 590.

The government presented the testimony and exhibits relating to the joint charges during the first portion of the trial, concluding with the summary testimony of IRS Special Agent Kenneth Wissel. The evidence that followed pertained to the tax evasion counts filed against Lambert. The government's order of proof facilitated the separation of the evidence and served to mitigate any potentially adverse effect of the evidence submitted solely against Lambert. Throughout the trial, the court admonished the jury to consider certain evidence only as to Lambert. As a result, the jury was able to compartmentalize the evidence as to each of the defendants and to properly apply it as the court instructed. United States v. Pack, 773 F.2d at 267.

Further, we cannot agree with Pinto's claim that her right to a fair trial was undermined by the disparity in the evidence against Lambert as compared to the alleged dearth of evidence implicating her. In a conspiracy case, a quantitative disparity in the evidence, without more, provides no justification for severance. United States v. Hack, 782 F.2d 862, 871 (10th Cir.), cert.

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denied, 476 U.S. 1184, 106 S.Ct. 2921, 91 L.Ed.2d 549 (1986). Given the government's order of proof, the trial court's continuous admonitions and the fact that the interests of judicial economy were served by the avoidance of duplicitous separate trials, the trial court did not abuse its discretion in denying the motion for severance.

V.

[15] Both defendants next argue that the trial court erred in not dismissing the conspiracy count because the statute of limitations had expired before the charges *435 were filed on April 1, 1986. Their theory is that the offense of evading tax due on income derived from the sale and distribution of marijuana in 1977 was completed no later than April 15, 1978, the due date for the filing of their tax returns.

Under the Internal Revenue Code, the statute of limitations for a conspiracy to defraud the United States is six years. 26 U.S.C. s 6531; [FN4] United States v. Brunetti, 615 F.2d 899, 901-02 (10th Cir.1980). It therefore was incumbent upon the government to prove that the conspiracy was still in existence on April 1, 1980, and that at least one overt act in furtherance of the conspiracy was performed after that date. Grunewald v. United States, 353 U.S. 391, 396, 77 S.Ct. 963, 969, 1 L.Ed.2d 931 (1957); United States v. Brunetti, 615 F.2d at 901.

FN4. 26 U.S.C. s 6531 provides in pertinent part:
No person shall be prosecuted, tried, or punished for any of the various offenses arising under the internal revenue laws unless the indictment is found or the information instituted within 3 years next after the commission of the offense, except that the period of limitation shall be 6 years--
(1) for offenses involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner;

* * *

(8) for offenses arising under section 317 of Title 18 of the United States Code, where the object of the conspiracy is to attempt in any manner to evade or defeat any tax or the payment thereof.

Defendants' theory, that the central purpose of the conspiracy was accomplished with the filing of the tax returns, ignores both the object of their conspiracy as charged in the indictment and the evidence presented at trial to establish the conspiracy. They were charged with conspiring to defraud the United States, in violation of 18 U.S.C. s 371, [FN5] "by impeding, impairing, obstructing, and defeating the lawful governmental functions" of the IRS "in the ascertainment, computation, assessment, and collection of income taxes...." Rec. vol. I, doc. 1, at 1. The indictment was based on one continuing conspiracy, the central object of which was not merely to evade taxes on marijuana income in 1978, but rather to immunize defendants from prosecution for tax evasion. Forman v. United States, 361 U.S. 416, 422-23, 80 S.Ct. 481, 485-86, 4 L.Ed.2d 412 (1960); see Grunewald v. United States, 353 U.S. at 405, 77 S.Ct. at 974 (distinguishing between acts of concealment done in furtherance of the main criminal objectives of the conspiracy and acts of concealment done solely for the purpose of covering up

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the crime).

FN5. 18 U.S.C. s 371 provides in pertinent part:
If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

The object of defendants' conspiracy, the concealment of income derived from the sale and distribution of marijuana in 1977, did not end with the filing of their income tax returns in 1978. The filing of the returns was but the first step in the process of evading taxes on that income, with additional overt acts subsequently undertaken to conceal the marijuana income in an attempt to make the evasion succeed. Forman v. United States, 361 U.S. at 423-24, 80 S.Ct. at 485-86. Because at least one overt act was committed within six years prior to the filing of the indictment, the trial court properly denied defendants' motion to dismiss the conspiracy count. United States v. Brunetti, 615 F.2d at 901.

VI.

Defendants' final contention is that the trial court erred by failing to give their tendered instruction setting out their theory of defense. Defendant Lambert also contends that the court erred in giving instruction 38, which addressed the cash expenditure method of proving tax evasion.

[16] Jury instructions must be evaluated as a whole. United States v. Grissom, 814 F.2d 577, 580 (10th Cir.1987). The trial court is given substantial discretion in tailoring and formulating its instructions, so long as they correctly state the law and fairly and adequately cover the issues *436 presented. United States v. Pack, 773 F.2d at 267. Although a defendant is entitled to an instruction regarding his theory of defense, the trial court need not follow the exact language in an instruction tendered by the defendant. United States v. Hoffner, 777 F.2d 1423, 1426 (10th Cir.1985).

[17] The defendants tendered the following instruction:

If the evidence fails to establish beyond a reasonable doubt that defendants had taxable income from sales of marijuana in 1977 then you must find the defendants not guilty as to Count I.

In instructions 9 through 15, the court advised the jury of the law pertaining to the conspiracy charge. Rec. vol. II, doc. 78, at 23-31. Instruction 10 provided that the government had the burden of proving beyond a reasonable doubt every essential element of the crime charged, including the existence of the conspiracy charged in the indictment. Id. at 24. Instruction 2 contained the substance of the indictment, in which defendants were charged with conspiring to conceal income received in 1977 from the sale and distribution of marijuana. Id. at 4. While defendants reiterate their previously rejected claim that there was no evidence to show such income, the fact remains that the jury was properly instructed that it had to find beyond a reasonable doubt that defendants had income in 1977 from the sale and distribution of marijuana. The trial court did not err in refusing to give the tendered instruction when the substance of the instruction was contained in the

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charge given to the jury.

[18] Regarding instruction 38, defendant Lambert contends that the instruction was erroneous because it failed to require the government to prove his net worth at both the beginning and end of the indictment period and in addition was confusing and internally inconsistent. Due to the government's employment of the cash expenditure method of proof, it was not required to present formal net worth statements. United States v. Citron, 783 F.2d at 315; Taglianetti v. United States, 398 F.2d at 564-66. As to Lambert's corollary contention, we note that he did not submit a tendered instruction on the cash expenditure method of proof, and conclude that the trial court's instruction was neither confusing nor inconsistent, but rather properly directed the jury to determine whether expenditures in excess of reported income could be accounted for by assets available at the outset of the prosecution period. See Taglianetti v. United States, 398 F.2d at 565-66.

AFFIRMED.

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Citation 871 F.2d 1298 (CITE AS: 871 F.2D 1298)
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UNITED STATES of America, Plaintiff-Appellee (88-5195), Plaintiff-Appellant (88-5484),
v.
Billy York WALKER, Defendant-Appellant (88-5195), Defendant-Appellee (88-5484).

Nos. 88-5195, 88-5484.
United States Court of Appeals,
Sixth Circuit.
Argued Nov. 14, 1988.
Decided April 3, 1989.

Defendant was convicted after jury trial in the United States District Court for the Western District of Tennessee, Odell Horton, Chief Judge, of various federal banking laws. Defendant appealed. The Court of Appeals, Enslen, District Judge, sitting by designation, held that: (1) evidence of coconspirator's guilty plea was admissible as evidence of coconspirator's credibility, and (2) evidence of named borrowers' credit worthiness and their understanding of obligation to repay loans was irrelevant and inadmissible on charges of bank fraud.

Affirmed.

[1] CRIMINAL LAW k338(6)
110k338(6)
Evidence of coconspirator's guilty plea and plea agreement was admissible as evidence of coconspirator's credibility.

[2] WITNESSES k318
410k318
Introduction of entire plea agreement of codefendant is permitted, even where agreement contains promise to testify truthfully, since these details allow jury to consider fully possible conflicting motivations underlying codefendant's testimony, and thus codefendant's credibility.

[3] CONSPIRACY k24(6)
91k24(6)
Formerly 91k23
So called rule of consistency that requires where all possible coconspirators are tried together, and all but one are acquitted, remaining coconspirator's conviction must be reversed for lack of sufficient evidence, does not apply where coconspirators are tried separately or could have conspired with unindicted individuals.

[4] BANKS AND BANKING k509.10
52k509.10
Where bank officer arranges loans for named borrower, intending proceeds will benefit himself, and without disclosing his interest in loan transaction, he has acted in deceitful and dishonest manner in violation of bank fraud statute. 18 U.S.C.A. ss 371, 1344.

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[5] BANKS AND BANKING k509.25
52k509.25
Evidence of named borrowers' credit worthiness and their understanding of obligation to repay bank loans was irrelevant, and thus, inadmissible in prosecution of defendant, a bank officer, for bank fraud; officer had arranged loans for his own benefit, concealing his interest in them from other bank officials. 18 U.S.C.A. ss 371, 1344.

[6] CRIMINAL LAW k150
110k150
Conspiracy to defraud bank account based upon misapplication of bank funds and false entries in bank records was not barred by statute of limitations, even though prosecution was not commenced until several years after loans of issue were made, where defendant continuously attempted to conceal his interest in loans by keeping payments on loans currently and, later, by giving coconspirators funds to make payments on defendant's behalf, thus establishing repayment of loans and concealment were objectives of conspiracy. 18 U.S.C.A. ss 371, 3282.

[7] BANKS AND BANKING k509.25
52k509.25
Whether defendant, a bank official, made false entries in federal deposit insurance corporation questionaire when he failed to disclose loans made to third parties on his behalf was question for jury in prosecution alleging defendant made false entries. 18 U.S.C.A. s 1005.

[8] BANKS AND BANKING k509.25
52k509.25
Whether defendant, a bank officer, was guilty of making false entries in bank records based upon recordation of interest payment on loans, which records failed to reveal that payments were not made with named borrower's funds or that loans were not made for named borrowers' benefit, was question for jury in prosecution alleging false entry in bank records.

*1299 W. Hickman Ewing, Jr., U.S. Atty., Frederick H. Godwin, Asst. U.S. Atty. (argued), Memphis, Tenn., for U.S.

James Wilson (argued), Hal Gerber, Memphis, Tenn., for Billy York Walker.

Before NELSON and BOGGS, Circuit Judges, and ENSLEN, District Judge. [FN*]

FN* Honorable Richard A. Enslen, United States District Judge for the Western District of Michigan, sitting by designation.

ENSLEN, District Judge.

Billy York Walker appeals his conviction following a jury trial on each count of a 28-count indictment alleging violations of various federal banking laws. [FN1] Prior to 1985, Mr. Walker was the president and majority shareholder of Farmers Bank located in Dyersburg, Tennessee. Most of the bank's business was agricultural in nature. Mr. Walker was also the owner, president and operator of Walker Grain Company ("Walker Grain"), a grain storage firm, located in the same town.

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FN1. The indictment alleged violations of the following statutes: Count 1, conspiracy to commit bank fraud, 18 U.S.C. s 371, Counts 3-21, 24-26, false entries in bank records, 18 U.S.C. s 1005; Counts 22 and 28, false statement on loan application, 18 U.S.C. s 1014; and Counts 23 and 27, bank fraud, 18 U.S.C. s 1344.

Count 1 alleges that Walker and his life-long friend, Walter Hastings, conspired to defraud Farmers Bank, to misapply bank funds and to make false entries in bank records in violation of 18 U.S.C. s 371. Walker convinced Hastings to sign two promissory notes, one for $150,000 secured by stock owned by Hastings, and one for $118,000 which was unsecured. The proceeds of both loans were immediately deposited to Walker Grain's account at Farmers Bank. The loan applications did not disclose Walker Grain's interest in the loans. Walker personally approved both loans.

Originally, Hastings called Walker each time an interest payment was due and Walker made the payment using a Walker Grain check. In 1985, Walker started giving checks to Hastings and Hastings made the payments using his own checks. The overt acts in the conspiracy each involve separate interest payments on the two loans. The bank's records on each loan indicate that the loans were for Hastings' benefit and that Hastings made the interest payments. Counts 3-21 allege false entries in bank records based upon the failure of the records to indicate that the loans were not for Hastings' benefit and that he did not make the interest payments from his own funds.

In 1985, the bank's vice president in charge of loans, Larry James, noticed that the Hastings loans were becoming past due. He knew that Walker and Hastings were friends and offered to take the collection of these loans over for Walker, thinking Walker might be uncomfortable handling the accounts himself. Walker assured James that Hastings would repay the loans as soon as Hastings solved some other financial problems. An investigation conducted by the bank, at the suggestion of federal examiners, subsequently revealed Walker's interest in the Hastings loans. When confronted with the matter by bank officials, Walker shook his head and replied, "What can I say?" Thereafter, Walker took an indefinite leave of absence and never returned to the bank.

*1300 Walker's defense to counts 1 and 3-21 was that he lacked any intent to defraud the bank. He contends that he approved each loan in the ordinary course of business, based upon Hastings' credit worthiness, character, and reputation, as well as the bank's potential to profit from each loan. He claims that he lacked any intent to deceive the bank, although he admits that he did not tell the bank's board of directors of Walker Grain's interest in the loans. Walker contended that he did not think it necessary to tell the bank's board of directors about Walker Grain Company's interest in the Hastings loans, since the bank was only interested in profitability and since Hastings had the ability to repay the loans. [FN2] Walker testified that Hastings understood his obligation to repay the loans, but understood that the money would come from Walker. Hastings testified that he had no intention of repaying the loans and thought Walker would do so.

FN2. Hastings' financial statement filed with the bank indicated Hastings'

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tax evasion case — nature of crime requires concealment

Citation
571 F.2d 376.
78-1 USTC P 9321, 2 Fed. R. Evid. Serv. 1284
(CITE AS: 571 F.2D 376)

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UNITED STATES of America, Plaintiff-Appellee,
v.
Fred T. MACKEY, Defendant-Appellant.
Nos. 77-1074 and 77-1978.
United States Court of Appeals,
Seventh Circuit.
Argued Dec. 7, 1977.
Decided Feb. 22, 1978.

Defendant was convicted before the United States District Court for the Northern District of Indiana, South Bend Division, Allen Sharp, J., of attempted income tax evasion and of conspiracy to evade payment of income taxes, and he appealed. The Court of Appeals, Sprecher, Circuit Judge, held that (1) a witness' hearsay testimony that defendant's alleged coconspirator told him that comments he made to IRS agents would "probably send him (the coconspirator) to jail" was admissible, since the statement was "in furtherance of" the concealment portion of the conspiracy, and since the coconspirator's statement was made "during the course" of the conspiracy, (2) although a misstatement of law by the prosecutor in closing argument can be ground for reversal, and although defendant claimed that the prosecutor's closing comments suggested that the jury, in order to acquit, would have to believe that the prosecution suborned two witnesses to perjure themselves, an examination of the record disclosed that the prosecutor made no statement of law in his closing argument and merely stated that he "resent(ed)" defense counsel's argument that the aforesaid two prosecution witnesses had been induced to testify as they did out of fear of further prosecution, (3) while defendant argued that his conviction on the indictment's second count, attempted income tax evasion, must be reversed because two of the affirmative acts of tax evasion alleged were not proved, defendant did not contest that there was sufficient evidence to prove the other three affirmative acts alleged in that count and therefore the conviction had to be affirmed and (4) prosecution's failure to provide defendant with a copy of a transcript of an interview by an internal revenue agent with one prosecution witness was not a Brady violation, since defendant's request for Brady materials was general, and since nondisclosure of the aforesaid interview, which was merely additional material for impeaching an already thoroughly impeached witness, did not deprive defendant of a fair trial.

Affirmed.

[1] CRIMINAL LAW k423(1)
110k423(1)
In prosecution for conspiracy to evade payment of income taxes and attempted tax evasion, a witness' hearsay testimony that defendant's alleged coconspirator told him that comments he made to IRS agents would "probably send him [the coconspirator] to jail" was admissible, since the statement was "in furtherance of" the concealment portion of the conspiracy, and since the coconspirator's statement was made "during the course" of the conspiracy; moreover, even if the testimony were inadmissible, its admission was harmless error since it was merely a single comment in an eight-day trial that was only

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directly inculpatory as to the coconspirator, not defendant. 26 U.S.C.A. (I.R.C.1954) s 7201; 18 U.S.C.A. s 371; Federal Rules of Evidence, rule 801(d)(2)(E), 28 U.S.C.A.

[1] CRIMINAL LAW k1169.7
110k1169.7
In prosecution for conspiracy to evade payment of income taxes and attempted tax evasion, a witness' hearsay testimony that defendant's alleged coconspirator told him that comments he made to IRS agents would "probably send him [the coconspirator] to jail" was admissible, since the statement was "in furtherance of" the concealment portion of the conspiracy, and since the coconspirator's statement was made "during the course" of the conspiracy; moreover, even if the testimony were inadmissible, its admission was harmless error since it was merely a single comment in an eight-day trial that was only directly inculpatory as to the coconspirator, not defendant. 26 U.S.C.A. (I.R.C.1954) s 7201; 18 U.S.C.A. s 371; Federal Rules of Evidence, rule 801(d)(2)(E), 28 U.S.C.A.

[2] WITNESSES k286(2)
410k286(2)
Scope of redirect examination is a matter firmly committed to the sound discretion of the trial court.

[3] WITNESSES k287(2)
410k287(2)
Where the district court decided that the subject matter of defense counsel's cross-examination of a witness dealt with meetings between the witness and defendant's alleged coconspirator without any apparent time limitation, the court did not abuse its discretion in then allowing the prosecution, on redirect examination, to ask the witness about one meeting between him and the coconspirator not specifically raised in cross-examination.

[4] CRIMINAL LAW k662.11
110k662.11
Formerly 110k662(1)
Defendant's Fifth Amendment right to confront and cross-examine his alleged coconspirator was not violated by the admission of a witness' hearsay testimony to the effect that the coconspirator told him that his comments to IRS agents would "probably send him [the coconspirator] to jail, since defendant had the opportunity to cross-examine the witness as to whether the statement was actually made and the statement, itself, was basically reliable, being a statement against penal interest and not dependent on the coconspirator's recollection.

[5] CONSPIRACY k24.15
91k24.15
Formerly 91k23
The last overt act charged and proved in an indictment may, but does not always, mark the duration of the conspiracy. 18 U.S.C.A. s 371.

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[6] CRIMINAL LAW k1119(4)
110k1119(4)
Although a misstatement of law by the prosecutor in closing argument can be ground for reversal, and although defendant claimed that the prosecutor's closing comments suggested that the jury, in order to acquit, would have to believe that the prosecution suborned two witnesses to perjure themselves, an examination of the record disclosed that the prosecutor made no statement of law in his closing argument and merely stated that he "resent[ed]" defense counsel's argument that the aforesaid two prosecution witnesses had been induced to testify as they did out of fear of further prosecution.

[7] CRIMINAL LAW k726
110k726
Although statements to a jury suggesting some relationship between a defendant's fraudulent activities and the jurors' insurance premiums or taxes is improper, and although the prosecutor, in the instant attempted tax evasion trial, did say at one point "we recognize our responsibility to the Government to pay our taxes," such comment was in response to defense counsel's argument that $2,000,000 is a lot of money and that some of the expenditures that were being used as evidence were for the benefit of defendant's son; the prosecutor's comment was intended to dispel any sympathy for defendant on this point, not to appeal to the jury's pecuniary interests. 26 U.S.C.A. (I.R.C.1954) s 7201; 18 U.S.C.A. s 371.

[8] CRIMINAL LAW k726
110k726
In light of defense counsel's closing argument, the prosecutor rightly concluded that defendant was attempting to shift the blame to his alleged coconspirator, and there was thus no error in the prosecutor presenting his response to that issue in a colorful fashion, i. e., referring to the Biblical story of the slaying of Abel by Cain and quoting Cain's statement to God "I'm not my brother's keeper.".

[9] CRIMINAL LAW k706(3)
110k706(3)
To the extent there is ever a duty to complete an impeachment, it will only arise once the witness categorically denies having made the prior inconsistent statement, not when he merely fails to remember whether or not he made it.

[10] CRIMINAL LAW k1171.8(1)
110k1171.8(1)
Even if the prosecution, in regard to the impeachment of one of its witnesses who gave an unexpected answer and then denied making a prior inconsistent statement before a magistrate, had a duty to complete the impeachment by offering into evidence a transcript of the proceedings before the magistrate, it was difficult to fathom what harm to defendant's case attended that error.

[11] CRIMINAL LAW k700(1)
110k700(1)

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Formerly 110k700
In prosecution for attempted income tax evasion and conspiracy to evade payment of income taxes, defendant was not denied a fair trial by reason of the prosecution's possible misstatement in a letter that the fictitious bank account alleged in the attempted tax evasion count was maintained at the Citizen's Trust Bank in Atlanta, Georgia, and then subsequently proving that the account in fact was kept at the Gary National Bank. 26 U.S.C.A. (I.R.C.1954) s 7201; 18 U.S.C.A. s 371.

[12] INTERNAL REVENUE k5291.1
220k5291.1
Formerly 220k5291, 220k2447
In a prosecution for attempted tax evasion, the prosecution must prove some affirmative act constituting attempt to evade or defeat payment of taxes, but it need not prove each affirmative act alleged. 26 U.S.C.A. (I.R.C.1954) s 7201.

[13] INTERNAL REVENUE k5299
220k5299
Formerly 220k2451.2
While defendant argued that his conviction on the indictment's second count, to wit, attempted income tax evasion, must be reversed because two of the affirmative acts of tax evasion alleged were not proved, defendant did not contest that there was sufficient evidence to prove the other three affirmative acts alleged in that count and therefore the conviction had to be affirmed; furthermore, there was in fact sufficient evidence to support a finding that defendant committed all the affirmative acts alleged. 26 U.S.C.A. (I.R.C.1954) s 7201.

[14] INDICTMENT AND INFORMATION k10.2(8)
210k10.2(8)
While defendant claimed that there was no evidence before the grand jury to support a charge of subornation of perjury, which was the indictment's third count, and that the inclusion of such charge both as a separate count and as part of each of the other two counts, on which defendant was convicted, required reversal of his conviction, nothing in defendant's one-sided summary of the grand jury proceedings showed that the lower court erred in assessing the grand jury record and in then overruling defendant's claim; furthermore, defendant failed to certify the grand jury transcript as part of the record for appeal.

[15] CRIMINAL LAW k627.8(1)
110k627.8(1)
While defendant claimed that the district court erred in requiring him to produce documents without a fuller presentation by the prosecution to support its motion, defendant failed to contest the district court's finding that production of the documents would "expedite the trial in this case," and more importantly, defendant failed to allege any prejudice caused by the court's order. Fed.Rules Crim.Proc. rule 17(c), 18 U.S.C.A.

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[16] CRIMINAL LAW k627.8(3)
110k627.8(3)
Prosecution's failure to provide defendant with a copy of a transcript of an interview by an internal revenue agent with one prosecution witness was not a Brady violation, since defendant's request for Brady materials was general, and since nondisclosure of the aforesaid interview, which was merely additional material for impeaching an already thoroughly impeached witness, did not deprive defendant of a fair trial.

[17] CRIMINAL LAW k627.7(4)
110k627.7(4)
Failure of the prosecution, in tax evasion case, to provide defendant with the memorandum of an interview of a prosecution witness relating to his narcotics activities was not a violation of the Jencks Act, since the information contained in the interview did not "relate to" the witness' testimony. 18 U.S.C.A. ss 3500, 3500(e)(1).

*379 Harvey M. Silets, Chicago, Ill., for defendant-appellant.

Charles E. Brookhart, Myron C. Baum, Abraham M. Poretz, Tax Div., U. S. Dept. of Justice, Washington, D. C., for plaintiff-appellee.

Before CUMMINGS and SPRECHER, Circuit Judges, and CAMPBELL, Senior District Judge.[FN*]

FN* Senior District Judge William J. Campbell, of the Northern District of Illinois, is sitting by designation.

SPRECHER, Circuit Judge.

The case involves a large number of alleged errors by the district court in a criminal trial where the defendant was convicted both of attempted tax evasion in violation of 26 U.S.C. s 7201 and conspiracy to evade the payment of taxes in violation of 18 U.S.C. s 371. Defendant's chief arguments deal with the admissibility of the hearsay declarations of a co-conspirator not on trial, the propriety of some of the prosecutor's closing remarks and the failure of the prosecution to provide materials that might have been used by the defendant to impeach one of the prosecution's main witnesses.

I

This case involves two consolidated appeals arising out of the same district court case. Initially, defendant appeals his convictions for tax evasion and conspiracy on the basis of numerous assigned errors at trial. Defendant also appeals the district court's denial of his motion for a new trial based on "newly discovered" evidence that defendant claims was subject to disclosure by the government under Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and/or the Jencks Act, 18 U.S.C. s 3500. The facts underlying the convictions will be discussed first and those relevant to the motion for a new trial will be described subsequently.

A

The defendant, Fred T. Mackey, and his alleged co-conspirator, F. Lawrence Anderson, were charged in a five count indictment. Count I charged the defendant with conspiracy to evade payment of income tax and to defraud the United States by impeding the Internal Revenue Service in the collection of

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revenue in violation of 18 *380 U.S.C. s 371.[FN1] Count II charged the defendant with attempted tax evasion in violation of 26 U.S.C. s 7201.[FN2] Count III charged the defendant with subornation of perjury in violation of 18U.S.C. s 1622.[FN3] Counts IV and V of the indictment related only to F. Lawrence Anderson.[FN4]

FN1. That section provides:
If two or or more persons conspire either to commit any offense against the United States, or to defraud the United States . . . in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
18 U.S.C. s 371.

FN2. That section provides:
Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall . . . be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.
26 U.S.C. s 7201.

FN3. That section provides:
Whoever procures another to commit any perjury is guilty of subornation of perjury, and shall be fined not more than $2,000 or imprisoned not more than five years, or both.
18 U.S.C. s 1622.
The district court directed a verdict in favor of the defendant on this count of the indictment. Nonetheless, its inclusion at the trial is claimed as a basis for reversal. See part VII of this opinion infra.

FN4. F. Lawrence Anderson was severed from defendant's trial due to ill health. He was subsequently tried and acquitted of all charges against him in the indictment.

The claims in the indictment stem from a series of events subsequent to a $2,488,712 stipulated settlement of June 5, 1972, between the defendant and the Internal Revenue Service in a civil case before the Tax Court for back taxes and penalties for the period from 1954 through 1961 and 1963 through 1965. It was this large sum of money due and owing the federal government that the prosecution claims the defendant conspired and attempted to avoid paying.
The defendant's trial lasted for over a week, during which the prosecution presented 34 witnesses and over 100 documents. In turn, the defendant presented three witness on his behalf. Since we cannot describe all of the evidence presented at trial without unduly prolonging this opinion, we will focus on the important points in the government's and defendant's cases.
The prosecution presented evidence as to six affirmative acts of attempted tax evasion committed by the defendant. First, the prosecution showed that the defendant had substantial control over three companies, Gibraltar Mutual Insurance Company, Gibraltar Industrial Insurance Company and M.W.E. & S.

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Investment Company (M.W.E. & S.), and that he manipulated them so that most of the assets of the three were kept in M.W.E. & S. which left them potentially at the defendant's disposal. Second, the prosecution presented evidence that several checks of M.W.E. & S. were used to purchase personal goods and services for the defendant, and therefore, a bank account at the Gary National Bank placed in the company's name may have been "fictitious." Third, the defendant was shown to have made substantial purchases in cash, the source of which was generally unknown. Fourth, the prosecution presented evidence that defendant used money from M.W.E. & S. and the insurance companies to pay for various personal items, including, among other things, a security system and swimming pool for the defendant's home. Fifth, the prosecution showed that defendant had kept mortgages on his property, notwithstanding that there was no money due and owing to anyone. Finally, it was shown that defendant had placed his assets with another person and company by giving $25,000 in cash to a Carl Smith to invest in a company named A & D Realty, Inc. (A & D).

The prosecution's conspiracy charge is somewhat more complex. It revolves around the formation by F. Lawrence Anderson, defendant's co-conspirator, and Robert F. Deal, defendant's nephew by marriage, of A & D, which purchased the defendant's *381 home from the IRS.[FN5] It was the prosecution's theory that A & D was created for the defendant's benefit so that his resources could be placed secretly in A & D and thereby be protected from collection by the Internal Revenue Service. The defendant claimed that A & D was a legitimate realty company with bona fide investors. The prosecution presented three key witnesses on the conspiracy count who were purportedly shareholders in A & D, but who testified that they, in fact, had not invested their own money in the enterprise. Carl Smith, a pharmacist in a building owned by defendant, testified that he was initially contacted by Mr. Anderson about an "investment" in A & D Realty. He testified further that he was called by defendant to come to his office, whereupon he was given by the defendant $25,000 in cash in a paper bag and was told to purchase a cashier's check payable to A & D Realty and to take the check to Mr. Anderson. Smith testified that he did this, and that at some indeterminate time later he signed an A & D stock certificate for a $25,000 investment.

> FN5. The house was sold at auction in partial satisfaction of the two million dollars due and owing the IRS. It was initially purchased by an unrelated party at the first auction, but that party was unable to acquire sufficient funds to make the down payment. A & D Realty subsequently purchased the property for $136,000. The defendant continued to reside at his house throughout the entire period prior to trial.

A second witness, Warren E. Dotson, an automobile tire dealer, testified that defendant Mackey had asked him about investing in A & D Realty. In response to Dotson's comment that he lacked the money to invest, defendant said that Dotson "didn't need any" (Tr. at 672-75). Subsequently, Dotson was contacted by co-conspirator Anderson who gave Dotson $12,000 in cash and told him to take it to a bank and to get a cashier's check payable to A & D Realty. Dotson returned the check to Anderson's secretary. Later, just before he was to testify before the grand jury, Dotson was invited to an A & D Realty shareholders' meeting at Anderson's house, at which time he signed the

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company's stockholders book and a certificate for 60 shares of its stock.[FN6]

FN6. Warren Dotson's testimony was impeached by defense counsel on cross-examination. He had testified before the grand jury that the $12,000 was his own. He subsequently was indicted and pleaded guilty to perjury. As a part of his plea bargain for probation, Dotson promised to testify against the defendant. In addition, there was some reason to believe that Dotson had received $12,000 in a loan from the Small Business Administration, and that he testified that the money had come from Anderson to conceal his misuse of that loan which is a criminal offense.

The third witness, Dr. Edwin G. Moore, testified that he had been contacted by F. Lawrence Anderson about loaning Anderson money for some real estate investments. Dr. Moore agreed to do so, wrote a check payable to A & D Realty for the sum of $10,000 and took it to Anderson. In return, Dr. Moore immediately was given $10,000 in cash by one of Anderson's employees.

In addition to the evidence of a conspiracy between the defendant and F. Lawrence Anderson to have A & D Realty established and to place defendant's assets in the firm for the purpose of purchasing defendant's home, the prosecution sought to demonstrate the existence of a conspiracy to cover-up the true nature of A & D Realty. The primary evidence used was F. Lawrence Anderson's false grand jury testimony in April 1975, that Messrs. Smith and Dotson and Dr. Moore were actual investors in A & D Realty (Exhibit 33a). The concealment phase of the conspiracy was alleged to have continued until the date of the indictment.

Based primarily on the evidence described above, the jury found the defendant guilty on both the conspiracy and tax evasion counts in the indictment. The defendant appeals both convictions relying on several claimed errors by the district court during the trial.

B

As suggested above, Carl Smith's testimony that he received cash from the defendant and was told to invest it in A & D *382 Realty was an important part of the prosecution's conspiracy case. Subsequent to the entry of judgment in this case, defense counsel discovered evidence indicating that Smith might have been involved in the trafficking of narcotics before and after he supposedly received $25,000 in cash from defendant. While investigating this possibility, defense counsel discovered that agents of the Internal Revenue Service, including one who was investigating the defendant, had interrogated Smith about his narcotics activity. The IRS had elicited from Smith, in return for possible consideration in other matters, a statement which he refused to sign without his attorney present and which, in fact, he never did sign.

Defense counsel, believing that the evidence of Smith's narcotics trafficking was significant because it was a possible source for the $25,000 Smith claimed the defendant had given him, and also because it was a source that Smith would have a strong motive to conceal, moved for a new trial under Fed.R.Crim.P. 33 based on evidence that allegedly was withheld by the prosecution.

A hearing on the motion was held. During that hearing it was shown that defense counsel had evidence of Smith's possible narcotics trafficking available to him prior to trial. Smith had been questioned before the Grand Jury by the prosecution about a previous interview he had had with the

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government about narcotic transactions.[FN7] Smith's grand jury testimony was provided to defense counsel during pre-trial discovery.

FN7. During the grand jury testimony of Carl Smith on May 8, 1975, Smith was questioned by the prosecutor as follows:
Q. All right. Now, Mr. Smith, sometime ago, were you interviewed by a representative of Narcotics Bureau in connection with some transactions?
A. Yes, sir.
Q. All right. During that period of time did you tell this Narcotics Agent that you had no other source of income other than the salary that you received from your employment?
A. Yes, sir.

After the hearing, the court denied defendant's motion for two reasons. First, the court held that this evidence was not "newly discovered" because defense counsel could have located it had he exercised due diligence. Second, the court determined that the evidence was cumulative since it could only be used to impeach Smith's testimony which already had been impeached severely by defense counsel.[FN8] The defendant appeals from the district court's denial of his motion for a new trial.

FN8. Smith had testified previously before the grand jury investigating the defendant that he had invested his own money in A & D Realty. In fact, he had told the same story to his wife, parents and the Internal Revenue Service. Smith was subsequently indicted and convicted for perjury based on this testimony before the grand jury. In addition, Smith was granted immunity after his perjury conviction so that he would testify again before the grand jury and at the trial.

II

[1] Defendant's first argument is that the district court erred in admitting, through Dr. Moore's testimony, the statement by F. Lawrence Anderson made in August 1975, that Dr. Moore's comments to the IRS would "probably send" Anderson to jail. During cross-examination, defense counsel asked Dr. Moore about various conversations he had had with Mr. Anderson. From Dr. Moore's answers, defense counsel elicited the fact that the defendant had never been present during any of their meetings.

On redirect examination, the prosecution asked about a conversation between Dr. Moore and Anderson that occurred subsequent to the former's appearance before the grand jury. Defense counsel objected on the ground that the question was beyond the temporal scope of the cross-examination. The court overruled the objection on the basis that it fell within the subject matter of the cross-examination.

[2][3][4] In response to the question, Dr. Moore testified that Anderson told him that the comments to the Internal Revenue Service *383 agents would "probably send him (Anderson) to jail . . .." (Tr. at 771). Defendant argues primarily [FN9] that since the statement was made neither "in the course of" nor "in furtherance of" the conspiracy, as required by Fed.R.Evid. 801(d)(2)(E), it was inadmissible hearsay and that its admission against the defendant was prejudicial error.

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FN9. Defendant also appears to argue that the question on redirect examination that elicited the hearsay statement was beyond the scope of cross-examination. The general rule is that the scope of redirect examination is a matter firmly committed to the sound discretion of the trial court. United States v. Hodges, 480 F.2d 229, 233 (10th Cir. 1973); Chapman v. United States, 346 F.2d 383, 388 (9th Cir.), cert. denied, 382 U.S. 909, 86 S.Ct. 249, 15 L.Ed.2d 161 (1965). See also Schutter Candy Co. v. Stein Bros. Paper Box Co., 371 F.2d 340, 342 (7th Cir. 1966). Here the district court decided that the subject matter of the cross-examination dealt with meetings between Anderson and Moore without any apparent time limitation. On redirect examination, the prosecution asked about one meeting between Anderson and Moore not specifically raised in cross-examination. The judge certainly did not abuse his discretion by deciding that that line of questioning was appropriate. That the questioning elicited a response that was damaging to defendant does not affect the propriety of the court's decision as to the appropriate scope of redirect examination.
Defendant also asserts that the admission of Anderson's statement to Dr. Moore at the trial violated the defendant's constitutional right under the Fifth Amendment to confront and cross-examine Anderson. The assertion lacks merit. Defendant had the opportunity to cross-examine Dr. Moore as to whether the statement was actually made and the statement, itself, was basically reliable, being a statement against penal interest and not dependent on Anderson's recollection. See United States v. Cogwell, 486 F.2d 823, 833-35 (7th Cir. 1973), cert. denied, 416 U.S. 959, 94 S.Ct. 1975, 40 L.Ed.2d 310 (1974).

It seems to us quite clear that if the conspiracy can be said to have continued up to the time of Anderson's statement to Dr. Moore then that statement was "in furtherance of" the concealment portion of the conspiracy. The standard to be applied is whether some reasonable basis exists for concluding that the statement furthered the conspiracy. See United States v. Moore, 522 F.2d 1068, 1077 (9th Cir. 1975), cert. denied, 423 U.S. 1049, 96 S.Ct. 775, 46 L.Ed.2d 637 (1976); United States v. Knippenberg, 502 F.2d 1056, 1061 (7th Cir. 1974). While the statement is susceptible of alternative interpretations, it is quite reasonable to view it as an attempt to persuade Dr. Moore either to alter his statements to the IRS or to stop talking to the agency altogether.
Somewhat less clear is whether Anderson's statement was made "during the course" of the conspiracy. This court has recognized that "(t)he duration of a conspiracy . . . depends upon the scope of the agreement entered into by its members" and is, therefore, dependent on the facts in each case. United States v. Hickey, 360 F.2d 127, 141 (7th Cir.), cert. denied, 385 U.S. 928, 87 S.Ct. 284, 17 L.Ed.2d 210 (1966); United States v. Nowak, 448 F.2d 134, 139 (7th Cir. 1971). In addition, in determining whether there has been an agreement to conceal, the Supreme Court has stated that there must be more than "circumstantial evidence showing merely that . . . the conspirators took care to cover up their crime in order to escape punishment." Grunewald v. United States, 353 U.S. 391, 402, 77 S.Ct. 963, 972, 1 L.Ed.2d 931 (1957).

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See also Lutwak v. United States, 344 U.S. 604, 73 S.Ct. 481, 97 L.Ed. 593 (1953); Krulewitch v. United States, 336 U.S. 440, 69 S.Ct. 716, 93 L.Ed. 790 (1949).

On the record before us, we find that sufficient evidence existed from which a jury could infer that an agreement to conceal existed at the outset of the conspiracy. First, the indictment alleged and the prosecution proved a broad effort to evade taxes which by its nature required a substantial effort at concealment. Nowak, supra, 448 F.2d at 139. Thus, unlike in Lutwak and Krulewitch, where the object of the conspiracy was a discrete criminal act, here we deal with a crime that had no specific terminating event.[FN10] Therefore, *384 the nature of the attempted crime by itself provides a substantial inference of agreement to conceal or cover-up.

FN10. This case is distinguishable from both United States v. Flecha, 539 F.2d 874 (2d Cir. 1976) and United States v. Floyd, 555 F.2d 45 (2d Cir. 1977), on the basis that in both decisions the court found an event which terminated the conspiracy. In Flecha, the court concluded quite reasonably that the arrest of the conspirators ended the conspiracy. In Floyd, the court found that the conspiracy had as its sole object the robbing of a bank. Once that object was concluded, the conspiracy terminated. In this case, there is no such single event, and, therefore, we must examine all of the evidence to determine what the jury could reasonably decide the duration of the conspiracy had been.

In addition, there was the evidence of the meeting of the A & D stockholders and the false testimony of Anderson before the grand jury. The successful commission of the crime, rather than its mere concealment from investigation, required that the "investors" true status not be uncovered. Both acts, therefore, could be viewed by a jury as relating back to the decision to evade taxes. Viewing the case in the light most favorable to the government, we conclude that there was sufficient evidence from which a jury could determine that a cover-up of the crime was one of the central objects of the conspiracy as originally conceived. Therefore, the conspiracy continued until the date of the filing of the indictment, and Anderson's statement to Dr. Moore was made "during the course" of the conspiracy.

[5] We should note finally in dealing with this issue that, even if we were disposed to conclude that this evidence was inadmissible, we would still hold that its admission was harmless error under Fed.R.Crim.P. 52(a). It was merely a single comment in an eight-day trial that was only directly inculpatory as to Anderson, and not the defendant. Also, there is substantial independent evidence of the defendant's guilt. See United States v. Rizzo, 418 F.2d 71, 79 (7th Cir. 1969), cert. denied sub nom., Tornabene v. United States, 397 U.S. 967, 90 S.Ct. 1006, 25 L.Ed.2d 260 (1970); United States v. Fellabaum, 408 F.2d 220, 226 (7th Cir.), cert. denied, 396 U.S. 858, 90 S.Ct. 125, 24 L.Ed.2d 109 (1969). We, therefore, conclude that the admission of Anderson's statement to Dr. Moore is not a sufficient basis for reversal.[FN11]

FN11. Although defendant's brief is not clear on the point, it appears to argue in a footnote that the duration of the conspiracy cannot exceed the date of the last overt act charged and proved in the indictment. Since the

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last overt act in this case was Anderson's statements to the grand jury and his statement to Dr. Moore occurred subsequent to the grand jury appearance, the defendant argues that the statement was inadmissible. Defendant's reliance on Fiswick v. United States, 329 U.S. 211, 67 S.Ct. 224, 91 L.Ed. 196 (1946), to support his position is misplaced. In that case the Court held that the last overt act was also the object of the conspiracy, and therefore marked its termination. Id. at 216-17, 67 S.Ct. 224. The Court did not purport to establish a rule that the last overt act, of necessity, marks the duration of the conspiracy. In fact, the Court, itself, only stated that the overt acts "may" mark the duration of the conspiracy, and not that they must. Id. at 216, 67 S.Ct. 224. We should also note that defendant later in his brief argued that it was error for the prosecutor in his closing argument to make reference to Anderson's remark to Dr. Moore. Given our holding that the statement was admissible, it is obvious that defendant's argument has become frivolous.

III

[6] Defendant's next set of arguments deals with the propriety of the prosecutor's closing argument at the trial. The basis for the defendant's first assignment of error is the prosecutor's comments suggesting, in the defendant's view, that the jury would have to believe that the prosecution suborned witnesses Smith and Dotson to perjure themselves in order to acquit the defendant. Based on this characterization, the defendant argues that no such finding was necessary to acquit, and therefore, concludes that the prosecutor's statement represented a misstatement of the law within the meaning of United States v. Bohle, 445 F.2d 54 (7th Cir. 1971), and United States v. Phillips, 527 F.2d 1021 (7th Cir. 1975).

Defendant properly cites Bohle and Phillips for the proposition that a misstatement of law by the prosecutor in a closing argument can be a ground for reversal.[FN12] However, *385 the defendant here seriously exaggerates the nature of the prosecutor's remarks. The prosecutor made no statements of law in his closing argument. All that he did was respond to defense counsel's argument that Smith and Dotson had been induced to testify as they did out of fear of further prosecution. The prosecutor raised the point merely to state that he "resent(ed) it" (Tr. at 1063). There was no statement here, like that repeated several times in Phillips, that the jury had to find the prosecutor guilty of wrongdoing before it could acquit the defendant. We find no error in the prosecutor's comments on this point.[FN13]

FN12. This case is readily distinguishable from Bohle and Phillips. In Bohle, the prosecutor told the jury that in its evaluation of the defendant's insanity defense it could properly consider the presumption of sanity. However, as a matter of law, the jury was not permitted to consider that presumption. The court held that such a serious misstatement of the law on the central issue to the defendant's case was error. 445 F.2d at 71. There is no comparable misstatement of law in this case. In Phillips, the prosecutor on three separate occasions, and with the approval of the court in the presence of the jury, argued "you're going to have to find, I suppose, that I conspired with the agent to commit this crime by bringing it to you." 527 F.2d at 1022. The court correctly

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decided on those facts that the jury might reasonably have concluded that it had to find the prosecutor guilty of misconduct before it could acquit the defendant. The argument to the jury in this case was significantly less likely to mislead the jury.

FN13. Defendant also argues that the prosecutor's remarks about Dotson and Smith amounted to "placing his personal integrity behind the truthfulness of the witness(es)." United States v. Phillips, 527 F.2d 1021, 1023 (7th Cir. 1975). We cannot agree. Nothing in the prosecutor's comments even approaches the defendant's characterization that the argument "amounts to placing the prosecutor in the same conspiratorial nest with the witnesses." Id. at 1025.

[7] Next, defendant complains that the prosecutor in his closing argument improperly appealed to the pecuniary interests of the jury. This court has held that statements to a jury suggesting some relationship between a defendant's fraudulent activities and the jurors' insurance premiums or taxes is improper and potentially reversible error. See United States v. Trutenko, 490 F.2d 678, 679 (7th Cir. 1973); Epperson v. United States, 490 F.2d 98, 100 (7th Cir. 1973). However, this is not such a case.

At one point the prosecutor did say, "we recognize our responsibility to the Government to pay our taxes" (Tr. at 1080). However, the comment was in response to defense counsel's argument that two million dollars is a lot of money and that some of the expenditures that were being used as evidence were for the benefit of defendant's son. The prosecutor's argument was intended to dispel any sympathy for the defendant on this point, and not to appeal to the jury's pecuniary interests.

[8] Defendant's final assignment of error based on the closing argument is that the prosecutor made an uncalled for reference to the Biblical story of the slaying of Abel by Cain that was included merely for its highly prejudicial effect. During his argument, the prosecutor characterized the defendant's defense as an effort to shift the defendant's responsibility to F. Lawrence Anderson. In so doing, he quoted Cain's statement to God, "I'm not my brother's keeper" (Tr. at 1085). Defendant claims that he never attempted to shift the blame to Anderson in his argument. However, in his closing argument, defense counsel twice suggested that the arrangements for fraudulent shareholders might have been in Anderson's interest rather than the defendant's. He argued:

If Mr. Anderson was working some kind of a plan with . . . Dr. Moore, for example, . . . that is their problem. There's no proof whatsoever that Mr. Mackey had anything to do with that.

If you choose to believe that Mr. Dotson got the twelve thousand dollars, that he . . . invested in A & D from Mr. Anderson, that may be something between them, but you can't hold that against Mr. Mackey.

(Tr. at 1039). In light of these arguments, the prosecutor rightly concluded that defendant was attempting to shift the blame to Anderson. There is no error in presenting his response to this issue in a colorful fashion.

Based on our evaluation of the closing arguments of both the defense counsel and *386 the prosecutor, we conclude that the district court rightly decided that the prosecutor "in response to defense arguments made struck hard blows,

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but he did not strike foul ones" (Tr. at 1090). See Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935). We, therefore, find no error based on the prosecution's closing argument.

IV

One of the prosecution's witnesses, Artie Jenkins, was asked about the source of $5000 in cash that he had used to attempt to post bail for the defendant before a magistrate in Hammond, Indiana. The prosecution sought to elicit from the witness the fact that he had acquired the money from Gibraltar Insurance Company. Jenkins, however, stated that the money had come from his mother (Tr. at 145). In an effort to impeach this statement, the prosecutor asked if Jenkins had told the magistrate in charge of defendant's bail that the money had come from Gibraltar Insurance Company. Jenkins responded that he could not recall. The prosecutor then asked about other statements that Jenkins made before the magistrate, but he again responded that he did not recall. The prosecution did not attempt to offer into evidence a transcript of the proceedings before the magistrate in order to complete the impeachment.

Defendant claims that the prosecution, having emphasized the witness's comments to the magistrate, had a duty to complete the impeachment and failure to do so was prejudicial error. We disagree with defendant's analysis on both points.

[9][10] First, to the extent there is ever a duty to complete an impeachment, it will only arise once the witness categorically denies ever having made the prior inconsistent statement, United States v. Bohle, 445 F.2d 54, 73 (7th Cir. 1971), and not when he merely fails to remember whether or not he has made it. Second, even if a duty to impeach had arisen, it is difficult to fathom what harm to the defendant's case attended that error. The witness's testimony was generally favorable to defendant, the effort at impeachment was modest and the witness's significance to the prosecution's case was de minimis. Under these circumstances, we find no error in the prosecution's conduct.

V

Defendant argues that the prosecution deceived him by first stating in a bill of particulars that the fictitious bank account alleged in Count II of the indictment was maintained at the Citizens Trust Bank in Atlanta, Georgia and then subsequently proving that the account in fact was kept at the Gary National Bank. We find no basis in defendant's argument for reversal.

Initially, we note that the letter sent to defendant was not a bill of particulars. The district court denied the defendant's motion for a bill of particulars on September 24, 1976, because of the extensive discovery permitted. Therefore, cases cited by defendant dealing with misstatements in a bill of particulars are inapposite.

[11] There remains the possibility that defendant was sufficiently misled by the representations of the prosecution so that he was deprived of a fair trial. Defendant, in this respect, fails to identify how he was prejudiced by the prosecution's statement. In fact, after the trial below, counsel for the defendant stated, "I did not recall specifically that the letter related to the fictitious bank accounts until I had an opportunity to review it last night in the motel" (Tr. at 1100). This statement seems to belie any reliance by the defendant on the prosecution's letter. We agree with the district court's assessment that "(i)t would appear to me that defense counsel should have known

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about the M.W.E. & S. account and the Government's contentions in regard to it a long time ago" (Tr. at 1100). The prosecution's possible misstatement did not deny defendant a fair trial.

VI

Defendant's next two arguments are that the conviction under Count II must be reversed *387 because two of the affirmative acts of tax evasion alleged in the indictment were not proved. Defendant asserts that no evidence was presented as to fictitious bank accounts or fictitious mortgages. Defendant is incorrect in his assessment both of the law and the facts surrounding these issues.

[12][13] Under 26 U.S.C. s 7201, the prosecution must prove some affirmative act constituting an attempt to evade or defeat the payment of taxes. Spies v. United States, 317 U.S. 492, 499, 63 S.Ct. 364, 87 L.Ed. 418 (1943); United States v. Ming, 466 F.2d 1000, 1004 (7th Cir.), cert. denied, 409 U.S. 915, 93 S.Ct. 235, 34 L.Ed.2d 176 (1972). However, the prosecution need not prove each affirmative act alleged. This case seems directly controlled by this court's previous decision in United States v. Reicin, 497 F.2d 563 (7th Cir.), cert. denied, 419 U.S. 996, 95 S.Ct. 309, 42 L.Ed.2d 269 (1974), a mail fraud case involving, as here, several instances of illegal activity guided by a unitary scheme. Id. at 569-70. There, the court distinguished a Second Circuit decision, relied on heavily by defendant in this case, United States v. Groves, 122 F.2d 87 (2d Cir.), cert. denied, 314 U.S. 670, 62 S.Ct. 135, 86 L.Ed. 536 (1941), and held "it is necessary to prove at least one but not necessarily each of the specific acts to sustain each count." 497 F.2d 568. We believe that the court's analysis in Reicin applies with equal force here. Since defendant does not contest that there is at least sufficient evidence to prove the other three affirmative acts alleged in Count II of the indictment, we must affirm the conviction on this Count.

We note as an alternative basis for affirming the conviction on this Count that there was sufficient evidence to support a finding that the defendant committed all the affirmative acts alleged. First, defendant asserts that the only fictitious bank account at issue was the one in Atlanta, Georgia. In light of our discussion in part V, supra, however, this view is patently incorrect. The M.W.E. & S. account in Gary, Indiana was the basis for the allegation and there was a great deal of evidence as to whether it was a corporate account or merely a personal account of the defendant.

Second, the prosecution demonstrated that mortgages remained on defendant's property long after the debts that created them had been satisfied (Tr. at 479-80, 509, 546). While defendant presents persuasive arguments as to what inferences to draw from this fact, those arguments were for the jury and do not affect the correctness of the district court's decision to let the general allegation be considered by the jury. We, therefore, find no error on these points.[FN14]

FN14. Defendant argues similarly, again relying on United States v. Groves, 122 F.2d 87 (2d Cir.), cert. denied, 314 U.S. 670, 62 S.Ct. 135, 86 L.Ed. 536 (1941), that his conspiracy conviction must be reversed because the prosecution failed to prove one of the alleged objects of the conspiracy charged in Count I of the indictment, viz., that defendant and

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F. Lawrence Anderson caused witnesses to testify falsely before the grand jury and at the perjury trial of Carl Smith. First, there was some evidence supporting both general allegations. Second, the prosecution need only prove one object of the conspiracy, absent undue prejudice created by the evidence presented as to the object not proved. See United States v. Papadakis, 510 F.2d 287, 297 (2d Cir.), cert. denied, 421 U.S. 950, 95 S.Ct. 1682, 44 L.Ed.2d 104 (1975); United States v. Grizaffi, 471 F.2d 69, 73 (7th Cir. 1972), cert. denied, 411 U.S. 964, 93 S.Ct. 2141, 36 L.Ed.2d 684 (1973). Defendant neither contests that the prosecution in fact proved several objects of this conspiracy nor contends that the evidence used to prove the objects at issue here was prejudicial. Therefore, we find defendant's argument without merit.

VII

[14] Defendant next argues that there was no evidence before the grand jury to support a charge of subornation of perjury (Count III of the indictment), and that the inclusion of such a charge both as a separate count and as a part of each of the other counts in the indictment requires reversal of defendant's conviction. Defendant contends that courts must exercise some supervisory control over grand jury indictments if there is an allegation that there was "no evidence" presented to the *388 grand jury to support a given charge. United States v. Costello, 221 F.2d 668, 677 (2d Cir. 1955), aff'd on other grounds, 350 U.S. 359, 76 S.Ct. 406, 100 L.Ed. 397 (1956); Brady v. United States, 24 F.2d 405, 407-08 (8th Cir. 1928). Assuming, without deciding, that defendant correctly states the law, we nonetheless find no basis in this argument for reversal. Defendant raised this issue before the district court and it stated initially that it has inspected in camera several grand jury transcripts and concluded "with all due respect, Counsel, I don't think you are even close" (Tr. at 781). Then, the court overruled defendant's motion for a mistrial based on this argument (Tr. at 782). Nothing in defendant's one-sided summary of the proceedings before the grand jury convinces us that the court below erred in its assessment of the grand jury record. In light of this fact, and defendant's failure to certify the grand jury transcript as part of the record for appeal, we hold there was no error in the district court's decision.

VIII

[15] Defendant's last argument in his initial appeal is that the district court erred in requiring the defendant, pursuant to Fed.R.Crim.P. 17(c), to produce documents without a fuller presentation by the prosecution to support its motion. The court concluded in response to the defendant's motion to reconsider that production of the documents would "expedite the trial in this case." Defendant does not contest that finding. More importantly, defendant fails to allege any prejudice caused by the court's order. We, therefore, find no error.

IX

[16] On his appeal to the district court's denial of his motion for a new trial, defendant raises two arguments. First, defendant argues that the prosecution's failure to provide him with a copy of a transcript of an interview by an Internal Revenue Agent with Carl E. Smith was a violation of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). We disagree.

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In Brady, the Supreme Court held that:

(T)he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.

373 U.S. at 87, 83 S.Ct. 1196 (emphasis added). As suggested by the quotation from Brady, the narrow issue for us is, given the nature of the defendant's request for exculpatory materials, did the prosecutor have a duty to provide defendant with a transcript of this particular interview? That issue is controlled by the Supreme Court's recent decision in United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976).

The Court in Agurs reasoned that two factors define the duty of the prosecutor to provide Brady materials: whether the request for those materials was specific or general and their materiality. With regard to a general request, the Court concluded:

Such a request really gives the prosecutor no better notice than if no request is made. If there is a duty to respond to a general request of that kind, it must derive from the obviously exculpatory character of certain evidence in the hands of the prosecutor.

427 U.S. at 106-07, 96 S.Ct. at 2399. If the request for Brady material is general in nature, the Court held as to the materiality of that evidence that, "the prosecutor will not have violated his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial." Id. at 108, 96 S.Ct. at 2399.

Applying those standards to the record before us, we conclude that the prosecutor did not violate his constitutional duty to disclose. Here the defendant's request was for "(i)nformation relating to material inconsistencies between statements given by any person, whether or not he is a prospective Government witness, and information relating to material inconsistencies between two or more persons, whether or not they are prospective government witnesses." *389 Contrary to defendant's contention, we conclude that this request was "general" within the meaning of Agurs. At a minimum, we would require that defendant focus his request on a particular witness before we would hold the request to be "specific." Plainly, defendant's request did not give "the prosecutor notice of exactly what the defense desired." Id. at 106, 96 S.Ct. at 2398.

Having determined that the request was general, it remains to be determined whether its non-disclosure deprived defendant of a fair trial. That determination is best made by the district court judge, with our review limited to whether his "first-hand appraisal of the record" was "thorough" and "reasonable." Id. at 114, 96 S.Ct. at 2402. The court below, after a careful consideration of the requested material and the record at trial, concluded:

The material presented would have been of a collateral nature. At the very most a small part of the material presented might have been used for impeachment of Carl Smith. However, such would only have been cumulative.

(Order of Sept. 23, 1977, at 12). Given that the omitted evidence was merely additional material for impeaching an already thoroughly impeached witness, we conclude that the district court's assessment was reasonable.[FN15]

FN15. There is a substantial dispute between the defendant and the

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prosecution as to whether defense counsel exercised "due diligence" in discovering the relevance of Smith's narcotics interview. It is not exactly clear what role this issue plays in defendant's appeal of the denial of his motion for a new trial. Defendant in his initial brief before this court did not argue that the interview was "newly discovered" evidence. Instead, his arguments were limited to possible violations of Brady and the Jencks Act. The prosecution in its brief raised the "due diligence" defense. That analysis, as argued, seems absolutely unrelated to any point raised in defendant's brief. Nonetheless, the defendant responded to the issue in his reply brief; however, he did so within the context of the Brady issue. Initially, we conclude that we are not being asked to reverse solely because the interview is "newly discovered" evidence. Second, in light of our view that, regardless of whether defense counsel exercised "due diligence," there is no violation of Brady and Agurs on this record, we decline to consider the possible effect of that factor either for or against the defendant. Compare United States v. Hedgeman, 564 F.2d 763 (7th Cir. 1977) with Marshall v. United States, 141 U.S.App.D.C. 1, 436 F.2d 155 (1970).

[17] Second, defendant in this appeal argues that the failure of the prosecution to provide the memorandum of the interview of Carl Smith relating to his narcotics activities was a violation of the Jencks Act, 18 U.S.C. s 3500.[FN16] Since neither party argued the point, we assume, without deciding, that this was a "statement" within the meaning of 18 U.S.C. s 3500(e)(1). Thus, the key issue is whether the information contained in the interview " relates generally to the events and activities testified to" by Carl Smith. United States v. O'Brien, 444 F.2d 1082, 1086 (7th Cir. 1971).

FN16. That section provides in relevant part:
(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified.
18 U.S.C. s 3500.

The district court concluded both that the statement did not "relate to" Smith's testimony within the meaning of United States v. Cleveland, 507 F.2d 731 (7th Cir. 1974), and that, even if it had, failure to produce that information did not require reversal of the case. See United States v. Esposito, 523 F.2d 242, 248 (7th Cir. 1975), cert. denied, 425 U.S. 916, 96 S.Ct. 1517, 47 L.Ed.2d 768 (1976). We find no basis for reversing those determinations. The subject matter of Smith's statement to the IRS agent occurred well before the creation of A & D Realty and it only indirectly reflected on the witness's statement on direct examination that he received money from defendant. In addition, the fact that the witness was promised consideration in return for his cooperation in a completely unrelated narcotics investigation cannot be said to "relate to" his trial testimony in any way. *390 We, therefore, find no violation of the Jencks Act requiring reversal of defendant's conviction.

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For these reasons, the judgment of conviction entered by the district court on January 14, 1977, and the judgment denying the defendant's motion for a new trial entered September 23, 1977, are affirmed.

AFFIRMED.

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conspir to defraud gov't → crime of concealment

istrative decisions in the Department of Justice must flow. Nevertheless, the government has already received special dispensation in this regard through the federal rules. Fed.R.App.P. 4(a)(1) gives the government twice as long as the private litigant to file notice of appeal. If the government cannot make its strategic decisions within this time and a protective notice must be filed and later dismissed, there is no reason that the private litigant should be forced to pay attorneys' fees for a meaningless appeal. We conclude, therefore, that the government's appeal was not substantially justified.

The judgment of the district court is affirmed.

A true copy.

dx Grunewald

UNITED STATES of America, Appellee,

v.

Lorraine D. GLEASON, Appellant.

No. 84-1913.

United States Court of Appeals, Eighth Circuit.

Submitted March 14, 1985.

Decided July 3, 1985.

Defendant was convicted in the United States District Court for the Western District of Missouri, Joseph E. Stevens, Jr., J., of conspiracy to defraud United States by obstructing Treasury and collection of income taxes, and two counts of aiding in preparation of fraudulent income tax returns, and she appealed. The Court of Appeals, Floyd R. Gibson, Senior Circuit Judge, held that: (1) evidence, in form of coconspirator's statements, of "cover-up" or concealment of fraud was admissible, and did not create variance between conspiracy charged in indictment and evidence produced at trial; (2) trial judge, in questioning witnesses, did not overstep bounds of propriety; (3) defendant's rights under Speedy Trial Act were not violated; (4) district court did not abuse its discretion in refusing to limit potential cross-examination of defendant; and (5) conviction on one count of aiding in preparation of fraudulent returns was supported by sufficient evidence.

Affirmed.

1. Conspiracy ⇐43(12)

Evidence, in form of coconspirator's statements, of "cover-up" or concealment of fraud was admissible, and did not create variance between conspiracy charged in indictment and evidence produced at trial. 18 U.S.C.A. § 371.

2. Conspiracy ⇐28(1)

When successful accomplishment of crime necessitates concealment, acts of concealment are properly considered to be within scope of original conspiracy. 18 U.S.C.A. § 371.

3. Criminal Law ⇐656(2)

Trial judge, in questioning witnesses, did not overstep bounds of propriety, and questioning did not become so one-sided as to deprive defendant of fair trial.

4. Criminal Law ⇐1035(8)

In absence of objection to trial judge's comment, and because record reflected that comment was made out of jury's hearing, there was no plain error warranting reversal.

5. Criminal Law ⇐577.14

Where first trial ended in declaration of mistrial, and second indictment was filed before first indictment was dismissed, section of Speedy Trial Act [18 U.S.C.A. § 3161(e)] providing 70 days for retrial of case controlled, and, where retrial on superseding indictment commenced before that period expired, defendant's rights under such Act were not violated.

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6. Witnesses ⇐393(1)

Prosecutor could not properly have confronted defendant with her prior statements made in course of proceeding regarding guilty plea which was later withdrawn. Fed.Rules Cr.Proc.Rule 11(e)(6)(C), 18 U.S.C.A.

7. Witnesses ⇐277(2)

District court did not abuse its discretion in refusing to limit potential cross-examination of defendant about allegedly fraudulent tax return, after prosecutor stated that he would be compelled to seek perjury indictment against defendant if she testified, contrary to her prior sworn statement, that she did not know receipts attached to tax return were fraudulent, where prosecutor had right to use statement made by defendant in proceeding involving guilty plea, which was later withdrawn, in subsequent criminal proceeding for perjury, and even if defendant had testified without mentioning return on direct examination, if she had represented that she did not know that any receipts that she had attached to returns were fraudulent, return would relate to this testimony and could properly be addressed on cross-examination.

8. Criminal Law ⇐1144.13(3, 5)

In reviewing district court's denial of motion for judgment of acquittal, Court of Appeals must consider evidence in light most favorable to government and must give government benefit of all reasonable inferences that may be logically drawn from evidence.

9. Internal Revenue ⇐5303

Conviction of aiding in preparation of fraudulent income tax returns was supported by sufficient evidence, from which jury could reasonably conclude that defendant prepared return knowing that claimed charitable contribution had not been made, and that receipt she attached to return fraudulently represented that such contribution had been made. 26 U.S.C.A. 7206(2).

James R. Wyrsch, Kansas City, Mo., for appellant.

John R. Osgood, Asst. U.S. Atty., Kansas City, Mo., for appellee.

Before JOHN R. GIBSON, Circuit Judge, FLOYD R. GIBSON, Senior Circuit Judge, and BOWMAN, Circuit Judge.

FLOYD R. GIBSON, Senior Circuit Judge.

Defendant Lorraine D. Gleason appeals from the district court's [1] judgment entered on a jury verdict convicting her on one count of conspiracy to defraud the United States by obstructing the Department of Treasury in collection of income taxes in violation of 18 U.S.C. § 371, and two counts of aiding in the preparation of fraudulent income tax returns in violation of 26 U.S.C. § 7206(2) [2]. On July 6, 1984, the district court sentenced Gleason to two years imprisonment on the conspiracy count, with all but six months suspended, and three years probation to begin upon her release from custody, plus a $1,000 fine. On the remaining two counts, the court sentenced Gleason to three years probation on each count, to be served concurrently with each other and with the probation sentence imposed on the conspiracy count. Gleason appeals to this court, arguing that a variance existed at trial between the conspiracy charged in the indictment and the evidence shown at trial; that the trial court impermissibly acted as an advocate at trial; that her rights to a speedy trial were violated; that the trial court erred in refusing to limit potential cross-examination of her; and that the evidence as to Count Three of

1. The Honorable Joseph E. Stevens, United States District Judge for the Western District of Missouri.

2. Count Two charged Gleason with aiding and abetting in the preparation of the 1980 fraudulent tax return of Orville and Diane Hart. Count Three made a similar charge as to the 1980 tax return of Nora and Charles Blankenship.

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the indictment was insufficient to sustain a guilty verdict. We affirm.

I. Facts

In 1981, Lorraine Gleason worked with her husband Michael J. Gleason at Gleason's Tax and Accounting Service, a sole proprietorship owned by Michael Gleason in Independence, Missouri. Both Michael and Lorraine Gleason were members of the Universal Life Church, as was George Leigh, who occupied a separate office in the same building as the tax service. The Universal Life Church is a non-profit, religious corporation headquartered in Modesto, California. The Universal Life Church operates through "mail order ministries," through which anyone can be ordained as a minister and have conferred upon him ministerial credentials and powers. The ministers have no required duties, nor does the church have any established creed or doctrines. The Universal Life Church also issues "mail order church charters," through which as few as three people can be designated as a congregation. The members of the congregation may be members of the same family. Once ordained, a minister may donate to the church the earnings from his regular occupation, by placing the money into his congregation's bank account. In so doing, the minister receives a charitable contributions deduction of up to 50 percent of his gross income, with a corresponding reduction in income tax liability. The minister may then withdraw money from the account, tax-free, for the upkeep of the "church" (his home), and his living expenses, including food and lodging. The "Mother Church" in Modesto requires only that the congregation file a regular report.

The evidence at trial showed that both Michael and Lorraine Gleason prepared fraudulent income tax returns for various clients for the 1980 tax year. Typically, either Michael or Lorraine Gleason, or both, would conduct a preliminary interview with taxpayers, during which the taxpayers would produce necessary information to prepare their tax returns. Then either Michael or Lorraine Gleason would inform the taxpayers that more deductions would either decrease their tax liability or increase their tax refund. The Gleasons would refer the taxpayers to George Leigh, who would sell them receipts falsely stating that the taxpayers had made contributions to the Universal Life Church during 1980. Leigh sold the receipts for a small percentage of the stated contributions.[3] Either Michael or Lorraine Gleason would prepare returns for the taxpayers reflecting these bogus contributions, and the receipts were attached to the returns. If any taxpayer expressed concern about the possibility of audits, he or she would be assured by either Michael or Lorraine Gleason or George Leigh that the Universal Life Church would corroborate the claimed contributions.

Lorraine Gleason sought to establish as a defense at trial that she played no part in the conspiracy, and that her position at the tax service was merely that of a receptionist. Gleason insisted that she had not prepared any of the fraudulent returns but merely copied over returns sloppily prepared by her husband, or signed her name as preparer when he was too busy to sign his own name. The testimony at trial, however, showed that Lorraine Gleason had informed Orville and Diane Hart how they could receive a bigger refund by purchasing phony receipts from George Leigh. Gleason also filled out the Harts' receipts, signed their return as the preparer, and told the Harts not to worry about the validity of the deductions because the receipts substantiated the claimed contributions. Further, Lorraine Gleason was present when her husband informed Nora and Charles Blankenship about the availability of the false receipts and told them to con-

3. For example, the evidence at trial showed that Dale Bedsaul received from George Leigh receipts reflecting a total 1980 contribution of $9,000 to the Universal Life Church. Bedsaul paid Leigh $150 for the receipts. Ralph Keeling obtained receipts from Leigh representing a total 1980 contribution of $12,000; Keeling paid $60 or $65 for the receipts. James Massey paid Leigh $60 for receipts reflecting a $22,000 contribution to the Universal Life Church in 1980.

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tact George Leigh. She later attached the receipts that the Blankenships obtained from George Leigh to a completed tax return, which she had signed as preparer.

Lorraine Gleason pled guilty on July 27, 1983 to a one-count information charging her with aiding and assisting in the preparation of the false and fraudulent income tax return of taxpayer Ralph Keeling, in violation of 26 U.S.C. § 7206(2).[4] Gleason withdrew her guilty plea on November 23, 1983, and was indicted along with an alleged co-conspirator, J.C. Baxter, on December 9, 1983. A jury trial began on February 27, 1984, before the Honorable Scott O. Wright of the United States District Court for the Western District of Missouri. The court declared a mistrial on March 5, 1984, because the jury was unable to reach a verdict. Gleason was subsequently reindicted, and retried before Judge Stevens on May 7, 1984, resulting in the convictions from which she now appeals.

A. Variance

Gleason first contends on appeal that the district court erred in denying her motion for a new trial, for arrest of judgment, and for judgment of acquittal based on her allegation that a variance existed between the conspiracy charged in the indictment and the evidence produced at trial. She asserts that the district court erred in admitting evidence, in the form of a co-conspirator's statements, of the "cover-up" or concealment of the fraud, because the cover-up was not within the scope of the conspiracy charged in the indictment.[5] Thus, Gleason's argument goes, the Government introduced evidence at trial as to multiple conspiracies—the initial conspiracy to defraud the United States and a second conspiracy to conceal the fraud. Gleason cites *Grunewald v. United States*, 353 U.S. 391, 77 S.Ct. 963, 1 L.Ed.2d 931 (1957), in support of her claim that the admission of the cover-up evidence caused an impermissible variance from the indictment. Because of the variance between the lone conspiracy count in the indictment and the evidence produced as to multiple conspiracies, Gleason contends her conviction should be reversed.

[1, 2] We hold that the cover-up evidence was properly admitted and that no variance existed here. In citing *Grunewald*, Gleason overlooks the Court's direction in that case to distinguish "between acts of concealment done in furtherance of the *main* criminal objectives of the conspiracy, and acts of concealment done after these central objectives have been attained, for the purpose only of covering up after the crime." 353 U.S. at 405, 77 S.Ct. at 974 (emphasis in original). When "[t]he successful accomplishment of the crime necessitates concealment," acts of concealment are properly considered to be within the scope of the original conspiracy. *Id.* We agree with other courts that have held that a conspiracy covered by 18 U.S.C. § 371, such as the one charged here, necessarily contemplates acts of concealment to accomplish its objectives. *See United States v. Mackey*, 571 F.2d 376, 383–84 (7th Cir. 1978); *United States v. Diez*, 515 F.2d 892, 897–98 (5th Cir.1975), *cert. denied*, 423 U.S. 1052, 96 S.Ct. 780, 46 L.Ed.2d 641 (1976). *See also Forman v. United States*, 361 U.S. 416, 423–24, 80 S.Ct. 481, 485–86, 4 L.Ed.2d 412 (1960), *overruled on other grounds, Burks v. United States*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978). As the Fifth Circuit stated in *Diez*,

> [I]n the present case the central aim of the conspiracy was to deceive officials of the Internal Revenue Service, thereby inducing them to accept fraudulent tax returns as truthful and accurate. In light

4. Michael Gleason entered a plea of guilty on the same day to a charge pursuant to 26 U.S.C. § 7206(2) with respect to the 1980 income tax return of Patrick Goldsworthy.

5. The first indictment against Gleason did not specifically mention the concealment efforts. In the trial on this indictment, which ended in a mistrial, Judge Wright did not admit the concealment evidence. When Gleason was reindicted, the superseding indictment, on which she ultimately was convicted, did refer to the concealment.

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of the substantial possibility that the returns would be audited and investigated, the filing of the returns did not fully accomplish the purpose of the main conspiracy, which by its very nature, called for concealment.

515 F.2d at 897–898. Because the co-conspirators' concealment attempts were part of the original conspiracy, no variance existed and the concealment evidence was properly admitted.

II. Alleged Misconduct of Trial Judge

Gleason next asserts that the trial court erred in denying her motions for a new trial and for a mistrial based on her allegations that the trial judge's misconduct deprived her of a fair trial. Specifically, Gleason contends that the trial judge impermissibly interjected himself into her trial by questioning witnesses, particularly Bishop Imbeau of the Universal Life Church headquarters in Modesto; calling for Bishop Imbeau to produce certain evidence; and commenting on the evidence, all to her prejudice. In support of her argument Gleason cites us to many places in the transcript that she deems examples of the judge's misconduct.

[3, 4] We have reviewed the transcript carefully and conclude that the trial judge did not overstep the bounds of propriety. First, we note that at least a few of the transcript pages to which Gleason refers us contain no comments by the trial judge at all, while others contain comments made by the judge out of the presence of the jury, thus averting any chance of prejudice. Other passages cited by Gleason consist of comments made by the judge to the prosecutor or defense counsel, including rulings on objections. Still other comments by the judge appear in the record as having been made in the presence, but out of the hearing, of the jury. Gleason's counsel contends that one such comment in particular, when the judge stated that a witness had been "dead wrong" in his testimony concerning the tax free benefits of ministers, was audible at the counsel table and therefore probably to the jury as well. Counsel, however, did not make a contemporaneous objection to the comment. Had an objection been made at the time of the perceived error, the trial court would have had the opportunity to determine whether members of the jury had in fact overheard the comment. In the absence of such an objection, however, and because the record reflects that the comment was made out of the jury's hearing, we find that no plain error warranting reversal exists. *See United States v. Ellis*, 747 F.2d 1205, 1208 (8th Cir.1984).

A trial judge is more than a "mere moderator" of a trial. *United States v. Woods*, 696 F.2d 566, 570–71 (8th Cir.1982) (quoting *Dranow v. United States*, 307 F.2d 545, 572 (8th Cir.1962)).

> [The trial judge] has the prerogative, and at times the duty, of eliciting facts he deems necessary to the clear presentation of the issues. To this end he may examine witnesses who testify, so long as he preserves an attitude of impartiality and guards against giving the jury an impression that the court believes the defendant is guilty.

Llach v. United States, 739 F.2d 1322, 1329–30 (8th Cir.1984) (quoting *Dranow*, 307 F.2d at 572). Those questions that the trial judge did ask of witnesses were properly intended to clarify testimony and elicit necessary facts; the judge's questioning did not become so one-sided as to deprive Gleason of a fair trial. *See United States v. Bland*, 697 F.2d 262, 265 (8th Cir.1983) (when trial judge has made allegedly prejudicial comments, appeals court must use balancing process to determine whether such comments have "pervaded over-all fairness" of proceedings). In sum, the trial court did not err in denying Gleason's motions for a new trial and for a mistrial based on alleged misconduct.

III. Alleged Violation of Speedy Trial Act

Gleason also contends that her right to a speedy trial pursuant to the Speedy Trial Act, 18 U.S.C. §§ 3161–3174 (1982), was violated in this case. For consideration of this issue we review the relevant dates

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involved. Gleason originally waived indictment and pled guilty to a one-count information on July 27, 1983. The district court subsequently allowed her to withdraw her guilty plea November 23, 1983. The grand jury then handed down a nine-count indictment against Gleason and J.C. Baxter, in which Gleason was named in seven of the nine counts. Upon defense counsel's motion, the magistrate on January 9, 1984 ordered that the trial be continued from its scheduled January 23, 1984 starting date until February 27, 1984. After the case was tried, beginning on February 27, and submitted to the jury, the district court ordered a mistrial on March 5, 1984, because the jury was unable to reach a verdict. Baxter subsequently entered a guilty plea.

On March 13, 1984, the grand jury returned a new indictment against Gleason. This superseding indictment contained three counts. Count One charged a conspiracy based upon the same acts that served as the basis for the conspiracy charged in Count One of the previous indictment, but added a paragraph specifically including as part of the conspiracy actions taken to cover up the fraud. Counts Two and Three of the superseding indictment were identical to Counts Seven and Eight of the first indictment. The remaining charges in the previous indictment were dropped from the superseding indictment.

Gleason was arraigned on the new indictment on March 21, 1984, and the district court set the matter for trial on May 7, 1984. Gleason filed a motion to dismiss the case on April 25, based on alleged violations of the Speedy Trial Act, asserting that Speedy Trial computation should be governed by 18 U.S.C. § 3161(h)(6).[6] The district court denied the motion in an order filed April 26, 1984, citing 18 U.S.C. § 3161(e), which provides 70 days for the retrial of a case that ended in a mistrial.[7] Trial on the superseding indictment began on May 7, 1984, with the jury returning its guilty verdict on May 15. The Government subsequently moved to dismiss the first indictment against Gleason.

On appeal to this court Gleason argues that the district court erred in denying her motion to dismiss based on the Speedy Trial Act. She repeats her contention that section 3161(h)(6), rather than section 3161(e), applies. Gleason claims that the superseding indictment differs greatly from the initial indictment, and that the Government benefited from the alterations because it had fewer charges to prove and more evidence (from the broadening of the conspiracy count) with which to prove them. Because under section 3161(h)(6) the 70-day time period within which she could be tried expired before May 7, 1984, the indictment should have been dismissed with prejudice under 18 U.S.C. § 3162(a)(2).

[5] We agree with the district court that section 3161(e) applies to Gleason's case. Section 3161(e) plainly addresses the circumstance that warranted retrial in this case: the declaration of a mistrial. By its terms, section 3161(e) requires that a defendant be retried within seventy days of the declaration of a mistrial. Gleason's trial on May 7, 1984, was within seventy days of the March 5th declaration of mistrial. Gleason would have us read into section 3161(e) a condition that does not exist—namely, that a defendant must be tried on the identical indictment following a

6. 18 U.S.C. § 3161(h)(6) states:

> If the information or indictment is dismissed upon motion of the attorney for the Government and thereafter a charge is filed against the defendant for the same offense, or any offense required to be joined with that offense, any period of delay from the date the charge was dismissed to the date the time limitation would commence to run as to the subsequent charge had there been no previous charge [shall be excluded in computing the time within which the trial of any such offense must commence].

7. 18 U.S.C. § 3161(e) states in relevant part: "If the defendant is to be tried again following a declaration of the trial judge of a mistrial * * *, the trial shall commence within seventy days from the date the action occasioning the retrial becomes final."

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mistrial—and asks us to apply section 3161(h)(6).

We do not think section 3161(h)(6) can be applied without some distortion. That section expressly covers the circumstance when the Government moves to dismiss an indictment and *thereafter* a charge is filed for the same offense. Here, however, the second indictment was filed *before* the first indictment was dismissed. Thus by its terms section 3161(h)(6) does not apply to Gleason's situation. *See United States v. McCown*, 711 F.2d 1441, 1446 (9th Cir. 1983); *United States v. Horton*, 676 F.2d 1165, 1170 (7th Cir.1982), *cert. denied*, 459 U.S. 1201, 103 S.Ct. 1184, 75 L.Ed.2d 431 (1983). *C.f. United States v. Harris*, 724 F.2d 1452, 1454 (9th Cir.1984) (construing similar language in 18 U.S.C. § 3161(d)(1)). Gleason argues that the return of the second indictment in effect dismissed the first indictment against her, so that no excludable delay exists under section 3161(h)(6). She cites us to no cases, however, which hold that a superseding indictment automatically dismisses an original indictment, nor have we found any such authority. Based on a plain reading of the statute, then, we agree with the district court that section 3161(e)(6) specifically controls this situation and that Gleason's rights under the Speedy Trial Act were not violated.

IV. District Court's Refusal to Limit Potential Cross-Examination of Gleason.

[6] Gleason next assigns as error the district court's refusal to limit in advance the Government's cross-examination of her should she take the stand. When Gleason pled guilty on July 27, 1983 to the one-count information, she stated under oath that she knew the receipts attached to the tax return of Ralph Keeling were fraudulent. The district court later allowed Gleason to withdraw her guilty plea. Before this case went to trial, the prosecutor indicated that if Gleason elected to take the stand, he would question her about the Keeling return. If Gleason then testified that she did not know the receipts were fraudulent when she attached them to the Keeling return, the prosecutor stated that he would be compelled to seek a perjury indictment against her for contradicting her prior sworn statement.[8] Gleason thus asked the district court to rule before trial that the Government would not be able to cross-examine her about the Keeling return. The court refused to so limit the questioning, and Gleason did not testify.

Gleason argues that the failure to restrict the potential cross-examination of her prevented her from testifying. Basically, she asserts that the court should have restricted the cross-examination for two reasons. First, the Government was able to use the threat of perjury either to prevent Gleason from testifying or to force her to waive her rights under Fed.R.Crim.P. 11(e)(6)(C). Second, if Gleason did testify but did not mention the Keeling return on direct examination, any questions about that return on cross-examination would have been outside the scope of direct and therefore inadmissible under Rule 610 of the Federal Rules of Evidence.

[7] We think both of Gleason's arguments are without merit. Rule 11(e)(6)(D)(ii) of the Federal Rules of Criminal Procedure specifically contemplates the use of a statement made by a defendant in a proceeding involving a guilty plea, which is later withdrawn, in a subsequent criminal proceeding for perjury. The prosecutor's "threat" of perjury, therefore, was nothing more than a statement of intent to

8. The prosecutor would not have been able to confront Gleason with her prior statements because Rule 11(e)(6)(C) of the Federal Rules of Criminal Procedure provides that statements made by a defendant in the course of a proceeding regarding a guilty plea, which is later withdrawn, are not admissible against the defendant in any civil or criminal proceeding. Rule 11(e)(6)(D)(ii), however, allows as an exception to the general rule that such a statement is admissible "in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel." *See also* Rule 410 of the Federal Rules of Evidence.

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do that which he had an express right to do.

Further, even if Gleason had testified without mentioning the Keeling return on direct examination, if she had represented that she did not know that any of the receipts that she had attached to returns were fraudulent, the Keeling return would relate to this testimony and could properly be addressed on cross-examination. The scope of questioning permissible on cross-examination is within the broad discretion of the district court. *United States v. Schepp*, 746 F.2d 406, 410 (8th Cir.1984), *cert. denied*, — U.S. —, 105 S.Ct. 1190, 84 L.Ed.2d 336 (1985); *Villanueva v. Leininger*, 707 F.2d 1007, 1010 (8th Cir.1983) (per curiam). "Cross-examination may embrace any matter germane to direct examination, qualifying or destroying it, or tending to elucidate, modify, explain, contradict or rebut testimony given by the witness." *Roberts v. Hollocher*, 664 F.2d 200, 203 (8th Cir.1981). The district court did not abuse its discretion in refusing to limit the potential cross-examination of Gleason, especially when it could have expressly contradicted her testimony on direct.

V. Sufficiency of Evidence

Gleason's final contention before us is that the district court erred in denying her motions for a new trial, for arrest of judgment, and for judgment of acquittal based on her contention that the evidence as to Count Three of the Indictment was insufficient to sustain a guilty verdict. Count Three alleges that Gleason willfully and knowingly aided and assisted in preparing a fraudulent income tax return for Charles and Nora Blankenship for the 1980 tax year. Although Gleason concedes that the Blankenships' tax return did contain fraudulent deductions, she contests the jury's finding that she acted willfully, with full knowledge of the fraudulent nature of the return. She asserts that her duties at the tax service were merely clerical, that she had no tax expertise, and that the Blankenships relied on Michael Gleason's advice in claiming the fraudulent deductions. In support of her contentions, Gleason points to the Blankenships' testimony that they had no direct conversations with her about the Universal Life Church, and to Charles Blankenship's failure to identify her in court at trial.

[8, 9] In reviewing the district court's denial of a motion for judgment of acquittal, this court must consider the evidence "in the light most favorable to the government and must give the government the benefit of all reasonable inferences that may logically be drawn from the evidence." *United States v. DeLuna*, 763 F.2d 897, 924 (8th Cir.1985); *see also United States v. Anziano*, 606 F.2d 242, 244 (8th Cir.1979) (per curiam). In reviewing the evidence in the light most favorable to the Government, we conclude that the evidence as to Count Three was sufficient to sustain the jury verdict. Upon the Blankenships' initial visit to the tax service in March 1981, Lorraine Gleason conducted a preliminary interview to get information necessary to prepare their return. The Blankenships made no mention of any charitable contributions at that time. Lorraine Gleason was also present when her husband told the Blankenships that they needed a $9,000 deduction and discussed with them how they could get a receipt for a contribution from George Leigh. When Nora Blankenship later brought in a receipt obtained from Leigh representing that a $9,000 contribution had been made, Lorraine Gleason attached the receipt to a return that she had signed as the preparer, which already reflected that a $9,000 contribution had been made. That Charles Blankenship could not identify Gleason at trial is not significant in light of the fact that he met her only once in 1981, and the trial took place three years later. No question exists as to whether Lorraine Gleason was actually the woman who assisted the Blankenships on their visit to Gleason's Tax and Accounting Service. From the evidence the jury could reasonably conclude that Gleason prepared the Blankenships' return knowing that a $9,000 contribution to the Universal Life Church had not been made in 1980, and that the receipt she attached to

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the return fraudulently represented that such a contribution had been made.

VII. Conclusion

Because we find Gleason's allegations of error to be without merit, and the evidence of her guilt overwhelming, we affirm her convictions.

Roesevelt HAYES, Appellant,

v.

A.L. LOCKHART, Director, Arkansas Department of Corrections, Appellee.

No. 84-2092.

United States Court of Appeals, Eighth Circuit.

Submitted April 10, 1985.

Decided July 9, 1985.

Rehearing Denied Aug. 13, 1985.

Petitioner sought habeas corpus relief from state court conviction. The United States District Court for the Eastern District of Arkansas, Henry Woods, J., denied relief, and petitioner appealed. The Court of Appeals, Collinson, J., sitting by designation, held that: (1) trial judge had no affirmative duty to inquire on conflict of interest in joint representation of codefendants; (2) petitioner failed to show actual conflict of interest; and (3) issue whether petitioner was denied due process by giving of state's requested instruction was barred from collateral review by habeas court for failure to comply with state procedural rules.

Affirmed.

1. Criminal Law ⇐641.5(2)

Joint representation of codefendants is not per se violative of constitutional guarantees of effective assistance of counsel. U.S.C.A. Const.Amends. 6, 14.

2. Criminal Law ⇐641.5(5)

Trial judge did not have an affirmative duty to inquire whether joint representation of co-defendants would create a conflict of interest where neither defendant nor his trial attorney objected to proceeding to trial without separate counsel, and trial counsel did not indicate to the court that he foresaw even the possibility of a conflict.

3. Habeas Corpus ⇐25.1(6)

Without an objection or other signal to trial judge that a potential conflict of interest exists, a habeas petitioner must demonstrate that his attorney's performance was adversely affected by an actual conflict of interest.

4. Criminal Law ⇐641.5(3)

Defendant failed to demonstrate actual conflict of interest in trial counsel's joint representation of codefendants in first degree murder prosecution, notwithstanding that defendant, who shot victim after codefendant had initially shot her, and who alleged that his participation involved a "mercy killing," did not receive a reduced sentence, as given young age of codefendant and defendant's relationship to victim and codefendant, namely, sharing an apartment with them, it was not unreasonable for jury to have imposed a greater sentence on defendant.

5. Criminal Law ⇐641.13(1)

An appropriate inquiry in a Sixth Amendment case alleging ineffectiveness of counsel focuses upon the adversarial process, not on accused's relationship with his lawyer as such. U.S.C.A. Const. Amend. 6.

6. Criminal Law ⇐641.13(1)

If counsel is a reasonably effective advocate, he meets constitutional standards irrespective of his client's evaluation of his performance. U.S.C.A. Const.Amend. 6.

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Citation
731 F.2d 1521
84-1 USTC P 9484, 15 Fed. R. Evid. Serv. 1010
(CITE AS: 731 F.2D 1521)

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UNITED STATES of America, Plaintiff-Appellee,
v.
Fred W. SANS, Frank A. Weaner, Raymond O. McDonald, Jr., Defendants-Appellants.

No. 82-3106.

United States Court of Appeals,
Eleventh Circuit.

May 11, 1984.

Defendants were convicted in the United States District Court for the Middle District of Florida, Ben Krentzman, J., of conspiring to defraud government and failure to file currency transaction reports, and defendants appealed. The Court of Appeals, Tjoflat, Circuit Judge, held that: (1) delegation of authority to Secretary of Treasury in statute authorizing Secretary to require reports of transactions involving payment, receipt or transfer of United States currency was valid; (2) evidence was sufficient to support conviction of bank officials for wilfully failing to file currency transaction reports; (3) whether bank officials knew that other bankers disobeyed law was not relevant to whether they acted knowingly in failing to file forms or whether they acted with specific intent to ignore law; (4) jury was entitled to fine nonbank officer defendant guilty of conspiring even though it decided to acquit bank officers; (5) evidence of coconspirator's checkered past was relevant to establish bank officials' state of mind in entering into currency transaction; and (6) conspiring to fail to file currency transaction reports in order to impair Internal Revenue Service's ability to collect data constituted conspiracy to defraud United States.

Affirmed.

[1] UNITED STATES k34
393k34
Treasury regulation requiring financial institution to file report of exchange of currency involving transaction of currency of more than $10,000 came within meaning of statute requiring that transactions involving any domestic financial institution shall be reported to Secretary of Treasury if transactions involve payment, receipt or transfer of United States currency. Currency and Foreign Transactions Reporting Act, s 221, 31 U.S.C. (1976 Ed.) s 1081.

[2] CONSTITUTIONAL LAW k60
92k60
Congress may not transfer to others essential legislative functions with which it is vested; however, Congress may authorize other bodies to determine specific facts and may also establish general standards and delegate to others responsibility of effectuating legislative policy. U.S.C.A. Const. Art. 1, s 1.

[3] CONSTITUTIONAL LAW k62(5.1)
92k62(5.1)
Formerly 92k62(5)
Where statute enabled Secretary of Treasury to require only "reports" of transactions involving monetary instruments to which domestic financial

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institution was party, defined both monetary instruments and domestic financial institutions, and Secretary's choice whether to require reports at all, or what specific transaction, was limited by purposes of statute, statute providing that transactions involving domestic financial institutions shall be reported to Secretary at such time, manner and in such detail as Secretary may require was valid delegation of authority. Currency and Foreign Transactions Reporting Act, s 221, 31 U.S.C. (1976 Ed.) s 1081.

[3] UNITED STATES k34
393k34
Where statute enabled Secretary of Treasury to require only "reports" of transactions involving monetary instruments to which domestic financial institution was party, defined both monetary instruments and domestic financial institutions, and Secretary's choice whether to require reports at all, or what specific transaction, was limited by purposes of statute, statute providing that transactions involving domestic financial institutions shall be reported to Secretary at such time, manner and in such detail as Secretary may require was valid delegation of authority. Currency and Foreign Transactions Reporting Act, s 221, 31 U.S.C. (1976 Ed.) s 1081.

[4] UNITED STATES k34
393k34
Evidence in prosecution of bank officers for failure to file currency transaction reports, including testimony of teller and secretary of one officer, was sufficient to support findings that transactions occurred, that officers' failure to file reports was wilful, and that customer's actions in exchanging currency did not reasonably fit within known customer exemption to filing requirement. Currency and Foreign Transactions Reporting Act, s 221 31 U.S.C. (1976 Ed.) s 1081.

[5] CRIMINAL LAW k878(4)
110k878(4)
Where jury could have found evidence sufficient to show bankers purposely violated currency transaction reporting laws, but perhaps did so just to boost their business, not as coconspirators in action to defraud United States, bank officers' acquittal of conspiracy count did not bar their conviction on substantive counts of violating reporting laws. Currency and Foreign Transactions Reporting Act, ss 209, 221, 31 U.S.C. (1976 Ed.) ss 1058, 1081.

[6] CRIMINAL LAW k1173.1
110k1173.1
Trial court's refusal to deliver requested instruction is reversible error only if requested instruction was correct, was not substantially covered by others delivered, and concerned point in trial so important that failure to give requested instructions seriously impaired defendant's ability to defend himself.

[7] CRIMINAL LAW k829(3)
110k829(3)

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In prosecution for failure to file currency transaction reports, there was no error in denial of defendants' requested instruction on wilfulness element of the offense, since the first sentence of the requested instruction, referring to the "special nature" of this element, was not a clear statement of the law and since the remainder of the requested instruction was substantially covered by the instructions given by the court. Currency and Foreign Transactions Reporting Act, s 221, 31 U.S.C. (1976 Ed.) s 1081.

[7] CRIMINAL LAW k830
110k830
In prosecution for failure to file currency transaction reports, there was no error in denial of defendants' requested instruction on wilfulness element of the offense, since the first sentence of the requested instruction, referring to the "special nature" of this element, was not a clear statement of the law and since the remainder of the requested instruction was substantially covered by the instructions given by the court. Currency and Foreign Transactions Reporting Act, s 221, 31 U.S.C. (1976 Ed.) s 1081.

[8] CRIMINAL LAW k469.2
110k469.2
Formerly 110k469
Trial judge has broad discretion in admitting or excluding expert testimony, and his action is to be upheld unless manifestly erroneous.

[8] CRIMINAL LAW k1153(1)
110k1153(1)
Trial judge has broad discretion in admitting or excluding expert testimony, and his action is to be upheld unless manifestly erroneous.

[9] UNITED STATES k34
393k34
Wilfulness required for conviction of bank officials for failure to file currency transaction reports required knowing failure to obey law, with specific intent to disobey law; thus, testimony that banks universally ignored currency reporting requirements at time of transactions in question was not relevant to officials' wilfulness in failing to file form or to whether they acted with specific intent to ignore law. Currency and Foreign Transactions Reporting Act, s 221, 31 U.S.C. (1976 Ed.) s 1081.

[10] CONSPIRACY k40.2
91k40.2
Where second object of conspiracy, violation of law requiring filing of currency transaction reports, was read as incorporating statute which provides that one who wilfully causes act to be done which if directly performed by him or another would be offense against United States is punishable as principal, conviction of defendant for conspiracy to defraud government was not invalid on ground that only parties capable of committing illegal act of failing to file reports were acquitted of conspiracy. 18 U.S.C.A. s 2(b); Currency and Foreign Transactions Reporting Act, ss 209, 221, 31 U.S.C. (1976 Ed.) ss 1058, 1081.

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[11] CRIMINAL LAW k338(1)
110k338(1)
Determinations of admissibility of evidence rests largely within discretion of trial judge and will not be disturbed on appeal absent clear showing of abuse of discretion.

[11] CRIMINAL LAW k1153(1)
110k1153(1)
Determinations of admissibility of evidence rests largely within discretion of trial judge and will not be disturbed on appeal absent clear showing of abuse of discretion.

[12] CRIMINAL LAW k338(7)
110k338(7)
Newspaper items, which detailed codefendant's criminal activity, introduced to show bank's officers knew, or at least had reason to believe, that codefendant was using bank to launder his ill-gotten gains, were relevant to officers' state of mind in entering into currency transactions with codefendant; thus, where defendant asked for no limiting instruction, admission of evidence of codefendant's checkered past was not erroneous on ground it was irrelevant and overly prejudicial and denied defendant, who was tried with bank officers, fair trial in prosecution for conspiracy to defraud government. 18 U.S.C.A. s 371.

[12] CRIMINAL LAW k419(12)
110k419(12)
Newspaper items, which detailed codefendant's criminal activity, introduced to show bank's officers knew, or at least had reason to believe, that codefendant was using bank to launder his ill-gotten gains, were relevant to officers' state of mind in entering into currency transactions with codefendant; thus, where defendant asked for no limiting instruction, admission of evidence of codefendant's checkered past was not erroneous on ground it was irrelevant and overly prejudicial and denied defendant, who was tried with bank officers, fair trial in prosecution for conspiracy to defraud government. 18 U.S.C.A. s 371.

[13] CRIMINAL LAW k1030(1)
110k1030(1)
Objection not made at trial is viewed for plain error, which is error, when examined in context of entire case, that is so obvious that failure to notice it would seriously affect fairness and integrity of judicial proceeding. Fed.Rules Cr.Proc.Rules 51, 52(b), 18 U.S.C.A.

[14] CRIMINAL LAW k1036.3
110k1036.3
Trial judge's admission of evidence concerning checkered past of codefendant was not plain error in prosecution of defendant tried jointly with bank officials for conspiracy to defraud United States, where evidence of

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codefendant's dealings was necessary to show where codefendant obtained large sums of money that he endeavored to launder through bank, most of evidence of criminal activity was contained in newspaper articles with which prosecution showed bankers to have come in contact, and prosecution argued to jury that it should use articles only in considering bankers' state of mind in exchanging currency for codefendant.

[15] CRIMINAL LAW k622.1(2)
110k622.1(2)
Formerly 110k622(1)
Decision to sever is discretionary; appellant must show abuse of discretion in denying motion to sever and can do so only by demonstrating compelling prejudice.

[15] CRIMINAL LAW k1148
110k1148
Decision to sever is discretionary; appellant must show abuse of discretion in denying motion to sever and can do so only by demonstrating compelling prejudice.

[16] CRIMINAL LAW k622.2(4)
110k622.2(4)
Formerly 110k622(1)
Coconspirators should be tried jointly in interest of judicial economy, and severance is not warranted even if defendant participated in only single aspect of conspiracy.

[17] CRIMINAL LAW k622.2(3)
110k622.2(3)
Formerly 110k622(2)
Even if defendant charged with conspiracy to defraud government, and failure to file currency transaction reports, joined in codefendants' motion for severance, motion was properly denied as to defendant, where defendant showed no "compelling prejudice," and jury was able to distinguish what was necessary for his conviction of conspiracy from that which was not.

[18] CONSPIRACY k33(7)
91k33(7)
Conspiring to fail to file currency transaction report in order to impair Internal Revenue Service's ability to collect data that would have been in reports involves dishonest impeding of lawful governmental function, and therefore, constitutes conspiracy to defraud United States. 18 U.S.C.A. s 371.

[19] CONSPIRACY k51
91k51
Whether defendant was guilty of conspiring to defraud United States by obstructing Internal Revenue Service in its efforts to collect information and reports of currency transactions larger than $1,000, or wilfully failing to file and cause failure to file of currency transaction reports in connection

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with currency exchanges totalling in excess of $100,000, defendant was subject to being sentenced to five years in prison, or $1,000 fine, and therefore, sentence within those bounds was not excessive. 18 U.S.C.A. s 371.

[19] UNITED STATES k34
393k34
Whether defendant was guilty of conspiring to defraud United States by obstructing Internal Revenue Service in its efforts to collect information and reports of currency transactions larger than $1,000, or wilfully failing to file and cause failure to file of currency transaction reports in connection with currency exchanges totalling in excess of $100,000, defendant was subject to being sentenced to five years in prison, or $1,000 fine, and therefore, sentence within those bounds was not excessive. 18 U.S.C.A. s 371.

*1523 Michael C. Addison, Tampa, Fla., for Sans.

Anthony S. Battaglia, Stephen J. Wein, St. Petersburg, Fla., for Weaner & McDonald.

Lynn Hamilton Cole, Asst. U.S. Atty., Tampa, Fla., Sidney M. Glazer, Atty., Appellate Sect., Criminal Div., Dept. of Justice, Washington, D.C., for plaintiff-appellee.

Appeals from the United States District Court for the Middle District of Florida.

1524 Before TJOFLAT and FAY, Circuit Judges, and WISDOM [FN], Senior Circuit Judge.

FN* Honorable John Minor Wisdom, U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

TJOFLAT, Circuit Judge:

This case involves the attempts of Leon Cohen and his associates to "launder" illegally obtained money through the Palm State Bank, Palm Harbor, Florida, and to avoid federal income tax liability. Leon Cohen, his bookkeeper Fred Sans, the Palm State Bank, and two of the bank's officers, Frank Weaner and Ray McDonald, were charged in four counts with conspiracy to defraud the government, failure to file currency transaction reports (CTR's) (two counts), and falsifying facts in a matter under the jurisdiction of the Internal Revenue Service (IRS). [FN1] Leon Cohen's case was severed because he was ill, and the remaining indictees went to trial before a jury. At the close of the government's case, the court acquitted all four defendants of the fourth count. The jury found Sans guilty of the conspiracy count only; it found Weaner, McDonald, and the Palm State Bank guilty only of the two counts of failure to file the CTR's. Sans, Weaner and McDonald appeal, presenting several claims of error. We affirm.

FN1. See infra text at 1525 for the complete indictment.

I.

The conduct for which appellants were indicted took place in 1976 and 1977. At that time, Leon Cohen, an Atlanta, Georgia, resident, owed the IRS over $600,000, and it had filed substantial tax liens against him. Appellant Sans

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was Cohen's bookkeeper and accountant. Between late 1976 and mid-1977, Cohen obtained over $900,000, much of it in small bills ($5's, $10's and $20's), through various schemes to defraud Leslie Atkinson, a convicted drug dealer then serving a federal sentence in the Atlanta penitentiary. [FN2]

FN2. Atkinson's conviction is reported in United States v. Atkinson, 565 F.2d 1283 (11th Cir.1977), cert. denied, 436 U.S. 944, 98 S.Ct. 2845, 56 L.Ed.2d 785 (1978).

In November 1976, Cohen, through his attorney Stanley Galkin and associate John Tipton, offered to sell Atkinson six kilograms of heroin for $300,000. [FN3] Atkinson's representatives and Cohen's representatives were to exchange the drugs and money; however, Cohen arranged a simulated arrest at the exchange point, inducing Atkinson's associates to flee without the drugs or the money. Tipton and Sans counted the money over a period of two days at Cohen's house. Tipton and Jerome Kaplan, a business associate of Cohen's, exchanged some of the money at Atlanta banks; Cohen had instructed them not to exchange more than $5,000 at any one bank, and not to attract attention.

FN3. Atkinson apparently still managed a drug operation though he was incarcerated.

In January 1977, Sans and Cohen showed Charles Michael, another of Cohen's associates, what Cohen boasted was "a million dollars" in low denomination bills, and Cohen gave him $25,000 of that money to exchange for $100 bills at several North Carolina banks. Sans and Tipton were present when Michael returned the clean money. Also in January, Cohen showed Milton Chalmers, a commercial loan officer in a St. Petersburg, Florida, bank, a briefcase full of money and sought to exchange it for one hundred dollar bills. Chalmers, declining to make the exchange, explained the federal reporting requirements; [FN4] Cohen commented that he could circumvent *1525 the requirements by exchanging the money at the Palm State Bank because his associates controlled the bank.

FN4. 31 U.S.C. s 1081 (1976) authorized the Secretary of the Treasury to require the reporting of domestic currency transactions. Pursuant to this authority, the Secretary promulgated 31 C.F.R. 103.22(a) (1983) providing that "[e]ach financial institution shall file a report of each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to such financial institution, which involves a transaction in currency of more than $10,000."

On January 20, 1977, one day after the Palm State Bank received a large shipment of $100 and $50 bills from the Federal Reserve, Cohen came to the bank. Appellant McDonald, as the vice president with whom Cohen was dealing, brought Cohen to then head teller Rosemary Gardner and instructed her that Cohen had a large number of small bills that should be exchanged for large ones. $20,000 to $25,000 was exchanged on that occasion. McDonald told Gardner that no CTR was necessary, implying to her that such reports did not apply to exchanges of bills for other bills.

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In early February 1977, appellant Weaner, in the presence of McDonald and Cohen, instructed his secretary Loraine Ingham to take a large stack of cash to Rosemary Gardner to be exchanged, and to open a safety deposit box for Cohen, but without his name appearing on the bank's records. They set up the account in Tipton's name.

On March 10, 1977, Galkin and Cohen, accompanied by Chalmers, [FN5] exchanged about $50,000 at the Palm State Bank. Teller Gary Watson, who exchanged the money, asked Rosemary Gardner if a CTR needed to be filed. Gardner took a CTR form to Weaner's office and returned with it five minutes later. [FN6] No form was filed.

FN5. Cohen had asked Chalmers to accompany him on this trip, apparently to impress Chalmers with his authority at the Palm State Bank. Later that day, Cohen asked Chalmers if he could set up a similar exchange at the St. Petersburg bank. Chalmers, avoiding a direct refusal, told Cohen the risk involved would warrant a 10% charge on such an exchange.

FN6. The record does not reflect whether the form was filled out when Rosemary Gardner returned.

In March and April 1977, Cohen weaseled more money out of Atkinson. Galkin, at Cohen's direction, convinced Atkinson that he had high official connections who, for a $1 million fee, could arrange Atkinson's release from prison. After receiving a $100,000 prepayment from one of Atkinson's associates, Cohen, impersonating then Associate Attorney General Michael Egan, visited Atkinson at the prison. When Cohen returned, Sans and Tipton counted the $100,000. In April, Cohen forged a note to Atkinson's brother and used it to get $300,000 of Atkinson's money. Also in April, Cohen sent Sans to the Grand Cayman Islands where, by trick, Sans and Cohen arranged a wire transfer of $260,000 from an account Atkinson had there through a Canadian bank to a checking account in Sans' name at the Palm State Bank. Weaner's initials were on the card establishing the account.

On May 10, 1977, Palm State Bank received another Federal Reserve shipment of $50,000 in large bills. Cohen then exchanged about $40,000 in $5's, $10's and $20's for large bills. McDonald waited with Cohen at the teller window while then head teller Gary Watson made the exchange. Watson retained the small bills in his teller drawer. Watson again asked Rosemary Gardner about filing a CTR; no report was filed, however.

Cohen, Sans, Weaner, McDonald and Palm State Bank were indicted for: (count one) conspiracy to (a) defraud the United States by obstructing the IRS in its efforts to collect information and reports of currency transactions larger than $10,000, (b) falsify and conceal material facts within IRS jurisdiction in violation of 18 U.S.C. 1001, (c) willfully fail to file and cause the failure to file CTR's in connection with currency exchanges totaling in excess of $100,000 at Palm State Bank, and (d) defraud the United States by impeding collection of Cohen's income taxes; (count two) willful failure to file a CTR in connection with the March 10, 1977, money exchange; (count three) willful failure to file a CTR in connection with the May 10, 1977, money exchange; and (count four) concealing facts within IRS jurisdiction in violation of 18 U.S.C. 1001.

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*1526 At trial, the government presented Galkin, Tipton, Chalmers, Watson, Rosemary Gardner and teller Shirley Scoggins, among others, as witnesses. They testified to the above transactions. The defendants denied any wrongdoing on their part. Sans' denial, presented through his attorney's argument to the jury, was that he did not know Cohen was violating the law and did not know about the money exchanges. Weaner testified that no exchange had taken place to his knowledge, and even if one had he would not have thought a CTR was required because he thought Cohen fell into a "known customer" exemption to the reporting requirements. The exemption, at 31 CFR s 103.22(b)(3) (1972), provided that a bank would not need to "report transactions with an established customer maintaining a deposit relationship with the bank, in amounts which the bank may reasonably conclude do not exceed amounts commensurate with the customary conduct of the business ... of the customer concerned." McDonald testified that he recalled one cash exchange; Cohen had told him a real estate seller he was dealing with needed cash in large bills for certain property Cohen was trying to purchase, and McDonald had allowed him to exchange some small bills for large bills. No other exchanges had taken place, and, for the purpose of that one exchange, he had considered Cohen a "known customer" and so had not filed the CTR.

The defendants sought to buttress their denials of wrong-doing with the testimony of the president of the Palm State Bank, Phyllis Jones, and a banking expert, Gerald Stogniew; their testimony raised an inference that the currency exchange of May 10, 1977, handled by Gary Watson, could not have taken place. Jones said the bank's guidelines on the amount of cash the head teller could have in his drawer at any one time was $25,000 to $30,000, substantially less than the amount Cohen gave Watson on May 10; under the guidelines, Watson would have been required to deposit the excess in the bank's vault. Stogniew opined that the records of the bank's vault showed no deposit on May 10 of the number of small denomination bills Watson said he received from Cohen on that date, the inference being, as the defendants argued to the jury, that Watson had not conducted the exchange. As we have indicated, the jury found the bank officers and the bank guilty of having willfully failed to file the CTR's; it found Sans guilty of conspiracy.

On appeal, Weaner, McDonald and Sans raise three kinds of error. The first would require us to enter one or more judgments of acquittal; the second would require us to grant one or more of the appellants a new trial, and the third would require us to grant a resentencing. In the first category are two claims by Weaner and McDonald: (1) that the rules requiring CTR's to be filed were unconstitutional as they resulted from an overbroad congressional delegation, and (2) that the evidence was insufficient to establish that the March 10 and May 10 transactions occurred and that any failure to file was willful.

Two claims by Weaner and McDonald would require a new trial: (1) that the trial court erred in refusing one of two jury instructions Weaner requested on willfulness, and (2) that the trial court erred in refusing expert testimony proffered by Weaner regarding the banking trade custom of ignoring currency regulations. Sans brings two claims requiring us to grant him a new trial. First, he claims that his conspiracy conviction is flawed because it may have been based on a conspiracy objective which, due to the acquittals of Weaner and McDonald on the conspiracy count, could not have been part of the conspiracy. Second, he claims that irrelevant and prejudicial evidence regarding Leon Cohen

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fatally flawed his conviction. He brings one claim of the third type, asking us to require that he be resentenced because the conspiracy charge contained both misdemeanor and felony objectives, such that Sans might be guilty of a misdemeanor conspiracy rather than a felony *1527 conspiracy. If so, his sentence, as it stands, would be excessive. We first address Weaner's and McDonald's arguments.

I.

A. Constitutionality of the Regulations.

[1] Weaner and McDonald were convicted of substantive violations of 31 U.S.C. ss 1081 and 1058 (1976). [FN7] These statutory provisions were part of Chapter 21 of Title 31 of the United States Code, entitled Reports of Currency and Foreign Transactions. Section 1081 in its entirety provided that:

FN7. Since the indictment and trial, these sections have been revised and renumbered. Reports of Currency and Foreign Transactions now appear at 31 U.S.C.A. ss 5311-5322 (1983) as Records and Reports on Monetary Instruments Transactions. Also, the regulations promulgated pursuant to the statutes have been amended since the dates of the alleged offense. Here, reference is made to the statutes and regulations as existing at the time of the alleged offenses.

Transactions involving any domestic financial institution shall be reported to the Secretary [of the Treasury] at such time, in such manner, and in such detail, as the Secretary may require if they involve the payment, receipt, or transfer of United States currency, or such other monetary instruments as the Secretary may specify, in such amounts, denominations, or both, or under such circumstances, as the Secretary shall be regulation prescribe. (emphasis supplied.)

Section 1058 in its entirety provided that:

Whoever willfully violates any provision of this chapter or any regulation under this chapter shall be fined not more than $1,000 or imprisoned not more than one year, or both. (emphasis supplied.)

31 C.F.R. s 103.22 (1972), enacted by the Secretary of the Treasury pursuant to the aforementioned statutes, provided in pertinent part that:

Each financial institution shall file a report of each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to such financial institution, which involves a transaction of currency of more than $10,000.

Weaner and McDonald argue that the legislative delegation in section 1081 was too broad because Congress granted the Secretary the option to create criminal statutes in his sole discretion, unlimited by any guidelines. [FN8]

FN8. They also argue that even if the statute is a constitutional delegation, the Secretary has exceeded the scope of that delegation in creating 31 C.F.R. s 103.22 (1983). They base this argument on section 1081's reference to reportable transactions as "payment, receipt, or transfer" of currency, and the regulation's coverage of "deposit, withdrawal, exchange of currency or other payment or transfer." An "exchange," they assert, was not contemplated by section 1081. This argument is not credible; an "exchange" is certainly nothing more than

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two "payments" and thus is covered by the language of section 1081.

[2] The U.S. Constitution, Art. 1, s 1, provides that "all legislative powers herein granted shall be vested in a Congress of the United States." Congress may not transfer to others the essential legislative functions with which it is vested. Schechter Poultry Corp. v. United States, 295 U.S. 495, 529, 55 S.Ct. 837, 843, 79 L.Ed. 1570 (1935). However, Congress may "authorize other bodies to determine specific facts and may also establish general standards and delegate to others the responsibility of effectuating the legislative policy." United States v. Gordon, 580 F.2d 827, 839 (5th Cir.) cert. denied 439 U.S. 1051, 99 S.Ct. 731, 58 L.Ed.2d 711 (1978), citing Schechter.

United States v. Womack, 654 F.2d 1034, 1037 (5th Cir. Unit B 1981) cert. denied 454 U.S. 1156, 102 S.Ct. 1029, 71 L.Ed.2d 314 (1982), describes the standard we apply in judging a delegation challenge:

> Congressional legislation which prescribes essential standards and basic legislative policy and delegates to an administrator authority for promulgation of rules and regulations is constitutionally *1528 permissible, provided the standards are "sufficiently definite and precise to enable Congress, the courts and the public to ascertain whether the Administrator ... has conformed to those standards." The standards of the statute are not to be tested in isolation but must derive meaningful content from the purpose of the statute and its factual background and the statutory context in which the standards appear. (citations omitted)

[3] The statute in question here met these standards. The statute delegated a limited power to the Secretary: it enabled him to require only "reports" of transactions involving "monetary instruments" to which a "domestic financial institution" was a party. The statute defined both "monetary instruments" and "domestic financial institutions." While it is true that the Secretary might have chosen not to regulate at all under this section, if he chose to act he could require only that reports of transactions involving payment, receipt, or transfer of U.S. currency be made. Moreover, his choice whether to require the reports at all, or of what specific transactions, was limited by the purposes of the act, to require certain reports or records where such reports or records have "a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings." H.R. No. 975, 91st Cong., 2d Sess., reprinted in 1970 U.S.Code Cong. & Admin.News, 4394, 4395. The legislative history of the Act indicates that "the domestic reporting requirements were enacted because law enforcement agencies found that the growth of financial institutions had been paralleled by an increase in criminal activity associated with them." Id.

The limited nature of the delegation is even clearer when we consider, as we must, the factual background in which the statute appears. When the statute was enacted, the Secretary of the Treasury had been requiring reports of customers' large currency transactions for twenty-five years. Reports had been required for "currency transactions that, in the judgment of the institution, exceeded those 'commensurate with the customary conduct of the business, industry or profession of the person or organization concerned.' " California Bankers Association v. Shultz, 416 U.S. 21, 37, 94 S.Ct. 1494, 1506, 39 L.Ed.2d 812 (1974). This pattern of regulation was merely continued

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by the reporting requirements in this case.

Given the single action the Secretary could undertake (requiring reports), the pattern of prior regulation, and the extent to which Congress defined in the statute and legislative history the targets of the reporting requirements, the transactions covered, and the purpose of the reporting legislation, we find no delegation problem here. That the Secretary under section 1081 could have imposed standards enforceable by criminal penalties did not make the delegation less valid, for "[i]t is well established that a delegatee may formulate rules for violation of which the statute itself provides penalties imposable by judicial process...." Gordon, 580 F.2d at 840 (citations omitted).

B. Sufficiency of the Evidence

[4] Weaner and McDonald argue that there was insufficient evidence to show that the counts two and three currency transactions occurred and that their failure to file CTR's was willful. We disagree. There was sufficient testimony from the teller Gary Watson and Weaner's secretary Loraine Ingham for the jury to find that the transactions took place. Watson's testimony was not, as appellants argue, rendered valueless by the testimony of the bank's president and the banking expert we have recited concerning the currency exchange of May 10, 1977. Watson flatly refuted the president's statement that the bank's guidelines limited the amount of cash he could have in his teller's drawer; he said the limit was $80,000. He also said that he kept the money he got from Cohen in the drawer overnight. Consequently, he *1529 rendered meaningless the bank expert's testimony as to the state of the vault records on May 10.

The evidence was also sufficient for the jury to conclude that Cohen's actions did not reasonably fit within the known customer exemption. The evidence, albeit circumstantial, was also plainly adequate to support a conclusion that the bankers failed to file CTR's with specific intent to violate the reporting laws.

[5] Weaner and McDonald next argue that their acquittal of the conspiracy count bars conviction of the substantive counts because the jury, in determining that they had not joined the Cohen-Sans conspiracy, implicitly determined that they had not failed to file CTR's following the March 10 and May 10 currency exchanges. This argument is clearly without merit. The jury could have found beyond a reasonable doubt that Sans and Cohen engaged in a conspiracy with each other to defraud the United States by obstructing the calculation and collection of Cohen's taxes, and also that the bankers had purposely violated currency laws by failing to file the CTR's. The jury could certainly have found the evidence sufficient to show that the bankers purposely violated the reporting laws, but perhaps did so just to boost their business, and not as coconspirators of Cohen or Sans. Contrary to Weaner's and McDonald's arguments, the jury's conclusion that the bankers should be acquitted of conspiracy is consistent with its determination that the currency exchanges took place. That conclusion could merely indicate that the jury did not find the bankers to have had the requisite state of mind to be conspirators when those exchanges occurred.

C. The Willfulness Instruction

Weaner and McDonald asked the trial judge to instruct the jury on willfulness as follows:

The willfulness element under this law is of a special nature. The mere

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failure to comply with the terms of the law is not a violation, it must be shown beyond a reasonable doubt that the Defendant had specific knowledge of the reporting requirements alleged to have been violated. An acknowledgement by the Defendant of awareness of currency laws is not sufficient to prove willfulness under these statutes.

Declining to give this requested charge to the jury, the district court instructed the jury as follows:

Each of the following essential elements must be proved in order to establish the violation charged in Counts 2 and 3 of the indictment [the substantive counts charging failure to file the CTR's]:

* * *

[T]hird, that the defendant's act or acts, if any, in failing to file and causing the failure to file such a report were done willfully.

An act is willful if done knowingly and with specific intent to act with a bad purpose, either to disobey or to disregard the law. Specific intent, as the term implies, means more than the general intent to commit the act. To establish specific intent, the Government must prove that a defendant knowingly did an act which the law forbids or knowingly failed to do an act which the law requires, purposely intending to violate the law.

An act or a failure to act is knowingly done if done voluntarily and intentionally and not because of mistake or accident or other innocent reasons. (emphasis added.)

[6] A trial court's refusal to deliver a requested instruction is reversible error only if the requested instruction (1) was correct, (2) was not substantially covered by others delivered, and (3) concerned a point in the trial so important that the failure to give the requested instruction seriously impaired the defendant's ability *1530 to defend himself. United States v. Stone, 702 F.2d 1333, 1339 (11th Cir.1983); Pine v. United States, 135 F.2d 353, 355 (5th Cir.), [FN9] cert. denied, 320 U.S. 740, 64 S.Ct. 40, 88 L.Ed. 439 (1943); see United States v. Hitsman, 604 F.2d 443, 446 (5th Cir.1979). Here, to the extent the requested instruction was correct, it was substantially covered by the instruction the trial court gave.

FN9. In Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

[7] The first sentence of the requested instruction was not a clear statement of the law. Any willfulness requirement may or may not be "special"; this elucidated nothing helpful for the jury. The second sentence was substantially covered by the willfulness instruction and the court's other instructions; those instructions placed the burden on the government to prove every element of the offense beyond a reasonable doubt, including that the defendants purposefully intended to violate the reporting law. The third sentence was also adequately covered; nothing in the judge's instructions would have led the jury to believe that knowing the law was enough in itself to show willfulness. [FN10] Accordingly we find no error in the trial judge's rejection of the requested instructions.

FN10. Even taken as the defendants probably meant it, the third sentence

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was largely an incorrect statement of the law in this case. It comes from a case, United States v. Schnaiderman, 568 F.2d 1208 (5th Cir.1978), in which a Venezuelan tourist was carrying a large sum of money into the country. A customs officer asked the tourist if he understood U.S. currency laws. The tourist replied that he was aware of such laws but that he was going to spend the money gambling in Aruba two days later. The customs officer never asked about what, if any, specific currency laws the tourist was aware of. This court found the statement that he was aware of "U.S. currency laws" to be too vague and unspecific to constitute "knowledge" or provide a basis for a showing of willfulness within the meaning of the currency offenses charged. In this case, all defendants indicated a higher level of awareness than mere awareness of "U.S. currency laws" generally. The third sentence of the defendant's requested instruction is thus, at its best, a correct, but misleading and irrelevant, statement of the law.

D. The Expert Witness

Weaner and McDonald called a banking expert, Gerald Stogniew, to testify. Stogniew had been in banking for twenty-two years, had worked extensively as a bank auditor, and had conducted "director's audits." [FN11] Appellants asked the trial court to find Stogniew qualified as an expert on bank management for the purpose of testifying that banks universally ignored currency reporting requirements at the time of the Cohen transactions. They argued that this testimony, if received, would permit an inference that their failure to file the CTR's was not willful. The government objected that the testimony was not relevant to Weaner or McDonald's willfulness. The trial judge sustained the objection.

FN11. These covered an examination of responsibilities a director would have in his position with the bank and would include operational accounting reviews of the bank's operation and a determination if the bank was in compliance with various laws and regulations.

[8][9] The trial judge has broad discretion in admitting or excluding expert testimony, and his action is to be upheld unless manifestly erroneous. United States v. Costa, 691 F.2d 1358, 1361 (11th Cir.1982). We find no error here. The evidence was not relevant on the willfulness issue. As we have discussed, willfulness required the knowing failure to obey the law, with the specific intent to disobey the law. Whether the appellants knew that other bankers disobeyed the law was not relevant to whether they acted knowingly in failing to file the forms or whether they acted with specific intent to ignore the law.

II.

A. The Conspiracy Acquittals

Sans' first claim is based on a theory that one cannot be guilty of a conspiracy to *1531 commit an illegal act if the only party capable of committing the illegal act is acquitted of the conspiracy. Applying this theory, Sans observes initially that Weaner and McDonald were the only actors in this case with the legal duty to file CTR's and therefore the only ones capable of disregarding that duty. Because they were acquitted of conspiring

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to disregard that duty, he argues, he could not be guilty of conspiring with Cohen or anyone else to do so. We are not persuaded by Sans' theory. [FN12]

FN12. To willfully fail to file, or cause the failure to file, CTR's with the second object of the conspiracy charged. If Sans' theory were correct, a conviction based on this object would be defective. The evidence was clearly sufficient to support a conviction based on either of the other two objections of the conspiracy, however. Thus, if we were to agree with Sans, we would remand the case for a new trial on the conspiracy count, with the second object deleted.

We first note that "failing to file" the CTR and causing the "failure to file" the CTR are really just two ways in which one offense can be consummated. Sans was capable of "failing to file" a CTR under 18 U.S.C. s 2(b) (1982), which provides that one who "willfully causes an act to be done which if directly performed by him or another would be an offense against the United States is punishable as a principal" (emphasis added). United States v. Tobon-Builes, 706 F.2d 1092, 1099 (11th Cir.1983), shows clearly that a person with no duty to disclose financial information or file currency transaction reports can be found guilty under section 2(b). This is so even if the one who actually performs the criminal act or omission has no criminal intent and is thus innocent of the substantive crime. Tobon-Builes, 706 F.2d at 1099. See also United States v. Puerto, 730 F.2d 627 at 631 (11th Cir., 1984).

Tobon-Builes, id., cites with approval United States v. Lester, 363 F.2d 68 (6th Cir.1966) cert. denied, 385 U.S. 1002, 87 S.Ct. 705, 17 L.Ed.2d 542 (1967), which presented the precise issue Sans now raises. It involved application of section 2(b) in the context of a conspiracy where all of those who could have actually performed the illegal act charged as the object of the conspiracy were acquitted. In that case, two private citizens were tried along with three police officers for conspiring willfully to deprive another private citizen of his fourteenth amendment rights under color of state law. The police officers were also charged with committing the substantive offense and the two private citizens with aiding and abetting them in committing that offense. 18 U.S.C. s 2 (1982) was not explicitly alleged in the conspiracy count of the indictment. The jury acquitted the police officers of the conspiracy and the substantive offense; it acquitted the two other men of aiding and abetting, but convicted them of the conspiracy. On appeal, the two men argued that because they could not have acted "under color of law," and thus could not have committed the substantive offense, they could not have conspired to commit that offense in violation of 18 U.S.C. s 371 (1982).

The Lester court, reading 18 U.S.C. s 2 (1976) into the conspiracy count, upheld the conspiracy convictions. It pointed out first that, "[i]n keeping with the provisions of s 2, it has long been held that [a count of] an indictment need not specifically charge 'aiding and abetting' or 'causing' the commission of an offense against the United States, in order to support a jury verdict based upon a finding of either." Id. at 72. The court then applied this principle to the conspiracy count as follows:

So long as anyone who "willfully causes an act to be done" which, "if directly performed by him or another would be an offense against the United States", is punishable as a principal, it follows a fortiori that when two or

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more persons conspire willfully to "cause" an act forbidden by s 2(b), they ex necessitate conspire to "commit [an] offense against the United States" within the meaning of 18 U.S. s 371. Id. at 73.

The court cautioned:

Of no consequence here is the fact that one reading the record before us might *1532 find it difficult, perhaps even impossible, to comprehend how the jury could have acquitted all the police officers of the conspiracy offense. It is not the province of the Court to inquire by what course of reasoning the jury may have reached seemingly inconsistent verdicts. Inconsistency of verdicts as to various defendants in a particular case has always been an exclusive prerogative of the jury. Id. at 74.

[10] We agree with the Lester analysis. The second object of the conspiracy--the violation of the law requiring the filing of CTR's--must be read as having incorporated section 2(b). [FN13] Therefore, Sans could have been convicted of conspiring with Cohen to cause the failure to file the CTR's. Accordingly, the jury was entitled to find Sans guilty of the conspiracy even though it decided to acquit the bank officers.

FN13. Here, as in Lester the substantive offenses charged violations of 18 U.S.C. s 2 (1982), but the conspiracy charge failed to mention that section.

B. Prejudicial Evidence

Sans argues that the trial judge's admission of evidence of Leon Cohen's checkered past was erroneous because it was both irrelevant and overly prejudicial and denied him a fair trial. From time to time during the trial, the government introduced testimony and items of evidence that portrayed Cohen as a criminal. These items included newspaper articles, which detailed some of Cohen's criminal activity, taken from the records of the Palm State Bank. The articles were introduced to show that the bank and officers McDonald and Weaner knew, or at least had reason to believe, that Cohen was using the bank to launder his ill-gotten gains. The testimony of Cohen's criminal activity dealt mainly with his acquisition from Leslie Atkinson of the money he laundered at Palm State Bank. The testimony also suggested that Cohen had approached Wilton Chalmers about a possible loan from Chalmers' bank to set up a marijuana operation in Central America, and that Cohen had been convicted of impersonating a federal officer.

[11][12] Sans objected to some of the newspaper articles and the testimony about Cohen's criminal activities on the ground that this evidence was irrelevant to any issue in the case. His objections were overruled. Determinations of the admissibility of evidence rest largely within the discretion of the trial judge and will not be disturbed on appeal absent a clear showing of abuse of discretion. See United States v. Russell, 703 F.2d 1243 (11th Cir.1983). We find no abuse of discretion in the trial judge's admission of the evidence to which Sans objected on relevancy grounds. The newspaper articles were relevant to the bankers' state of mind in entering into the Cohen currency transactions. Evidence of Cohen's trial for impersonating a federal officer in the Atkinson schemes corroborated Galkin's testimony about the scheme. Cohen's comment to Chalmers about the marijuana loan was relevant to the issue of Cohen's criminal intent regarding the conspiracy. Since Cohen

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was an alleged coconspirator, his state of mind was relevant. Sans did not ask for any limiting instructions on any of this testimony.

[13] Sans also presents a new argument on appeal, that the evidence showing Cohen to be a criminal was inadmissible because its probative value was substantially outweighed by its prejudicial effect. We review an objection not made at trial by a plain error standard. See Fed.R.Crim.P. 51, 52(b). Plain error is error which, when examined in the context of the entire case, is so obvious that [our] failure to notice it would seriously affect the fairness and integrity of judicial proceedings. Russell, 703 F.2d at 1248.

[14] We find the trial judge's admission of the evidence not to be plain error. Evidence of Cohen's dealings with Leslie Atkinson was necessary to show where Cohen obtained the large sums of money that he endeavored to launder through the Palm *1533 State Bank, and the amount he needed to dispose of. Most of the evidence of Cohen's criminal activity was contained in the newspaper articles with which the prosecution showed the bankers to have come in contact. These articles were clearly admissible; as we have noted, they were important for the jury to consider in determining the bankers' state of mind in dealing with Cohen and processing the illicit transactions for him. The prosecution argued to the jury only that it should use the articles in considering Weaner's and McDonald's states of mind. All the "prejudicial" information had substantial probative value. It showed Cohen's acquisition of a large sum of money that required laundering, his trouble with Atlanta banks due to his past criminal conduct, his according need to go out-of-state to launder money, and Weaner and McDonald's state of mind in conducting the transactions. Any improper prejudicial effect of this evidence was minimized by the prosecutor's closing argument to the jury in that he drew only the proper inferences from the evidence.

Sans also argues that he moved for a severance because of the likelihood that evidence against Leon Cohen would be overly prejudicial, and the district court erroneously denied the motion. It is unclear whether Sans actually had a motion for severance before the court; his attorney merely filed a statement that he joined in other defendants' motions. At the time, Weaner and McDonald had pending a motion for a severance on the ground that information at trial regarding Cohen and Sans would be overly prejudicial. The trial court, ruling on the motion, stated that only Weaner and McDonald sought the severance; we find no evidence in the record that Sans took issue with that determination or requested a ruling on "his" motion for a severance. If he was a party to the severance motion, its denial was appropriate as to him in any event.

[15][16][17] The decision to sever is discretionary; an appellant must show an abuse of discretion in denying the motion to sever and can do so only by demonstrating "compelling prejudice." See United States v. Capo, 693 F.2d 1330 (11th Cir.1982) cert. denied --- U.S. ----, 103 S.Ct. 1793, 76 L.Ed.2d 359. "Compelling prejudice" means that the jury will not be able to "collate and appraise the independent evidence against each defendant.... [T]hough the task be difficult [unless the jury is unable to perform it] severance should not be granted." Tillman v. United States, 406 F.2d 930, 935 (5th Cir.), vacated in part on other grounds 395 U.S. 830, 89 S.Ct. 2143, 23 L.Ed.2d 742 (1969). Coconspirators should be tried jointly in the interests of judicial economy, and severance is not warranted even if a defendant participated in only a single aspect of the conspiracy. See

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United States v. Marszalkowski, 669 F.2d 655, 659-60 (11th Cir.1982) cert. denied sub. nom Brock v. United States, 459 U.S. 906, 103 S.Ct. 208, 74 L.Ed.2d 167. Applying these principles to Sans' case, even if he was included in the Weaver-McDonald motion for a severance, that motion was properly denied as to him. He shows no "compelling prejudice"; the jury was certainly able to distinguish what was necessary for his conviction of conspiracy from what was not.

C. The Conspiracy--Felony or Misdemeanor

The conspiracy statute, 18 U.S.C. s 371 (1982), subjects to criminal liability two kinds of conspiracies: (1) conspiracies "to defraud the United States, or any agency thereof in any manner or for any purpose"; and (2) conspiracies "to commit any offense against the United States." If such an offense is a misdemeanor, the punishment for such conspiracy cannot exceed the maximum punishment provided for such misdemeanor. *1534 [FN14] Sans argues that the first object of the conspiracy count described a misdemeanor offense rather than a felony. Since the jury could have convicted him on that object, he asserts, the maximum sentence he could have received was that for a misdemeanor conspiracy rather than that for a felony conspiracy. [FN15] Since we disagree with his premise, we uphold the sentence imposed. [FN16]

FN14. Section 371 provides:
Conspiracy to commit offense or to defraud United States
If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

FN15. He received an indeterminate three-year prison sentence under 18 U.S.C. s 4205(b)(2) (1982).

FN16. There is some question as to whether Sans properly preserved this point for appeal. At the charge conference prior to closing arguments, the parties discussed using a special verdict form showing separate verdicts for each object of the conspiracy. During the discussion, Sans' attorney stated that he thought the first conspiracy objective was the commission of a misdemeanor, and asked what the others thought. The court and the government stated that it was a felony. The attorney did not mention the point again. After the jury retired, the court asked counsel about their record objections to the court's jury instructions, and Sans' counsel stated that he adopted the objections "and comments" he had made at the charge conference. The misdemeanor/special verdict forms issue might arguably be such a "comment."

The conspirators' first objective was "[t]o unlawfully, knowingly, and intentionally defraud the United States ..." by impairing the IRS' ability to collect the data that would have been in the CTR's that should have been filed

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following the currency exchanges in question. Sans argues that a conspiracy to fail to file CTR's cannot rise to the level of a conspiracy to defraud the United States. Rather, he argues, the indictment alleged only a conspiracy to commit the misdemeanor offense of failing to file CTR's. We do not find this argument convincing. A conspiracy to fail to file CTR's can amount to a conspiracy to defraud the United States.

United States v. Burgin, 621 F.2d 1352 (5th Cir.), cert. denied 449 U.S. 1015, 101 S.Ct. 574, 66 L.Ed.2d 474 (1980), discusses the broad sweep of allowable conspiracies "to defraud the United States" under section 371. The court, citing Dennis v. United States, 384 U.S. 855, 86 S.Ct. 1840, 16 L.Ed.2d 973 (1966), noted that the conspiracy-to-defraud language reaches "any conspiracy for the purpose of impairing, obstructing, or defeating the lawful function of any department of government." 621 F.2d at 1356. The Burgin court also quoted Hammerschmidt v. United States, 265 U.S. 182, 188, 44 S.Ct. 511, 512, 68 L.Ed. 968 (1924) as follows:

> To conspire to defraud the United States means primarily to cheat the government out of property or money, but it also means to interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest. It is not necessary that the government shall be subjected to property or pecuniary loss by the fraud, but only that its legitimate official action and purpose shall be defeated by misrepresentation, chicane, or the overreaching of those charged with carrying out the governmental intention. (emphasis added).

[18][19] The first conspiracy object alleged certainly met the criteria expressed in Burgin. It involved the dishonest impeding of a lawful governmental function. As the government points out, by submitting the fraud charge to the jury instead of charging simple conspiracy to commit a misdemeanor, it increased its own burden of proof. The jury was required to find the *1535 fraud element rather than just an agreement to fail to file CTR's. Accordingly, we find no error in the government's proceeding under the conspiracy-to-defraud theory, or to Sans' sentence. Whether guilty of joining in the conspiracy to defraud or either of the two other objects of the conspiracy in this case, Sans was subject to being sentenced under section 371 to five years in prison, or a $10,000 fine, or both. His sentence was within these bounds.

AFFIRMED.

END OF DOCUMENT

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suggests that false FDIC certif. re: 3d party interests in loans/self dealing was part of conspir.

Citation 871 F.2d 1298 (CITE AS: 871 F.2D 1298)
FOUND DOCUMENT
Database CTA
Mode Page

UNITED STATES of America, Plaintiff-Appellee (88-5195), Plaintiff-Appellant (88-5484),
v.
Billy York WALKER, Defendant-Appellant (88-5195), Defendant-Appellee (88-5484).

Nos. 88-5195, 88-5484.
United States Court of Appeals,
Sixth Circuit.
Argued Nov. 14, 1988.
Decided April 3, 1989.

Defendant was convicted after jury trial in the United States District Court for the Western District of Tennessee, Odell Horton, Chief Judge, of various federal banking laws. Defendant appealed. The Court of Appeals, Enslen, District Judge, sitting by designation, held that: (1) evidence of coconspirator's guilty plea was admissible as evidence of coconspirator's credibility, and (2) evidence of named borrowers' credit worthiness and their understanding of obligation to repay loans was irrelevant and inadmissible on charges of bank fraud.

Affirmed.

[1] CRIMINAL LAW k338(6)
110k338(6)
Evidence of coconspirator's guilty plea and plea agreement was admissible as evidence of coconspirator's credibility.

[2] WITNESSES k318
410k318
Introduction of entire plea agreement of codefendant is permitted, even where agreement contains promise to testify truthfully, since these details allow jury to consider fully possible conflicting motivations underlying codefendant's testimony, and thus codefendant's credibility.

[3] CONSPIRACY k24(6)
91k24(6)
Formerly 91k23
So called rule of consistency that requires where all possible coconspirators are tried together, and all but one are acquitted, remaining coconspirator's conviction must be reversed for lack of sufficient evidence, does not apply where coconspirators are tried separately or could have conspired with unindicted individuals.

[4] BANKS AND BANKING k509.10
52k509.10
Where bank officer arranges loans for named borrower, intending proceeds will benefit himself, and without disclosing his interest in loan transaction, he has acted in deceitful and dishonest manner in violation of bank fraud statute. 18 U.S.C.A. ss 371, 1344.

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[5] BANKS AND BANKING k509.25
52k509.25
Evidence of named borrowers' credit worthiness and their understanding of obligation to repay bank loans was irrelevant, and thus, inadmissible in prosecution of defendant, a bank officer, for bank fraud; officer had arranged loans for his own benefit, concealing his interest in them from other bank officials. 18 U.S.C.A. ss 371, 1344.

[6] CRIMINAL LAW k150
110k150
Conspiracy to defraud bank account based upon misapplication of bank funds and false entries in bank records was not barred by statute of limitations, even though prosecution was not commenced until several years after loans of issue were made, where defendant continuously attempted to conceal his interest in loans by keeping payments on loans currently and, later, by giving coconspirators funds to make payments on defendant's behalf, thus establishing repayment of loans and concealment were objectives of conspiracy. 18 U.S.C.A. ss 371, 3282.

[7] BANKS AND BANKING k509.25
52k509.25
Whether defendant, a bank official, made false entries in federal deposit insurance corporation questionaire when he failed to disclose loans made to third parties on his behalf was question for jury in prosecution alleging defendant made false entries. 18 U.S.C.A. s 1005.

[8] BANKS AND BANKING k509.25
52k509.25
Whether defendant, a bank officer, was guilty of making false entries in bank records based upon recordation of interest payment on loans, which records failed to reveal that payments were not made with named borrower's funds or that loans were not made for named borrowers' benefit, was question for jury in prosecution alleging false entry in bank records.

*1299 W. Hickman Ewing, Jr., U.S. Atty., Frederick H. Godwin, Asst. U.S. Atty. (argued), Memphis, Tenn., for U.S.

James Wilson (argued), Hal Gerber, Memphis, Tenn., for Billy York Walker.

Before NELSON and BOGGS, Circuit Judges, and ENSLEN, District Judge. [FN*]

FN* Honorable Richard A. Enslen, United States District Judge for the Western District of Michigan, sitting by designation.

ENSLEN, District Judge.

Billy York Walker appeals his conviction following a jury trial on each count of a 28-count indictment alleging violations of various federal banking laws. [FN1] Prior to 1985, Mr. Walker was the president and majority shareholder of Farmers Bank located in Dyersburg, Tennessee. Most of the bank's business was agricultural in nature. Mr. Walker was also the owner, president and operator of Walker Grain Company ("Walker Grain"), a grain storage firm, located in the same town.

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repayment of loans and concealment were objectives of conspiracy. 18 U.S.C.A. ss 371, 3282.

U.S. v. Walker

[7]
52 BANKS AND BANKING
52XI Federal Deposit Insurance Corporation
52k509 Offenses and Penalties
52k509.25 k. Prosecutions.
C.A.6 (Tenn.),1989.
Whether defendant, a bank official, made false entries in federal deposit insurance corporation questionaire when he failed to disclose loans made to third parties on his behalf was question for jury in prosecution alleging defendant made false entries. 18 U.S.C.A. s 1005.

U.S. v. Walker
[8]
52 BANKS AND BANKING
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ENSLEN, District Judge.
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FN1. The indictment alleged violations of the following statutes: Count 1, conspiracy to commit bank fraud, 18 U.S.C. s 371, Counts 3-21, 24-26, false entries in bank records, 18 U.S.C. s 1005; Counts 22 and 28, false statement on loan application, 18 U.S.C. s 1014; and Counts 23

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and 27, bank fraud, 18 U.S.C. s 1344.

Count 1 alleges that Walker and his life-long friend, Walter Hastings, conspired to defraud Farmers Bank, to misapply bank funds and to make false entries in bank records in violation of 18 U.S.C. s 371. Walker convinced Hastings to sign two promissory notes, one for $150,000 secured by stock owned by Hastings, and one for $118,000 which was unsecured. The proceeds of both loans were immediately deposited to Walker Grain's account at Farmers Bank. The loan applications did not disclose Walker Grain's interest in the loans. Walker personally approved both loans.

Originally, Hastings called Walker each time an interest payment was due and Walker made the payment using a Walker Grain check. In 1985, Walker started giving checks to Hastings and Hastings made the payments using his own checks. The overt acts in the conspiracy each involve separate interest payments on the two loans. The bank's records on each loan indicate that the loans were for Hastings' benefit and that Hastings made the interest payments. Counts 3-21 allege false entries in bank records based upon the failure of the records to indicate that the loans were not for Hastings' benefit and that he did not make the interest payments from his own funds.

In 1985, the bank's vice president in charge of loans, Larry James, noticed that the Hastings loans were becoming past due. He knew that Walker and Hastings were friends and offered to take the collection of these loans over for Walker, thinking Walker might be uncomfortable handling the accounts himself. Walker assured James that Hastings would repay the loans as soon as Hastings solved some other financial problems. An investigation conducted by the bank, at the suggestion of federal examiners, subsequently revealed Walker's interest in the Hastings loans. When confronted with the matter by bank officials, Walker shook his head and replied, "What can I say?" Thereafter, Walker took an indefinite leave of absence and never returned to the bank.

*1300 Walker's defense to counts 1 and 3-21 was that he lacked any intent to defraud the bank. He contends that he approved each loan in the ordinary course of business, based upon Hastings' credit worthiness, character, and reputation, as well as the bank's potential to profit from each loan. He claims that he lacked any intent to deceive the bank, although he admits that he did not tell the bank's board of directors of Walker Grain's interest in the loans. Walker contended that he did not think it necessary to tell the bank's board of directors about Walker Grain Company's interest in the Hastings loans, since the bank was only interested in profitability and since Hastings had the ability to repay the loans. [FN2] Walker testified that Hastings understood his obligation to repay the loans, but understood that the money would come from Walker. Hastings testified that he had no intention of repaying the loans and thought Walker would do so.

FN2. Hastings' financial statement filed with the bank indicated Hastings' net worth was between $6 and $8 million dollars at the time of these loans.

Count 2 alleges that Walker, in his capacity as president of Farmers Bank, made a false statement on a Federal Deposit Insurance Corporation ("FDIC") questionnaire. The questionnaire at issue, dated May 25, 1982, asked

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net worth was between $6 and $8 million dollars at the time of these loans.

Count 2 alleges that Walker, in his capacity as president of Farmers Bank, made a false statement on a Federal Deposit Insurance Corporation ("FDIC") questionnaire. The questionnaire at issue, dated May 25, 1982, asked Walker to: "List all extensions of credit made since last examination for the accommodation of others than those whose names appear on bank's records or on credit instruments in connection with such extension." Walker answered that no such loans had been made. The government charged that this statement was false because it failed to disclose the loans to Hastings which were used for the benefit of Walker Grain.

Count 22 involves a loan made to Mr. Hastings by the Bank of Friendship, located in Friendship, Tennessee, in the amount of $150,000. The president of the Bank of Friendship is John York, Mr. Walker's cousin. Mr. York testified that Walker called him and asked him to make a loan to Walter Hastings. York never spoke to Hastings about the loan. The note showed that the purpose of the loan was for "operating capital." It was repaid by a check drawn on Farmers Bank showing Hastings as the remitter. Hastings testified that he had never been to the Bank of Friendship and had never spoken to York regarding a loan. The government contended that the loan to Hastings was not used as operating capital, but was instead used to make a principal and interest payment on Hastings' $150,000 note at Farmer's Bank. The balance of one of the Hastings notes was increased to repay the Bank of Friendship loan. The government argued that Walker obtained this loan for Hastings under false pretenses, by failing to disclose Walker Grain's interest in the transaction. [FN3]

FN3. At trial, Walker characterized this transaction as a "participation loan," arguing that the Bank of Friendship extended credit to Hastings at the request of Farmers Bank, to provide the latter bank with some ready cash. Walker argued that such transactions were commonplace, and that in the general course of business, Farmers Bank would repay the participating bank when it had available cash. Since the participating bank would look to Farmers Bank, rather than to debtor for repayment, Walker contended that it was unnecessary to inform the Bank of Friendship of the loan's real beneficiary.

Counts 23 and 24 relate to a gentleman named Dan Holloway. Mr. Holloway's 1982 financial statement showed a net worth of $100 million dollars and he had deposits in the Farmers Bank totaling up to $1,250,000. Walker owned an option on an 80-acre farm in Dyersburg, Tennessee. He and Holloway decided to develop the farm as a gravel pit. They jointly applied for, and received, a loan for $120,000 from First Tennessee Bank to buy the farm/gravel pit. This note was secured by a deed of trust on the land. Walker and Holloway never earned any profits on the gravel pit. They each paid half of the interest on the loan and of one payment to reduce principal.

When First Tennessee Bank requested a second principal reduction, Walker could not come up with the funds. Holloway agreed to take over the loan in exchange for Walker's interest in the property. At Holloway's request, Walker arranged for *1301 Farmers Bank to lend Holloway $122,055.90. Part of the proceeds

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from the loan went to pay off the First Tennessee loan and part went to cover an overdraft in a checking account held jointly by Walker and Holloway. Walker transferred his interest in the property to Holloway after these transactions were completed.

Count 23 alleges that Walker engaged in a scheme to defraud Farmers Bank by means of false statements to the bank's finance committee. Members of the finance committee testified that, on January 7, 1985, Walker told the committee that the loan to Holloway was well collateralized and/or secured by real estate. The minutes of the meeting contain the following entry:

Dan Holloway, application for loan of $122,000 at FBP for one year, accompanied by financial statements, to payoff farm note at First Tennessee Bank, secured by deed of trust on farm. Approved.

Walker did not disclose his interest in the loan to the finance committee and none of the loan documents disclosed that Walker benefited from the loan. Walker also denied that he benefited from the loan, even though it eliminated his obligation to First Tennessee Bank and an overdraft on a checking account at Farmers Bank.

Count 24 alleges that Walker caused a false entry to be made in bank records--specifically the minutes of the January 7, 1985 finance committee meeting--since those minutes imply that the note to Holloway was secured by a deed of trust on the farm when, in fact, the loan from Farmers Bank was unsecured. Walker argued that the minute entry is not false, since the reference to a deed of trust refers to the First Tennessee Bank loan, not to the loan from Farmers Bank. In addition, the note itself and the loan documents all indicated on their face that the Farmers Bank loan was unsecured. Walker argued that he did not receive a benefit from the loan to Holloway, since he had already relinquished his interest in the gravel pit.

Count 25 alleges a false entry in the form of a false endorsement Walker caused another bank employee, Mabel Paschal, to make on a cashier's check. Walker drew a check for $54,747.51 on Walker Grain's checking account, made payable to Henry Simon. Walker gave Paschal the Walker Grain/Henry Simon check and directed her to make out a cashier's check to Holloway in the amount of $47,770.02, which she did. Walker then told her to give him the difference in cash. Paschal complied, and then noticed that the Simon check was not endorsed. She testified that Walker told her to sign it. When she refused, he instructed her to stamp the back of the check with a stamp reading "Credit to the account of the within named payee. Absence of endorsement guaranteed, Farmers Bank, Dyersburg, TN."

Walker denied telling Paschal to endorse the check or to stamp it. He argued that, since the check was drawn on the Walker Grain account, it did not need an endorsement and this was not unusual. Walker admitted that Henry Simon did not exist, and explained his use of a false name by saying that he did not want Holloway to become embroiled in his difficulties with the FDIC. The government contends that the cash was given to Holloway to make one half of an interest payment due on the $122,055.90 loan to Holloway. Holloway made this interest payment, with a check drawn on his business account, on the same day as the cashier's check transactions occurred.

Count 26 alleges that Walker incorrectly answered the question involved in Count 2 on a July, 1985 FDIC questionnaire. As he had in 1982, Walker answered that no accommodation loans had been made. An FDIC examiner took the July,

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1985 questionnaire to Walker and stated that he had found two loans which should have been reflected in the questionnaire. Walker had his secretary delete the previous answer and type the two loans in its place. The government contends that Walker should have, but did not, include the loan to Holloway and a January 23, 1985 loan to Carl Jones. Walker contends that his original answer was correct, according to his understanding of the questionnaire.

*1302 Jones was a former business partner in Walker Grain. He left the firm in 1983 or 1984, owing it approximately $200,000. He also owned some beans and milo which were stored at the grain company. Walker approved a loan from Farmers Bank to Jones for approximately $130,000 which was secured by Jones' beans. Walker did not need board approval to make this loan. The money was deposited to Jones' account and was used to pay his debt to Walker Grain, leaving a balance due of approximately $70,000. Walker contends that this was not an "accommodation loan" within the meaning of the FDIC questionnaire.

The government characterized this transaction somewhat differently. It argued that Jones was the manager of Walker Grain in January 1985 and that he also had a farming partnership with Walker. The farming operation was financed by advances from Walker Grain. In January, 1985, Walker told Jones that the farm owed Walker Grain for the advances and that they needed to be paid because the Walker Grain account was overdrawn. Walker wanted Jones to come to the bank to get a loan to cover the overdraft. On January 24, Jones borrowed about $130,000 from the bank in his own name. Walker approved the loan. The money went to Jones' personal account and was paid to Walker Grain by Jones' personal check on the same day. Although the note said it was secured by beans, Jones testified that these beans did not exist. The note did not indicate that Jones' farm or Walker Grain would benefit from the loan.

Count 27 alleges that Walker engaged in a scheme to defraud Farmers Bank when, in January, 1985 he applied to the bank for a loan on behalf of Walker Grain. Walker needed the loan to cover a $300,000 overdraft in the grain company's checking account. After applying for the loan, Walker then deposited a check for $300,000, drawn on Walker Grain's account at First Citizens National Bank, into the company's Farmers Bank account. The First Citizens account had been closed in 1982 and did not have sufficient funds to cover the check. Walker told a vice president of Farmers Bank that the grain company had a loan for $300,000 and other deposits coming in which would cover the overdraft. He failed to disclose the loans made to Hastings and Jones on behalf of the grain company. Walker Grain eventually obtained a $190,000 loan from Farmers Bank.

Count 28 alleges that Walker made a false statement to the bank, for the purpose of influencing its action on the Walker Grain loan. The statement at issue is Walker's statement that the grain company had funds to cover the check drawn on First Citizens Bank and therefore the overdraft in the grain company's Farmers Bank account. The government charged that this statement was false since Walker knew that the First Citizens account was closed and did not have funds to pay the check.

Walker testified that he was aware of the overdraft and called an employee of First Citizens Bank to arrange a loan. The employee, Mr. Lipford, told Walker that the loan would have to be approved by his discount committee. Walker told Lipford that, in the meantime, he was going to write a check on the company's First Citizens account and deposit it at Farmers Bank. Lipford approved and this was done. Walker alleges that he informed Farmers Bank about the First

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Citizens loan and about the fact that the check was written before the loan was actually approved. The First Citizens loan was never approved. Walker Grain's overdraft at Farmers Bank was cured by the Farmers Bank loan and by the check from Jones.

Mr. Walker raises five issues on appeal. He argues first that the trial court erred in admitting into evidence Walter Hastings' guilty plea to a conspiracy identical to that alleged in count 1 of the indictment. His second argument is that the trial court erred in denying him a new trial when Hastings withdrew his guilty plea. Third, Walker argues that the trial court erred in excluding evidence relevant to his intent to defraud or injure Farmers Bank. Fourth, he contends that prosecution of the conspiracy alleged in count 1 is barred by the applicable statute of limitations. Finally, Walker argues that the trial court erred in *1303 denying his motion for judgments of acquittal on counts 2, 3-21, 24, 26 and 28. Because we find no error, we will affirm Walker's conviction on all counts. The government has appealed from the district court's order granting Walker bond pending appeal. Because we resolve Walker's appeal in favor of the government, we need not reach the issues raised in its appeal.

Admission of Hastings' Guilty Plea and Plea Agreement. Prior to Walker's trial, Mr. Hastings pled guilty to a conspiracy charge virtually identical to Count 1 of the indictment against Walker. [FN4] Mr. Hastings testified at Walker's trial, and was allowed to testify to both his guilty plea and the contents of his plea agreement with the government. Walker argues that admission of this evidence made his conviction on Count 1 inevitable, since the jury knew that Hastings was guilty of a conspiracy and that Walker was the only individual Hastings could have conspired with. He concludes that admission of Hastings' guilty plea and plea agreement allowed the government to establish his guilt by association with Hastings.

FN4. Hastings is identified as a co-conspirator in the Walker indictment, but is not named as a co-defendant in that indictment.

[1] We hold that it was not error for the trial court to admit evidence of Hastings' guilty plea and plea agreement. While the government may not use a witness' guilty plea as evidence of another defendant's guilt, the plea "may properly be considered as evidence of a witness' credibility," United States v. Christian, 786 F.2d 203, 214 (6th Cir.1986), and may also be used to show the witness' first-hand knowledge of and participation in the offense. United States v. Little Boy, 578 F.2d 211, 212 (8th Cir.1978). "Admissibility of the plea turns on the purpose for which it is offered. When that purpose is to further the jury's difficult task of evaluating credibility, it is relevant and admissible without regard to the identity of the offering party." United States v. Halbert, 640 F.2d 1000, 1004 (9th Cir.1981).

[2] We have held that much of the prejudice associated with the use of a plea agreement is negated where the pleading individual testifies at trial. "In such a case, it is reasonable to believe that the jury uses the testimony regarding the facts to convict the [ ]defendants and the testimony regarding the guilty plea to assess the witness' credibility." Christian, 786 F.2d at 214. Introduction of the entire plea agreement is permitted, even where the agreement contains a promise to testify truthfully, since these details allow

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the jury to "consider fully the possible conflicting motivations underlying the witness' testimony, and, thus, the witness' credibility." United States v. Townsend, 796 F.2d 158, 163 (6th Cir.1986).

In this case, these is no argument that the government improperly emphasized Hastings' guilty plea, United States v. Halbert, 640 F.2d 1000, 1005 (9th Cir.1981); United States v. Pickett, 746 F.2d 1129, 1135-36 (6th Cir.1984), cert. denied, 469 U.S. 1226, 105 S.Ct. 1222, 84 L.Ed.2d 362 (1985), nor could such a claim be sustained. Hastings testified only briefly regarding the matter, and the government did not refer to his plea in its closing argument. The agreement was relevant to Hastings' credibility and was admissible for that purpose. Further, the trial court gave the jury an appropriate limiting instruction, cautioning them that the plea agreement had "been offered so that you may properly assess the credibility of the witness. It is not offered for any other purpose and you should not consider it for any other purpose." While it is a better practice to instruct the jury on both the plea agreement and the guilty plea itself, the trial court's failure to do so in this instance did not deprive Walker of a fair trial. As the government argues, the plea agreement at issue discussed Hastings' guilty plea. An instruction regarding the plea agreement was sufficient to confine the jury's consideration of both the plea and the agreement to its assessment of Hastings' credibility.

Walker's remaining argument, that the similarity between the charge against Hastings *1304 and Count 1 of the indictment against Walker virtually assured his conviction on that count, is without merit. It is often the case that a defendant will plead guilty to a conspiracy charge, and then testify against his co-conspirators who stand trial for a similar or identical crime. If it was always unfairly prejudicial to admit the guilty plea of such a co-defendant, then the rule recognized in Christian, Townsend and Halbert would be meaningless. The jury was instructed that Hastings' guilty plea could not be used as evidence of Walker's guilt, and that it could consider that plea only in evaluating Hastings' credibility. There is no reason to assume that the jury disregarded this instruction.

[3] Denial of Motion for New Trial. Approximately five months after Walker's conviction, Hastings appeared for sentencing pursuant to his guilty plea and was allowed to withdraw that plea. At the sentencing hearing, Hastings expressly denied that he intended to defraud the bank through his transactions with Walker. Upon learning of Hastings' withdrawn plea, Walker moved for a new trial on the ground of newly discovered evidence. The trial court denied this motion without a hearing. Walker argues that it was an abuse of the trial court's discretion to deny this motion. We find that this issue need not be decided because, after Walker's motion was denied, Mr. Hastings changed his plea a second time and pled guilty to the same conspiracy. The "newly discovered evidence" proffered by Walker in support of a new trial, therefore, no longer exists. [FN5]

FN5. Even if Walker's "newly discovered evidence" had not evaporated, we would affirm the trial court's decision. The so-called rule of consistency requires that, where all possible co-conspirators are tried together, and all but one are acquitted, the remaining conspirator's conviction must be reversed for lack of sufficient evidence. United States v. Patterson,

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678 F.2d 774 (9th Cir.), cert. denied, 459 U.S. 911, 103 S.Ct. 219, 74 L.Ed.2d 174 (1982); United States v. Phillips, 630 F.2d 1138 (6th Cir.1980). The rule does not apply where co-conspirators are tried separately or could have conspired with unindicted individuals. United States v. Sachs, 801 F.2d 839 (6th Cir.1986); United States v. Irvin, 787 F.2d 1506, 1512-13 (11th Cir.1986); United States v. Espinos-Cerpa, 630 F.2d 328 (5th Cir.1980). Thus, even if Hastings had been acquitted of the conspiracy, his acquittal would not mandate reversal of Walker's conviction. Further, at the time Walker's motion was denied, Hastings' guilt had not been determined. The jury was free to discredit Hastings' claim that he lacked intent to defraud the bank, just as it discredited Walker's similar claim. While Hastings' withdrawn plea may incrementally increase Walker's chances of acquittal, it is insufficient to demonstrate that Walker would likely be acquitted if his case were retried. United States v. O'Dell, 805 F.2d 637 (6th Cir.1986), cert. denied, --- U.S. ----, 108 S.Ct. 170, 98 L.Ed.2d 124 (1987); United States v. Terry, 729 F.2d 1063, 1067 (6th Cir.1984); United States v. Barlow, 693 F.2d 954 (6th Cir.1982), cert. denied, 461 U.S. 945, 103 S.Ct. 2124, 77 L.Ed.2d 1304 (1983).

Intent to Defraud. At trial, Mr. Walker attempted to prove that he lacked an intent to defraud or injure the bank by proving that Holloway and Hastings were good credit risks and understood their obligation to repay the loans at issue. Walker argues that, under United States v. Gens, 493 F.2d 216 (1st Cir.1974), this evidence is relevant to show a lack of intent to defraud the bank. The government argues that this evidence was properly excluded. Relying on United States v. Foster, 566 F.2d 1045 (6th Cir.1977), cert. denied, 435 U.S. 917, 98 S.Ct. 1473, 55 L.Ed.2d 509 (1978), the government argues that whether the loans were "good" or "bad" is irrelevant to the defendant's intent to defraud the bank. The trial court apparently agreed with the government's position, ruling the evidence irrelevant. Despite this ruling, however, the jury heard testimony from a number of witnesses indicating that both Hastings and Holloway were good credit risks and their financial statements indicated that they had the ability to repay the loans. In addition, Mr. Walker testified that he considered the borrower's financial strength, character, and reputation as well as the bank's potential to profit from the loans before approving the loans. Mr. Walker further testified that Holloway and Hastings understood their obligation to repay the loans in the event that Walker was unable to do so. Although we believe that the government and the trial court construed Foster too broadly, we find no error in the attempted exclusion of this evidence.

*1305 In United States v. Gens, 493 F.2d 216 (1st Cir.1974), the court reversed a bank director's conviction for misapplication of bank funds, 18 U.S.C. s 656, finding insufficient evidence that the director had intended to defraud the bank. In that case, two bank officers approved loans to third parties, knowing that the funds would be given to Gens, a bank director who could not borrow the money himself because he had already exceeded the bank's lending limit. The First Circuit held that misapplication of bank funds had not been established:

[W]here the named debtor is both financially capable and fully understands

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that it is his responsibility to repay, a loan to him cannot--absent other circumstances--properly be characterized as a sham or dummy, even if bank officials know he will turn over the proceeds to a third party. Instead, what we really have in such a situation are two loans: one from the bank to the named debtor and the other from the named debtor to the third party. The bank looks to the named debtor for repayment of its loan, while the named debtor looks to the third party for repayment of his loan. If for some reason the third party fails to make repayment to the named debtor, the latter nonetheless recognizes that this failure does not end his own obligation to repay the bank. In this situation, the bank official has simply granted a loan to a financially capable party, which is precisely what a bank official should do. There is no natural tendency to injure or defraud the bank, and the official cannot be said to have willfully misapplied bank funds in violation of s 656.

Id. at 222 (footnote omitted). See also United States v. Fusaro, 708 F.2d 17, 21 (1st Cir.), cert. denied, 464 U.S. 1007, 104 S.Ct. 524, 78 L.Ed.2d 708 (1983); United States v. Blackwood, 735 F.2d 142, 145-46 (4th Cir.1984).

A number of other circuits have accepted the Gens court's reasoning, but have refused to apply it in cases where the beneficiary of the loan is a bank officer who conceals his interest in the loan from the bank. See United States v. Shively, 715 F.2d 260, 265 (7th Cir.1983) ("it has been held to be misapplication per se for a bank officer or employee to funnel funds to himself by making a loan to a third party ..."), cert. denied, 465 U.S. 1007, 104 S.Ct. 1001, 79 L.Ed.2d 233 (1984); United States v. Krepps, 605 F.2d 101, 106 (3rd Cir.1979); United States v. Twiford, 600 F.2d 1339, 1341 (10th Cir.1979) ("misapplication occurs when an officer of a bank knowingly lends money to a fictitious borrower or causes the loan to be made for his own benefit, concealing his interest from the bank"); United States v. Steffen, 641 F.2d 591, 597 (8th Cir.) (financial condition of borrower irrelevant where bank officer benefits from loan and conceals interest from the bank), cert. denied, 452 U.S. 943, 101 S.Ct. 3091, 69 L.Ed.2d 959 (1981). At least one circuit has rejected the Gens analysis in all circumstances. United States v. Kennedy, 564 F.2d 1329, 1339 (9th Cir.1977) ("misapplication ... occurs when funds are distributed under a record which misrepresents the true state of the record with the intent that bank officials ... will be deceived"), cert. denied, 435 U.S. 944, 98 S.Ct. 1526, 55 L.Ed.2d 541 (1978). [FN6]

FN6. Each of these cases involve misapplication of bank funds in violation of 18 U.S.C. s 656. The crime at issue here is bank fraud, in violation of 18 U.S.C. ss 371, 1344. Both crimes require proof that the defendant intended to defraud or injure a bank. The crimes differ in that misapplication requires proof of a conversion of bank funds, while bank fraud requires only a fraudulent statement designed to influence a bank's action. Compare United States v. Goldblatt, 813 F.2d 619, 625-26 (3rd Cir.1987), with United States v. Duncan, 598 F.2d 839, 860 (4th Cir.1979).

Although we have been faced with the issue on at least two occasions, United States v. Cooper, 577 F.2d 1079 (6th Cir.), cert. denied, 439 U.S. 868, 99 S.Ct. 196, 58 L.Ed.2d 179 (1978); United States v. Foster, 566 F.2d

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1045 (6th Cir.1977), cert. denied, 435 U.S. 917, 98 S.Ct. 1473, 55 L.Ed.2d 509 (1978), we have never expressly adopted or rejected the Gens analysis. In Cooper, we found that the named borrowers lacked the ability to repay the loans and did not understand their obligation to do so. *1306 Thus, even if Gens had been adopted, it would not have exonerated the bank official's conduct in that case. In Foster, we distinguished Gens on the grounds that, unlike the defendants in Foster, "the defendants in Gens were not recipients of kickbacks from loans which they had approved." 566 F.2d at 1050. Since the bank officials in Foster received kickbacks in exchange for approving the loans at issue, they knew that the loans had to be made in an amount larger than would otherwise have been necessary. Thus, even if the borrowers had fit the Gens criteria, a portion of the loan proceeds had been misapplied--that portion attributable to the kickbacks. Foster did not hold that evidence of a named borrower's credit worthiness was irrelevant under all circumstances.

In this case, there is no evidence that Mr. Walker received a kickback from the loans at issue, and it appears that the named borrowers, Hastings and Holloway, had the ability to repay the loans and understood their obligation to do so. Mr. Walker is, however, a bank officer, and he approved the loans at issue for his own benefit concealing that fact from the bank's board of directors. This case, therefore, requires us to determine whether we will adopt the First Circuit's Gens rule, the modified form of that rule adopted by other circuits, or the Ninth Circuit's complete rejection of Gens. We believe that the Third Circuit's reasoning in United States v. Krepps, 605 F.2d 101 (3rd Cir.1979), most accurately states the law on this issue.

[4] In Krepps, a bank officer loaned money to two borrowers, who then loaned the money to him. He concealed his interest in these loans from other bank officials. The Third Circuit found sufficient evidence of an intent to defraud the bank, and affirmed his conviction for misapplication of bank funds:

> [I]f the named debtor is credit worthy and understands that he is responsible to repay the loan, "the bank official has simply granted a loan to a financially capable party, which is precisely what a bank official should do." How this party chooses to dispose of the fund so obtained should, in the absence of misrepresentation on his part, be of no interest to the bank, and certainly not to the criminal law.
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> * * *
>
> It is quite a different matter, however, when a bank officer procures the assistance of another person in obtaining the desired funds for his own use. In these circumstances, it cannot be said that the bank officer is doing "precisely what a bank official should do." To the contrary, a jury would be warranted in concluding that the loan transaction was undertaken with intent to defraud the bank or to deceive its officers or examiners, notwithstanding the fact that the intermediary may have been financially capable of repaying the loan and undertook to do so. A jury might plausibly deduce that the bank officer, by channeling the funds through another party, sought to conceal from the bank his own interest in the transaction and thereby circumvent the barrier--imposed by the statute [limiting direct loans to bank officers] and the bank's own regulations--to the bank's making the particular loan directly to him.
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> * * *

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Essentially, then, it is our view that a willful misapplication ... is established when a bank officer secures a loan for himself by having the bank lend to a named debtor who then transfers the funds to him, even when the named debtor is financially capable and [fully] understands that it is his legal responsibility to repay the loan. In these circumstances, the very existence of a mediated transaction demonstrates that the bank officer had the measure of criminal intent needed to establish a willful misapplication of bank funds.

Id. at 106, 108.

The Krepps rule is compatible with our decisions in Cooper, Foster and United States v. Franklin, 608 F.2d 241 (6th Cir.1979). In each of these cases, we held that, "at the very least, the term misapplication '[means a] deceitful and dishonest mishandling of bank funds.' " Franklin, 608 *1307 F.2d at 244 (quotingCooper, 577 F.2d at 1085). Where a bank officer arranges loans for a named borrower, intending that the proceeds will benefit himself, and without disclosing his interest in the loan transaction, he has acted in a deceitful and dishonest manner. As the Third Circuit noted in Krepps, he has acted to circumvent federal statutes limiting a bank's extension of credit to its own officers and he has concealed material facts about the transaction from other bank officials. Such conduct is sufficient to establish the necessary intent to injure or defraud the bank.

[5] In this case, evidence of Hastings' and Holloway's credit worthiness and their understanding of the obligation to repay was irrelevant, as the trial court held. Mr. Walker arranged these loans for his own benefit, concealing his interest in them from other bank officials. With these facts, the government adequately established Walker's intent to defraud the bank. The fact that the loans were otherwise "good" loans, and that the named borrowers understood their obligation to repay the loans if Walker defaulted on them, is irrelevant because Walker personally benefited from the transactions at issue. Thus, even if the trial court misread our holding in Foster, his ruling was correct. Walker was not prejudiced by the trial court's attempted exclusion of this evidence, and his convictions on counts 1, 23 and 27 are affirmed.

[6] Walker's remaining arguments are without merit. Count 1 of the indictment is not barred by the applicable statute of limitations. 18 U.S.C. s 3282. Although the loans at issue in that count were made in 1981, Walker continuously attempted to conceal his interest in them by keeping payments on the loans current and, later, by giving Hastings the funds to make payments on Walker's behalf. The government thus established that repayment of the loans and concealment of Walker's interest in them were objectives of the conspiracy. The conspiracy therefore continued until its discovery in 1985. "In conspiracies where a main objective has not been attained or abandoned and concealment is essential to success of that objective, attempts to conceal the conspiracy are made in furtherance of the conspiracy." United States v. Howard, 770 F.2d 57, 61 (6th Cir.1985). See also United States v. Portner, 462 F.2d 678 (2d Cir.), cert. denied, 409 U.S. 983, 93 S.Ct. 319, 34 L.Ed.2d 246 (1972); United States v. Hickey, 360 F.2d 127 (7th Cir.1966).

[7] Walker attacks his convictions on counts 2 and 26 of the indictment, which allege that he made false entries in two Federal Deposit Insurance Corporation ("FDIC") questionnaires, in violation of 18 U.S.C. s 1005. The entries at issue required Walker to disclose all accommodation loans, or loans made to named parties on behalf of an unnamed person, which had

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been made, "since last examination." Walker answered this question in the negative in 1982, after the loans to Hastings, and again in 1985, after the Holloway and Jones loans. He testified at trial that he believed the question referred to the last bank examination by any entity, including state bank examiners. Because the record does not disclose whether Walker revealed these loans during examinations by state officials which preceded the FDIC examinations, Walker argues that his answers to the questions were correct and that the jury must have speculated as to his guilt on these counts.

Walker was not entitled to a directed verdict of acquittal on either count. Taking the evidence in the light most favorable to the government, a reasonable jury could have concluded that the FDIC's question referred to the last examination conducted by that agency. See United States v. O'Boyle, 680 F.2d 34 (6th Cir.1982); United States v. Gibson, 675 F.2d 825 (6th Cir.), cert. denied, 459 U.S. 972, 103 S.Ct. 305, 74 L.Ed.2d 285 (1982). Under that theory, Walker's answers were false. Further, there is no evidence to indicate that Walker disclosed the transactions at issue to state officials, or even that state officials require such a disclosure. Finally, the testimony showed that, after an FDIC official explained the question to Walker in 1985, he changed his answer to this question to reveal *1308 two previously omitted loans, but failed to disclose the Holloway and Jones loans. The government was required to show that Walker knowingly and willfully made a false entry in the questionnaire regarding a material fact, with the intent to deceive the FDIC. United States v. McGuire, 744 F.2d 1197, 1200 (6th Cir.1984), cert. denied, 471 U.S. 1004, 105 S.Ct. 1866, 85 L.Ed.2d 159 (1985). The evidence adduced at trial, taken in the light most favorable to the government, would allow a reasonable jury to draw that conclusion.

[8] Nor was Walker entitled to a directed verdict on counts 3 through 21 of the indictment. These counts allege false entries in bank records based upon the recordation of interest payments on the Hastings loans. These records recorded the fact that interest payments had been made, but did not reveal that the payments were not made with Hastings' funds or that the loans were not made for Hastings' benefit. Walker contends that the entries are not false because they recorded actual transactions exactly as they occurred.

A statement may be false when it contains a half truth or when it conceals a material fact. McGuire, 744 F.2d at 1200, n. 2; United States v. Krepps, 605 F.2d 101, 108 (3rd Cir.1979) ("an entry may be false by virtue of an omission of material information as much as by an actual misstatement"). Here, the records failed to disclose Walker Grain's interest in the loans and the fact that Walker Grain made the interest payments on Hastings' behalf. Both facts may be regarded as material. The jury was entitled to conclude that these entries were false.

Walker argues that the entries are not false because they recorded actual transactions exactly as they occurred. In United States v. Hardin, 841 F.2d 694, 697 (6th Cir.1988), we noted, "It is undisputed that an entry that shows a transaction as it actually occurred is not a false entry under section 1005." That rule remains undisputed, but does not require that Walker's conviction be reversed. In Hardin, a bank official made a questionable loan of $250,000 to a business in which his wife had an interest. The loan was sold to another bank. Two years later, the bank official renewed the loan, using the proceeds to extinguish his bank's obligation to the

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purchasing bank. The bank records disclosed a $250,000 loan to the business. The indictment charged that this entry was false because the loan was not made to the business, but to another bank. At trial, the government failed to prove that the loan was never made; instead it argued that the loan was a sham or a mere formality. Since the government failed to prove that the loan was never made, the defendant's conviction for making false statements was reversed.

This case is distinguishable from Hardin on its facts. Here the government alleged and proved that the entries at issue were false because they failed to disclose that the loans were not made for the benefit of the named borrower and that the named borrower had not made the interest payments with his own funds. Hardin expressly distinguished cases involving loans made for the benefit of unnamed third parties. Id. at 698. Further, the charge in this case was that the entries failed to disclose material information, not that they recorded interest payments or loans which had never been made. The entries at issue are false not because they fail to disclose the manner in which a transaction occurred, but because they fail to disclose the true beneficiary of the loans at issue.

Walker argues that the trial court erred in refusing to grant a judgment of acquittal on Count 24 of the indictment. This count alleges a false entry in the minutes of the finance committee meeting which approved the Holloway loan. That entry stated, "Dan Holloway, application for loan of $122,000 at FBP for one year ... to pay off farm note at First Tennessee Bank, secured by deed of trust on farm. Approved." The government argued at trial that this entry was false because it misled the finance committee into believing that the bank's loan to Holloway would be secured by a deed of trust on a farm, when the loan was in fact unsecured. Walker points out that the loan documents indicate *1309 that the loan was unsecured. No member of the finance committee testified that Walker told them the loan would be secured. Walker concludes that, because the minute entry can be read two ways, he was entitled to a verdict of acquittal on this count.

We disagree. The minute entry may, indeed, be read in two ways, one favorable to Walker and one unfavorable. In considering Walker's motion for a judgment of acquittal, the district court was required to view the evidence in the light most favorable to the government. There was sufficient evidence to allow the jury to conclude that this entry was false, and Walker's argument to the contrary is without merit. See, United States v. Johnson, 741 F.2d 854, 856 (6th Cir.), cert. denied, 469 U.S. 1075, 105 S.Ct. 572, 83 L.Ed.2d 512 (1984); United States v. Green, 548 F.2d 1261, 1262 (6th Cir.1977).

Walker's challenge to his conviction on Count 28 of the indictment is equally without merit. On January 18, 1985, Walker applied for a loan of $200,000 from the bank for Walker Grain Company. On that date, Walker Grain Company's checking account at the bank was overdrawn by $293,072.06. In applying for the loan, Walker assured Gary Carlton that he had a check for $300,000 coming in which would cover the overdraft. The check was written on a Walker Grain Company checking account at First Citizens Bank. This account had been closed in June, 1982 and there were no funds in the account to cover the $300,000 check. Walker testified at trial that the check was written because he had applied for a loan in that amount from First Citizens Bank, although the loan had not yet been approved. He testified that he informed Mr. Carlton of these facts. The loan from First Citizens Bank was never approved, although

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there was no evidence that Walker Grain Company's $300,000 check was dishonored by that bank. On January 24, 1985, Farmers Bank loaned $190,000 to Walker Grain Company and the proceeds were deposited into the Walker Grain Company account. These proceeds, together with the proceeds of the Jones loan, allowed Farmers Bank to cover the $300,000 check written on the First Citizens account, curing the overdraft in the Walker Grain Company account.

Walker argues that he made no false statements to Carlton in order to receive the $190,000 loan, because he explained to Carlton that the $300,000 check would be covered by a loan from First Citizens. As the government argues, however, the jury was entitled to view Walker's statements as false because he failed to tell Carlton that Walker Grain Company's checking account at First Citizens had been closed for nearly four years. Further, in the course of applying for the loan from Farmers Bank, Walker failed to inform Carlton that the grain company already had hundreds of thousands of the bank's dollars in its coffers from the Hastings and Jones loans. Certainly these are omissions of material fact which the jury was entitled to consider in determining Walker's guilt. That they chose not to accept Walker's version of the events is no ground for reversing his conviction.

We conclude, therefore, that the jury's verdict on each count of the indictment must be affirmed. The district court did not err in admitting evidence of Hastings' guilty plea and plea agreement, or in excluding evidence of the named borrowers' ability to repay the loans at issue in counts 1, 23 and 27 of the indictment. While evidence of the named borrowers' ability to repay and understanding of their obligation to do so may be relevant in certain cases, it is not where, as here, the individual who actually benefited from the loan was a bank officer. The prosecution is not barred by the applicable statute of limitations, and the district court did not err in denying Walker's motion for judgment of acquittal on the remaining counts of the indictment. Accordingly, we AFFIRM Walker's conviction on all counts. Given our disposition of Walker's appeal, we see no need to address the issues raised in the government's appeal.

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"substantial possibility" of govt investigation/audit → efforts to conceal probably part of orig. conspiracy

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75-2 USTC P 9656
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UNITED STATES of America, Plaintiff-Appellee,
v.
Joe Raymond DIEZ and Peter A. Palori, Defendants-Appellants.
No. 74-2641.
United States Court of Appeals,
Fifth Circuit.
July 14, 1975.

The United States District Court for the Middle District of Florida, at Tampa, Ben Krentzman, J., found one of the defendants guilty of income tax evasion and found both defendants guilty of conspiring to defraud the United States by impeding the Internal Revenue Service in the collection of income taxes, and they appealed. The Court of Appeals, Ainsworth, Circuit Judge, held that (1) the hearsay statements made by a coconspirator in 1972 were part of the central conspiracy itself, which involved a series of real estate transactions between 1965 and 1968 but which had not terminated when the statements were made, and they were thus admissible under the coconspirator exception to the hearsay rule, (2) the work papers of defendant's accountant, an alleged coconspirator, were admissible, (3) the refusal of the defendant's motion for a trial separate from his accountant was not an abuse of discretion, where, inter alia, defendant's proffer in support of his motion was bereft of exculpatory content and where the motion was made late in the trial, and (4) the illustrative charts used by the government, while undeniably making assumptions concerning the proper attribution of income from the real estate transactions, had ample evidentiary support.

Affirmed.

[1] CRIMINAL LAW k423(1)
110k423(1)
Acts and declarations of coconspirators are binding upon each member of the conspiracy if made during the life of the conspiracy and in furtherance of any of its objects.

[2] CRIMINAL LAW k419(2.20)
110k419(2.20)
Formerly 110k419(1)
Where IRS agent's statement, reported to second agent by coconspirator, of his intention to classify defendant as a dealer in real estate was received not to prove that defendant was or had been classified as a dealer, but rather to prove that the first agent intended to regard him as one, the statement of the first agent was a "statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain and bodily health)" and fell under the well-established exception to the hearsay rule for such statements. Federal Rules of Evidence, rules 803(3), 805, 28 U.S.C.A.

[3] CRIMINAL LAW k410
110k410
Since, when IRS agent first interviewed defendant, defendant specifically

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referred the agent to an accountant for answers to any questions concerning taxes, the statement thereafter made by the accountant constituted an "admission by an authorized agent" and was admissible against defendant irrespective of whether the coconspirator exception applied.

[4] CRIMINAL LAW k422(1)
110k422(1)
In prosecution for conspiring to defraud the United States by impeding the Internal Revenue Service in the collection of income taxes, involving a series of real estate transactions between 1965 and 1968, the hearsay statements made by coconspirator in 1972 were part of the central conspiracy itself, which had not terminated when those statements were made, and were thus admissible under the coconspirator exception to the hearsay rule.

[5] CRIMINAL LAW k423(1)
110k423(1)
A statement need not be false in every detail in order to have been made in furtherance of a conspiracy to conceal and defraud.

[6] CRIMINAL LAW k423(1)
110k423(1)
Although isolated parts of coconspirators' hearsay statements may have been true, the record showed that, taken as a whole, the statements were deceptive in design and were therefore in furtherance of the conspiracy, rendering them admissible under the coconspirator exception to the hearsay rule.

[7] CRIMINAL LAW k423(3)
110k423(3)
In prosecution for conspiring to defraud the United States by impeding the Internal Revenue Service in the collection of income taxes, the work papers of defendant's accountant, an alleged coconspirator, were admissible under the coconspirator exception to the hearsay rule, since the papers were prepared during the course of the conspiracy and were also in furtherance of the purpose thereof, namely, the filing of false income tax returns. 18 U.S.C.A. s 371; 26 U.S.C.A. (I.R.C.1954) s 7201.

[8] CRIMINAL LAW k423(3)
110k423(3)
Accountant for unindicted coconspirator could have testified to what his client told him concerning the ownership of subject land, since his client's statements to him were those of a coconspirator during the course and in furtherance of a conspiracy to defraud the United States by impeding the Internal Revenue Service in the collection of income taxes. 18 U.S.C.A. s 371; 26 U.S.C.A. (I.R.C.1954) s 7201.

[9] CRIMINAL LAW k436(2)
110k436(2)
Formerly 110k436
Availability of the declarant does not bar introduction of a document under the Business Records Act. 28 U.S.C.A. s 1732.

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[10] CRIMINAL LAW k419(12)
110k419(12)
In prosecution for conspiring to defraud the United States by impeding the Internal Revenue Service in the collection of income taxes, involving a series of real estate transactions, a letter from an attorney for the seller of a parcel purchased and later resold by defendant, which letter stated that defendant was the actual mortgagor of the property even though the property was held in the name of defendant's mother, was admissible over a hearsay objection, even though the attorney testified that an unindicted coconspirator had told him that defendant was the mortgagor, since the coconspirator's statement was made long before the conspiracy ended and was in furtherance of the conspiracy. 18 U.S.C.A. s 371.

[11] CONSPIRACY k48.1(2.1)
91k48.1(2.1)
Formerly 91k48.1(2)
In prosecution brought against uncle and nephew for conspiring to defraud the United States by impeding the Internal Revenue Service in the collection of income taxes, the role of the uncle in the various real estate transactions in question was amply established by the government's evidence, and his motion for acquittal was thus properly denied. 18 U.S.C.A. s 371; 26 U.S.C.A. (I.R.C.1954) s 7201.

[12] CONSPIRACY k40
91k40
Mere association with members of a conspiracy is insufficient to establish a person's participation in the conspiracy.

[13] CRIMINAL LAW k1159.2(5)
110k1159.2(5)
Guilty verdict must be sustained if there is substantial evidence, taking view most favorable to the government, to support it, and that standard is not changed by fact that government's case rested in substantial part on circumstantial evidence.

[13] CRIMINAL LAW k1159.6
110k1159.6
Guilty verdict must be sustained if there is substantial evidence, taking view most favorable to the government, to support it, and that standard is not changed by fact that government's case rested in substantial part on circumstantial evidence.

[14] CRIMINAL LAW k622.2(4)
110k622.2(4)
Formerly 110k622(2)
In prosecution for income tax evasion and for conspiring to defraud the United States by impeding the Internal Revenue Service in the collection of income taxes, the refusal of defendant's motion for a trial separate from his accountant was not an abuse of discretion, where, inter alia, defendant's

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proffer in support of his motion was bereft of exculpatory content and where said motion was made very late in the trial. 18 U.S.C.A. s 371; 26 U.S.C.A. (I.R.C.1954) s 7201; Fed.Rules Crim.Proc. rule 14, 18 U.S.C.A.

[15] CRIMINAL LAW k622.3
110k622.3
Formerly 110k622(3)
For court to grant a severance motion based on the unavailability of a codefendant whose testimony is allegedly needed, the movant must show a bona fide desire to use the codefendant's testimony, that the testimony will be exculpatory, that the codefendant will likely testify if the severance is granted, and that the motion is timely and will not impair the economy of judicial resources.

[16] CRIMINAL LAW k622.2(1)
110k622.2(1)
Formerly 110k622(1)
Complexity of the trial, by itself, is insufficient ground for overturning trial court's denial of a severance motion; in fact, in complex trials the pressures against severance are especially great because of the drain on judicial resources that would be created by separate trials.

[17] CONSPIRACY k45
91k45
In joint trial of uncle and nephew on charge of conspiring to defraud the United States by impeding the Internal Revenue Service in the collection of income taxes, nephew's preconspiracy financial statement which purported to list nephew's outstanding obligations, yet made no mention of a loan from uncle, was admissible as evidence casting doubt on whether nephew had made a $3,200 interest payment to uncle for a loan, thus supporting government's charge of a conspiracy to conceal nephew's income.

[18] CRIMINAL LAW k1169.5(2)
110k1169.5(2)
In joint trial of uncle and nephew on charge of conspiring to defraud the United States by impeding the Internal Revenue Service in collecting income taxes, uncle could not have been prejudiced by the introduction of nephew's preconspiracy financial statement, which purported to list nephew's outstanding obligations yet made no mention of a loan from uncle, since the jury was repeatedly instructed that statements of any conspirator made before the existence of the conspiracy may only be considered as evidence against the person making it.

[19] CRIMINAL LAW k437
110k437
In prosecution for conspiring to defraud the United States by impeding the Internal Revenue Service in collecting income taxes, the illustrative charts used by the government, while undeniably making assumptions concerning the proper attribution of income from the real estate transactions involved, had ample evidentiary support. 18 U.S.C.A. s 371; 26 U.S.C.A. (I.R.C.1954) s

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7201.

[20] CRIMINAL LAW k777
110k777
Where summaries are used in a prosecution for income tax evasion, the trial court should instruct the jury that the summaries do not, of themselves, constitute evidence in the case but only purport to summarize the documents and detail evidence already submitted. 26 U.S.C.A. (I.R.C.1954) s 7201.

[21] CRIMINAL LAW k437
110k437
In a criminal prosecution, it is within the trial court's discretion to decide whether the Government may use illustrative charts.

*894 Raymond E. LaPorte, Tampa, Fla., for Diez.

E. David Rosen, Miami, Fla., for Palori.

John L. Briggs, U. S. Atty., Bernard Dempsey, Asst. U. S. Atty., Jacksonville, Fla., Claude Tison, Jr., Asst. U. S. Atty., Tampa, Fla., for plaintiff-appellee.

Appeals from the United States District Court for the Middle District of Florida.

895 Before GIBSON,[FN] THORNBERRY and AINSWORTH, Circuit Judges.

FN* Of the Eighth Circuit, sitting by designation.

AINSWORTH, Circuit Judge:

Peter A. Palori and Joe Raymond Diez appeal from convictions of conspiring to defraud the United States by impeding the Internal Revenue Service in the collection of income tax in violation of 18 U.S.C. s 371. Palori also appeals from his conviction on four counts of income tax evasion. 26 U.S.C. s 7201. Both defendants assign numerous errors in the trial court's rulings concerning the admissibility and weight of hearsay evidence, the propriety of a joint trial of the defendants, and the possibility of prejudice from the Government's use of illustrative charts.

I. Factual Background

The Government's case against Palori and Diez involved a series of real estate transactions in Tampa, Florida, between 1965 and 1968. The Government's theory was that Palori was the real owner of shares of the various parcels sold in these transactions, but that he had arranged for several of his relatives to act as nominal owners or brokers in the transactions and to report part of the profits from the sales on their own tax returns. Palori's mother, Minnie Lopez, reported profits from a number of the transactions on her returns and was indicted as a member of the conspiracy but acquitted. Diez, who is Palori's uncle, reported part of the profit from one of the transactions, as well as two brokerage commissions allegedly received in connection with other transactions, and interest on a loan he allegedly made to Palori. B. J. DeGuzman, Palori's accountant during the tax years in question, reported part of the profit from one of the real estate transactions, and was indicted and convicted both for his role in the conspiracy and for preparing false returns specifically those of Palori and his relatives.[FN1] The Government contended

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that all of this income was properly attributable to Palori. James Garrett and Clarence Prevatt, two unindicted coconspirators, also participated in some of the transactions.

FN1. DeGuzman did not appeal his conviction.

II. Evidence Allegedly Admitted in Violation of the Hearsay Rule

A. Statements of Coconspirators

[1] Palori and Diez contend that it was error to permit the introduction of several statements by Garrett and DeGuzman, two of their coconspirators, which, they argue, were inadmissible under the hearsay rule. The general principles governing the introduction of out-of-court declarations by one conspirator against another, for the truth of the matter stated, are clear:

It is established law, at least since Krulewitch v. United States, 1949, 336 U.S. 440, 69 S.Ct. 716, 93 L.Ed. 790, and under so many cases prior to and following Krulewitch that it would be an affectation to cite them, that acts and declarations of co-conspirators are binding upon each member of the conspiracy, if made during the life of the conspiracy and in furtherance of any of its objects.

United States v. Harrell, 5 Cir., 1970, 436 F.2d 606, 613. See United States v. Register, 5 Cir., 1974, 496 F.2d 1072, 1078.

[2][3] The statements complained of were part of the testimony of Agents Brock and Hill of the Internal Revenue Service. Brock testified that DeGuzman told him, in an interview in November 1970, that during a prior audit another agent, named Hunting, had proposed to classify Palori as a dealer in real estate,[FN2]and *896 thus as ineligible for the special tax treatment usually given long-term capital gains.[FN3] DeGuzman also stated in interviews during July 1969 and July 1970, according to the testimony of Agents Brock and Hill, that he and Minnie Lopez had paid fees and brokerage commissions to Diez in connection with several of the real estate transactions in the case.[FN4]

FN2. The fact that DeGuzman's statement, like numerous others introduced at trial, relied on a statement by another person does not render the testimony inadmissible. Agent Hunting's statement, reported to Agent Brock by DeGuzman, was a statement of his intention to classify Palori as a dealer in real estate. The statement was received not to prove that Palori was or had been classified as a dealer, but rather to prove that Agent Hunting intended to regard him as one. The statement was thus a "statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain and bodily health)" and falls under the well-established exception to the hearsay rule for such statements. Fed.R.Evid. Rule 803(3). DeGuzman was therefore a competent witness to Hunting's statement, just as Agent Brock was a competent witness to DeGuzman's statement under the coconspirator rule. "Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules." Fed.R.Evid. Rule 805.

The Federal Rules of Evidence were approved by Congress on January 2, 1975, and take effect on the one hundred and eightieth day thereafter. The Rules

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are to be applied even in advance of their effective date "except to the extent that application of the rules would not be feasible, or would work (an) injustice." United States v. Rivera, 2 Cir., 1975, 513 F.2d 519. See United States v. Arias-Diaz, 5 Cir., 1974, 497 F.2d 165, 170.

FN3. Palori made no objection to the introduction of this statement, either on the basis of the hearsay rule or on the basis of irrelevance, and admission of the testimony was not plain error. Wright, Federal Practice and Procedure: Criminal s 856 (1969). Therefore, it seems doubtful that we can consider this assignment of error as to Palori. Moreover, Agent Hunting was available and testified at trial. Neither Palori nor Diez has explained why they did not attempt to cross-examine him or call him as a witness on this issue.

FN4. Because DeGuzman's statement is consistent with Palori and Diez's version of the facts, it is unclear how admission of this testimony prejudiced defendants. Moreover, when Agent Brock first interviewed Diez he specifically referred the agent to DeGuzman for answers to any questions concerning his taxes. DeGuzman's statement, therefore, would appear to be an "admission by an authorized agent," Hayes v. United States, 5 Cir., 1969, 407 F.2d 189, 192, and therefore would be admissible irrespective of whether the coconspirator exception applies. In Hayes the accountant acted pursuant to a written power of attorney, but we know of no precedent requiring authorization by a written instrument.

According to Agent Brock's testimony, in an interview during January 1972 Garrett stated that Diez "didn't participate as a partner in any of Mr. Palori's real estate transactions, nor did he perform any services which would entitle him to a commission." This statement, in contrast to that of DeGuzman concerning payment of fees and commissions, supported the Government's contention that income properly belonging to Palori was being attributed to Diez as part of the conspiracy. Agent Brock, testifying as an expert witness, also stated that in computing Palori's income for 1965 he disregarded a check from Palori to Garrett, allegedly for the latter's interest in a parcel sold in one of the transactions, because Garrett had told him (in the January 1972 interview) that he did not own an interest in the parcel in question.[FN5]

FN5. This testimony is largely repetitive of earlier testimony by Agent Brock. On cross-examination his testimony strongly suggested that Garrett had told him he held no interest in the property in question. No objection was made by defendants. His testimony on redirect examination, to which Palori objected, was largely repetitive of his answers on cross-examination.
Garrett's statement to the agents disavowing any ownership of a share in one of the parcels sold in 1965 was also introduced in the form of his tax return for that year, which contained no reference to gain from that sale. Palori contends that the tax return was inadmissible, relying on Greenbaum v. United States, 9 Cir., 1935, 80 F.2d 113, 125, which we cited approvingly in dicta in United States v. Ragano, 5 Cir., 1973, 476 F.2d 410, 417-418. Like the testimony on redirect concerning Garrett's oral

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statement to the agents, however, the information supplied by the tax return was merely repetitive of what Agent Brock had stated on cross-examination without objection. Under these circumstances, the admission of the tax return and Agent's Brock's statements on redirect examination was not erroneous or prejudicial.

Palori and Diez contend that these hearsay statements were, at most, attempts to conceal the completed crime, and thus could not be introduced under the coconspirator exception to the hearsay rule. A review of the prior Supreme *897 Court cases convinces us that this argument must fail.

In Krulewitch v. United States, 336 U.S. 440, 69 S.Ct. 716, 93 L.Ed. 790 (1949), the Supreme Court held inadmissible the hearsay statement of a coconspirator made after she had been apprehended. The Government argued that there was an implicit conspiracy to conceal the crime. The Court noted, however, that no such conspiracy to conceal had been charged in the indictment, and stated:

It is beyond doubt that the central aim of the alleged conspiracy transportation of the complaining witness to Florida for prostitution had either never existed or had long since ended in success or failure when and if the alleged co-conspirator made the statement attributed to her.

336 U.S. at 442, 69 S.Ct. at 718.

In Lutwak v. United States, 344 U.S. 604, 73 S.Ct. 481, 97 L.Ed. 593 (1953), a conspiracy to conceal the crime was charged in the indictment, but the Court interpreted Krulewitch to require more than an unsubstantiated allegation:

This Court in (Krulewitch) rejected the Government's contention that in every conspiracy there is implicit an agreement as a part thereof for the conspirators to collaborate to conceal the conspiracy.

344 U.S. at 616, 73 S.Ct. at 489. The Court held in Lutwak that the Government had failed to prove a conspiracy to conceal the crime, and went on to discuss what kind of proof would be sufficient. See GRUNEWALD v. United States, 353 U.S. 391, 403-405, 77 S.Ct. 963, 973-974, 1 L.Ed.2d 931 (1957).

[4] It is unnecessary to apply the reasoning developed in these prior cases concerning proof of a conspiracy to conceal a completed crime, because the statements in question here were part of the central conspiracy itself, which had not terminated when those statements were made. In this case the Government charged a conspiracy to defraud the United States by impeding the Internal Revenue Service in the collection of income tax. This conspiracy is different from the conspiracies discussed in the cases relied on by defendants.

In Krulewitch the conspiracy was to transport a woman across state lines for prostitution in violation of 18 U.S.C. s 2421. That conspiracy clearly had ended when the arrested coconspirator made her statement. In Lutwak, supra, the conspiracy was

" 'to defraud the United States of and concerning its governmental function and right of administering' the immigration laws and the Immigration and Naturalization Service, by obtaining the illegal entry into this country of three aliens as spouses of honorably discharged veterans."

344 U.S. at 605, 73 S.Ct. at 483 (emphasis added). The conspiracy to defraud was complete when the conspirators deceived the immigration officials into permitting them to enter the country.[FN6] The Court held that

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coconspirators' statements made later would not be admissible under the coconspirator exception to the hearsay rule. In GRUNEWALD, supra, the conspiracy was to defraud the United States by preventing criminal tax prosecutions. The prosecutions were prevented through the procurement, by bribery, of "no prosecution" rulings from the Internal Revenue Service, and ended when the rulings were issued.

FN6. The dissolution of the fraudulent marital relations, after the aliens had entered the United States but long before the indictments were handed down, left little doubt that the conspiracy to defraud the Government had ended.

On the other hand, in the present case the central aim of the conspiracy was to deceive officials of the Internal Revenue Service, thereby inducing them to accept fraudulent tax returns as truthful and accurate. In light of the substantial possibility that the returns would be audited and investigated, the filing of the returns did not fully accomplish the purpose *898 of the main conspiracy, which, by its very nature, called for concealment.[FN7]

FN7. The conspiracy alleged in this case is similar to the Supreme Court's examples, in GRUNEWALD, supra, of crimes that inherently involve concealment.
Kidnapers in hiding, waiting for ransom, commit acts of CONCEALMENT in furtherance of the conspiracy itself, just as repainting a stolen car would be in furtherance of a conspiracy to steal; in both cases the SUCCESSFUL ACCOMPLISHMENT of the crime NECESSITATES CONCEALMENT.
353 U.S. at 405, 77 S.Ct. at 974 (emphasis added).

The Supreme Court described a very similar conspiracy in Forman v. United States, 361 U.S. 416, 423-424, 80 S.Ct. 481, 486, 4 L.Ed.2d 412 (1960):
(T)he conspiracy was a continuing one extending from 1942 to 1953 and its principal object was to evade (taxes) for 1942-1945, inclusive, by concealing (the conspirators') "holdout" income. This object was not attained when the tax returns for 1945 concealing the "holdout" income were filed. As was said in GRUNEWALD, this was but the first step in the process of evasion. The concealment of the "holdout" income must continue if the evasion is to succeed.
In some circumstances it may be difficult to determine precisely when the deception has been accomplished in a conspiracy like this one.[FN8] A lapse of several years between the filing of the last fraudulent return and the initiation of investigative efforts by the Government might suggest that the conspiracy had succeeded in its purpose. Statements made during the course of such an investigation might be considered outside the scope of the coconspirator exception. That difficult determination is unnecessary in the present case, however, because an IRS audit of Palori's returns for 1965 and 1966 was undertaken in April 1968 even before the last fraudulent return involved here was filed. Thus the conspirators were clearly on notice that their activities had aroused suspicion and that further deception might be necessary to fulfill their purpose. At the time of the statements by DeGuzman and Garrett, it could not be said that the conspiracy "had long since ended in success or failure," as was true in Krulewitch. No charges had been brought,

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so the conspiracy could not be considered a failure, and the investigation had not been abandoned, so the conspiracy could not be considered a success.

FN8. In Forman the Supreme Court suggested that so long as acts of concealment continue beyond the filing of the returns, such conspiracies cannot be said to have "ended in success or failure" until either the conspirators are caught or the statute of limitations has run on any action to recover the evaded taxes. 361 U.S. at 424, 80 S.Ct. at 486.

"(T)he termination of a conspiracy generally is an issue to be determined on the facts of the individual case . . . ." United States v. Sarno, 1 Cir., 1972, 456 F.2d 875, 878. We find no reversible error in the District Court's conclusion that, for purposes of admissibility, there was sufficient evidence that the statements in question were made during the course of the conspiracy. See United States v. Nowak, 7 Cir., 1971, 448 F.2d 134, 139; Nassif v. United States, 8 Cir., 1966, 370 F.2d 147, 151-152; United States v. Hickey, 7 Cir., 1966, 360 F.2d 127, 140-141; United States v. Klein, 2 Cir., 1957, 247 F.2d 908.

[5][6] Defendants contend that, even if made during the conspiracy, several of the statements made by DeGuzman and Garrett to the IRS agents cannot be considered in furtherance of the conspiracy.[FN9] Defendants argue that since the statements were consistent with the Government's position at trial, they must be considered as true; and true statements do not further a conspiracy to deceive. A statement need not be false in every detail, however, in order to have been *899 made in furtherance of a conspiracy to conceal and defraud. Deception rarely takes the form of an uninterrupted series of lies. A fair reading of the agents' interviews with DeGuzman and Garrett convinces us that, taken as a whole, the coconspirators' statements were deceptive in design, especially when considered in conjunction with the versions of the facts related to the agents by Palori, Diez and the others during the investigation. The truthfulness of isolated parts of the statements does not affect this conclusion. Cf. Bruton v. United States, 391 U.S. 123, 126, 88 S.Ct. 1620, 1622, 20 L.Ed.2d 476 (1968); United States v. Maddox, 5 Cir., 1974, 492 F.2d 104, 107.

FN9. The fact that Garrett and Prevatt were not made defendants in the case does not render the coconspirator exception inapplicable to them. United States v. Nixon, 418 U.S. 683, 700-701, 94 S.Ct. 3090, 3104, 41 L.Ed.2d 1039 (1974).

B. Evidence Admitted Under the Business Records Act

[7] The trial court received into evidence, over defendants' objections, several documents which the Government contended were admissible under the Business Records Act. 28 U.S.C. s 1732(a).[FN10] Defendants particularly objected to the introduction of work papers, given to the IRS agents by DeGuzman, showing that Palori had a one-third interest in a parcel of land sold in one of the transactions in the case, although Diez reported half of the gain attributable to that one-third share on his own tax return for 1965. Defendants contend that proper foundation for introducing the papers as business records was lacking. We need not resolve that question, however,

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because DeGuzman's work papers, like his statements discussed earlier, were admissible under the coconspirator exception to the hearsay rule. The work papers were prepared shortly after the sale of the parcel in 1965, and thus were statements made during the course of the conspiracy. They also were in furtherance of the purpose of the conspiracy: the filing of false income tax returns.[FN11]

FN10. Section 1732(a) provides:
In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.
Rule 803(6) of the Federal Rules of Evidence provides:
The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
(6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

FN11. As we noted earlier in connection with DeGuzman and Garrett's oral statements, the fact that DeGuzman's notations on the work papers coincided with the Government's version of the facts at trial does not mean that they were not in furtherance of the conspiracy.

The remainder of the documents in question, objected to by Palori, are writings "made in (the) regular course of any business," 28 U.S.C. s 1732, and were otherwise qualified to be introduced under the Act. Palori does not dispute this, but raises other objections to the admission of these documents, which we deal with separately.
The Government offered in evidence the work papers of Clarence Prevatt's accountant, showing a profit of $24,612.91 on the sale of a parcel of real estate in 1968 and allocating $9,000 of that profit as Palori's share $9,000 that Palori did not report on his 1968 return. *900 The accountant testified that he prepared the work paper in the regular course of business, specifically in the course of preparing Prevatt's 1968 tax return. He also testified that Prevatt, an unindicted coconspirator in the case, had provided the information he used in his computations.
[8] Apparently Palori's only objection to the introduction of this document

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is that, since the accountant could not testify to what Prevatt had told him concerning the ownership of the land, the same information could not come in by virtue of being preserved in a business record. We believe, however, that the accountant could have so testified, because Prevatt's statements to him were those of a coconspirator during the course and in furtherance of the conspiracy. The purpose of the conspiracy was to enable Palori to receive income from the various real estate transactions without revealing his participation in them as an owner and thus exposing himself to tax liability. The statements of the conspirators that were intended to facilitate the flow of funds to Palori were as much in furtherance of the conspiracy as were the statements designed to conceal the disposition of the proceeds of the transactions. Without Prevatt's directions to his accountant, which indisputably were given before the conspiracy ended, Palori would not have received his share of the proceeds from the sale, and a major purpose of the conspiracy would have been frustrated.

To establish Palori's intention to conceal his participation in one of the transactions in 1967, the prosecution offered a letter from an official of the title company that closed the sale, stating that Palori "did not want his name to appear because he did not think it was politically expedient that it do so." The title company official testified that he wrote the letter in the regular course of business and that Palori himself was the source of his statement concerning the omission of Palori's name from the transaction.[FN12]

FN12. Palori contends that the title company official could not remember whether Palori specifically directed that his name be kept out of the transaction or whether he simply drew that conclusion himself. A careful reading of the testimony to which Palori refers, however, shows that the official's uncertainty concerned a different part of his letter. In any event, the clear import of the text of the letter is that Palori had requested that his name not be mentioned, and a specific present recollection of that fact on the part of the writer of the letter is unnecessary.

[9] Palori contends that the title company officer's letter should not have been admitted because he was available to provide his own testimonial recollection of the facts in the letter. Availability of the declarant, however, does not bar introduction of a document under the Act. McCormick on Evidence s 311 at 728-729 (1972); Fed.R.Evid. Rule 803(6).

[10] As further evidence of Palori's concealment of his participation in the transactions, the prosecution introduced a letter from an attorney for the seller of a parcel purchased and later resold by Palori. It stated that Palori was the actual mortgagor of the property, even though the parcel was held in the name of Minnie Lopez, Palori's mother. The attorney testified that he prepared the letter in the regular course of his business. He stated that he had written Mrs. Lopez to tell her where to send the mortgage payments, but she had failed to make the first payment. Garrett intervened, informing the attorney that Palori was the actual mortgagor of the property and would be making the payments.

Palori maintains that the attorney was uncertain of the source of his information, but a review of the attorney's testimony reveals this contention

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to be without merit. Furthermore, the fact that the attorney relied on Garrett's statement does not render admission of the letter violative of the hearsay rule. The statement was made in 1967, long before the conspiracy ended. It was in furtherance *901 of the conspiracy because the attorney had already brought foreclosure proceedings against Minnie Lopez. If Garrett had not intervened the conspirators could not have resold the property.

III. Sufficiency of the Evidence as to Diez

[11] Diez contends that the trial court erred in denying his motion for acquittal under Rule 29 of the Federal Rules of Criminal Procedure, because the evidence was insufficient for submission of the case to the jury. His argument is based chiefly on the paucity of references to his role in the conspiracy by the numerous witnesses at trial. Under the Government's theory of the case, however, Diez's role was amply established by the evidence.

The Government sought to prove that Diez had reported income that was not properly attributable to him. That the income was reported by Diez was established by introducing his tax returns for 1965, 1966, 1967 and 1968. The other half of the Government's case against Diez was more difficult, because it required proof that Diez had not earned the income in question and had not owned a share of the property that was the source of the sales proceeds listed on his return.

[12] The prosecutor asked a number of witnesses whether they knew Diez, and many of them answered affirmatively. Diez argues that, because the prosecutor did not pursue the relevance of these witnesses' familiarity with Diez, his conviction was the product of guilt by association. It is true that mere association with members of a conspiracy is insufficient to establish a person's participation in the conspiracy,[FN13] but in this case it was the defendant's nonassociation that proved his guilt. Despite his acquaintance with a number of the witnesses at trial, Diez was not mentioned as a participant in the real estate transactions by anyone but Palori and, in one statement, DeGuzman.

> FN13. United States v. Oliva, 5 Cir., 1974, 497 F.2d 130, 134; United States v. Suarez, 5 Cir., 1973, 487 F.2d 236, 239; United States v. Martinez, 5 Cir., 1973, 486 F.2d 15, 24; United States v. Jackson, 5 Cir., 1970, 426 F.2d 305, 309; Jett v. United States, 5 Cir., 1968, 393 F.2d 139, 140; Causey v. United States, 5 Cir., 1965, 352 F.2d 203, 207; Panci v. United States, 5 Cir., 1958, 256 F.2d 308, 312; United States v. Cantone, 2 Cir., 1970, 426 F.2d 902, 904. Cf. United States v. Menichino, 5 Cir., 1974, 497 F.2d 935, 942-943; United States v. Edwards, 5 Cir., 1974, 488 F.2d 1154, 1158.

Simon Wooten, an associate of Palori who owned a one-third share of one of the parcels sold, indicated no knowledge of any participation in the transaction by Diez, who nevertheless reported the profit from a one-sixth interest in the property on his return. Gaston Fernandez, the real estate broker who handled the transaction, identified only Palori, Garrett, and Simon Wooten as owners of the land. Diez's name did not appear on any documents connected with the sale, and there was no record of any payment of sale expenses by him. Although the other owners received payments from Palori by check for their interests in the property, there was no record of any such check from Palori to Diez.

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DeGuzman's worksheet compiled during the preparation of Palori's 1965 tax return, lists one-third interests held by Palori, Garrett, and Simon Wooten.
Diez reported a $5,000 brokerage commission, allegedly paid by Minnie Lopez, from another real estate sale involved in the case. The broker who procured the purchase option by which the owners (Palori and others) acquired this land, however, knew of nothing Diez had done in connection with the property which would warrant receipt of a commission. The closing statements for this transaction show payment of commissions to several real estate brokers, but Diez is not among them. Although in all the other transactions Minnie Lopez paid sale expenses by purchasing cashier's checks with cash withdrawals from her *902 savings account, there was no such check payable to Diez.[FN14]

FN14. At trial Palori offered a different explanation of Diez's receipt of the $5,000. He stated that Diez had made arrangements for sewerage hook-ups for a parcel sold in Minnie Lopez's name, and he had recommended that she pay Diez $5,000 for his services. The Government introduced evidence showing that Palori was aware of the need for sewerage hook-ups long before he allegedly commissioned Diez to look into the matter and had hired an expert engineer to solve the problem. Palori maintains that the engineer was hired in connection with sewerage hook-ups for another parcel sold in the same transaction, but that was a question for the jury.

Diez also reported a $6,000 commission, allegedly paid to him in cash by DeGuzman, in connection with another real estate transaction involved in the case. Like Minnie Lopez, DeGuzman consistently made payments by check in the other transactions. The real estate broker who helped Palori and Garrett obtain an option to purchase on the property, which was later sold, testified that he knew of no efforts by Diez in connection with the property which would warrant receipt of a commission.
Finally, Diez reported as his income $3,200 allegedly paid to him by Palori as interest on a loan. Palori's records contain no indication, however, of such payments. Nor is there any evidence that any such loan was made to Palori by Diez.
The pattern of Diez's reporting of income also reinforced the Government's case. For three of the four years in question (1965-1968), Diez reported substantial losses consistently in excess of his gains from the real estate transactions. In 1966, the only year in which Diez reported no losses, no gains from commissions or the sale of real estate were reported on his return.
Against all this evidence there was only the out-of-court statement of DeGuzman (to which Agent Brock testified) concerning his payment of a commission to Diez, for which he furnished an alleged receipt, and the testimony of Palori, who stated that Diez participated in all of the transactions from which he reported income, but had been paid in cash each time and had participated without the knowledge of anyone but himself, DeGuzman, and Minnie Lopez.
[13] The standard we must apply in reviewing a denial of a motion for acquittal is clear. "The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it." Glasser v. United States, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1942). That the Government's case rested in substantial part on

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circumstantial evidence does not change that standard. Id.; United States v. Prince, 5 Cir., 1974, 496 F.2d 1289, 1293; McFarland v. United States, 5 Cir., 1960, 273 F.2d 417, 419. "Circumstantial evidence in this respect is intrinsically no different from testimonial evidence." Holland v. United States, 348 U.S. 121, 140, 75 S.Ct. 127, 137, 99 L.Ed. 150 (1954). See United States v. Miller, 5 Cir., 1974, 500 F.2d 751, 763. Our examination of the evidence and application of the appropriate standard of review compels the conclusion that the trial court did not err in denying Diez's motion for acquittal.

IV. Defendants' Motions for Severance

Palori contends that the trial court erred in refusing to grant him a trial separate from DeGuzman's. Diez contends that the trial court erred in refusing to grant him a trial separate from Palori's. Both of these assignments of error are without merit.

A. Palori's Motion

[14] After the Government and the other defendants had rested and he had presented his evidence, Palori moved for a severance, alleging that DeGuzman would testify in his behalf if a separate trial was granted. Palori's proffer in support of his motion was, in its entirety, as follows:

*903 He (DeGuzman) would be prepared to testify for and on behalf of Mr. Palori as to the manner and means by which he computed the taxes and his error or omission on the 1967 tax return. His advice from time to time on tax matters.

[15] In Byrd v. Wainwright, 5 Cir., 1970, 428 F.2d 1017, we discussed the factors a trial court should consider in ruling on a motion for severance based on the unavailability of a codefendant whose testimony is allegedly needed. First, the movant must show a bona fide desire to use the codefendant's testimony. In Byrd the movant's assertions concerning the importance of the codefendant's testimony were made "with full exploration of reasons." 428 F.2d at 1020. Here, in contrast, the defendant offered an unelaborated conclusory statement.

Second, the codefendant's testimony must be specifically shown to be exculpatory. United States v. Wilson, 5 Cir., 1974, 500 F.2d 715, 721. In this case the defendant's proffer not only lacked sufficient detail but also was bereft of exculpatory content. Palori had based prior motions for severance on the allegedly prejudicial effect of admissions made by DeGuzman during the investigation. His proffer contained nothing to erase this suggestion that DeGuzman would be a damaging, rather than exculpating, witness. The testimony briefly described in the proffer was irrelevant. Palori's defense was not that he relied in good faith on advice that proved to be incorrect. He contended that the transactions were exactly as represented on the various tax returns. As to the omission on Palori's 1967 tax return, Palori had already stated that the proceeds from one of the sales was left out of the return inadvertently. See United States v. Burke, 5 Cir., 1974, 495 F.2d 1226, 1234. Cf. United States v. Shuford, 4 Cir., 1971, 454 F.2d 772, 778.

Third, the movant must show a substantial likelihood that the codefendant will testify if the severance is granted. In Byrd the prosecutor and other defense counsel advised the judge, before he ruled on the severance motion, that the codefendant would testify if a separate trial was granted. Here there is nothing to show why DeGuzman would be any more willing to testify in a separate

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trial than in a joint trial. See United States v. Cochran, 5 Cir., 1974, 499 F.2d 380, 391-392; United States v. Burke, supra, 495 F.2d 1226, 1234.

Finally, the trial judge should consider the timeliness of the motion and the effect of a severance on economy of judicial resources. Byrd v. Wainwright, supra, 428 F.2d at 1020; United States v. Burke, supra, 495 F.2d at 1234; United States v. Johnson, 5 Cir., 1973, 478 F.2d 1129, 1134. In the present case, Palori has offered no explanation for making his motion very late in the trial.[FN15] Having spent three weeks of trial time hearing the testimony of over sixty witnesses and considering over three hundred documents, the trial judge was not obliged to treat Palori's motion as he would an ordinary severance request made at the outset of a trial.

FN15. Palori's two prior motions for severance were not based on the contention that DeGuzman would testify in his behalf, and he has not contended on appeal that the denial of these earlier motions is error.

The granting of a motion for severance under Rule 14 of the Federal Rules of Criminal Procedure is within the trial court's discretion. E. g., Opper v. United States, 348 U.S. 84, 95, 75 S.Ct. 158, 165, 99 L.Ed. 101 (1954); United States v. Burke, supra, 495 F.2d at 1233-1234; Byrd v. Wainwright, supra, 428 F.2d at 1018; Smith v. United States, 5 Cir., 1967, 385 F.2d 34, 38. We find nothing to indicate an abuse of discretion on the part of the trial court in denying Palori's motion.[FN16]

FN16. Palori alternatively requested that the court bifurcate the jury deliberations, so that DeGuzman's guilt or innocence could be resolved whereupon he would testify for Palori. This procedure would have been impractical and unwarranted. The jury could not have determined DeGuzman's guilt or innocence on the conspiracy count without coming to a conclusion concerning Palori's guilt or innocence on the substantive count, which would nullify the purpose of having the bifurcated deliberation in the first place.

*904 B. Diez's Motion

Diez contends that trying him with Palori was inherently unfair, because of the sheer complexity of the case and the impossibility of expecting the jury to restrict their consideration of evidence admitted against less than all the defendants. Closely related to this contention is Diez's assertion that the trial court's general instructions to the jury concerning the admissibility of evidence in a conspiracy trial were inadequate.

[16] The complexity of a trial, by itself, is insufficient grounds for overturning a trial court's denial of a severance motion. In complex trials the pressures against severance are especially great, because of the drain on judicial resources that would be created by separate trials. See Byrd v. Wainwright, supra ; United States v. Martinez, supra, 486 F.2d at 23.

The only specific evidence cited by Diez as prejudicing him in the joint trial was a record of zoning proceedings held by the Hillsborough County Commission in late 1966 and early 1967, and a financial statement given by Palori to his bank in September 1964. The minutes of the Commission proceedings were

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introduced to refute Palori's contention that he recommended to Minnie Lopez that she pay Diez a $5,000 commission for arranging sewer hook-ups to a parcel of property sold in her name in 1967. This evidence showed that Palori had been aware of the sewerage problem months before he allegedly commissioned Diez to look into the matter, and had hired an engineer to develop plans for sewerage connections. The minutes supported the Government's contention that Diez had not earned the $5,000 he reported on his 1967 tax return. They were admissible against both Palori and Diez as proof of the existence of a conspiracy to conceal Palori's income.[FN17]

FN17. Diez asserts that a cautionary instruction was necessary because this evidence was offered only to impeach Palori's credibility. Although in its brief the Government does use the term "impeachment" in discussing Diez's contention, this evidence is referred to as "impeachment of Palori's testimony." The context in which the Commission records were offered leaves no doubt that they were introduced as evidence of guilt. Palori contends the minutes were introduced to inject an element of political scandal into the trial, because they suggest connivance between him and Prevatt, an unindicted coconspirator and member of the Commission, to arrange for zoning variances and changes. As we explained in our discussion of Diez's motion for severance, however, there were legitimate reasons for the introduction of the minutes. The Government is not required to forego valuable evidence merely because it may lay bare the unsavory details of a defendant's dealings.

[17][18] Diez's objection to the admission of Palori's financial statement is also without merit. Palori furnished the statement to his bank in connection with an application for a loan several months before, under the Government's theory, the conspiracy began. The statement purported to list Palori's outstanding obligations, yet made no mention of a loan from Diez. By casting doubt on whether Palori had made a $3,200 payment of interest to Diez, the evidence supported the Government's charge of a conspiracy to conceal Palori's income. Although the court did not give an instruction to the jury cautioning that Palori's admission was not binding on Diez, or the other alleged coconspirators, such an instruction was given in connection with the introduction of a similar financial statement by Palori later in the trial. More importantly, the jury was repeatedly instructed throughout the trial that "(s)tatements of any conspirator which are not in furtherance of the conspiracy or made before its existence or after its termination may be considered as evidence only against the person making it." In light of these instructions we fail to see how Diez was prejudiced by the introduction of Palori's pre-conspiracy financial statement.

*905 To say that the jury might have been confused amounts to nothing more than an unfounded speculation that the jurors disregarded clear instructions of the court in arriving at their verdict.

Opper v. United States, supra, 348 U.S. at 95, 75 S.Ct. at 165.[FN18]

FN18. Diez challenges the correctness of the court's cautionary instruction concerning the kind of evidence admissible to connect a defendant with a conspiracy. The record shows that the trial judge

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apparently did skip a line, inadvertently, when he first read to the jury the standard instruction on this point. No one objected. Moreover, the instruction was correctly repeated throughout the trial, thus eliminating any possibility of prejudice.

V. The Government's Use of Charts

[19] Palori and Diez claim prejudice by the Government's use of illustrative charts and summaries in connection with the testimony of its summary witness, Agent Brock. Their argument is that the captions on the charts and the headings on various columns of figures misled the jury by assuming the central fact to be proved at trial to whom various items of income were properly attributable. [FN19] The caption on one chart, for example, reads "Schedule of Sales, Net Taxable Gains to Peter A. Palori And Amounts Not Reported Or Taxable Gain Reported By Others."

FN19. Defendants also object to the parts of one chart listing the total sales price of the properties sold and the listing of the taxable gains, rather than the entire gains, reported by DeGuzman and Minnie Lopez on the various real estate transactions. We find no prejudice from the listing of the sales prices. Furthermore, the taxable gain to Lopez and DeGuzman was only half of the entire gain because they reported these items of income as long-term capital gains. If the entire gain had been shown, the chart would have given a misleading indication of the amount of taxable income Palori had avoided reporting.

The charts undeniably make assumptions concerning the proper attribution of the income from the transactions in this case, and the propriety of Palori and Diez's attributions of this income was the crucial issue at trial. Any such chart of computations, however, must rest on certain assumptions. Contrary to defendants' argument, the essential requirement is not that the charts be free from reliance on any assumptions, but rather that these assumptions be supported by evidence in the record. United States v. Lawhon, 5 Cir., 1974, 499 F.2d 352, 357; Gordon v. United States, 5 Cir., 1971, 438 F.2d 858, 876; Myers v. United States, 5 Cir., 1966, 356 F.2d 469, 470; Azcona v. United States, 5 Cir., 1958, 257 F.2d 462, 466; Barsky v. United States, 9 Cir., 1964, 339 F.2d 180, 181-182. See Watkins v. United States, 1 Cir., 1961, 287 F.2d 932, 934.[FN20] In this case it is indisputable that the assumptions on which the Government based its charts that is, its version of the facts were amply supported by evidence already presented to the jury.

FN20. Baines v. United States, 5 Cir., 1970, 426 F.2d 833, relied on by defendants, is inapposite. In that case the crucial issue was whether dancing and music occurred simultaneously after 9:30 p. m. in a nightclub, for purposes of a cabaret tax on the sale of liquor. The Government relied on a chart computing the amount of taxes based on the assumption that every sale of liquor after 9:30 p. m. occurred while music and dancing were occurring simultaneously. There was no evidence to support that assumption. In this case, each representation made on the charts is supported by evidence in the record.

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[20] The court should instruct the jury that "summaries do not, of themselves, constitute evidence in the case but only purport to summarize the documented and detailed evidence already submitted." [FN21] Gordon v. United States, supra, 438 F.2d at 877. See Myers v. *906 United States, supra, 356 F.2d at 470. In this case such instructions were given both when the Government's summary witness testified and again at the close of the case. [FN22] We believe the court's instructions eliminated any possibility of the charts confusing the jury.

FN21. Contrary to defendants' assertion, relying on Steele v. United States, 5 Cir., 1955, 222 F.2d 628, this Court has never held that the jury cannot take illustrative charts with them to the jury room. In that case we held only that the charts in question, because of their composition and layout, could not properly have been submitted to the jury, and that it was doubly prejudicial to accede to the jury's request for the charts after the deliberations began. See Flemister v. United States, 5 Cir., 1958, 260 F.2d 513, 516; United States v. Warner, 8 Cir., 1970, 428 F.2d 730, 737.

FN22. Defendants contend that the court described these charts in its instruction to the jury as "summaries of facts." Although that phrase appears in the Government's proposed instruction, the record shows that the trial judge did not use this language.

[21] It is within the trial court's discretion to decide whether the Government may use illustrative charts. United States v. Lawhon, supra, 499 F.2d at 357; Gordon v. United States, supra, 438 F.2d at 877; Bobsee Corporation v. United States, 5 Cir., 1969, 411 F.2d 231, 241; Lloyd v. United States, 5 Cir., 1955, 226 F.2d 9, 16; United States v. Dana, 7 Cir., 1972, 457 F.2d 205, 207-208. We perceive no abuse of discretion here.

Having reviewed all of defendants' assignments of error carefully, we find no reversible error.

Affirmed.

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whether tax evasion is not complete when false forms are filed -- subsequent false statements to the IRS are in furtherance of conspiracy -- "cover up" conduct"

Citation 731 F.Supp. 1189
65 A.F.T.R.2d 90-1019, 90-1 USTC P 50,138
(CITE AS: 731 F.SUPP. 1189)
FOUND DOCUMENT
Database DCT
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UNITED STATES of America
v.
Jeffrey L. FELDMAN and Paul J. Foont, Defendants.
No. 89 Cr. 765 (CSH).
United States District Court,
S.D. New York.
March 2, 1990.

aff'd 992 F2d 320

Defendants charged with tax evasion and conspiracy filed motion for various pretrial relief. The District Court, Haight, J., held that: (1) six-year limitations period applicable to tax evasion counts based on defendants' alleged creation of limited partnerships designed to defer income for one tax year commenced to run on last date defendants concealed true nature of transactions engaged in by partnerships; (2) Government was required to supply affidavit on personal knowledge of IRS agent or Justice Department official specifying exact date on which Justice Department referral was made; (3) defendants were not entitled to discover list of Government's witnesses; and (4) defendant was not entitled to severance based on his claim that codefendant would exculpate him at separate trial.

Motions granted in part and denied in part.

[1] CRIMINAL LAW k150
110k150
Six-year limitations period applicable to tax evasion counts based on defendants' alleged creation of limited partnerships designed to defer income for one tax year commenced to run on last date defendants concealed true nature of transactions engaged in by partnerships, rather than when tax returns containing allegedly fraudulent deductions were filed by limited partners. 26 U.S.C.A. ss 6531, 7201.

[2] CRIMINAL LAW k150
110k150
Six-year limitations period applicable to conspiracy charges based on defendants' alleged conspiracy to evade taxes commenced when defendants last made false statements to Internal Revenue Service agents designed to conceal fraudulent deductions, rather than when deductions were actually taken. 18 U.S.C.A. s 371; 26 U.S.C.A. s 6531.

[3] CRIMINAL LAW k627.6(1)
110k627.6(1)
Government was required to supply affidavit on personal knowledge of Internal Revenue Service (IRS) agent or Justice Department official specifying exact date on which Justice Department referral was made in prosecution for tax evasion and conspiracy, where defendants sought to discover whether IRS summonses issued in connection with civil tax investigation were made at time Justice Department referral was in effect, so as to require suppression of statements made in response to those summonses. 26 U.S.C.A. s 7602.

[4] CRIMINAL LAW k629(3.1)

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110k629(3.1)
Formerly 110k629(3)
Defendants charged with tax evasion were not entitled to discover list of Government's witnesses; although defendants claimed that potential witness pool was large and witness list would greatly facilitate defense preparation, they failed to present specific evidence showing need for disclosure.

[5] INDICTMENT AND INFORMATION k121.2(3)
210k121.2(3)
Defendants charged with tax evasion and conspiracy were entitled to bill of particulars requiring Government to produce identities of persons whom defendants were alleged to have aided and abetted.

[5] INDICTMENT AND INFORMATION k121.2(6)
210k121.2(6)
Defendants charged with tax evasion and conspiracy were entitled to bill of particulars requiring Government to produce identities of persons whom defendants were alleged to have aided and abetted.

[6] CRIMINAL LAW k629(1)
110k629(1)
Defendants charged with tax evasion and conspiracy were entitled to list of those exhibits Government anticipated might be used at trial within 14 days of trial.

[7] CRIMINAL LAW k629(1)
110k629(1)
Defendants charged with tax evasion and conspiracy were not entitled to production of Government's evidence in advance of trial.

[8] CRIMINAL LAW k374
110k374
Defendants charged with tax evasion and conspiracy were entitled to be informed as to whether Government intended to offer similar act evidence at trial within 14 days of trial.

[9] CRIMINAL LAW k700(5)
110k700(5)
Defendants charged with tax evasion and conspiracy were not entitled to immediate production of Brady impeachment material, where Government had stated its intent to make such production for each government witness.

[10] CRIMINAL LAW k622.2(10)
110k622.2(10)
Defendant charged with tax evasion and conspiracy was not entitled to severance based on his claim that codefendant would exculpate him at separate trial, although codefendant had stated in affidavit that he would waive his Fifth Amendment privilege at separate trial; affidavit also suggested that codefendant would be willing to waive Fifth Amendment privilege at joint trial,

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and case was complex one that would take more than one month to try. U.S.C.A. Const.Amend. 5.

*1190 Otto G. Obermaier, U.S. Atty., S.D.N.Y., New York City (Robert J. Cleary, Asst. U.S. Atty., of counsel), for U.S.

Kronish, Lieb, Weiner & Hellman, New York City (Alan Levine, Celia Goldwag Barenholz and Patricia S. Constantikes, [FN*] of counsel), for Paul J. Foont.

FN* Awaiting Admission in New York

Shea & Gould, New York City (Michael S. Feldberg and Lloyd M. Eisenberg, of counsel), for Jeffrey L. Feldman.

MEMORANDUM OPINION AND ORDER

HAIGHT, District Judge:

Trial in this tax evasion case is scheduled to begin on April 23, 1990. Defendants now move for various pre-trial relief.

Background

The indictment in the captioned case charges the defendants with various offenses arising out of certain financial transactions entered into by the Cralin partnerships. [FN1]

FN1. The Cralin partnerships "were a series of New York limited partnerships that were promoted as dealers or broker-dealers in various securities, commodities, and options." Indictment at P 2(a).
Specifically, the Cralin partnerships refer collectively to the following limited partnerships: Securities Arbitrage Company, Capital Trading Group, Arbitrage Partners, The Money Market Group, Capital Futures Group, Multi-Asset Group, Cralin Securities Company, Cralin Metals Company, and Greystone Investment Group. Id. at PP 2(b)-(j).
Feldman was, at all times relevant to the indictment, a "Special Partner" in Securities Arbitrage Company, Capital Trading Group and Arbitrage Partners. As a special partner, Feldman had a 1% partnership interest in each of those partnerships. Feldman also had a "controlling interest in the managing or general partners" of The Money Market Group, Capital Futures Group, Multi-Asset Group, Cralin Securities Company, Cralin Metals Company, and Greystone Investment Group. Id. at P 2(m).
Foont was, at all times relevant to the indictment, the Chief Trader for the Cralin partnerships. In addition, Foont was the President of the corporate general partner of Multi-Asset Group and the Executive Vice President of the general partners of Cralin Securities Company, Cralin Metals Company and Greystone Investment Group. Id. at P 2(n).

The government alleges that the defendants devised a plan to create approximately *1191 $140,000,000 in false tax deductions for the 1981 tax year, such deductions to be passed on to the limited partners in the Cralin partnerships. The government charges the defendants with the creation and concealment of a fraudulent income deferral device aimed at evading taxes for the 1981 tax year.

Specifically, the defendants are charged with having entered into a secret oral agreement with New York Hanseatic Division ("New York Hanseatic") [FN2] on

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behalf of the Cralin partnerships pursuant to which New York Hanseatic was paid a set fee for creating records substantiating certain false transactions by the Cralin partnerships in government securities. These transactions led to fraudulent interest deductions by the limited partners in the amount of $140,000,000 for the tax year 1981. The second stage of the transaction was the reporting of false income in the amount of $132,000,000 for the tax year 1982. That false income was also passed on to the limited partners.

FN2. New York Hanseatic operates "as a broker-dealer in government backed securities and other interest-rate sensitive instruments, to purchase significant tax losses for a fee, and to provide significant tax losses to willing purchasers for a fee." Indictment at P 2(1).

The charges in the indictment, all of which arise out of the basic scenario set forth above, are divided into three groups. Count 1 charges the defendants with conspiracy in violation of 18 U.S.C. s 371. The conspiracy is defined as one extending from "in or about 1981 through in or about the end of 1985", one object of which was the evasion of taxes due and owing in the 1981 tax year. Indictment at P 1.

Counts 2 through 6 charge the defendants with tax evasion arising out of the 1981 tax returns of various limited partners. The return of each of those partners forms the basis for a separate count in the indictment. Although the offenses arise out of the 1981 tax returns, the indictment charges the defendants with tax evasion for the period 1981 through 1985.

Counts 7 through 15 charge the defendants with aiding and assisting in the filing of certain false tax returns for the Cralin partnerships. Each of the false filings referred to in this set of charges relates to the 1983 tax year.

Defendants move for various pre-trial relief. Specifically, defendants move to dismiss counts 1 through 6 as barred by the statute of limitations. Defendants further move for various discovery and a bill of particulars. Defendant Foont moves for a severance. I address these issues in turn.

Discussion

I. Statute of Limitations

It is common ground that the applicable statute of limitations in respect of both the conspiracy charged in count 1 and the tax evasion charges contained in counts 2 through 6 is six years. 26 U.S.C. s 6531. [FN3]

FN3. 26 U.S.C. s 6531 provides in pertinent part:
No person shall be prosecuted, tried, or punished for any of the various offenses arising under the internal revenue laws unless the indictment is found or the information instituted within 3 years next after the commission of the offense, except that the period of limitation shall be 6 years--
(1) for offenses involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner;
(2) for the offense of willfully attempting in any manner to evade or defeat any tax or the payment thereof....

The indictment in the captioned case was filed on October 10, 1989. Thus, in

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order to be timely filed, the indictment must charge the defendants with crimes committed within six years of October 10, 1989, namely on or after October 10, 1983. Defendants contend that the indictment fails in that regard, while the government argues that both the conspiracy and the counts of evasion were not complete until the end of 1985, well after the October 1983 limitations cutoff date.

A. Tax Evasion

[1] Defendants are charged with five counts of tax evasion in violation of 26 U.S.C. s 7201. [FN4] The elements of tax evasion are familiar:

FN4. 26 U.S.C. s 7201 provides:
Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

*1192 (1) an attempt to evade or defeat a tax or the payment thereof;
(2) an additional tax due and owing; and
(3) willfulness.

Sansone v. United States, 380 U.S. 343, 351, 85 S.Ct. 1004, 1010, 13 L.Ed.2d 882 (1965).

That first element of tax evasion, commonly referred to as the "affirmative act" requirement or the affirmative act of evasion, is described by the Supreme Court as "some willful commission in addition to the willful omissions that make up the list of misdemeanors," Spies v. United States, 317 U.S. 492, 499, 63 S.Ct. 364, 368, 87 L.Ed. 418 (1943), such as failure to pay a tax or failure to file a tax return in any given year.

Willful but passive neglect of the statutory duty may constitute the lesser offense, but to combine with it a willful and positive attempt to evade tax in any manner or to defeat it by any means lifts the offense to the degree of felony.

Id. The question presented by the instant motion is when the statute of limitations began to run.

Defendants contend that the crime was complete, if committed at all, with the filing of the 1981 tax returns that contained the allegedly fraudulent deductions. In the alternative, defendants argue that the counts of evasion were complete with the filing of the 1982 tax returns that constituted the second prong of the attempt to evade taxes for the 1981 tax year. In essence, the government alleges that the defendants engaged in a course of conduct aimed at evading taxes for 1981, which continued through 1985 at which time the statute of limitations began to run. In consequence, the government argues, the instant indictment was filed only four years after the limitations period began to run, well within the limitations period.

The indictment alleges the following as affirmative acts of evasion occurring after October 10, 1983.

(d) From in or about 1981 through in or about 1985, FELDMAN and FOONT concealed the bogus, fraudulent and pre-arranged nature of the New York Hanseatic transactions from the outside accountants of the Cralin partnerships

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and attempted to mislead those accountants as to the true nature of the transactions.

(f) On or about December 1, 1983, FOONT made false statements and representations to an employee of the IRS, in the presence of FELDMAN and one of the outside accountants for the Cralin partnerships, for the purpose of concealing the fraudulent and pre-arranged nature of the tax losses passed on to the limited partner-investors of the Cralin partnerships, ..., to wit, FOONT told an IRS agent that there were no oral or written agreements affecting the 1981 transactions between the Cralin partnerships and New York Hanseatic.

(g) In or about 1984, FELDMAN made false statements and representations to an employee of the IRS, in the presence of FOONT and one of the outside accountants for the Cralin partnerships, for the purpose of concealing the fraudulent and pre-arranged nature of the tax losses passed on to the limited partner-investors of the Cralin partnerships, ..., to wit, FELDMAN told an IRS agent that there were no oral or written agreements affecting the 1981 transactions between the Cralin partnerships and New York Hanseatic.

(h) Between in or about mid-1984 and in or about April 1985, FOONT refused to answer questions posed by an employee of the IRS, in the presence of one of the outside accountants for the Cralin partnerships, for the purpose of concealing the fraudulent and pre-arranged nature of the tax losses passed on to the limited partner-investors of the Cralin partnerships, *1193 ..., to wit, FOONT refused to answer an IRS agent's question about the financing for the 1981 transactions between the Cralin partnerships and New York Hanseatic.

(i) Between in or about March 1985 and in or about April 1985, FELDMAN made false statements and representations to one of the outside accountants for the Cralin partnerships for the purpose of concealing the fraudulent and pre-arranged nature of the tax losses passed on to the limited partner-investors of the Cralin partnerships, ..., to wit, FELDMAN lied to the accountant about the financing for the 1981 transactions between the Cralin partnerships and New York Hanseatic.

Indictment at P 7(d), (f)-(i).

Defendants concede, as they must, that false statements to an employee of the IRS constitute affirmative acts of evasion. United States v. Beacon Brass, 344 U.S. 43, 45-46, 73 S.CT. 77, 78-79, 97 L.Ed. 61 (1952) ("[t]he language of [26 U.S.C. s 7201] which outlaws willful attempts to evade taxes 'in any manner' is clearly broad enough to include false statements made to Treasury representatives for the purpose of concealing unreported income"). [FN5] Rather, defendants contend that the alleged false statements, along with the other affirmative acts of evasion set forth in the indictment, occurred after the crime of evasion was complete.

FN5. Defendants take issue with two of the so-called affirmative acts of evasion, namely those contained in PP 7(h) and (i). Paragraph 7(h) alleges that sometime in mid-1984 Foont refused to answer certain questions put to him by an employee of the IRS. Defendants argue that Foont had a Fifth Amendment right to refuse to answer whatever questions were asked of him by the IRS and such refusal can thus not constitute an affirmative act of evasion and should be struck from the indictment. Although defendants cite no case law in support of their argument, the government is in essence attempting to hold Foont's

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> invocation of the Fifth Amendment privilege against him on the face of the charging instrument, in violation of basic principles of constitutional law.
>
> It does not appear that there existed a duty on the part of defendant Foont to answer the questions asked by the IRS. Indeed, by letter dated December 7, 1989, counsel for defendant Foont served a request for a bill of particulars as follows:
>
> 7. Paragraph 7(h)--Identify any duty on Mr. Foont's part to answer the question allegedly put by the IRS agent.
>
> The government declined to provide a response to defendant Foont's request. Affidavit of Celia Goldwag Barenholtz sworn to on December 19, 1989 at P 7. Absent some showing by the government that Foont had a duty to answer the IRS's questions, or citation to case law demonstrating the propriety of the inclusion of Foont's failure to do so as an affirmative act of evasion or an overt act in furtherance of the conspiracy, I direct that the allegations be stricken from the indictment. The government has ten (10) days to make the requisite showing.
>
> In respect of P 7(i) which alleges that Feldman made false statements in March or April of 1985 to an outside accountant for the Cralin partnerships, defendants argue that even if the allegation is true, it does not amount to an affirmative act of evasion as to taxes due and owing in the 1981 tax year. Defendants make this argument without benefit of citation to case law, which points clearly in the opposite direction. The Supreme Court has held that "any conduct, the likely effect of which would be to mislead or conceal" constitutes an affirmative act of evasion. Spies, 317 U.S. at 499.
>
> Congress did not define or limit the methods by which a willful attempt to defeat and evade might be accomplished and perhaps did not define lest its effort to do so result in some unexpected limitation. Nor would we by definition constrict the scope of the Congressional provision that it may be accomplished 'in any manner.' By way of illustration, and not by way of limitation, we would think affirmative willful attempt may be inferred from conduct such as keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind, and any conduct, the likely effect of which would be to mislead or to conceal. If the tax-evasion motive plays any part in such conduct the offense may be made out even though the conduct may also serve other purposes such as concealment of other crime.
>
> Id.

Two separate but related issues are presented by these facts and the arguments of counsel. First, the question arises whether the elements of the alleged crime of evasion were present in 1981 or 1982. The next issue presented for consideration is whether, assuming that the elements *1194 of tax evasion were all present in 1981 or 1982, the limitations period began to run at that point, or after the last affirmative act of evasion, that being in 1985. I address these issues in turn.

In respect of that first issue, whether the elements of evasion were

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present in 1981, it is important to note that the tax returns at issue were not filed by the defendants. Rather, the fraudulent tax returns were filed by various limited partners of the Cralin partnerships to whom the tax benefits of certain false transactions were passed along. In these circumstances, it is difficult to view the allegedly false filings as a "watershed event" for purposes of the statute of limitations. [FN6]

FN6. Indeed, the Supreme Court has recognized that affirmative acts of evasion, such as lying to the IRS, can support a prosecution for tax evasion, and consequently start the clock on the limitations period, even where the defendant never files a return. Spies, 317 U.S. 492, 63 S.Ct. 364.

It is defendants' course of conduct preceding and subsequent to the false filings that constitutes the evasion with which they are charged. Specifically, the government charges the defendants with a continuing series of acts ranging in time from the creation of the allegedly fraudulent transactions with New York Hanseatic to the defendants' continued and ongoing concealment of the true nature of those transactions. The question is whether the last act in such a course of conduct is that which properly triggers the statute of limitations.

While not cited in the briefs, United States v. Shorter, 608 F.Supp. 871 (D.C.D.C.1985), aff'd, 809 F.2d 54 (D.C.Cir.), cert. denied, 484 U.S. 817, 108 S.Ct. 71, 98 L.Ed.2d 35 (1987) is instructive. In that case the government had charged the defendant in one felony count of "willful attempt to evade the payment of income taxes due for the years 1972 through 1983, in violation of 26 U.S.C. s 7201." 608 F.Supp. at 873. Shorter had filed allegedly fraudulent tax returns for the years in question. The indictment was returned in 1984. The defendant argued that the indictment was time-barred as to the tax years between and including 1972 and 1977 and consequently that allegations as to those tax years should be stricken from the indictment. The defendant further argued that the single felony count was impermissibly duplicitous and should be dismissed, inasmuch as it alleged twelve separate offenses, namely evasion for each tax year 1972 through 1983.

The district court rejected defendant's first claim, namely that certain of the allegations of evasion were time-barred.

[T]he statute of limitations does not ipso facto rule out prosecution with respect to taxes owing prior to 1978, for the offense of tax evasion is not necessarily committed only in the year when the tax was due and payable. That is so because the existence of a tax deficiency is but one of the two essential elements of the crime, the other being an affirmative act of willful evasion. Sansone v. United States, 380 U.S. 343, 351, 85 S.Ct. 1004, 1010, 13 L.Ed.2d 882 (1965); Spies v. United States, 317 U.S. 492, 63 S.Ct. 364, 87 L.Ed. 418 (1943). An act constituting evasion which occurs during the limitations period brings the prosecution within the statute of limitations even if the taxes being evaded were due and payable prior thereto. United States v. Trownsell, 367 F.2d 815 (7th Cir.1966); United States v. Mousley, 194 F.Supp. 119 (E.D.Pa.1961), aff'd without opinion, 311 F.2d 795 (3d Cir.1963); United States v. Sclafani, 126 F.Supp. 654 (E.D.N.Y.1954), aff'd on other grounds, 265 F.2d 408 (2d Cir.1959); see also, United States v.

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Malnik, 348 F.Supp. 1273 (S.D.Fla.1972), aff'd on other grounds, 489 F.2d 682 (5th Cir.1974).

It follows that the indictment in this case is not subject to dismissal even with respect to the evasion of taxes due prior to 1978 if it is supported by proof of one or more affirmative acts of evasion committed by the defendant within the past six years if these acts relate to taxes due in earlier years. Id. at 874 (footnote omitted). The court held that, on its face, the indictment did not *1195 suffer from a statute of limitations problem. That was so because the indictment alleged, and the government contended that it would prove, a continuing series of acts of evasion, or a course of conduct aimed at evading the payment of past taxes. Where defendant's conduct was of a continuing nature, the court viewed the limitations period as properly running from the last of defendant's actions, not the first.

The defendant in Shorter further argued that the single felony count was impermissibly duplicitous and should therefore be dismissed. The district court denied the motion. The court's analysis in that regard is illuminating. In determining whether "it is proper to charge a continuing scheme to evade taxes for several years", the court looked to "(1) the language and legislative history of the statute, and (2) the nature of the proscribed conduct." [FN7] 608 F.Supp. at 877. The district court found little guidance in the language and legislative history of the tax evasion statute and thus turned to the Supreme Court's opinion in Spies. Specifically, the district court turned to the Court's non-exclusive list of conduct amounting to affirmative acts of evasion. Much of the conduct envisioned by the Court as paving the way for a prosecution for tax evasion is that sort of conduct "which typically would be committed on a multi-year, continuing-course-of-conduct basis," id., namely the keeping of a double set of books, concealment of assets or covering up sources of income, and acts of that nature. The type of conduct alleged in the instant indictment, continuing efforts by the defendants to conceal the fraudulent nature of the New York Hanseatic transactions from the outside accountants of the Cralin partnerships, is that same sort of continuing conduct faced by the district court in Shorter.

> FN7. This is the analysis set forth by the Court in Toussie v. United States, 397 U.S. 112, 115, 90 S.Ct. 858, 860, 25 L.Ed.2d 156 (1970), which defendants urge upon this Court.

The district court further evaluated the duplicity argument with respect to the statute of limitations question. In what is essentially a fairness inquiry, the court observed that if the first count of the indictment were severed into twelve separate counts, each alleging a violation of the tax evasion statute for a single year 1972 through 1983, all of the acts of evasion occurring within the limitations period relating to those years could be introduced as to each year in which there was a tax deficiency.

Thus, the first count of such a hypothetical indictment presumably would allege evasion of taxes due in 1972. In support of that count, the government would be entitled to introduce evidence of a tax deficiency in 1972 as well as of any and all affirmative acts of evasion after 1978 [the limitations cutoff date] which may have been intended to evade payment of the 1972 taxes. Id. at 878-79. The court further noted that "[a]cts of evasion

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occurring between 1972 and 1978 would probably also be admissible, especially where--as in the instance of the establishment of a bank account in the name of another--they had continuing consequences." Id. at 878 n. 21. The court of appeals agreed with the district court's observations on this point. 809 F.2d at 57.

I find the court's reasoning in Shorter persuasive. Here, as in that case, the government alleges an ongoing course of conduct that constitutes the affirmative act of evasion. In essence, that course of conduct consisted of a series of lies and acts of concealment in respect of both the outside accountants of the Cralin partnerships and employees of the IRS. The government is not required by the statute of limitations to parse out that course of conduct in order to find the date of the first misstatement to an accountant. Of course, whether the government will be able to prove that sort of continuing conduct that the indictment suggests is ultimately a question for the jury. [FN8]

FN8. I note that in Shorter Judge Greene instructed the jury that it must find that sort of continuous conduct alleged by the government in order to convict.
Judge Greene took steps to ensure against the problem "of a possible lack of unanimity of the jury under the indictment and the proposed evidence in the event of a guilty verdict." 608 F.Supp. at 881. Specifically, the Judge charged the jury on the requirement that an affirmative act of evasion occurring after 1978 must be proved by the government and that such act must relate to the alleged nonpayment of taxes for any one or more of the specific years 1972 through 1978. The court further employed "special interrogatories" or a special verdict form in order to make certain that each juror, in the case of a conviction, voted for that verdict based on the same affirmative act of evasion.
Moreover, the court instructed the jury that in order "to return a verdict of guilty on the felony count, it must agree unanimously ... that these acts of evasion were part of a course of conduct which had as its purpose the willful evasion of the payment of such taxes." Id. In respect of that last instruction, the district court noted that "[a]lthough the existence of a course of conduct is not an element of the offense as such, it would be unfair to the defendant and inconsistent with the prosecutions' theory to permit it to rely on the existence of such a course to defeat the duplicity claim (as augmented by the statute of limitations defense), but then to have this factor ignored when the jury is called upon to make its decision." Id. at 881-82 n. 27.

*1196 I am not faced with the situation where a defendant files a false tax return and then is called in by the IRS to talk about that return perhaps a decade or more after its filing. Defendants argue that if that individual were to give false testimony to the IRS, under the government's theory at bar he could then be prosecuted for tax evasion as to the return filed more than six years before the return of the indictment, based solely on the single affirmative act of giving false testimony to the IRS, a result with which they disagree.

But that is not the case at bar. In the instant case, defendants did not even

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file the returns at issue. Rather, it is their ongoing course of allegedly fraudulent conduct in its entirety that forms the basis for this prosecution. The statute of limitations thus cannot begin to run until the entirety of that conduct is complete, which in this case is the end of 1985. The indictment was timely filed in respect of counts 2 through 6, the tax evasion counts.

B. Conspiracy

[2] Relying on Grunewald v. United States, 353 U.S. 391, 77 S.Ct. 963, 1 L.Ed.2d 931 (1957), defendants argue that the conspiracy count is barred by the six year statute of limitations.

In Grunewald the defendants were charged with and convicted of conspiracy to defraud the United States with reference to certain tax matters. The indictment charged the defendants with conspiring " 'to defraud the United States in the exercise of its governmental functions of administering the internal revenue laws and of detecting and prosecuting violations of the internal revenue laws free from bribery, unlawful impairment, obstruction, improper influence, dishonesty, fraud and corruption....' " Id. at 394, 77 S.Ct. at 968. The indictment further charged that "a part of the conspiracy was an agreement to conceal the acts of the conspirators." Id.

The acts of concealment, such as bribery and the giving of false testimony, occurred within the six year limitations period. However, the defendants' improper efforts to get "no prosecution" rulings in two tax fraud cases were complete with the issuance of those rulings more than six years prior to the filing of the indictment. The question presented in Grunewald was whether the indictment, in light of the government's proof at trial, properly charged a single conspiracy, or whether the non-time-barred acts of concealment were merely part of a second conspiracy to cover up the first, namely that to obtain the no prosecution rulings. If there were two conspiracies then the first was time-barred. The Court said the following:

> [A]fter the central criminal purposes of a conspiracy have been attained, a subsidiary conspiracy to conceal may not be implied from circumstantial evidence showing merely that the conspiracy was kept a secret and that the conspirators took care to cover up their crime in order to escape detection and punishment.

353 U.S. at 401-02, 77 S.Ct. at 972. The Court rejected the government's argument that the defendants' efforts to conceal their earlier wrongdoings should be viewed as part of the original conspiracy to obtain the no prosecution rulings. Defendants at bar *1197 argue that their alleged misstatements to agents of the IRS, which statements constitute three out of the four overt acts executed within the limitations period, [FN9] similarly constitute a second conspiracy to conceal the first.

> FN9. One of the three overt acts dealing with statements made to the IRS alleges Foont's refusal to answer questions of that agency. Indictment at P 5(i). As discussed at n. 5 supra, that allegation is improper absent some showing by the government to the contrary.
> The fourth overt act within the limitations period alleges that between March and April 1985, Feldman lied to one of the Cralin partnerships' outside accountants concerning the financing for the New York Hanseatic transactions.

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This case is manifestly different from Grunewald. Here the conspiracy was entered into, in part, to accomplish the offenses of tax evasion charged in counts 2 through 6 of the indictment. [FN10] As discussed above, the misstatements to the IRS are an integral element of the substantive evasion charges underlying the conspiracy alleged in count 1. Grunewald itself suggests the importance of this distinction:

> FN10. The indictment also alleges that the defendants conspired to accomplish the acts of aiding and assisting in those false filings charged in counts 7 through 15.

> By no means does this mean that acts of concealment can never have significance in furthering a criminal conspiracy. But a vital distinction must be made between acts of concealment done in furtherance of the main criminal objectives of the conspiracy, and acts of concealment done after these central objectives have been attained, for the purpose only of covering up after the crime.

Id. at 405, 77 S.Ct. at 974 (emphasis in original). In this instance, the acts of concealment are central to the government's proof on the underlying evasion charges. In other words, they were in furtherance of one of the main criminal objectives of the conspiracy, tax evasion.

Defendants' motion to dismiss the conspiracy count as barred by the statute of limitations is denied.

II. Discovery

A. Initiation of the Criminal Investigation

[3] Defendants seek discovery of a limited nature in respect of the start and duration of the IRS's civil investigation as well as the start of the criminal investigation. Specifically, defendants seek to determine whether summonses served upon the defendants were improper and thus whether statements given by the defendants in response to those summonses are subject to suppression.

The relevant statutory provision is 26 U.S.C. s 7602, which grants the IRS authority to serve summonses for "the purpose of inquiring into any offense connected with the administration or enforcement of the internal revenue laws", so long as a Justice Department referral is not in effect. [FN11] If a Justice Department referral is in effect at the time summonses are issued, defendants have the basis for a motion to suppress the statements made in consequence of those summonses. See United States v. MacKenzie, 777 F.2d 811, 819 (2d Cir.1985); see also United States v. Piper, 681 F.Supp. 833, 839 (M.D.Ga.1988). [FN12] Defendants at bar are not in a position to know whether a Justice Department referral was in effect at the time the summonses were issued without limited discovery from the government on the point. It is that discovery they now seek.

> FN11. The statute defines a Justice Department referral as being in effect when either (i) the IRS has recommended to the Attorney General "a grand jury investigation of, or the criminal prosecution of, such person for any offense connected with the administration or enforcement of the internal revenue laws", 26 U.S.C. s 7602(c)(2)(A)(i), or when "any request is made [by the Justice Department of the IRS] under section 6103(h)(3)(B) for

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the disclosure of any return or return information (within the meaning of section 6103(b)) relating to such person", 26 U.S.C. s 7602(c)(2)(A)(ii).

FN12. I intimate no present view as to outcome of such a motion to suppress were it to be made.

The government argues that "the only showing that the Government need make, at most, is an affidavit from the case agent affirming that there was no Justice Department *1198 referral at the time the summonses were issued." Government's Memorandum at 18-19. The government cites cases to that effect. See Godwin v. United States, 564 F.Supp. 1209, 1211 (D.Del.1983) (amendment of 26 U.S.C. s 7602 "did not alter the showing required by the government to establish a prima facie case for the enforcement of the summons"); Drum v. United States, 570 F.Supp. 938, 941 (M.D.Pa.1983) ("[t]he requisite showing of good faith may be made by the affidavit of the Internal Revenue Service Agent who issued the challenged summons and who is seeking enforcement thereof"), aff'd without opinion, 735 F.2d 1348 (3d Cir.1984).

The government supplies the affidavit of Special Agent Laura Wolf, the IRS special agent currently assigned to the case. Wolf states that a Justice Department referral was not in effect until approximately April 1987, some two years after the last statements alleged in the indictment. Affidavit of Laura Wolf sworn to on January 5, 1990 at P 3. That affidavit is on information and belief. Wolf states that she "was initially assigned to the instant investigation in approximately March, 1987 [and] ... was the first IRS criminal investigator so assigned." Id. at P 2. Apart from this general statement as to Wolf's association with the investigation, the affidavit contains no statement as to the source of her beliefs in respect of the date on which the Justice Department referral was in effect. Having submitted that affidavit, the government declares the ball to be in defendants' court.

By letter dated January 18, 1990, counsel for defendant Foont brings to this Court's attention a grand jury subpoena dated March 19, 1985 which seemingly relates to the captioned action. Specifically, the subpoena is one directed to the "Custodian of Records" at Cralin & Co., Inc. The subpoena directs production as follows:

Arbitrage Trading Partners
Greystone Investment Group
Money Market Group
Securities Arbitrage
Cralin Securities Co.
Cralin Metals Co.
Multi Asset Group
Cralin Governments Group
Cralin & Co., Inc.
Cralin Group, Inc.
Cralin Capital Partners
Cralin Capital Investment Associates
Capital Futures Group
Capital Trading Group

1. From January 1, 1980 to the present for the above-named entities all

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documents and material, including but not limited to tape recordings, correspondence, memoranda, notes, wires, telexes, checks, comparisons, confirmations, workpapers, traders' tickets, spread sheets, contracts, blotters relating any financial business or proposed dealings with Arbitrage Management Company.

2. Employment/Personnel and Compensation file for Paul Foont.

NOTE: If any document is not produced under a claim of privilege, provide a list of the documents not produced, their author, date, parties distributed to and a brief description of the subject matter so that the claims may be litigated.

The subpoena states that the information was sought in connection with the investigation of an alleged violation of 18 U.S.C. s 371 (conspiracy to defraud the IRS); 18 U.S.C. s 1341 (mail fraud); and 26 U.S.C. s 7206(2) (aiding and assisting in the filing of false tax returns). On its face, the subpoena appears to be one issued in connection with the grand jury investigation of this case. If that is so, a Justice Department referral was in effect at least as early as March 19, 1985, the date of the subpoena's issuance, rather than the April 1987 date suggested by the affidavit supplied by the government. Defendants' having provided such information, the ball is now back in the government's court.

I therefore direct the government to supply an affidavit(s) on personal knowledge of an IRS agent(s) or other official of that agency, and/or representatives of the Justice Department specifying the exact date on which a Justice Department referral was made in this case. The affidavit(s) should specify whether the grand jury subpoena of March 19, 1985 was issued in *1199 connection with the investigation of this case. The government is to comply with this direction within ten (10) days of the date of this Opinion.

B. Notes of Defendants' Oral Statements

Defendants move for production of any notes memorializing defendants' statements to the IRS. The government represents that no such notes were taken, thereby rendering the request moot.

C. Witness List

[4] Defendants move for production of "a list of the witnesses the government intends to call during its case in chief." Defendants' Memorandum at 24. The government opposes that application.

The lead case in this circuit on the subject of witness list disclosure is United States v. Cannone, 528 F.2d 296 (2d Cir.1975). Both defendants and the government find comfort in Cannone. Defendants argue that certain language in Cannone supports the application for disclosure, while the government argues that the holding of the case clearly prohibits it. The court stated that it is "often desirable" to allow disclosure because

> without the benefit of such disclosure, the defense may be substantially hampered in its preparation for trial. At a minimum, pretrial ignorance of the identity of the prosecution's witnesses tends to detract from the effectiveness of the defense's objections and cross-examination.

528 F.2d at 301. However, the Second Circuit held that the district court had abused its discretion in providing the defendants with a witness list where "the defense made only an abstract, conclusory claim that such disclosure was necessary to its proper preparation for trial." Id. at 301-02.

Defendants next point to the factors enumerated in United States v.

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Turkish, 458 F.Supp. 874, 881 (S.D.N.Y.1978) in support of their application. Those factors are as follows:

(1) Did the offense alleged in the indictment involve a crime of violence?

(2) Have the defendants been arrested or convicted for crimes involving violence?

(3) Will the evidence in the case largely consist of testimony relating to documents (which by their nature are not easily altered)?

(4) Is there a realistic possibility that supplying the witnesses' names prior to trial will increase the likelihood that the prosecution's witnesses will not appear at trial, or will be unwilling to testify at trial?

(5) Does the indictment allege offenses occurring over an extended period of time, making preparation of the defendants' defense complex and difficult?

(6) Do the defendants have limited funds with which to investigate and prepare their defense?

458 F.Supp. at 881.

While it is true that four out of the six Turkish factors support defendants' argument, [FN13] they have not come forth with "specific evidence of the need for disclosure", 528 F.2d at 302, as is required for the district court to properly direct disclosure. In essence, defendants argue that the government's investigation was a long one and the potential witness pool is a large one and a witness list would thus greatly facilitate defense preparation. That is not the specific showing contemplated by Cannone. Indeed, although the potential witness pool is large in an absolute sense, many of the witnesses are known to the defendants. Specifically, defendants are familiar with the former employees of the Cralin partnerships, the limited partners involved in the case and the outside accountants and lawyers with whom they dealt. Moreover, defendants have access to the record of and therefore knowledge of the witnesses called in United States v. Atkins, 87 Cr. 246 (MEL), a related trial arising out of the same transactions at issue here.

FN13. Specifically, the first two factors as well as factors four and five point in defendants' favor.

*1200 Defendants' motion for the production of a witness list is denied.

D. Bill of Particulars

Defendants outline eight basic areas as to which they seek a bill of particulars. Specifically, defendants seek immediate production of the following:

1. a list of those documents the government intends to introduce at trial;

2. the identities of those persons allegedly aided and abetted by the defendants in respect of the false income tax returns that form the basis for counts 7 through 15;

3. the substance of the alleged "secret oral agreements" entered into by the defendants;

4. identification of the alleged fraudulent sales literature distributed to potential investors in the Cralin partnerships;

5. the means by which the conspirators attempted to mislead the outside accountants of the Cralin partnerships;

6. the allegedly false information contained on the schedule K-1 forms sent by the Cralin partnerships to its partners;

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7. whether the government intends to use similar act evidence at trial;
8. Brady impeachment material.

[5] The second of these requests, namely one for the production of the identities of those persons whom the defendants are alleged to have aided and abetted, is on par with the traditional request for an enumeration of one's alleged co-conspirators. The government recognizes its obligation to provide that latter information to the defendants and has presumably now made the requisite production. The government is similarly directed to make production forthwith of the names of those persons whom the defendants are alleged to have aided and abetted.

[6] As to a list of those documents which the government will seek to introduce at trial, I will not ask the government to finalize the minutiae of its case in this way some six weeks in advance of trial. However, in this case where all concede that a significant number of documents have been produced by the government and will presumably be used at trial, it is right to narrow the field before trial in order to allow more effective case preparation by the defense. I therefore direct that the government make available to the defendants a list of those exhibits it anticipates might be used at trial within fourteen (14) days of trial.

[7] The middle four requests are no more than a "demand for the government's evidence in advance of trial," United States v. Gottlieb, 493 F.2d 987, 994 (2d Cir.1974), and the "law does not impose an obligation [on the government] to preview its case or expose its legal theory." United States v. Leonelli, 428 F.Supp. 880, 882 (S.D.N.Y.1977). The requests are denied.

[8] The government declined to respond to defendants' request in respect of whether it intends to offer similar act evidence at trial, but states that "[a]s the trial date approaches, we will address this issue anew." Letter of AUSA Robert J. Cleary dated February 22, 1989 at P 13. The government is directed to make production in that regard within fourteen (14) days of trial.

[9] As to the Brady impeachment material which defendants seek, the government recognizes its well-established obligation to produce that material and states its intent to make such production along with the 3500 material for each government witness. That is sufficient. See, e.g., United States v. Nixon, 418 U.S. 683, 701, 94 S.Ct. 3090, 3104, 41 L.Ed.2d 1039 (1974) ("[g]enerally, the need for evidence to impeach witnesses is insufficient to require its production in advance of trial"); United States ex rel. Lucas v. Regan, 503 F.2d 1, 3 n. 1 (2d Cir.1974) ("[n]either Brady nor any other case we know of requires that disclosures under Brady be made before trial"), cert. denied, 420 U.S. 939, 95 S.Ct. 1149, 43 L.Ed.2d 415 (1975); United States v. Biaggi, 675 F.Supp. 790, 812 (S.D.N.Y.1987) (" '[i]nformation bearing on a witness' credibility, such as grants or promises of immunity, *1201 plea bargain arrangements, or other consideration promised by the Government in return for testimony must be turned over at the same time as other 18 U.S.C. s 3500 materials' ") (citations omitted); United States v. Abrams, 539 F.Supp. 378, 390 (S.D.N.Y.1982) ("Brady ... does not require the government to disclose information pertaining to the credibility of witnesses before that witness testifies") (citations omitted). Defendants' motion to compel immediate production of Brady impeachment material is denied.

III. Severance

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[10] Defendant Foont moves for severance pursuant to the doctrine of United States v. Finkelstein, 526 F.2d 517 (2d Cir.1975), cert. denied, 425 U.S. 960, 96 S.Ct. 1742, 48 L.Ed.2d 205 (1976). The Finkelstein doctrine is one that governs motions for severance based on attempts by one defendant to obtain the exculpatory testimony of his co-defendant. Foont contends that were he to be tried separately from Feldman, Feldman would exculpate Foont at Foont's trial.

The Second Circuit has enumerated four factors to be considered in evaluating such a claim for severance.

> (1) the sufficiency of the showing that the co-defendant would testify at a severed trial and waive his Fifth Amendment privilege, ... (2) the degree to which the exculpatory testimony would be cumulative, ... (3) the counter arguments of judicial economy, ... and (4) the likelihood that the testimony would be subject to substantial, damaging impeachment....

526 F.2d at 523-24 (citations omitted). I address these factors in turn.

As to the first factor, the likelihood that Feldman would waive his Fifth Amendment privilege and testify at a separate trial of Foont, Foont offers the affidavit of his co-defendant in which Feldman states that he would testify at Foont's trial as follows:

> On several occasions, including at least one occasion in 1981, Paul J. Foont and I discussed the fact that Price Waterhouse, the Cralin entities' accountants, and Paul, Weiss, Rifkind, Wharton and Garrison, the Cralin entities' legal counsel, had stated, in substance, that the transactions entered into by the Cralin entities in 1981 were legal. During the time period covered by the transactions alleged in the indictment, Mr. Foont was an employee of the Cralin entities and reported to me and others who were in charge of and had ownership interests in the Cralin entities.

Affidavit of Jeffrey L. Feldman sworn to on December 19, 1989 at P 2. Feldman further states that he is "willing to testify at a separate trial of Mr. Foont, even if that trial came before [his] own, and [he is] prepared to waive [his] fifth amendment privilege against self-incrimination at Mr. Foont's trial." Id. at P 3. While the Feldman affidavit is certainly a strong suggestion that he would indeed testify at Foont's trial, there is no indication that he would not also testify at a joint trial of both defendants. Moreover, Feldman's affidavit suggests that he may indeed be willing to so testify given his representation that he would waive his Fifth Amendment privilege and testify at a trial of Foont even if that trial were scheduled before his own.

The second factor is the degree to which the proffered exculpatory testimony would be cumulative. Foont states that his defense at trial "will be that he lacked the requisite intent for the crimes charged." Defendants' Memorandum of Law at 34. Foont argues that Feldman's testimony goes directly to the central issue of Foont's intent in respect of the transactions at issue. The government argues that the proffered testimony is cumulative insofar as the accountants and lawyers had been misled into believing that the transactions were legal and will so testify. In other words, the accountants and lawyers will themselves testify that they advised the defendants that the transactions were legal, but that such advise was given based on fraudulent information. Assuming that Feldman would testify that the conversations were innocent discussions concerning whether the Cralin partnerships should enter into the

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subject transactions and Feldman *1202 informed Foont that the outside accountants and lawyers found no legal impediments to so doing, then such testimony would be probative of Foont's state of mind.

Considerations of judicial economy clearly weigh against severance. This is a complex case that will take more than one month to try and the burdens on limited judicial resources in trying the case twice are obvious. Moreover, witnesses would be twice inconvenienced and our jury system doubly taxed.

As to possible impeachment of Feldman's testimony, it is true that if Feldman were tried first and convicted, his testimony at a later trial of Foont would be subject to damaging impeachment. Of course, that is a problem easily remedied by scheduling Feldman's trial after that of Foont. However, the information contained in the ex parte affidavit of AUSA Cleary suggests certain possible areas of impeachment.

On balance, Foont has not satisfied his burden under Finkelstein.

Conclusion

Defendants' motions are denied except as set forth in this Opinion.

The government is directed to proceed in conformity with this Opinion.

The foregoing is SO ORDERED.

END OF DOCUMENT

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completion of scheme--
mail fraud -- acts of concealment meant to "lull" victim into false sense of security / avoid detection.

Citation 106 S.Ct. 725 88 L.Ed.2d 814, 54 USLW 4123 (CITE AS: 474 U.S. 438, 106 S.CT. 725)
Database SCT
Mode Page
FOUND DOCUMENT

UNITED STATES, Petitioner
v.
James C. LANE and Dennis R. Lane.
James C. LANE and Dennis R. Lane, Petitioner
v.
UNITED STATES.
Nos. 84-744, 84-963.
Argued Oct. 9, 1985.
Decided Jan. 27, 1986.
Rehearing Denied March 31, 1986.
See 475 U.S. 1104, 106 S.Ct. 1507.

Defendants were convicted in the United States District Court for the Northern District of Texas on various charges arising from certain arson schemes, and they appealed. The Court of Appeals, 735 F.2d 799, reversed and remanded. Rehearing was denied, 741 F.2d 1381. After granting certiorari, the Supreme Court, Chief Justice Burger, held that: (1) misjoinder under Criminal Procedure Rule pertaining to multiple defendants is subject to harmless-error analysis and is not reversible error per se; (2) misjoinder of one count of mail fraud involving one defendant with other counts of mail fraud involving both defendants was harmless error; and (3) evidence was sufficient to support convictions.

Reversed and remanded.

Justice Brennan filed opinion concurring in part and dissenting in part in which Justice Blackmun joined.

Justice Stevens filed opinion concurring in part and dissenting in part in which Justice Marshall joined.

[1] CONSTITUTIONAL LAW k268(2.5)
92k268(2.5)
Improper joinder of defendants does not, in itself, violate the Constitution; rather, misjoinder arises to level of a constitutional violation only if it results in prejudice so great as to deny a defendant his Fifth Amendment right to a fair trial. Fed.Rules Cr.Proc.Rule 8(b), 18 U.S.C.A.; U.S.C.A. Const.Amend. 5.

[1] INDICTMENT AND INFORMATION k124(3)
210k124(3)
Improper joinder of defendants does not, in itself, violate the Constitution; rather, misjoinder arises to level of a constitutional violation only if it results in prejudice so great as to deny a defendant his Fifth Amendment right to a fair trial. Fed.Rules Cr.Proc.Rule 8(b), 18 U.S.C.A.; U.S.C.A. Const.Amend. 5.

[2] CRIMINAL LAW k1167(1)
110k1167(1)
Misjoinder of defendants under Criminal Rule 8(b) is subject to harmless-error analysis and is not reversible error per se; an error involving misjoinder affects substantial rights and requires retrial only if misjoinder results in

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actual prejudice because it had substantial and injurious effect or influence in determining jury's verdict. Fed.Rules Cr.Proc.Rule 8(b), 18 U.S.C.A.

[2] INDICTMENT AND INFORMATION k124(1)
210k124(1)
Misjoinder of defendants under Criminal Rule 8(b) is subject to harmless-error analysis and is not reversible error per se; an error involving misjoinder affects substantial rights and requires retrial only if misjoinder results in actual prejudice because it had substantial and injurious effect or influence in determining jury's verdict. Fed.Rules Cr.Proc.Rule 8(b), 18 U.S.C.A.

[3] CRIMINAL LAW k1167(1)
110k1167(1)
Misjoinder of first count charging one defendant with mail fraud with other counts charging both defendant and codefendant with mail fraud was harmless error, considering that when evidence of misjoined first count was introduced, district court provided a proper limiting instruction and in final charge repeated instruction and admonished jury to consider each count and defendant separately; moreover, same evidence on first count would likely have been admissible on joint retrial of the other counts to show defendant's intent under Evidence Rule 404(b). Fed.Rules Cr.Proc.Rule 8(b), 18 U.S.C.A.; Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

[3] INDICTMENT AND INFORMATION k124(5)
210k124(5)
Misjoinder of first count charging one defendant with mail fraud with other counts charging both defendant and codefendant with mail fraud was harmless error, considering that when evidence of misjoined first count was introduced, district court provided a proper limiting instruction and in final charge repeated instruction and admonished jury to consider each count and defendant separately; moreover, same evidence on first count would likely have been admissible on joint retrial of the other counts to show defendant's intent under Evidence Rule 404(b). Fed.Rules Cr.Proc.Rule 8(b), 18 U.S.C.A.; Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

[4] POSTAL SERVICE k35(8)
306k35(8)
To find a violation of the mail fraud statute [18 U.S.C.A. s 1341], the charged mailings must be for purpose of executing the fraudulent scheme; mailings occurring after receipt of the goods obtained by fraud are within the statute if they were designed to lull the victims into a false sense of security, postpone their ultimate complaint to the authorities and make the apprehension of defendants less likely than if no mailings had taken place.

[5] POSTAL SERVICE k35(8)
306k35(8)
Evidence was sufficient to support convictions on three counts of mail fraud arising from overall scheme to defraud fire insurer notwithstanding defendants' claim that mailings to insurer alleged in indictment occurred after irrevocable

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receipt of related payment, and thus after each scheme to defraud came to fruition; mailings charged in the counts took place while overall scheme charged in indictment was still continuing; scheme was not completed until after mailing charged in last count, because that mailing, as were the others, was intended to "lull" insurer into a false sense of security. 18 U.S.C.A. s 1341.

[5] POSTAL SERVICE k49(11)
306k49(11)
Evidence was sufficient to support convictions on three counts of mail fraud arising from overall scheme to defraud fire insurer notwithstanding defendants' claim that mailings to insurer alleged in indictment occurred after irrevocable receipt of related payment, and thus after each scheme to defraud came to fruition; mailings charged in the counts took place while overall scheme charged in indictment was still continuing; scheme was not completed until after mailing charged in last count, because that mailing, as were the others, was intended to "lull" insurer into a false sense of security. 18 U.S.C.A. s 1341.

**726 *438 Syllabus [FN*]

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

James Lane and his son Dennis, respondents in No. 84-744, were indicted on counts for, inter alia, mail fraud in connection with insurance claims that were made and that insurers paid for fire damage to a restaurant and duplex that James had hired a professional arsonist to burn. The restaurant was operated by James in partnership with others. Count 1 charged James with mail fraud with regard to that fire. The duplex was owned by a different partnership, of which Dennis was one of the partners. Counts 2 through 4 charged both respondents with mail fraud related to the duplex fire. Count 5 charged both respondents with conspiracy to commit mail fraud in connection with a third arson scheme, and Count 6 charged Dennis with perjury before the grand jury. The Federal District Court denied respondents' pretrial motions for severance on the alleged ground that the charged offenses were misjoined in violation of Federal Rule of Criminal Procedure 8(b), which provides that two or more defendants may be charged in the same indictment if they are alleged to have participated "in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." The trial then proceeded jointly before a jury. When evidence relating to the restaurant fire was admitted, the court instructed the jury not to consider that evidence against Dennis, and repeated this instruction in the final charge and admonished the jury to consider each count and defendant separately. The jury returned convictions on all counts. The Court of Appeals reversed and remanded for new trials, holding that the joinder of Count 1 with the other five counts violated Rule 8(b) and that such misjoinder was prejudicial per se. The court, however, rejected respondents' contention that there was insufficient evidence to support convictions under Counts 2 through 4 because each charged mailing

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occurred after each related insurance payment had been received and thus after each scheme to defraud had reached fruition.

Held:

1. Misjoinder under Rule 8(b) is subject to harmless-error analysis and is not reversible error per se. An error involving misjoinder "affects *439 substantial rights" and requires retrial only if the misjoinder results in actual prejudice because it "had substantial and injurious effect or influence in determining the jury's verdict." Kotteakos v. United States, 328 U.S. 750, 776, 66 S.Ct. 1239, 1253, 90 L.Ed. 1557 (1946). It is only by such a holding that Rule 8(b) and Federal Rule of Criminal Procedure 52(a)--which provides that any error "which does not affect substantial rights shall be disregarded"--can be brought into substantial harmony. Here, in the face of overwhelming evidence of guilt, the claimed error was harmless. The District Court provided proper limiting jury instructions, and, moreover, the same evidence on Count 1 would likely have been admissible on joint retrial of the other counts to show James' intent under Federal Rule of Evidence 404(b). Any error therefore failed to have any "substantial influence" on the verdict. Pp. 729-733.

2. There was sufficient evidence to support the convictions on Counts 2 through 4. On the evidence and under proper instructions, the jury could properly find that the mailings charged in Counts 2 and 3 took place while the overall scheme charged in the indictment was still continuing and that the scheme was not completed until after the mailing charged in Count 4, because that mailing, as were the others, was intended to "lull" the insurer into a false sense of security. Pp. 733-734.

735 F.2d 799 (CA5 1984), reversed and remanded.

BURGER, C.J., delivered the opinion of the Court, in which WHITE, POWELL, REHNQUIST, and O'CONNOR, JJ., joined, and in Part III of which BRENNAN, MARSHALL, BLACKMUN, and STEVENS, JJ., joined. BRENNAN, J., filed an opinion concurring in part and dissenting in part, in which BLACKMUN, J., joined, post, p. ---. STEVENS, J., filed an opinion concurring in part and dissenting in part, in which MARSHALL, J., joined, post, p. ---.

**727 Bruce Neil Kuhlik, Washington, D.C., for the U.S.

Clifford W. Brown, Lubbock, Tex., for James C. Lane and Dennis R. Lane.

Chief Justice BURGER delivered the opinion of the Court.

We granted certiorari to resolve a conflict among the Circuits as to whether a misjoinder under Rule 8 of the Federal *440 Rules of Criminal Procedure is subject to the harmless-error rule, [FN1] and to determine whether there is sufficient evidence in this case to support convictions for mail fraud under 18 U.S.C. s 1341.

FN1. Six Circuits have adopted a per se approach holding that misjoinder is always reversible error. See United States v. Turkette, 632 F.2d 896, 906, and n. 35 (CA1 1980), rev'd on other grounds, 452 U.S. 576, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981); United States v. Graci, 504 F.2d 411, 414 (CA3 1974); United States v. Bova, 493 F.2d 33 (CA5 1974); United States v. Bledsoe, 674 F.2d 647, 654, 657-658 (CA8), cert. denied sub nom. Phillips v. United States, 459 U.S. 1040, 103 S.Ct. 456, 74 L.Ed.2d 608 (1982); United States v. Eagleston, 417 F.2d 11, 14

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(CA10 1969); United States v. Ellis, 709 F.2d 688, 690 (CA11 1983). Six have subjected misjoinder claims to harmless-error analysis. See United States v. Ajlouny, 629 F.2d 830, 843 (CA2 1980), cert. denied, 449 U.S. 1111, 101 S.Ct. 920, 66 L.Ed.2d 840 (1981); United States v. Seidel, 620 F.2d 1006 (CA4 1980); United States v. Hatcher, 680 F.2d 438, 442 (CA6 1982); United States v. Varelli, 407 F.2d 735, 747-748 (CA7 1969); United States v. Martin, 567 F.2d 849, 854 (CA9 1977); Baker v. United States, 131 U.S.App.D.C. 7, 21-23, 401 F.2d 958, 972-974 (1968). Most of these courts had previously taken the view that misjoinder is prejudicial per se.

I

A

James Lane and three partners opened the El Toro Restaurant in Amarillo, Texas, in the summer of 1978. The business never operated at a profit, however, and sales began to decline that fall. In November, Lane purchased fire insurance covering the building's contents and improvements and any related business losses. Simultaneously, he hired Sidney Heard, a professional arsonist, to burn the building in order to escape the lease and partnership. On February 27, 1979, Heard set a fire that caused smoke damage to the building's contents. Lane first settled with the insurer on the contents and improvements. He then submitted an income statement that falsely indicated the restaurant had operated at a profit. After the insurance adjuster mailed the statement to the insurer's headquarters, Lane settled his business interruption claim.

*441 In early 1980, Lane again hired Heard to set fire to a duplex that Lane was moving to a vacant lot in Amarillo. Lane obtained a fire insurance policy on the building, listing the owner as L & L Properties, a partnership between his son Dennis Lane and Andrew Lawson. An accomplice of Heard's burned the duplex on May 1, 1980.

Thereafter, on three occasions Dennis Lane signed proof-of-loss claims for repairs and submitted them to an insurance adjuster, who issued drafts in return totaling $12,000. [FN2] Each time, the adjuster later **728 mailed the proof-of-loss to the insurer's headquarters. The adjuster issued a final settlement draft for $12,250 on September 16, 1980. Two days later, he mailed a memorandum to headquarters explaining why repairs had exceeded previous estimates by some $10,000. He enclosed invoices supplied by Dennis Lane listing various materials and furniture purportedly purchased to repair and refurbish the duplex. In fact, these invoices had been fabricated by James Lane, Heard, and Heard's secretary.

FN2. Each proof-of-loss form stated that the "loss did not originate by any act, design or procurement on the part of your insured or this affiant" and that "no attempt to deceive [the] company as to the extent of the loss has been made."

The Lanes and Lawson met with Heard several weeks after the duplex fire to discuss a proposal to establish and burn a flower shop in Lubbock, Texas. Heard and Dennis Lane picked out a suitable building in July 1980, and an accomplice of Heard's, William Lankford, prepared fictitious invoices for

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merchandise and delivered some artificial flowers to the building later in August. In November, James Lane insured the contents for $50,000. Heard, however, was later arrested for an unrelated crime, and the planned arson never took place.

In March 1981, an Amarillo newspaper article connected Dennis Lane with a scheme to burn the flower shop with Heard; that same day, James Lane canceled the insurance policy. On May 12, 1981, Dennis Lane appeared before a *442 federal grand jury investigating Heard. He testified that Heard had nothing to do with the flower shop or with his own dealings with Lankford.

B

James Lane and Dennis Lane were indicted in multiple counts for mail fraud in violation of 18 U.S.C. s 1341, conspiracy in violation of 18 U.S.C. s 371, and perjury in violation of 18 U.S.C. s 1623. Count 1 charged James Lane with mail fraud with regard to the El Toro Restaurant fire. Counts 2 through 4 charged both Lanes with mail fraud related to the duplex fire, and Count 5 charged them with conspiracy to commit mail fraud in connection with the flower shop arson plan. In Count 6, Dennis Lane was charged with perjury before the grand jury.

Prior to trial in the District Court for the Northern District of Texas, the Lanes filed motions for severance contending that the charged offenses were misjoined in violation of Federal Rule of Criminal Procedure 8(b), but the motions were denied and the trial proceeded jointly before a jury. When evidence relating to the El Toro Restaurant fire was admitted, the trial court instructed the jury not to consider that evidence against Dennis Lane. App. 21. The trial judge repeated this instruction in the final charge, together with an instruction regarding the separate consideration to be given each defendant and each count. Ibid. The Lanes renewed their severance motions at the end of the Government's evidence and at the close of all evidence, but the motions were again denied. The jury returned convictions on all counts.

On appeal, the Lanes argued that misjoinder under Rule 8(b) had occurred. [FN3] The Court of Appeals for the Fifth Circuit *443 concluded that Counts 2 through 6 were properly joined, but agreed "that Count 1 should not have been joined with the others because it was not part of the same series of acts or transactions as Counts 2 through 6." 735 F.2d 799, 803-804 (1984). The court refused to consider the Government's argument that the error, if any, was harmless, stating only that "Rule 8(b) misjoinder is prejudicial per se in this circuit." Id., at 806 (citing United States v. Levine, 546 F.2d 658 (CA5 1977)). The court reversed **729 the Lanes' convictions and remanded for new trials.

FN3. Rule 8(b) provides:
"(b) Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count."

At the same time, the Court of Appeals rejected the Lanes' contention that there was insufficient evidence to support convictions for mail fraud under

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Counts 2 through 4 because each charged mailing occurred after each related payment had been received, and thus after each scheme had reached fruition. [FN4] The Court of Appeals distinguished our holding in United States v. Maze, 414 U.S. 395, 94 S.Ct. 645, 38 L.Ed.2d 603 (1974), and instead relied on United States v. Sampson, 371 U.S. 75, 83 S.Ct. 173, 9 L.Ed.2d 136 (1962), to hold that mailings occurring after receipt of an insurance payment may nevertheless be "in execution of fraud" as required by 18 U.S.C. s 1341 where they are "designed to lull the victims into a false sense of security and postpone investigation." 735 F.2d, at 807-808.

FN4. The Court of Appeals also rejected James Lane's challenge to the sufficiency of the evidence with regard to Count 1. That holding was not challenged in the Lanes' cross-petition.

The court found sufficient evidence for the properly instructed jury to "infer that the mailings were intended to and did have a lulling effect" because they helped persuade the insurer that "the claims were legitimate." Id., at 808. It emphasized that had the proof-of-loss forms not been mailed shortly after issuance of the insurance drafts, the insurer might have been alerted to the possibility of a fraud. Ibid. *444 Similarly, the false invoices submitted by Dennis Lane "gave the impression of a perfectly innocent claim." Ibid.

The Government's petition for rehearing was denied. 741 F.2d 1381 (1984). We granted certiorari, 469 U.S. 1206, 105 S.Ct. 1167, 84 L.Ed.2d 318 (1985). We reverse in part and affirm in part.

II

The Court of Appeals held that misjoinder "is inherently prejudicial." [FN5] 735 F.2d, at 804. The Circuits are divided on the question whether misjoinder requires automatic reversal, or whether the harmless-error rule governs. [FN6] Most Circuits that have adopted the per se approach have relied on McElroy v. United States, 164 U.S. 76, 17 S.Ct. 31, 41 L.Ed. 355 (1896), where this Court applied the joinder statute then in force and reversed convictions of jointly tried defendants after rejecting the Government's argument that there was no showing of prejudice. Id., at 81, 17 S.Ct., at 33.

FN5. Although the Government continues to believe that Count 1 was properly joined with Counts 2 through 6, it does not challenge that holding here.

FN6. See n. 1, supra.

McElroy, however, was decided long before the adoption of Federal Rules of Criminal Procedure 8 and 52, and prior to the enactment of the harmless-error statute, 28 U.S.C. s 2111, which provides that on appeal we are to ignore "errors or defects which do not affect the substantial rights of the parties." Under Rule 52(a), we are similarly instructed that any error "which does not affect substantial rights shall be disregarded." [FN7]

FN7. Justice STEVENS' partial dissent argues that McElroy conclusively

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determined misjoinder is prejudicial per se, and that Rule 8 was intended to represent a restatement of existing law, including the "rule of the McElroy case." Post, at 735. Rule 8, however, is simply a procedural rule with certain technical requirements, and Justice STEVENS' opinion refers to the Advisory Committee on Rules' citation of McElroy, see post, at 738, n. 3, making clear they were referring only to those technical requirements of prior law. Nowhere is there any indication Rule 8 was intended to enshrine any substantive "principle" of McElroy that misjoinder requires reversal, nor is there any citation of McElroy 's specific holding.

*445 The Court's holding in Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), made a significant change in the law of harmless error. There, Justice Black, speaking for the Court, emphasized that even "some constitutional errors [may] be deemed harmless, not requiring the automatic reversal of the **730 conviction." Id., at 22, 87 S.Ct., at 827. In rejecting the automatic reversal rule, the Court stated:

"We are urged by petitioners to hold that all federal constitutional errors, regardless of the facts and circumstances, must always be deemed harmful.... We decline to adopt any such rule." Id., at 21-22, 87 S.Ct., at 826-827 (emphasis added).

Justice Black went on to note that all 50 States follow the harmless-error approach, and

"the United States long ago through its Congress established ... the rule that judgments shall not be reversed for 'errors or defects which do not affect the substantial rights of the parties.' 28 U.S.C. s 2111. None of these rules on its face distinguishes between federal constitutional errors and errors of state law or federal statutes and rules." Id., at 22, 87 S.Ct., at 827 (footnote omitted).

Since Chapman, we have "consistently made clear that it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations." United States v. Hasting, 461 U.S. 499, 509, 103 S.Ct. 1974, 1980, 76 L.Ed.2d 96 (1983). In Hasting, we again emphasized that

"given the myriad safeguards provided to assure a fair trial, and taking into account the reality of the human fallibility of the participants, there can be no such thing as an error-free, perfect trial, and ... the Constitution does not guarantee such a trial." Id., at 508-509, 103 S.Ct., at 1980.

[1] *446 In this case, the argument for applying harmless-error analysis is even stronger because the specific joinder standards of Rule 8 are not themselves of constitutional magnitude. [FN8] Clearly, Chapman and Hasting dictate that the harmless-error rule governs here. [FN9]

FN8. Improper joinder does not, in itself, violate the Constitution. Rather, misjoinder would rise to the level of a constitutional violation only if it results in prejudice so great as to deny a defendant his Fifth Amendment right to a fair trial.

FN9. Justice STEVENS' partial dissent suggests Chapman is irrelevant to our analysis because that case involved a constitutional violation, whereas

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the error here is of a nonconstitutional nature. Post, at 738. It is difficult to see any logic in the argument that although the harmless-error rule may be applicable to constitutional violations, it should not be applied to violations of mere procedural rules. Justice STEVENS recognizes that the standard for harmless-error analysis adopted in Chapman concerning constitutional errors is considerably more onerous than the standard for nonconstitutional errors adopted in Kotteakos v. United States, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946). See post, at 731, n. 11. The heightened regard we have for constitutional protections surely warrants a conclusion that nonconstitutional provisions must be treated at least comparably, and in Hasting we emphasized even "most constitutional violations" must be ignored if they are harmless. 461 U.S., at 509, 103 S.Ct., at 1980.

The applicability of harmless error to misjoinder also follows from Kotteakos v. United States, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946), a case similar to the one at hand. There, some 32 defendants were charged with one conspiracy, when in fact there had been at least eight separate conspiracies. Nineteen defendants were jointly tried, and seven were convicted. The Court applied the harmless-error statute to an error resulting from a variance from the indictment, and held the error was not harmless in that case. Emphasizing the numerous conspiracies involving unrelated defendants, as well as seriously flawed jury instructions, the Kotteakos Court reversed the convictions in light of each of the 32 defendants' "right not to be tried en masse for the conglomeration of distinct and separate offenses" involved. Id., at 775, 66 S.Ct., at 1252.

*447 Although the Court's review in that case was from the perspective of a variance from the indictment, rather than misjoinder, the Court recognized that misjoinder was implicated, and suggested that the harmless-error rule could similarly apply in **731 that context. [FN10] Id., at 774-775, 66 S.Ct., at 1252.

FN10. The Court pointed out that "the problem is not merely one of variance ... but is also essentially one of proper joinder." 328 U.S., at 774, 66 S.Ct., at 1252. Even so, the Court indicated the harmless-error rule must apply, although perhaps with "restraint." Id., at 775, 66 S.Ct., at 1252.

A holding directly involving misjoinder again indicated the harmless-error rule should apply. In Schaffer v. United States, 362 U.S. 511, 80 S.Ct. 945, 4 L.Ed.2d 921 (1960), three different groups of defendants were charged with participating in separate criminal acts with one other group of three defendants. The indictment also charged all the defendants with one overall count of conspiracy, making joinder under Rule 8 proper. At the close of the Government's case, however, the District Court concluded there was insufficient evidence of conspiracy and dismissed that count. The court then denied a motion for severance after concluding that defendants failed to show prejudice from the joint trial; the Court of Appeals affirmed. This Court recognized that "the charge which originally justified joinder turn[ed] out to lack the support of sufficient evidence." Id., at 516, 80 S.Ct., at 948.

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Essentially, at that point in the trial, there was a clear error of misjoinder under Rule 8 standards. Nevertheless, the Schaffer Court held that once the Rule 8 requirements were met by the allegations in the indictment, severance thereafter is controlled entirely by Federal Rule of Criminal Procedure 14, which requires a showing of prejudice. Id., at 515-516, 80 S.Ct., at 947-948. The Court then affirmed the finding of no prejudice. Although the Court did not reach the harmless-error rule because Rule 8(b) had initially been satisfied, the Court's language surely assumed the rule was applicable.

A plain reading of these cases shows they dictate our holding. Applying the 1919 statute treated in Kotteakos, which *448 governed only "technical errors," 28 U.S.C. s 391 (1946 ed.), the Court emphasized the clear intent of Congress "was simple: To substitute judgment for automatic application of rules." 328 U.S., at 759-760, 66 S.Ct., at 1245. "In the final analysis judgment in each case must be influenced by conviction resulting from examination of the proceedings in their entirety, tempered but not governed in any rigid sense of stare decisis by what has been done in similar situations." Id., at 762, 66 S.Ct., at 1246. The Court flatly rejected per se rules regarding particular errors because "any attempt to create a generalized presumption to apply in all cases would be contrary not only to the spirit of [the statute] but also to the expressed intent of its legislative sponsors." Id., at 765, 66 S.Ct., at 1248.

Schaffer discussed the current harmless-error statute, which was enacted in 1949 after Kotteakos and deleted the qualifying word "technical" regarding errors governed by the rule. See 28 U.S.C. s 2111. The Court again rejected any per se rule for joinder errors requiring reversal, refusing to "fashion a hard-and-fast formula that ... [the] joinder [wa]s error as a matter of law." 362 U.S., at 516, 80 S.Ct., at 948. Citing Kotteakos, the Court pointed out that there "[t]he dissent agreed that the test of injury resulting from joinder 'depends on the special circumstances of each case.' " 362 U.S., at 517, 80 S.Ct., at 948 (quoting 328 U.S., at 777, 66 S.Ct., at 1254 (Douglas, J., dissenting)). [FN11]

FN11. Contrary to these clear holdings, Justice STEVENS' partial dissent advocates a rule-by-rule review establishing bright-line per se rules whether to conduct harmless-error analysis. Post, at 733-739. But on its face, Rule 52(a) admits of no broad exceptions to its applicability. Any assumption that once a "substantial right" is implicated it is inherently "affected" by any error begs the question raised by Rule 52(a). Assuming there is a "substantial right," the inquiry remains whether the error "affects substantial rights" requiring reversal of a conviction. That kind of inquiry requires a review of the entire record. See United States v. Hasting, 461 U.S., at 509, 103 S.Ct., at 1980. It is simply too late in the day to argue that Congress intended to incorporate any per se rule of McElroy for misjoinder following Kotteakos, the subsequent enactment of an arguably broader statute, and this Court's prejudice inquiry in Schaffer.

*449 **732 In common with other courts, the Court has long recognized that joint trials "conserve state funds, diminish inconvenience to witnesses and public authorities, and avoid delays in bringing those accused of crime to

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trial." Bruton v. United States, 391 U.S. 123, 134, 88 S.Ct. 1620, 1627, 20 L.Ed.2d 476 (1968). Rule 8 accommodates these interests while protecting against prejudicial joinder. But we do not read Rule 8 to mean that prejudice results whenever its requirements have not been satisfied.

Under Rule 52(a), the harmless-error rule focuses on whether the error "affect [ed] substantial rights." In Kotteakos the Court construed a harmless-error statute with similar language, and observed:

"The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand." 328 U.S., at 765, 66 S.Ct., at 1248.

[2] Invoking the Kotteakos test, we hold that an error involving misjoinder "affects substantial rights" and requires reversal only if the misjoinder results in actual prejudice because it "had substantial and injurious effect or influence in determining the jury's verdict." Id., at 776, 66 S.Ct., at 1253. Only by so holding can we bring Rules 8 and 52(a) "into substantial harmony, not into square conflict." [FN12] Id., at 775, 66 S.Ct., at 1253.

FN12. Respondents argue that application of the harmless-error rule to Rule 8(b) misjoinder will eviscerate Rule 14, which provides the trial court with discretion to grant a severance even if the joinder is proper under Rule 8 when it believes the defendants or the Government may be prejudiced by a joinder. We see no conflict with our holding and the applicability of Rule 14. Rule 14's concern is to provide the trial court with some flexibility when a joint trial may appear to risk prejudice to a party; review of that decision is for an abuse of discretion. Rule 8(b), however, requires the granting of a motion for severance unless its standards are met, even in the absence of prejudice; review on appeal is for an error of law. Applying the harmless-error rule to Rule 8(b) misjoinder simply goes to the additional question whether the error requires setting aside the convictions. We need not decide whether the degree of prejudice necessary to support a Rule 14 motion for severance is identical to that necessary to require reversal for a Rule 8(b) error. Justice STEVENS' partial dissent fails to recognize that the Rule 14 prejudice component involves a different inquiry from the Rule 8 technical requirements. Indeed, the express language of Rule 14, as well as the Advisory Committee Note, shows that Congress tolerates some Rule 8 joinders even when there is prejudice. The first hurdle in obtaining a severance under Rule 14 is a showing of prejudice, and if shown, it remains in the district court's discretion whether to grant the motion.

*450 Of course, "we are not required to review records to evaluate a harmless-error claim, and do so sparingly, [but] we plainly have the authority to do so." United States v. Hasting, 461 U.S., at 510, 103 S.Ct., at 1981 (footnote omitted).

[3] In the face of overwhelming evidence of guilt shown here, we are satisfied that the claimed error was harmless. When evidence on misjoined Count 1 was introduced, the District Court provided a proper limiting instruction, and in the final charge repeated that instruction and admonished

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the jury to consider each count and defendant separately. Moreover, the same evidence on Count 1 would likely have been admissible on joint retrial of Counts 2 through 6 to show James Lane's intent under Federal Rule of Evidence 404(b). Any error therefore failed to have any "substantial influence" on the verdict. Kotteakos, supra, 328 U.S., at 765, 66 S.Ct., at 1248. [FN13]

FN13. We can agree with Justice STEVENS' partial dissent "that the harmless-error inquiry is entirely distinct from a sufficiency-of-the-evidence inquiry." Post, at 740; our reliance on the Kotteakos test makes that clear. See supra, at 731. But that does not in any sense mean that overwhelming evidence of guilt is irrelevant; the threshold of overwhelming evidence is far higher than mere sufficiency to uphold conviction.

Nor may proper limiting instructions or jury charges never be "an adequate response" to a prejudice inquiry. Post, at 747. Contrary to the suggestion of the dissent, Blumenthal v. United States, 332 U.S. 539, 68 S.Ct. 248, 92 L.Ed. 154 (1947), provides direct support for the Court's approach in this case. There the Court recognized that, in the context of mass trials (as in Kotteakos), limiting instructions on evidence admissible only as to one defendant might in some circumstances be inadequate to prevent prejudice. 332 U.S., at 559-560, 68 S.Ct., at 257-258. But here, as in Blumenthal, we are not faced with any trial en masse of numerous defendants and unrelated crimes.

When there are few defendants and the trial court is aware of the potential for prejudice, "the risk of transference of guilt over the border of admissibility [may be] reduced to the minimum" by carefully crafted limiting instructions with a strict charge to consider the guilt or innocence of each defendant independently. Id., at 560, 68 S.Ct., at 257. We cannot necessarily "assume that the jury misunderstood or disobeyed" such instructions. Id., at 553, 68 S.Ct., at 254. Indeed, this Court's conclusion in Schaffer that defendants failed to show prejudice was based directly on the fact that "the judge was acutely aware of the possibility of prejudice and was strict in his charge--not only as to the testimony the jury was not to consider, but also as to that evidence which was available in the consideration of the guilt of each [defendant] separately under the respective substantive counts." 362 U.S., at 516, 80 S.Ct., at 948.

The same caution was exercised by the trial judge here, and no different result should be required. The Government initially observes that because of the similarity of each arson scheme, "only the court of appeals' narrow reading of Rule 8" led to its finding of misjoinder. At trial, Heard and Lankford--two principal actors--testified against both Lanes, who relied essentially on denials or character defenses. Moreover, the evidence as to Count 1 was distinct and easily segregated from evidence relating to Counts 2 through 6. The misjoinder error, if any, in these circumstances was harmless.

*451 **733 III

[4] Respondents challenge the sufficiency of the evidence to sustain their convictions. To find a violation of the mail fraud statute, 18 U.S.C. s

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1341, [FN14] the charged "mailings" must be "for the purpose of executing the scheme." Kann v. United States, 323 U.S. 88, 94, 65 S.Ct. 148, 151, 89 L.Ed. 88 (1944). Mailings occurring after receipt of the goods obtained by fraud are within the statute if they "were designed to lull the victims into a false sense of security, postpone their ultimate complaint to the *452 authorities, and therefore make the apprehension of the defendants less likely than if no mailings had taken place." United States v. Maze, 414 U.S., at 403, 94 S.Ct., at 650. See United States v. Sampson, 371 U.S. 75, 83 S.Ct. 173, 9 L.Ed.2d 136 (1962).

FN14. The statute provides in relevant part:
"Whoever, having devised or intending to devise any scheme or artifice to defraud, ... for the purpose of executing such scheme or artifice ..., places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, ... or knowingly causes to be delivered by mail ... any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

[5] Only Counts 2 through 4, involving the duplex fire, are at issue. The Lanes argue that each mailing occurred after irrevocable receipt of the related payment, and thus after each scheme to defraud came to fruition. [FN15] This argument misconstrues the nature of the indictment, which charged an overall scheme to defraud based on the events surrounding the duplex fire. Counts 2 through 4 merely relate to separate mailings concerning partial payments that were a part of the whole scheme. The jury could properly find the scheme, at the earliest, was not completed until receipt of the last payment on September 16, 1980, which finally settled their claim. Hence, the mailings charged in Counts 2 and 3 clearly took place while the scheme was still continuing.

FN15. The Government contends that undisputed testimony shows the insurance drafts issued to the Lanes, unlike normal business checks, were not payable on demand but only upon authorization from the insurer's home office when they arrived at the insurer's bank for collection. If the drafts deposited by the Lanes had been dishonored by the insurer's banks, the amounts would have been charged against their account. The Lanes, therefore, may not have irrevocably received the proceeds of the fraud prior to the final mailing. See Brief for United States 30-31. The Court of Appeals, however, did not rely on this argument, and we decline to resolve this factual issue here.

Moreover, the jury could reasonably have found that the scheme was not completed **734 until the final mailing on September 18, 1980, charged in Count 4, because that mailing was intended (as were the two earlier ones) to "lull" the insurer into a false sense of security. [FN16] The jury was properly instructed *453 that each charged mailing must have been made both "for the purpose of executing the scheme to defraud," App. 22, and prior to the scheme's completion, id., at 23, and further that mailings "which facilitate concealment of the scheme" are covered by the statute. [FN17] Id., at 24.

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FN16. Our conclusion that the delayed mailings at issue in this action were part of an ongoing scheme to defraud is in accord with our holding in United States v. Sampson, 371 U.S. 75, 83 S.Ct. 173, 9 L.Ed.2d 136 (1962). In that case, defendants purported to help businessmen obtain loans or sell their businesses in exchange for an "advance fee." Id., at 77, 83 S.Ct., at 174. Following the deposit of checks for these fees, the defendants' plan called for the mailing of a form letter assuring the victims of the fraud that they were receiving the services they paid for. Id., at 78, 83 S.Ct., at 174. The Court upheld defendants' convictions for mail fraud because of the "lulling effect" of the delayed mailings.

We see no conflict with our holding in United States v. Maze, 414 U.S. 395, 94 S.Ct. 645, 38 L.Ed.2d 603 (1974). There, use of a stolen credit card led to the mailing of charge statements to a bank. We held that the fraud was completed upon the defrauder's receipt of the goods, distinguishing Sampson because the mailing of the charge slips, rather than acting to "lull" the bank into acquiescence, instead "increased the probability that [the defrauder] would be detected and apprehended." 414 U.S., at 403, 94 S.Ct., at 650. Had the Lanes failed to submit timely proof-of-loss forms here, the insurer might very well have discovered the fraud.

The Lanes contend that the Fifth Circuit's decision in this case also conflicts with United States v. Ledesma, 632 F.2d 670 (CA7), cert. denied, 449 U.S. 998, 101 S.Ct. 539, 66 L.Ed.2d 296 (1980), which reversed a conviction involving the mailing of a fraudulent proof-of-loss form after receipt of insurance proceeds. In that case, however, the Seventh Circuit never discussed Sampson or the possibility that the delayed mailing had any "lulling" effect.

FN17. The Lanes argue that the Government must show that the charged mailings were specifically intended to lull, rather than showing simply a general intention on their part to defraud, in order to come within Sampson 's holding. We need not determine whether any such specific intent must be shown, as we agree with the Court of Appeals that there was sufficient evidence for the jury to infer specific intent to lull here under these instructions, which the Lanes did not challenge on appeal or in their cross-petition.

The judgment of the Court of Appeals, ordering a new trial based on misjoinder of Count 1 with Counts 2 through 6, is reversed in part and affirmed in part, and the action is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice BRENNAN, joined by Justice BLACKMUN, concurring in part and dissenting in part.

I agree that the evidence was sufficient to sustain the mail fraud convictions and therefore join Part III of the Court's *454 opinion. I also agree that the Court of Appeals erred in holding that misjoinder under Rule 8 of the Federal Rules of Criminal Procedure is prejudicial per se. I write separately,

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however, because my reasons for reaching this conclusion differ from the Court's, and because I agree with Justice STEVENS that the harmless-error inquiry should be made in the first instance by the Court of Appeals.

I

The Act of February 26, 1919 (1919 Act), 40 Stat. 1181, amended s 269 of the Judicial Code. It provided in part:

"On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties." 28 U.S.C. s 391 (1925-1926 ed.).

In 1949, this provision was reenacted in its current form as 28 U.S.C. s 2111, and now instructs appellate courts to "give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties." The 1919 Act was also incorporated **735 in the Federal Rules of Criminal Procedure, and Rule 52(a) provides that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." See also, Fed.Rule Civ.Proc. 61 ("The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties"). Although s 2111 and Rule 52(a) refer to "errors or defects" without the qualifying word "technical," this change did not alter the substantive legal test. See H.R.Rep. No. 352, 81st Cong., 1st Sess., 18 (1949), U.S.Code Cong.Serv. 1949, 1248 (s 2111 "[i]ncorporates" former harmless-error statute); Advisory Committee's *455 Notes on Fed.Rule Crim.Proc. 52(a), 18 U.S.C.App., p. 657 (Rule is a "restatement of existing law").

The 1919 Act, s 2111, and Rule 52(a) all provide that an error is to be disregarded unless it "affects the substantial rights of the parties." This litigation thus presents a straightforward question of statutory construction: what does the phrase "affects the substantial rights of the parties" mean? Respondents in No. 84-744 contend that the term "substantial rights" refers to a particular class of rights which are essential to a fair trial and argue that errors which "affect" these rights cannot be disregarded on appeal. According to respondents, the 1919 Act, as reenacted in s 2111 and Rule 52(a), incorporated our holding in McElroy v. United States, 164 U.S. 76, 17 S.Ct. 31, 41 L.Ed. 355 (1896), that joinder is one of these "substantial rights," so that misjoinder is per se reversible.

For the reasons which follow, I conclude that the question whether a particular error "affects the substantial rights of the parties" does not entail a process of classification, whereby some rights are deemed "substantial" and errors affecting these rights are automatically reversible. Rather, an error "affects substantial rights" only if it casts doubt on the outcome of the proceeding. In other words, subject to the exceptions discussed in Part II (most importantly the exception for constitutional errors), I read s 2111 and Rule 52(a) to require harmless-error inquiry for all procedural errors. As none of these exceptions is applicable to misjoinder in violation of Rule 8, I concur in the Court's result on this issue.

Reference to whether error "affected the substantial rights of the parties" was not invented by Congress in 1919. The phrase was commonly used by courts

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throughout the 19th century to express the conclusion that particular claims of error did or did not warrant reversal. However, as used by these courts, error which "affected the substantial rights of the parties" was generally understood to refer, not to errors respecting a particular class of rights, but rather to any error which affected the fairness of the trial as a whole by calling *456 into question the reliability of the result. See, e.g., Connors v. United States, 158 U.S. 408, 411, 414, 15 S.Ct. 951, 952, 953, 39 L.Ed. 1033 (1895); Maish v. Arizona, 164 U.S. 599, 602, 17 S.Ct. 193, 195, 41 L.Ed. 567 (1896); Williams v. United States, 168 U.S. 382, 390-398, 18 S.Ct. 92, 95-98, 42 L.Ed. 509 (1897); American Surety Co. v. Pauly, 170 U.S. 133, 159, 18 S.Ct. 552, 562, 42 L.Ed. 977 (1898); McCabe & Steen Constr. Co. v. Wilson, 209 U.S. 275, 279, 28 S.Ct. 558, 560, 52 L.Ed. 788 (1908); Holmgren v. United States, 217 U.S. 509, 523-524, 30 S.Ct. 588, 591-592, 54 L.Ed. 861 (1910). In other words, the statement that an error did not "affect the substantial rights of the parties" was a way of stating the conclusion that the error was not prejudicial.

A careful reading of McElroy demonstrates that it is consistent with this understanding of the phrase "affects the substantial rights of the parties." In McElroy, five defendants were charged in two indictments with separate assaults and in a third indictment with arson. Three of the defendants were also charged in yet a fourth indictment with another assault. After explaining these charges, the Court noted that "it is the settled rule ... to confine the indictment to one distinct offence **736 or restrict the evidence to one transaction" because "[i]n cases of felony, the multiplication of distinct charges has been considered so objectionable as tending to confound the accused in his defence, or to prejudice him as to his challenges...." 164 U.S., at 80, 17 S.Ct., at 32. The Court then stated: "Necessarily where the accused is deprived of a substantial right by the action of the trial court, such action, having been properly objected to, is revisable on error." Ibid. In context, this merely restates the common-law understanding that an error is reversible if it prejudices the defendant. The Court did not state that joinder is a "substantial right" and, for this reason, any error respecting joinder is reversible. Rather, the Court held that "[i]t cannot be said in [a case of improper joinder] that all the defendants may not have been embarrassed and prejudiced in their defence, or that the attention of the jury may not have been distracted to their injury in passing upon distinct and independent transactions." Id., at 81, 17 S.Ct., at 33. In other words, the *457 Court concluded that misjoinder is the kind of error which must be presumed to have prejudiced the accused and, for that reason, misjoinder affects his "substantial rights." As discussed in Part II, the irrebuttable presumption that misjoinder is prejudicial is inconsistent with the Court's subsequent harmless-error jurisprudence and can be overruled. For the moment, however, it is important only to note that nothing in McElroy suggests that the requirement that error have "affect[ed] the substantial rights of the parties" refers to anything other than that the error have been prejudicial.

Absent some contrary indication, then, it would seem logical to conclude that when Congress used the phrase "affect[s] the substantial rights of the parties" in the 1919 Act, Congress meant to require an inquiry into whether an error cast doubt on the verdict, not to create a class of rights as to which error

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was per se reversible. The legislative history of the 1919 Act confirms that this was in fact what Congress intended.

The primary impetus for the enactment of the 1919 Act was the practice in some jurisdictions of reversing convictions on appeal for any procedural error at trial, without regard to whether the error was prejudicial. See Kotteakos v. United States, 328 U.S. 750, 758-759, 66 S.Ct. 1239, 1244-1245, 90 L.Ed. 1557 (1946). There was also concern over the inconsistent application of harmless-error analysis by other courts, this Court in particular. See H.R.Rep. No. 913, 65th Cong., 3d Sess., 2 (1919) (quoting H.R.Rep. No. 611, 62d Cong., 2d Sess., 2 (1912)). The large number of reversals which resulted from failure to scrutinize errors for their prejudicial effect was criticized by leaders of the legal profession, including Taft, Pound, Wigmore, and Hadley. See Kotteakos, supra, at 758-759, 66 S.Ct., at 1244-1245. After prolonged consideration, Congress responded to this criticism by passing the 1919 Act. The House Report accompanying the Act explained:

" 'It is the purpose of the ... bill to enact, in so far as the appellate courts are concerned, that in the consideration *458 in an appellate court of a writ of error or an appeal judgment shall be rendered upon the merits without permitting reversals for technical defects in the procedure below and without presuming that any error which may appear had been of necessity prejudicial to the complaining party.' " H.R.Rep. No. 913, supra, at 2 (quoting H.R.Rep. No. 611, supra, at 2) (emphasis added).

The theme that reversal be limited to prejudicial errors is found throughout the legislative history. For example, the Report accompanying the first version of the bill to pass the House of Representatives explained the meaning of the requirement that error be disregarded unless it "affect[s] the substantial rights of the parties" by quoting from an article by President Taft: " 'No judgment of the court below should be reversed except for an error which the court, after hearing [sic] the entire evidence, can affirmatively say would have led to a different verdict.' " **737 H.R.Rep. No. 1949, 61st Cong., 3d Sess., 1 (1911) (quoting Taft, The Administration of Criminal Law, 15 Yale L.J. 1, 16 (1905)). The Report criticized the practice of reversing judgments for errors which "did not in the least affect the substantial rights of the parties, the real merits of the case having been properly adjudicated upon the first trial." H.R.Rep. No. 1949, supra, at 2 (emphasis added). See also, ibid. (quoting Justice O'Gorman of the New York Supreme Court to the effect that "[o]ne of the gravest faults with our present mode of trial is the ease and frequency with which judgments are reversed on technicalities which do not affect the merits of the case, and which at no stage of the case have affected the merits"); H.R.Rep. No. 1218, 63d Cong., 3d Sess. (1914); H.R.Rep. No. 264, 64th Cong., 1st Sess. (1916).

Our decision in Kotteakos v. United States, supra, forecloses any remaining questions as to the interpretation of the phrase "affects substantial rights of the parties." In Kotteakos, we expressly rejected the argument that the 1919 Act required a determination of "what are only technical, *459 what substantial rights; and what really affects the latter hurtfully." 328 U.S., at 761, 66 S.Ct., at 1246. We held instead that the Act's command to disregard errors unless they "affect the substantial rights of the parties" was a command not to overturn a conviction unless, after examining the record as a

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whole, the court concludes that an error may have had "substantial influence" on the outcome of the proceeding. Id., at 765, 66 S.Ct., at 1248. Justice Rutledge's explanation, which includes a description of the proper analysis to apply in evaluating the effect of procedural errors, is well worth repeating:

"It comes down on its face to a very plain admonition: 'Do not be technical, where technicality does not really hurt the party whose rights in the trial and in its outcome the technicality affects.' ...

"Easier was the command to make than it has been always to observe. This, in part because it is general; but in part also because the discrimination it requires is one of judgment transcending confinement by formula or precise rule. That faculty cannot ever be wholly imprisoned in words, much less upon such a criterion as what are only technical, what substantial rights; and what really affects the latter hurtfully. Judgment, the play of impression and conviction along with intelligence, varies with judges and also with circumstance. What may be technical for one is substantial for another; what minor and unimportant in one setting crucial in another.

* * *

"In the final analysis judgment in each case must be influenced by conviction resulting from examination of the proceedings in their entirety, tempered but not governed in any rigid sense of stare decisis by what has been done in similar situations. Necessarily the character of the proceeding, what is at stake upon its outcome, and the relation of the error asserted to casting the balance *460 for decision on the case as a whole, are material factors in judgment.

* * *

"If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress. But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand." Id., at 760-765, 66 S.Ct., **738 at 1245-1248 (citations and footnotes omitted). [FN1]

FN1. It scarcely needs repeating that, since correction may come from the legislature, considerations of stare decisis are at their strongest when this Court confronts its previous constructions of a statute. Cf. Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406-407, 52 S.Ct. 443, 447, 76 L.Ed. 815 (1932) (Brandeis, J., dissenting).

II

This interpretation of s 2111 and Rule 52(a) as requiring examination of the prejudicial effect of all procedural errors is subject to several exceptions. First, and most importantly, constitutional errors are governed by the Due Process Clauses of the Fifth and Fourteenth Amendments rather than by s 2111

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and Rule 52(a). See Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); United States v. Hasting, 461 U.S. 499, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1983). Thus, the test for harmless constitutional error is stricter than its statutory counterpart. Compare, Chapman, supra, at 24, 87 S.Ct., at 828 (prosecution must establish that the error *461 was "harmless beyond a reasonable doubt"), with Kotteakos, 328 U.S., at 765, 66 S.Ct., at 1248 (error is harmless unless it had "substantial influence" on the outcome or leaves one in "grave doubt" as to whether it had such effect). [FN2] In addition, Congress may, of course, expressly provide that a particular right is excluded from the operation of the harmless-error rule. Neither of these exceptions applies to misjoinder in violation of Rule 8, however. Misjoinder does not ordinarily rise to the level of a constitutional violation, [FN3] and nothing in the language or *462 history of either the statutory harmless-error provisions or Rule 8 indicates that Congress chose to except misjoinder from harmless-error scrutiny. [FN4]

FN2. Until Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), harmless-error analysis was considered inapplicable to errors respecting constitutional rights. See id., at 42-44, 87 S.Ct., at 836-837 (Stewart, J., concurring in result) ("[I]n a long line of cases, involving a variety of constitutional claims in both state and federal prosecutions, this Court has steadfastly rejected any notion that constitutional violations might be disregarded on the ground that they were 'harmless' " (citing and discussing examples)); see also, Kotteakos, 328 U.S., at 764-765, and n. 19, 66 S.Ct., at 1247-1248, and n. 19. In Chapman, we altered this practice and held that "there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction." 386 U.S., at 22, 87 S.Ct., at 827. Although we have since held that the Chapman harmless-error test applies to "most constitutional violations," United States v. Hasting, 461 U.S., at 509, 103 S.Ct., at 1980, harmless-error analysis remains inapplicable to many constitutional rights. E.g., Vasquez v. Hillery, 474 U.S. 254, 106 S.Ct. 617, 88 L.Ed.2d 598 (1985) (discrimination in grand jury selection); Connecticut v. Johnson, 460 U.S. 73, 84-88, 103 S.Ct. 969, 976-978, 74 L.Ed.2d 823 (1983) (opinion of BLACKMUN, J.) (Sandstrom violation); Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) (right to counsel); Tumey v. Ohio, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927) (right to impartial tribunal).
Because the source and nature of the harmless-error test for constitutional errors does not derive from s 2111 or Rule 52(a), our cases concerning constitutional errors do not affect, and are not affected by, our decision today, which applies only to the statutory harmless-error doctrine.

FN3. But cf. Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). It is also possible that a particular case of misjoinder may be so egregious as to constitute a deprivation of due process. If this were the case, the error would be governed by Chapman

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rather than by s 2111 or Rule 52(a). See n. 4, infra. Of course, a joinder of claims or parties that was so improper as to violate the Due Process Clause would undoubtedly also be prejudicial.

FN4. As explained above, the 1919 Act was not intended to codify a rule of per se reversal for particular rights, much less for misjoinder. Similarly, as the majority points out, nothing in the legislative history of Rule 8 indicates an intent to do anything more than set forth the technical requirements for and limitations on the joinder of claims or defendants. Ante, at 729, n. 7.

Justice STEVENS' partial dissent recognizes two further exceptions: (1) "when an independent value besides reliability of the outcome suggests that [harmless-error] analysis is inappropriate," and (2) "when the harmlessness of the error cannot be measured with precision." Post, at 745. **739 Although the cases he cites to support these additional exceptions involved constitutional errors, Justice STEVENS may well be correct in asserting that they also apply to errors governed by the statutory harmless-error provisions. I need not decide that question to conclude, as does Justice STEVENS, that--like the first two exceptions--neither applies to misjoinder.

The applicability of the exception to protect values other than reliability is easily disposed of. Rules respecting joinder are based on recognition that the multiplication of charges or defendants may confuse the jury and lead to inferences of habitual criminality or guilt by association. McElroy, 164 U.S., at 80, 17 S.Ct., at 32. Apart from this, however, joinder rules do not serve "an independent value besides reliability of the outcome" justifying an exception to the harmless-error principle. Surely it cannot be maintained that misjoinder affects a right so fundamental to a fair trial that it " 'infect[s] the validity of the underlying judgment itself, or the integrity of the process by which that judgment was obtained.' " Post, at 745, n. 15 (quoting Rose v. Lundy, 455 U.S. 509, 544, 102 S.Ct. 1198, 1216, 71 L.Ed.2d 379 (1982) (STEVENS, J., dissenting)).

*463 The exception for errors as to which the prejudicial effect cannot be measured with precision requires closer consideration. As previously noted, McElroy held that misjoinder is per se reversible because a court can never safely conclude that it was not prejudicial. 164 U.S., at 81, 17 S.Ct., at 33. However, trial courts routinely inquire into possible prejudice from joint trials when considering motions for severance under Federal Rule of Criminal Procedure 14, and appellate courts just as routinely perform that inquiry in reviewing Rule 14 rulings. [FN5] To be sure, problems of jury confusion arising from misjoinder may be substantial. It is also quite easy for the jury to be prejudiced by evidence of other crimes or by inferences from an accused's association with other defendants. Thus, it may be that, once the proper test for harmless error is applied, most misjoinders will in fact result in reversal. However, the prejudice that may result from misjoinder is not so difficult to ascertain that it must always be presumed to be present. Whatever force the holding in McElroy may once have had, its precedential force has been greatly eroded by the 1919 Act, whose legislative history disapproves of such presumptions, supra, at ----, and by subsequent decisions such as

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Kotteakos. [FN6] Today, adherence to the view that misjoinder is per se prejudicial would stand out as a stark and unjustified anomaly, leading to just the sort of unnecessary reversals that inspired enactment of the *464 1919 Act. To the extent that McElroy states a contrary holding, I would overrule it.

FN5. The Court correctly notes in its opinion, see ante, at 732, n. 12, that while the nature of the inquiry under Rules 8 and 14 is similar, the purposes and scope of these Rules are different.

FN6. Kotteakos rejected the argument that variance between the indictment and proof at trial should be per se reversible because such errors "naturally" result in prejudice. Relying on the legislative history of the harmless-error rule, the Court concluded that such presumptions should not lightly be inferred. "The only permissible presumption," the Court said, "would seem to be particular, arising from the nature of the error and 'its natural effect' for or against prejudice in the particular setting." 328 U.S., at 765-766, 66 S.Ct., at 1248.

III

The Court goes on to resolve the harmless-error question. I respectfully dissent. To begin with, I agree with Justice STEVENS that "[u]ndertaking a harmless-error analysis is perhaps the least useful function that this Court can perform." Post, at 746. See United States v. Hasting, 461 U.S., at 520, n. 2, 103 S.Ct., at 1986, n. 2 (opinion of BRENNAN, J.); see also, Connecticut v. Johnson, 460 U.S. 73, 102, 103 S.Ct. 969, 985, 74 L.Ed.2d 823 (1983) (POWELL, J., dissenting). Having concluded that a harmless-error inquiry is required, I, like Justice STEVENS, think we should remand to the Court of Appeals, **740 which is in a better position than we are to study the complete trial record with care.

Moreover, it is apparent that the Court's perfunctory effort to evaluate the effect of this error is inadequate. The Court tells us simply that the error is harmless "[i]n the face of overwhelming evidence of guilt shown here...." Ante, at 739. But where is the "examination of the proceedings in their entirety" called for by Kotteakos? See 328 U.S., at 762, 66 S.Ct., at 1246. Kotteakos instructs the reviewing court to "ponde[r] all that happened without stripping the erroneous action from the whole," and expressly states that "[t]he inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error." Id., at 765, 66 S.Ct., at 1248. Obviously, the existence of overwhelming evidence is relevant to determining the "effect the error had or reasonably may be taken to have had upon the jury's decision." Id., at 764, 66 S.Ct., at 1247. But I would have thought it equally obvious that, at the very least, consideration of the magnitude of the error in the context of the trial would also be called for; this the Court has not done. The Court also tells us that the error was harmless because the same evidence "would likely have been admissible" at a joint retrial of the defendants without the improper count. Ante, at 732-733. However, as I thought *465 iKotteakos made clear, that is irrelevant. The crucial thing is the effect the error had in the proceedings

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which actually took place, not whether the same thing could have been done in hypothetical proceedings. See 328 U.S., at 762-765, 66 S.Ct., at 1246-1248. Harmless-error analysis is not an excuse for overlooking error because the reviewing court is itself convinced of the defendant's guilt. The determination of guilt is for the jury to make, and the reviewing court is concerned solely with whether the error may have had a "substantial effect" upon that body.

Justice Traynor of the California Supreme Court wrote that "the evaluation of an error as harmless or prejudicial is one of the most significant tasks of an appellate court, as well as one of the most complex." R. Traynor, The Riddle of Harmless Error 80 (1970). It is a task this Court is manifestly ill-equipped to undertake. See United States v. Hasting, supra, at 516-518, 103 S.Ct., at 1984-1985 (STEVENS, J., concurring in judgment). I would remand the cases for the Court of Appeals to undertake the task.

Justice STEVENS, with whom Justice MARSHALL joins, concurring in part and dissenting in part.

Rule 52(a) of the Federal Rules of Criminal Procedure provides:

"Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." (Emphasis added.)

The question presented in No. 84-744 is whether a misjoinder of defendants prohibited by Rule 8(b) is an error which affects substantial rights. [FN1] In my opinion, the Court *466 has answered that question incorrectly; moreover, its opinion unfortunately confuses rather than clarifies the law of "harmless error."

FN1. Rule 8(b) of the Federal Rules of Criminal Procedure provides: "Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count."

I

Our central task is, of course, to construe Rule 8(b) of the Federal Rules of Criminal Procedure. Thus, we must consider the history, purpose, and language of that Rule.

Prior to the adoption of the Federal Rules of Criminal Procedure, this Court decided that the misjoinder of defendants, as well as the misjoinder of offenses, was an error that deprived the accused of "a substantial right." McElroy v. United **741 States, 164 U.S. 76, 80, 17 S.Ct. 31, 32, 41 L.Ed. 355 (1896). McElroy concerned both kinds of misjoinder. Five defendants were charged with offenses committed on April 16, 1894, and May 1, 1894, but only three of them were charged with a separate offense committed on April 16, 1894. The two defendants who were not charged with the separate offense made essentially the same objection to their joint trial as did Dennis Lane in this case. As to those two defendants, the Government confessed error and the Court unanimously reversed and remanded for a new trial. [FN2] As to the other three defendants, *467 the majority of the Court held that a misjoinder of

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offenses had occurred, and required a new trial without any special showing of prejudice. After reviewing the misjoinder of defendants and of offenses, the Court concluded:

> FN2. "It is clear that the statute does not authorize the consolidation of indictments in such a way that some of the defendants may be tried at the same time with other defendants charged with a crime different from that for which all are tried.
>
> * * *
>
> "It is admitted by the government that the judgments against Stufflebeam and Charles Hook must be reversed ...." 164 U.S., at 80, 17 S.Ct., at 32.
>
> In confessing error, the Government seemed to concede that reversal was appropriate without any specific showing of prejudice. See Brief for United States in McElroy v. United States, O.T.1896, No. 402, p. 6 ("It cannot be certainly affirmed that Stufflebeam and Charles Hook were not embarrassed and prejudiced, in their defense to the indictments under which they stood charged, by the fact that they were compelled to make their defense in a proceeding in which McElroy, Bland, and Hook were prosecuted for arson committed April 16, 1894, which was on the same day of the assaults and fifteen days before the arson for which they were tried").

"Necessarily where the accused is deprived of a substantial right by the action of the trial court, such action, having been properly objected to, is revisable on error." Ibid.

Thus, almost a half century before the adoption of Rule 8, the Court squarely held that protection against misjoinder was a "substantial right," and that the violation of the misjoinder rule required reversal.

Today, the Court does not dispute that McElroy required reversal for misjoinder. Instead, the Court suggests, rather obliquely, that three developments have undermined that holding: (1) the adoption of Rule 8; (2) the adoption of Rule 52(a) and the passage of the harmless-error statute; and (3) the development of a harmless-error doctrine in constitutional law. Ante, at 729-730. The reliance on the harmless-error developments will be addressed in more detail. Since we are construing Rule 8, however, the majority's bare citation to it--and apparent reliance on the history of its passage--must be first considered.

The majority seems to be of the view that the adoption of Rule 8 cast doubt on the validity of McElroy. Ante, at 729. Far from disavowing McElroy, however, the Federal Rules continued the misjoinder rule. The notes of the Advisory Committee on Rules state that both subdivisions of Rule 8 represent "substantially a restatement of existing law." Neither the text of Rule 8, nor the Advisory Committee Notes, nor the history of the Rule contains any suggestion that Rule 8 was intended to change the rule of the McElroy case. Indeed, the Advisory Committee displayed a keen awareness of the McElroy precedent by citing the opinion in *468 its discussion of misjoinder. [FN3] At the time the Federal Rules were being considered, moreover, commentators shared the Advisory Committee's view that the Rules merely continued the misjoinder doctrine in its then current form, and restated existing law. [FN4]

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The principle **742 that misjoinder deprives the accused of "a substantial right" and therefore is "revisable on error" thus remained the law when the Federal Rules of Criminal Procedure became effective in 1946.

FN3. See 5 Federal Rules of Criminal Procedure: Documentary History, Second Preliminary Draft, Feb. 1944, Note to Rule 8, pp. 35-36 ("Since the counts of two or more indictments consolidated for trial, under 18 U.S.C. s 557, are 'put ... in the same category as if they were separate counts in one indictment,' McElroy v. United States, 164 U.S. 76, 77, 17 S.Ct. 31, 32, 41 L.Ed. 355 (1896), this type of joinder is more widely practiced than is generally realized").

FN4. See Maguire, Proposed New Federal Rules of Criminal Procedure, 23 Ore.L.Rev. 56, 59 (1943) ("Subdivision (b) of Rule 9 provides for a joinder of defendants where they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting or resulting in an offense, and that they may be charged in one or more counts, together or separately, in any manner indicating their respective participation in the offense or offenses.... This rule merely restates the present Federal statute ..."). "Rule 9" became the current "Rule 8" without substantial change. See Orfield, Joinder in Federal Criminal Procedure, 26 F.R.D. 23, 28-29 (1960).

Furthermore, if one reads Rule 8 in conjunction with Rule 14, it is immediately apparent that the draftsmen of the Rules regarded every violation of Rule 8 is inherently prejudicial. For Rule 14 authorizes the Court to grant a severance, even in the absence of a Rule 8 violation, if either the defendant or the Government is prejudiced by a joinder of offenses or defendants. [FN5] Thus, it seems clear that the draftsmen of the Rules regarded violations of Rule 8 as inherently prejudicial, and recognized that even joinders that were not prohibited by the Rule should be forbidden if a party *469 could demonstrate actual prejudice. This is the way Professor Charles Wright interpreted the intent of the draftsmen in his 1969 treatise. He wrote:

FN5. Rule 14 provides, in pertinent part: "If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires."

"Indeed there would be no point in having Rule 8 if the harmless error concept were held applicable to it. If that concept could be applied, then defendant could obtain reversal only if the joinder were prejudicial to him. But Rule 14 provides for relief from prejudicial joinder, and a defendant can obtain a reversal, in theory at least, if he has been prejudiced even though the joinder was proper. If misjoinder can be regarded as harmless error, then reversal could be had only for prejudice whether the initial joinder was proper or improper. If that were true, it would be pointless to define in Rule 8 the limits on joinder, since it would no longer be of significance whether those

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limits were complied with, and the draftsmen would have been better advised to allow unlimited joinder of offenses and defendants, subject to the power of the court to give relief if the joinder were prejudicial." 1 C. Wright, Federal Practice and Procedure, s 144, p. 329 (1969). [FN6]

FN6. In his current edition, Professor Wright notes that a number of federal courts have held that misjoinder may be harmless error, but he concludes that "there remains much to be said for what was once the almost-unanimous view that misjoinder is never harmless error." 1 C. Wright, Federal Practice and Procedure: Criminal, s 145, p. 532 (2d ed. 1982).

Other commentators have agreed that the structure of the Federal Rules strongly supports the conclusion that the draftsmen viewed a violation of the misjoinder rule as inherently prejudicial. [FN7]

FN7. See Note, Harmless Error and Misjoinder Under the Federal Rules of Criminal Procedure: A Narrowing Division of Opinion, 6 Hofstra L.Rev. 533, 544, n. 65 (1978) ("Implicit in the assertion that rule 8 sets the limits of tolerable prejudice is the argument that if its purpose is not to set such limits there is no purpose in the rule. Rule 14 would vest all questions of joinder in the trial court.... As both rule 14 and rule 8 were included in the rules, rule 8 must have been intended to establish the outer bounds within which the trial court has discretionary power under rule 14"). In my view, the majority's discussion of this issue, ante, at 732, n. 12, fails to answer this straightforward reading of Rule 8 and Rule 14.

*470 Thus, a review of the state of the law of joinder at the time the Federal Rules of Criminal Procedure were adopted, of the Advisory Committee's intent to restate then-existing law, and of the text of the Rules themselves requires a conclusion that a Rule 8 misjoinder violation is an error that affects the substantial rights of the accused and therefore requires reversal of a conviction.

**743 II

In addition to its unexplained reference to the adoption of Rule 8, the Court suggests that its new misjoinder rule--that prejudice must be shown to justify reversal of a Rule 8 misjoinder error--is supported by its interpretation of developments in the law of "harmless error." Specifically, the Court observes that the McElroy approach has been undermined by the passage of a harmless-error statute and rule, ante, at 729, and by the development of a harmless-error doctrine for constitutional errors, ante, at 729-730. Although the majority does not distinguish between these two categories, they require separate analysis. Neither category, however, remotely supports the majority's bald assertion that misjoinder should not be viewed as affecting "substantial rights," and thus not be viewed as inherently prejudicial.

The majority refers to the current harmless-error statute, 28 U.S.C. s 2111, and to Rule 52(a). As the majority points out, both define harmless error in terms of whether a violation affects "substantial rights." [FN8] Since this Court had already made clear that misjoinder affected "substantial

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*471 rights," McElroy, 164 U.S. 76, 17 S.Ct. 31, 41 L.Ed. 355 (1896), it is curious that the majority concludes, with no support at all, that the passage of a statute and Rule which allowed for correction of errors that did not affect "substantial rights" somehow changed the legal status of a violation that had been described in precisely those words. This view is especially curious when it is remembered that the Rule governing joinder was viewed by the draftsmen as a restatement of existing law.

FN8. See 28 U.S.C. s 2111 ("On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties"); Fed.Rule Crim.Proc. 52(a) ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded").

To be sure, McElroy was decided before the first harmless-error statute was passed in 1919. That statute, a reaction to the hypertechnicality that had developed in American jurisprudence, did mark a significant change in our system's view of the effect of error. [FN9] But it is a long leap from that recognition to a view that the passage of the harmless-error statute in 1919--and the subsequent adoption of Rule 52(a) in 1946 and the passage of the current harmless-error statute in 1949--summarily jettisoned all prior jurisprudence on the errors that affected "substantial rights." Indeed, interpretations of the 1919 statute accorded it a very different mission. As Justice Frankfurter explained in refusing to require a showing of prejudice to justify reversal for a statutory violation: "Suffice it to indicate, what every student of the history behind the Act of February 26, 1919, knows, that that Act was intended to prevent matters concerned with the mere etiquette of trials and with the formalities and minutiae of procedure from touching the merits of a verdict." Bruno v. United States, 308 U.S. 287, 294, 60 S.Ct. 198, 200, 84 L.Ed. 257 (1939). And, while Rule 52(a) and the 1949 harmless-error statute were changed in a way that some commentators have found significant, [FN10] the *472 continuation **744 of "substantial rights" as the benchmark for assessing the harmlessness of error provides no support for the proposition that anyone intended to change something that had been found to affect a "substantial right" into something that did not affect a substantial right.

FN9. For a discussion of the background of the 1919 statute, see Kotteakos v. United States, 328 U.S. 750, 758-760, 66 S.Ct. 1239, 1244-1245, 90 L.Ed. 1557 (1946).

FN10. The 1919 statute referred to "technical errors, defects, or exceptions which do not affect the substantial rights of the parties." 40 Stat. 1181, 28 U.S.C. s 391 (1946 ed.) (emphasis added). Rule 52(a) referred to "[a]ny error, defect, irregularity or variance which does not affect substantial rights"; the 1949 statute referred to "errors or defects which do not affect the substantial rights of the parties." 28 U.S.C. s 2111. See Note, 6 Hofstra L.Rev., supra n. 7, at 540 (discussing

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possible significance of change). But cf. H.R.Rep. No. 352, 81st Cong., 1st Sess., 18 (1949) (new harmless-error statute intended to "incorporate" former harmless-error statute); Rule 52(a), Notes of Advisory Committee on Rules, 18 U.S.C.App., p. 657 (Rule intended as "a restatement of existing law"); Kotteakos, 328 U.S., at 757, n. 9, 66 S.Ct., at 1243, n. 9 (citing Advisory Committee comment that Rule 52(a) was intended as " 'a restatement of existing law' ").

Thus, neither the harmless-error statute, passed within a few years of the adoption of Rule 8, nor Rule 52(a), adopted at the same time as Rule 8, changed the interpretation of the misjoinder rule reflected in Rule 8.

The harmless-error statute and Rule are, however, at least relevant to the inquiry at hand. In contrast, the majority's reliance on Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), ante, at 729-730, is plainly misplaced. The majority observes: "Clearly, Chapman and Hasting dictate that the harmless-error rule governs here." Ante, at 730. Nothing could be less clear. This case does not involve a claim of constitutional error. The harmless-error doctrine that was enunciated in Chapman thus does not settle the issue raised by this case. Simply because constitutional errors may be subject to a harmless-error inquiry does not mean that all nonconstitutional errors must be subject to harmless-error analysis, and this Court has never so held. [FN11] Rather, our mission in *473 reviewing nonconstitutional errors is, first, to discern whether the rule or statute which is being violated was intended to be subject to harmless-error analysis. If there is a definitive answer to that question, our inquiry should be at an end. [FN12] If there is no definitive answer, then we must try to assess the rule or statute in question in light of the purpose of the harmless-error rule and statute. We should not, however, rewrite existing law by adopting a presumption that, simply because a violation is nonconstitutional, it is automatically subject to harmless-error inquiry.

FN11. That the Court has recognized the difference between constitutional and nonconstitutional harmless-error inquiries is reflected in the considerable difference in the Court's standards on these two subjects. Compare Chapman, 386 U.S., at 24, 87 S.Ct., at 828 ("before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt"), with Kotteakos v. United States, 328 U.S., at 765, 66 S.Ct., at 1248 (in nonconstitutional cases, "[t]he inquiry ... is ... whether the error itself had substantial influence"). To the extent that the majority ultimately cites the Kotteakos standard as governing this case, ante, at 731-732, it is consistent with this distinction in our case law; to the extent that the majority suggests that Chapman controls the outcome of this case, however, ante, at 730, it reveals confusion about this distinction.

FN12. Cf. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-843, 104 S.Ct. 2778, 2781, 81 L.Ed.2d 694 (1984) ("If the intent of Congress is clear, that is the end of the matter; for

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the court ... must give effect to the unambiguously expressed intent of Congress").

As the majority observes, the Court's willingness to invoke the harmless-error doctrine has expanded dramatically in recent years. This expansion is a source of considerable concern, [FN13] particularly because the Court has often been unclear and imprecise in its increasingly frequent invocation of harmless *474 error. [FN14] In my view, **745 harmless-error analysis is inappropriate in at least three situations: (1) when it is clear that a statute or Rule was not intended to be subject to such a rule; (2) when an independent value besides reliability of the outcome suggests that such analysis is inappropriate; [FN15] and (3) when the harmlessness of an error cannot be measured with precision. [FN16] In my view, misjoinder clearly falls into the first *475 category. It also has elements of the second and third. Misjoinder implicates the independent value of individual responsibility and our deep abhorrence of the notion of "guilt by association." Our criminal justice system has expanded considerably in its tolerance of multiple joinders and massive conspiracy trials. The rule against misjoinder remains, however, as an ultimate safeguard of our cherished principle that one is tried for one's own deeds, and not for another's. [FN17] The harmfulness of misjoinder is also the type of error that has consequences that are difficult to measure with precision. [FN18] These concerns may or may not outweigh the societal interests that motivate the Court today, but they are surely strong enough to demonstrate that the draftsmen of the Federal Rules acted responsibly when they adhered to the time-honored rule of the McElroy case. The misjoinder Rule that they crafted is clear, and should be respected. [FN19] Misjoinder affects "substantial rights," and should lead to reversal.

FN13. See Comment, Harmless Error: Abettor of Courtroom Misconduct, 74 J.Crim.L. & C. 457, 475 (1983) ("The harmless error standards as currently applied in review of criminal trials are eroding the integrity of the criminal justice system by encouraging violations of longstanding trial rules"); Goldberg, Harmless Error: Constitutional Sneak Thief, 71 J.Crim.L. & C. 421, 422 (1980) ("the doctrine of harmless constitutional error destroys important constitutional and institutional values"); Note, Harmful Use of Harmless Error in Criminal Cases, 64 Cornell L.Rev. 538, 540 (1979) ("increased use of harmless error analysis is inherently dangerous regardless of whether the errors violate the Constitution, statutes, or the common law") (footnotes omitted); Cameron & Osborn, When Harmless Error Isn't Harmless, 1971 Law & Social Order 23, 42 ("while the harmless error doctrine is an extremely useful device ... it is not one that is without its dangers"). Cf. United States v. Jackson, 429 F.2d 1368, 1373 (CA7 1970) (Clark, J., sitting by designation) (" 'Harmless error' is swarming around the 7th Circuit like bees.... [T]he courts may have to act to correct a presently alarming situation").

FN14. See Field, Assessing the Harmlessness of Federal Constitutional Error--A Process in Need of a Rationale, 125 U.Pa.L.Rev. 15, 32 (1976) (

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"In sum, the case law on the content of the harmless error standard is less than lucid. There is some indication that Supreme Court opinions slip back and forth from one suggested standard to another, without explicit notice of the change, though the change could produce different results in many cases"); Saltzburg, The Harm of Harmless Error, 59 Va.L.Rev. 988 (1973) ("Chaos surrounds the standard for appellate review of errors in criminal proceedings"); Mause, Harmless Constitutional Error: The Implications of Chapman v. California, 53 Minn.L.Rev. 519, 557 (1969) ("the Court, if only in an effort to further the interest of net judicial economy, should attempt to delineate certain well-defined classes of constitutional error which require automatic reversal").

FN15. In the constitutional area, the Court has made clear that certain independent values render a harmless-error analysis inappropriate. See, e.g., Rose v. Mitchell, 443 U.S. 545, 99 S.Ct. 2993, 61 L.Ed.2d 739 (1979) (racial discrimination in the selection of a grand jury is not subject to harmless-error analysis); Chapman, 386 U.S., at 23, 87 S.Ct., at 827 ("there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error"). Cf. Rose v. Lundy, 455 U.S. 509, 544, 102 S.Ct. 1198, 1216, 71 L.Ed.2d 379 (1982) (STEVENS, J., dissenting) (some constitutional errors "are so fundamental that they infect the validity of the underlying judgment itself, or the integrity of the process by which that judgment was obtained").

FN16. In Holloway v. Arkansas, 435 U.S. 475, 491, 98 S.Ct. 1173, 1182, 55 L.Ed.2d 426 (1978), Chief Justice BURGER explained that harmless error was inappropriate in assessing the constitutional error of inappropriate joint representation in part because such an inquiry required "unguided speculation." See also Note, 64 Cornell L.Rev., supra n. 13, at 563-564 ("Holloway's rationale naturally extends beyond the sixth amendment: it suggests that a rule of automatic reversal should apply to those fundamental, pervasive errors that have uncertain prejudicial impact.... The rule of automatic reversal should be extended to all errors, whether or not pervasive or constitutional, that result in unascertainable prejudice") (footnotes omitted).

FN17. Cf. Krulewitch v. United States, 336 U.S. 440, 457-458, 69 S.Ct. 716, 724-725, 93 L.Ed. 790 (1949) (Jackson, J., concurring) ("Few instruments of injustice can equal that of implied or presumed or constructive crimes. The most odious of all oppressions are those which mask as justice").

FN18. See Note, 6 Hofstra L.Rev., supra n. 7, at 563 (harmless error "is inaccurate as a test for ascertaining the prejudice resulting from misjoinder because of the impossibility of determining the extent of that prejudice").

FN19. The majority's suggestion that two Supreme Court opinions have held

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misjoinder subject to the harmless-error rule is erroneous. The majority writes: "A holding directly involving misjoinder again indicated the harmless-error rule should apply." Ante, at 730. The decision cited by the majority for this proposition, Schaffer v. United States, 362 U.S. 511, 80 S.Ct. 945, 4 L.Ed.2d 921 (1960), explicitly found no Rule 8 error and explicitly disavowed the type of "indication" claimed by the majority. See 362 U.S., at 517, 80 S.Ct., at 948 ("The harmless-error rule, which was the central issue in Kotteakos, is not even reached in the instant case, since here the joinder was proper under Rule 8(b) and no error was shown"). Thus, the majority's discussion of Schaffer, ante, at 730-731, is completely beside the point. Indeed, one year after Schaffer was decided, it was read to support, not the majority's conclusion, but the viability of the McElroy rule. See Ward v. United States, 110 U.S.App.D.C. 130, 137, 289 F.2d 877, 878 (1961) (Burger, J.) (citing Schaffer and McElroy to reject Government suggestion that defendant must show prejudice to obtain reversal after misjoinder of defendants has been established).

Similarly, the majority's claim that Kotteakos "suggested that the harmless-error rule could similarly apply" to misjoinder, ante, at ----, vastly overstates the case. The Court noted that a possible joinder violation gave added weight to its conclusion that the error before it was not harmless. 328 U.S., at 774-775, 66 S.Ct., at 1252. The Court observed that "s 269 [the harmless-error statute] carries the threat of overriding the requirement of s 557 for substituting separate counts in the place of separate indictments, unless the application of s 269 is made with restraint. The two sections must be construed and applied so as to bring them into substantial harmony, not into square conflict." Id., at 775, 66 S.Ct., at 1253. This expression of concern about the possible effect of harmless error on misjoinder, however, hardly supports the notion that Kotteakos held misjoinder subject to harmless-error analysis. And, despite the majority's view that its holding is the only way to bring harmless error and misjoinder into "substantial harmony," ante, at 732, a conclusion that misjoinder necessarily affects substantial rights produces the same harmony.

*476 **746 III

Undertaking a harmless-error analysis is perhaps the least useful function that this Court can perform, cf. United States v. Hasting, 461 U.S. 499, 516-518, 103 S.Ct. 1974, 1984-1985, 76 L.Ed.2d 96 (1983) (STEVENS, J., concurring in judgment). For that reason, a decision that a harmless-error inquiry is required should lead to a remand to the Court of Appeals, which is in a far better position than we are to study the complete trial record with care. The majority's opinion in this case confirms the general advisability of that approach.

The Court's conclusion that Dennis Lane suffered no prejudice is based on three cursory observations. First, the Court asserts, with no explanation, that there was "overwhelming evidence" of his guilt. Ante, at 732. There are at least two problems with this observation. The first is that the majority fails to appreciate the Kotteakos recognition that the harmless-

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error inquiry is entirely distinct from a sufficiency-of-the-evidence inquiry. [FN20] The second is that, *477 even if it were faithfully applying the Kotteakos distinction between sufficiency of the evidence and harmless error, the majority utterly fails to explain its statement about "overwhelming evidence." A reading of Kotteakos reveals that only the most painstaking and thorough review of an entire trial record can justify a conclusion that its standard has, or has not, been met. The opinion the Court announces today contains no indication that it has made that kind of analysis of the case against Dennis Lane. [FN21]

FN20. In Kotteakos, the Court accepted the defendants' concession that the evidence was not "insufficient, if considered apart from the alleged errors relating to the proof and the instructions at the trial." 328 U.S., at 753, 66 S.Ct., at 1242. The Court went on to emphasize that the harmless-error analysis is fundamentally different from the sufficiency analysis. "The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand." Id., at 765, 66 S.Ct., at 1248. Even though the evidence was concededly sufficient without the errors, the Court thus found the errors not harmless, and the convictions reversible. The majority quotes the relevant passage from Kotteakos, ante, at 732, but fails to reflect its principle in its analysis.

FN21. The only specific evidence even mentioned by the majority--the testimony of Heard and Lankford, ante, at 732, n. 13--represents accomplice testimony. Such testimony is, of course, generally recognized as posing special evidentiary problems. See, e.g., 1 J. Weinstein & M. Berger, Weinstein's Evidence P 107[04], pp. 107-50--107-51 (1985); 3 S. Gard, Jones on Evidence s 20:60, pp. 736-737 (6th ed.1972).

Second, the Court notes that the jury was properly instructed to evaluate the evidence under each count and against each defendant separately. Since that instruction should be given routinely in every case in which there is a joinder of defendants or offenses, it surely cannot be regarded as an adequate response to a claim that a misjoinder was prejudicial. [FN22]

FN22. Indeed, in the year following Kotteakos, this Court made clear that proper jury instructions might not alleviate the problems inherent in joint trials:
"The grave danger in this case, if any, arose not from the trial court's rulings upon admissibility or from its instructions to the jury. As we have said, these were as adequate as might reasonably be required in a joint trial. The danger rested rather in the risk that the jury, in disregard of the court's direction, would transfer, consciously or unconsciously, the effect of the excluded admissions from the case as made against Goldsmith and Weiss across the barrier of the exclusion to the other three defendants." Blumenthal v. United States, 332 U.S. 539,

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559, 68 S.Ct. 248, 257, 92 L.Ed. 154 (1947).

*478 **747 Finally, the Court rather hesitantly suggests that the evidence on Count 1 "would likely have been admissible" in a joint retrial on Counts 2-6, ante, at 732. The Court thus assumes that a joint retrial is inevitable. Of course, if misjoinder is found only as to Dennis Lane, as I suggest below, then the majority's point collapses. In any event, nothing in Kotteakos or in our harmless-error precedents suggests that this Court should find an error harmless because of the Court's completely untested speculations about a possible future retrial. Not surprisingly, Kotteakos suggests precisely the opposite. [FN23]

FN23. "The Government's theory seems to be, in ultimate logical reach, that the error presented by the variance is insubstantial and harmless, if the evidence offered specifically and properly to convict each defendant would be sufficient to sustain his conviction, if submitted in a separate trial. For reasons we have stated and in view of the authorities cited, this is not and cannot be the test under s 269 [the harmless error statute]." 328 U.S., at 767, 66 S.Ct., at 1249.

A determination that an error was harmless is an extremely weighty conclusion; it implicates profound notions of fairness and justice. [FN24] Even if the majority is correct that Rule 8 misjoinder should be subject to harmless-error analysis, I am convinced that the majority's summary finding of harmless error in this case fails to give the issue the attention it deserves. [FN25]

FN24. See R. Traynor, The Riddle of Harmless Error 80 (1970) ("[T]he evaluation of an error as harmless or prejudicial is one of the most significant tasks of an appellate court, as well as one of the most complex. Each evaluation bears upon our traditional understanding that fair trial encompasses not only fair notice and an adequate opportunity to be heard before the appropriate tribunal, but also an orderly presentation of evidence and a rational application of the law thereto").

FN25. A more searching review of the record might require the majority to confront certain troublesome aspects of this erroneous joinder. The majority might have to confront the fact that at least 9 of the Government's 26 witnesses--more than one third--addressed the El Toro fire, the offense for which Dennis Lane was not charged. See Testimony of Morris Loewenstern, Tr. 33-43; Testimony of Earl Simpson, id., at 44-50; Testimony of Cindy Wright, id., at 58-59; Testimony of David Lard, id., at 62-89, 96-103; Testimony of Ben Shaw, id., at 103-112; Testimony of Jack Stotts, id., at 113-123; Testimony of Wayne Cox, id., at 123-132; Testimony of Jay Messenger, id., at 139-157; and Testimony of Sidney Heard, id., at 230-243. It might have to confront the fact that two of the defense witnesses similarly focused on the El Toro fire. See Testimony of Janie Malone, id., at 681-736; Testimony of Jess Maddox, id., at 891-894. It might have to confront the fact that, in their closing arguments, both

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the Government and the defense counsel devoted considerable attention to the El Toro fire. See id., at 989-993; defense's closing arg., id., at 1008-1014. And it might, finally, have to confront the fact that the prosecutor's closing words to the jury were that "each of these charges has been proved against J.C. Lane and Dennis Lane beyond a reasonable doubt." Id., at 1051 (emphasis added).

This is not to say that I have studied the record with sufficient care to conclude that, if misjoinder is subject to harmless-error analysis, the error here was not harmless. Rather, it is to say that I am convinced that the majority's opinion gives no indication of having wrestled with the complexities of the 1,000-page trial transcript in a manner that would permit its confident assertion that the error was harmless.

*479 IV

I agree with the Court's conclusion that the evidence was sufficient to sustain both convictions of mail fraud and therefore join Part III of its opinion. I also agree with the judgment insofar as it upholds the conviction of James Lane. It is perfectly clear that the violation of Rule 8(b)--the rule prohibiting the improper joinder of defendants --occasioned by the misjoinder of Count 1 did not affect James Lane because he was the defendant in Count 1. But since there is no claim that the son, Dennis Lane, took any part in Count 1 (the mail fraud regarding the 1979 El Toro Restaurant **748 fire), I believe that his right not to be joined as a defendant in his father's trial for that felony was a "substantial right" that was adversely affected by the misjoinder.

In my view, the Court's opinion misconstrues the history and purpose of Rule 8, sows further confusion in the Court's *480 harmless-error jurisprudence, and fails to make the kind of harmless-error analysis that Rule 52(a) requires. Because I do not consider these errors harmless, I respectfully dissent from the judgment regarding Dennis Lane in No. 84-744.

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Act of concealment = overt act in furtherance if done to "lull" victims into not discovering crime

Citation 9 F.3d 1025 (CITE AS: 9 F.3D 1025)
Database CTA
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FOUND DOCUMENT

UNITED STATES of America, Appellee,
v.
Steven E. ROGERS, Defendant-Appellant.
No. 1184, Docket 92-1111.
United States Court of Appeals,
Second Circuit.
Argued April 1, 1993.
Decided Nov. 16, 1993.

Defendant was convicted in the United States District Court for the Southern District of New York, Charles S. Haight, Jr., J., of wire fraud, transporting fraudulent securities in interstate commerce, and conspiring to commit those crimes. Defendant appealed. The Court of Appeals, Pierce, Circuit Judge, held that: (1) evidence supported finding that telexes were overt acts of conspiracy within statute of limitations, which established timeliness of prosecution; (2) evidence supported convictions for wire fraud, even if defendant did not personally send telexes; and (3) defendant's Sixth Amendment rights were violated by district judge's refusal to instruct jury on definition of "securities" and to let jury decide whether fictitious equipment leases were within meaning of statute prohibiting transportation of stolen "securities." Affirmed in part, reversed in part, and remanded.

[1] CRIMINAL LAW k149
110k149
Evidence supported finding that telexes sent within limitations period were intended to stall repayment of credit previously issued on collateral of fictitious equipment leases and to lull lender into not discovering fraud and, thus, communications were acts within wire fraud statute and overt acts of conspiracy, rather than acts of concealment after attainment of objectives of conspiracy. 18 U.S.C.A. s 3282.

[1] CRIMINAL LAW k150
110k150
Evidence supported finding that telexes sent within limitations period were intended to stall repayment of credit previously issued on collateral of fictitious equipment leases and to lull lender into not discovering fraud and, thus, communications were acts within wire fraud statute and overt acts of conspiracy, rather than acts of concealment after attainment of objectives of conspiracy. 18 U.S.C.A. s 3282.

[2] TELECOMMUNICATIONS k363
372k363
Evidence supported convictions for wire fraud based on findings that defendant was consulted before coconspirator sent telexes to lender, that communications were integral to scheme to defraud lender through fictitious equipment leases offered as collateral for line of credit, and that communications were reasonably foreseeable part of scheme in which defendant participated, even though defendant did not personally send or instruct coconspirator to send telexes. 18 U.S.C.A. s 1343.

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[3] CRIMINAL LAW k641.5(7)
110k641.5(7)
Coconspirator's joinder in motion to disqualify defendant's attorney was sufficient to assert conflict of interest supporting disqualification even though coconspirator had never been client of attorney; coconspirator had been privy of his employer at deposition of coconspirator in prior civil lawsuit against employer in which attorney had appeared on behalf of employer.

[4] CRIMINAL LAW k641.5(.5)
110k641.5(.5)
Defendant's Sixth Amendment right to counsel was not violated by district court's disqualification of defendant's attorney for conflict of interest from prior representation involving coconspirator, despite district court's failure to personally address defendant on disqualification; attorney had agreed to withdrawal and district court had authority to insist that defendant be represented by counsel who did not have conflicts of interest. U.S.C.A. Const.Amend. 6.

[5] CRIMINAL LAW k1173.2(2)
110k1173.2(2)
District court's decision not to charge jury on all elements of charged crime is error that has effect of relieving prosecution of its burden of proving every element beyond reasonable doubt.

[6] JURY k34(3)
230k34(3)
Defendant's Sixth Amendment rights were violated by district judge's refusal to instruct jury on definition of "securities" and let jury decide whether fictitious equipment leases were within meaning of statute prohibiting transportation of stolen "securities," after district court had made preliminary determination that leases in question possibly could be "securities." U.S.C.A. Const.Amend. 6; 18 U.S.C.A. ss 2311, 2314.
See publication Words and Phrases for other judicial constructions and definitions.

[6] RECEIVING STOLEN GOODS k9(1)
324k9(1)
Defendant's Sixth Amendment rights were violated by district judge's refusal to instruct jury on definition of "securities" and let jury decide whether fictitious equipment leases were within meaning of statute prohibiting transportation of stolen "securities," after district court had made preliminary determination that leases in question possibly could be "securities." U.S.C.A. Const.Amend. 6; 18 U.S.C.A. ss 2311, 2314.
See publication Words and Phrases for other judicial constructions and definitions.

[7] CRIMINAL LAW k1170(1)
110k1170(1)
District court's refusal to allow defendant to present evidence that equipment leases at issue were not "securities" within meaning of statute prohibiting

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transportation of fraudulent "securities" and refusal to instruct jury on issue created structural error in trial process that required reversal of defendant's conviction. 18 U.S.C.A. ss 2311, 2314.

[7] CRIMINAL LAW k1173.2(2)
110k1173.2(2)
District court's refusal to allow defendant to present evidence that equipment leases at issue were not "securities" within meaning of statute prohibiting transportation of fraudulent "securities" and refusal to instruct jury on issue created structural error in trial process that required reversal of defendant's conviction. 18 U.S.C.A. ss 2311, 2314.

[8] CRIMINAL LAW k1190
110k1190
Reversal of conviction for offense of transporting fraudulent securities did not affect conviction for conspiracy to commit wire fraud and to transport fraudulent conspiracies, or convictions for underlying wire fraud; additional conspiratorial conduct of wire fraud still supported conspiracy conviction after reversal of conviction for other object of conspiracy.
*1026 Michael S. Devorkin, New York City (Doar Devorkin & Rieck, of counsel), for defendant-appellant.
Nelson W. Cunningham, Asst. U.S. Atty., New York City (Roger S. Hayes, U.S. Atty. S.D.N.Y. of counsel), for appellee.

Before OAKES, PIERCE and PRATT, Circuit Judges.

PIERCE, Circuit Judge:
Steven E. Rogers appeals from a judgment of conviction, entered after a jury trial in the United States District Court for the Southern District of New York (Charles S. Haight, Jr., Judge). Rogers was convicted of conspiring to commit wire fraud and to transport fraudulent securities in interstate or foreign commerce, in violation of 18 U.S.C. s 371; wire fraud, in violation of 18 U.S.C. s 1343; and transporting a fraudulent security in interstate or foreign commerce, in violation of 18 U.S.C. s 2314. For the reasons set forth below, we affirm in part and reverse in part, and remand to the district court.

BACKGROUND

Steven E. Rogers was the Director of International Operations of Trend International, a subsidiary of the Trend Group. Leonard Hoffman was Vice President of Administration and oversaw the finances of Trend Group in Connecticut. Trend Group was primarily a financial services business and Lease Trend, one of its subsidiaries, was mainly in the business of leasing equipment, which it had purchased, to end users of the equipment. The lessee submitted an application to Lease Trend and agreed to make periodic payments once the equipment was delivered, installed and accepted. To obtain financing for the purchase of the equipment, Lease Trend borrowed money from a funding source, such as a bank. The funding source, in turn, would get a security interest in the equipment and an assignment from Lease Trend of the payments it was to receive from the lessee.
In July 1984, Trend Group established a one-year, $2 million revolving line of

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credit with Banque de L'Union Europeenne ("BUE"), a French bank, to finance equipment lease transactions. To draw upon the line of credit, Trend Group was to present a complete lease package, including a lease signed by the lessee and a letter from a financing source stating that it would lend money for permanent financing of the equipment. The money BUE lent to Trend Group was to be partial financing for the purchase of the equipment, to pay the manufacturer while he finished installing the equipment. Trend Group was permitted to borrow the funds from BUE for 180 days.

Rogers and Hoffman were the individuals at Lease Trend responsible for administering the BUE line of credit. As of August 15, 1984, Trend Group had tendered signed leases it had on hand to borrow approximately $950,000 from BUE. Despite this, by the end of August 1984, Trend Group had, according to Hoffman, "almost zero cash in the company." Hoffman testified that he reported this to Rogers and the two of them agreed to submit falsified lease packages to BUE *1027 and to borrow money on this collateral. Hoffman constructed phony lease packages and brought them to Rogers, who signed his own name on behalf of Trend Group and forged the signatures of the lessee where required. Hoffman and Rogers submitted fifteen to twenty phony lease packages. By March 1985, Trend Group had exhausted its $2 million line of credit with BUE, and there was no possibility of drawing further on the line of credit. Trend Group began falling behind on interest payments for both the phony and legitimate leases, as some of both types of leases remained in BUE's possession longer than the 180 days permitted under the revolving credit line. In late March 1985, Christiane Godchaux, whose duties included loan administration and documentation at BUE, began requesting the payment of back interest and explanations of why the older leases had not been repaid within 180 days.

Hoffman responded in a series of letters and telexes. He testified that he was "stalling for time." In these communications, Hoffman falsely represented the status of the phony lease packages and stated false excuses for the late payments. Hoffman discussed these series of communications with Rogers before sending each of them out. In one telex, sent on June 4, 1985, Hoffman falsely stated that several leases held by BUE for nearly a year were experiencing installation problems, and he set out a schedule of when the equipment covered by the leases should be installed. In a letter dated June 6, 1985, Hoffman offered to exchange four older legitimate leases for a new phony lease. He then forwarded a phony lease package with Focus 4, Inc., a California printing concern, as the lessee. In the lease package, Rogers had forged the signatures of Focus 4 officials. Hoffman testified that this lease package was sent out so that Trend Group would not have to repay BUE $191,000 then owing on the four older leases. BUE permitted the exchange of the four older leases with the Focus 4 lease. Through June 1985, Godchaux continued to request from Trend Group payment of unpaid interest and principal. On June 25, 1985, Hoffman sent her another telex falsely stating that the leases in BUE's possession would be taken out in accordance with the schedule set out in the June 4, 1985 telex.

Trend Group never repaid the $2 million it had borrowed under the line of credit with BUE. BUE sued and obtained a judgment against Lease Trend, and made efforts to collect on the leases it held as collateral. Prior to indictment, Rogers executed for the prosecution's benefit a written waiver of the statute of limitations for any offenses committed on or after May 30, 1985.

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On June 12, 1990, a four-count indictment was filed against Rogers and Hoffman. Count One charged them with conspiring to commit wire fraud, in violation of 18 U.S.C. s 1343, and conspiring to transport forged and fraudulent securities in interstate and foreign commerce, in violation of 18 U.S.C. s 2314. The objects of the conspiracy were the creation by Rogers and Hoffman of a scheme to defraud investors to obtain money and property by means of false and fraudulent representations and promises using wire communications, and the transportation of forged securities in interstate commerce. The indictment alleged that the conspiracy was achieved by the defendants and their co-conspirators via the forging and creation of fictitious equipment leases which were provided to BUE, as collateral, to induce BUE to advance monies to Lease Trend; and that the defendants and their co-conspirators forged and created fictitious equipment leases and assorted documentation, and provided them to BUE so that Lease Trend would not have to repay earlier loans. Listed also as overt acts were: Hoffman's sending of telexes from Lease Trend's Connecticut office to Paris, France, on June 4 and 25, 1985; Rogers' causing a letter to be sent from Lease Trend to Godchaux at BUE on June 6, 1985; and that on June 6 and 21, 1985, Hoffman caused letters to be sent from Lease Trend to Godchaux at BUE. Count Two charged Rogers and Hoffman with committing wire fraud through a telex wire communication on approximately June 4, 1985, in violation of 18 U.S.C. s 1343, and Count Three charged them with committing wire fraud through a telex wire communication on approximately June 25, 1985. Under Count Four, Rogers and Hoffman were charged with transporting *1028 a fraudulent security in interstate commerce on or about June 6, 1985, in violation of 18 U.S.C. s 2314.

Prior to trial, Rogers moved to dismiss Counts One through Three, claiming that the alleged conspiracy had terminated in March 1985 and that prosecution under the conspiracy and substantive wire fraud counts was barred by the five-year statute of limitations, 18 U.S.C. s 3282. He moved also to dismiss Count Four because the Focus 4 lease was not a security within the meaning of 18 U.S.C. s 2311. In an order dated January 24, 1991, the district court denied his motion, ruling that the statute of limitations had not lapsed, and that the Focus 4 lease was a security as a matter of law. Also, the court denied Rogers' request for a hearing to offer testimony on the question of whether the equipment lease named in Count Four was a security.

On January 2, 1991, Hoffman pleaded guilty to Count Four of the indictment and agreed to testify on behalf of the Government at Rogers' trial. On January 7, 1991, the Government moved to disqualify as Rogers' attorney, Gary D. Rafsky, Esq., who is Rogers' son. In its memorandum of law in support of the motion, the Government asserted that in preparation for trial it had recently discovered that Rafsky had represented Hoffman at a 1986 deposition in connection with a civil lawsuit arising out of the same facts; that it anticipated that Hoffman would be a key trial witness against Rogers; and that this created a conflict of interest for Rafsky. The Government argued that Rafsky, in representing Rogers and cross-examining Hoffman, would unfairly rely upon confidential attorney-client communications he received from Hoffman, and that Rafsky, to avoid becoming a fact-witness at trial, might limit his cross-examination of Hoffman, which might impair his representation of Rogers.

A hearing was held the next day, at which Hoffman joined in the Government's motion. After hearing the Government's presentation, the judge asked Rafsky

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his "perception" on the motion for his disqualification. Rafsky responded:

I do believe it's clear that there is a conflict in my representation, particularly in light of the fact that having just learned that Mr. Hoffman will be a key witness and in that regard, while I am not happy with the prospect of disqualification, I understand what the obligations are and would have to concur with the government in that respect.

Rafsky also stated that when he had suggested to Rogers the possibility of continuing to represent him, but not to cross-examine Hoffman, Rogers had decided against such a limitation. After a brief discussion, the court excused Rafsky from the case as Rogers' primary attorney. The Assistant United States Attorney then stated: "Mr. Rogers is in court, and I should note for the record that he has been present throughout this entire proceeding." The judge then instructed Rogers that he could apply for the appointment of counsel, if warranted under his present economic circumstances. Thereafter, John Burke, Esq., was appointed, pursuant to the Criminal Justice Act, as substitute counsel.

On January 24, 1991, Burke raised the issue of whether Rafsky would be able to assist in Rogers' defense "in any way possible with the exception of the cross examination or anything to do with Mr. Hoffman in this matter." The district court issued an order the next day addressing that issue. In that order, the court directed that in any consultation between Rafsky, as former counsel to Rogers, and Burke, as successor counsel, Rafsky was not to reveal and Burke was not to inquire into any confidential information or secrets Rafsky had obtained during his previous representation of Hoffman. Burke was also not to engage in any discussions referring to that representation with Rogers or anyone else on the defense team.

On June 3, 1991, Rogers' jury trial began. Prior to the selection of the jury, Burke requested that Rafsky be permitted to sit at counsel table and that, with respect to the prior deposition, if the Government wanted "to make an issue out of it that he represented Mr. Hoffman, that's their business." The district judge ruled that Rafsky could sit at counsel table and that the Government would *1029 be permitted to elicit that Hoffman was represented at the deposition by Rafsky. Hoffman was the only witness who testified that Rogers was involved in the crimes. During Hoffman's testimony, the Government elicited that Rafsky was Lease Trend's corporate attorney, that he had attended the deposition with Hoffman, and that before the deposition Rogers told Hoffman: "Don't do anything to hurt yourself." Hoffman stated that he believed that Rogers meant he was to protect himself and that if he had told the truth during the deposition he would not have been protecting himself. On cross-examination, Hoffman stated that he lied approximately twenty to thirty times during the deposition. After the Government rested, Rogers did not put on a defense case, but defense counsel moved for a judgment of acquittal. The court denied the motion.

In its instructions to the jury, the court charged that the Focus 4 lease was a security as a matter of law, and the court, without objection, charged the jury that it had to consider whether the communications alleged to have occurred after May 30, 1985, were designed to lull BUE into a false sense of security, postpone its ultimate complaint to the authorities and make the apprehension of Rogers less likely than if those communications had not taken place. The jury returned with verdicts of guilty on all counts. On February

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18, 1992, Rogers was sentenced to concurrent terms of four years' imprisonment on Counts One and Two; and to concurrent terms of five years' probation on Counts Three and Four, to be commenced following his imprisonment. A mandatory special assessment was imposed upon each count. Rogers is now serving his sentence. This appeal followed.

DISCUSSION

On appeal, Rogers contends that his convictions under Count One--the conspiracy count--and Counts Two and Three--the substantive wire fraud counts--were barred by the statute of limitations. He notes that, in accordance with Grunewald v. United States, 353 U.S. 391, 396, 77 S.Ct. 963, 969, 1 L.Ed.2d 931 (1957), the Government had to prove beyond a reasonable doubt that he was responsible for an act, on or after May 30, 1985, that was executed in furtherance of a continued main object of the alleged scheme. Rogers maintains that the trial evidence established that Lease Trend drew its last funds from BUE in March 1985 and that the indictment did not allege, either as an object or a means of the scheme, an agreement by the co-conspirators to conceal the alleged conduct, either before or after the main objects of the conspiracy were accomplished. Consequently, he argues that the sending of the telexes in June 1985 was not charged as part of the original conspiracy and that the prosecution should not have been permitted to rely upon that evidence.

Grunewald v. United States considered the statute of limitations in conspiracy prosecutions. The Supreme Court stated:

> [T]he crucial question in determining whether the statute of limitations has run is the scope of the conspiratorial agreement, for it is that which determines both the duration of the conspiracy, and whether the act relied on as an overt act may properly be regarded as in furtherance of the conspiracy.

353 U.S. at 397, 77 S.Ct. at 970 (footnote omitted). Grunewald noted that "a vital distinction must be made between acts of concealment done in furtherance of the main criminal objectives of the conspiracy, and acts of concealment done after these central objectives have been attained, for the purpose only of covering up after the crime." Id. at 405, 77 S.Ct. at 974 (emphasis in original). "Thus, the life of a conspiracy cannot be extended for statute of limitations purposes by acts of concealment occurring after the conspiracy's criminal objectives have been fully accomplished even if those acts are 'done in the context of a mutually understood need for secrecy.' " United States v. Fletcher, 928 F.2d 495, 499 (2d Cir.) (quoting Grunewald, 353 U.S. at 402, 77 S.Ct. at 972), cert. denied, --- U.S. ----, 112 S.Ct. 67, 116 L.Ed.2d 41 (1991).

[1] We disagree with Rogers' contention that the statute of limitations barred his prosecution under Count One. Count One herein charged that Rogers and Hoffman conspired to, inter alia, commit wire fraud, *1030 and that the sending of the telexes in June 1985 was part of that conspiracy. In the context of wire fraud, the Supreme Court has stated that mailings occurring after the receipt of goods obtained by fraud are within the statute if those mailings were designed "to lull the victims into a false sense of security, postpone their ultimate complaint to the authorities, and therefore make the apprehension of the defendants less likely than if no mailings had taken place." United States v. Lane, 474 U.S. 438, 451-52, 106 S.Ct. 725, 733, 88 L.Ed.2d 814 (1986) (citations and internal quotation marks omitted). In this case, based upon the evidence presented at trial, the jury could have properly

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found that the conspiracy to commit wire fraud, which was charged in Count One of the indictment, was not complete until after the June 1985 telexes were submitted to BUE. As such, the June 1985 communications listed in Count One were overt acts of the conspiracy that took place within the statute of limitations. See United States v. Elkin, 731 F.2d 1005, 1008-09 (2d Cir.) (fraudulent verification letter sent to Government two years after defendant had received improperly obtained money from Government was part of scheme to defraud Government), cert. denied, 469 U.S. 822, 105 S.Ct. 97, 83 L.Ed.2d 43 (1984). Similarly, prosecution of Rogers for wire fraud, under Counts Two and Three of the indictment, was not barred by the statute of limitations because the June 1985 communications could properly be considered by the jury to have been designed to lull BUE into not discovering the alleged fraud. Lane, 474 U.S. at 451-52, 106 S.Ct. at 733.

[2] Rogers also challenges the sufficiency of the evidence under Counts Two and Three. According to him, there was insufficient evidence of an intent by him to join Hoffman in sending the June telexes. He argues that the Government did not prove that, within the statute of limitations, he personally sent or instructed anyone to send telexes on June 4 and 25, 1985.

We do not agree. Under the wire fraud statute, the Government was required to prove beyond a reasonable doubt that Rogers caused a wire communication to be transmitted for the purpose of executing his scheme to defraud. See 18 U.S.C. s 1343. For purposes of the wire fraud statute, "an act [can be] caused not simply when it was a physical consequence of the person's conduct but when, in addition, the actor either knew the consequence would occur or its occurrence was reasonably foreseeable." United States v. Muni, 668 F.2d 87, 89-90 (2d Cir.1981) (footnote omitted).

Herein, Hoffman testified that in late August 1984 he reported to Rogers that there was almost no cash in Lease Trend, that the two of them agreed to submit falsified lease packages to BUE as collateral, and to borrow money on this collateral. Hoffman thereafter composed phony lease packages and Rogers forged the signatures of the lessee, where required, on these documents. After Lease Trend had submitted these leases and exhausted its line of credit and began falling behind on interest payments, BUE began requesting the payment of back interest. Hoffman then sent out a series of telexes, including communications on June 4 and 25, 1985, which falsely represented the status of the phony lease packages and misrepresented reasons for the late payments. He testified that he discussed both of these communications with Rogers before sending them out. Based upon this evidence, the jury could have found beyond a reasonable doubt that Rogers was consulted prior to when the challenged communications were sent out, that these communications were integral to the scheme to defraud BUE, of which Rogers was a part, and that these communications were a reasonably foreseeable part of the scheme. United States v. Keats, 937 F.2d 58, 64 (2d Cir.), cert. denied, --- U.S. ----, 112 S.Ct. 399, 116 L.Ed.2d 348 (1991).

[3] Next, Rogers argues that he was denied his sixth amendment right to counsel of choice. Rogers claims that Rafsky was not subject to disqualification because there was no previous attorney-client relationship between him and Hoffman, since Rafsky was representing Lease Trend, and not Hoffman at the deposition. Rogers also claims that he did not waive his sixth amendment right to counsel because in considering the Government's motion to disqualify Rafsky, the district *1031 court failed to advise him personally

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of his right to counsel and to question him personally.

A criminal defendant's sixth amendment right to counsel of choice is circumscribed in several important respects. For instance, a defendant may not "insist on the counsel of an attorney who has a previous or on-going relationship with an opposing party, even when the opposing party is the Government." Wheat v. United States, 486 U.S. 153, 159, 108 S.Ct. 1692, 1697, 100 L.Ed.2d 140 (1988). Nor can a defendant insist upon being represented by an attorney "where the attorney in question is potentially in a position to use privileged information obtained during prior representation of the movant." United States v. James, 708 F.2d 40, 45 (2d Cir.1983) (quotation marks and citations omitted).

Rogers is correct that, when Hoffman testified at the deposition, it was on Lease Trend's behalf, see Fed.R.Civ.P. 30(b)(6), and that it was not Hoffman but Lease Trend, the corporation, on whose behalf Rafsky appeared. Accordingly, Lease Trend was the client and the holder of any attorney-client privilege with respect to any information Rafsky may have obtained in relation to the deposition. See Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 348-49, 105 S.Ct. 1986, 1990-91, 85 L.Ed.2d 372 (1985). The record does not indicate Lease Trend's position regarding the possible use by Rafsky, in his defense of Rogers, of information obtained during his employment at Lease Trend. Our observation in United States v. Cunningham, 672 F.2d 1064, 1072 (2d Cir.1982), is equally pertinent here:

> No case has been called to our attention, and we are aware of none, in which an attorney has been disqualified on grounds of conflicting prior representation solely at the behest of a person other than the former client or its privy.... '[A]s a general rule, courts do not disqualify an attorney on the grounds of conflict of interest unless the former client moves for disqualification.' The refusal to disqualify in the absence of a motion by the former client is all the more appropriate in the context of a criminal prosecution with its implication of constitutional rights.

(quoting In re Yarn Processing Patent Validity Litigation, 530 F.2d 83, 88 (5th Cir.1976) (footnotes omitted)). We believe, however, that in this case, Hoffman, as an employee at Lease Trend when he was deposed, should be considered a privy of the company. As such, his joinder in the motion to disqualify Rafsky was sufficient to assert the adverse nature of his interest in the confidences he may have disclosed to Rafsky vis-a-vis Rogers' continued representation by Rafsky, and presented the district judge "with a plain duty to act" on the disqualification motion. Yarn Processing, 530 F.2d at 89. In this Circuit, when faced with a motion to disqualify a criminal defendant's attorney, and the defendant indicates that he desires to waive his right to representation by an attorney without a conflict of interest, a district court must:

> (i) advise the defendant of the dangers arising from the particular conflict; (ii) determine through questions that are likely to be answered in narrative form whether the defendant understands those risks and freely chooses to run them; and (iii) give the defendant time to digest and contemplate the risks after encouraging him or her to seek advice from independent counsel.

United States v. Iorizzo, 786 F.2d 52, 59 (2d Cir.1986) (citation omitted). We have also stated that motions for disqualification should be made pre-trial. Id.

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[4] We reject Rogers' contention that his right to counsel was violated because the district court failed to advise him personally of his right to counsel and to question him personally prior to disqualifying Rafsky. The record supports the district court's conclusion that Rafsky could no longer participate as Rogers' primary attorney, but that he could, with certain limitations, continue to assist in Rogers' defense. Upon discovering that Rafsky, as corporate counsel, and Hoffman, an employee of Lease Trend, had attended a deposition in connection with a civil lawsuit arising out of the same facts, the government moved to disqualify Rafsky. At a hearing on the motion, Rafsky agreed to *1032 withdraw, stating "while I am not happy with the prospect of disqualification, I understand what the obligations are and would have to concur with the Government in that respect." He also stated that Rogers had considered and previously rejected the possibility of Rafsky continuing to represent him, but not cross-examining Hoffman. It would have been preferable for the court to personally address Rogers, who was present in the courtroom during the entire proceeding, to insure that he had been properly advised of his constitutional rights. Although Rogers was not questioned as to Rafsky's imminent disqualification, the district court did not abuse its discretion in disqualifying Rafsky. "Federal courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them.... Thus, where a court justifiably finds an actual conflict of interest, there can be no doubt that it may decline a proffer of waiver, and insist that [a] defendant[ ] be [represented by conflict-free counsel]." Wheat, 486 U.S. at 160, 162, 108 S.Ct. at 1697, 1698.

Rogers contends that the district court denied him his sixth amendment right to a jury trial on each issue of fact when it decided as a matter of law that the Focus 4 leases were "securities," and so charged the jury.

[5] We agree with Rogers' claims on this issue. A trial court's decision not to charge the jury on all the elements of a charged crime is an error that has the effect of relieving the prosecution of its burden of proving every element beyond a reasonable doubt. United States v. Smith, 939 F.2d 9, 10-11 (2d Cir.1991) (per curiam) (citing Francis v. Franklin, 471 U.S. 307, 313, 105 S.Ct. 1965, 1970, 85 L.Ed.2d 344 (1985)). As the Supreme Court noted recently, in reversing a conviction entered after the jury was given constitutionally deficient instructions:

> The [sixth amendment right to a jury trial] includes, of course, as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of "guilty." Thus, although a judge may direct a verdict for the defendant if the evidence is legally insufficient to establish guilt, he may not direct a verdict for the [prosecution], no matter how overwhelming the evidence.

Sullivan v. Louisiana, --- U.S. ----, ----, 113 S.Ct. 2078, 2080, 124 L.Ed.2d 182 (1993) (citation omitted).

Section 2314 prohibits the transportation in commerce of stolen goods, wares, and merchandise valued at $5,000 or more, stolen securities, or falsely made, forged, altered, or counterfeited securities. The term "security," as used in s 2314, is defined in 18 U.S.C. s 2311. [FN1] Herein, the district court relied upon United States v. Wexler, 621 F.2d 1218 (2d Cir.), cert. denied, 449 U.S. 841, 101 S.Ct. 119, 66 L.Ed.2d 48 (1980), to rule against Rogers.

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In Wexler, we held that the defendants, by conceding the issue at trial, had waived their ability to challenge in this Court the issue of whether the equipment leases therein were "securities" within the meaning of ss 2311 and 2314. Id. at 1222-23. In any event, we went on to state that "securities are 'instruments which have intrinsic value and are recognized and used as such in the regular channels of commerce,' " id. at 1223 (citing United States v. Canton, 470 F.2d 861, 864 (2d Cir.1972)) (emphasis in original), and that "it appears that the decision in each case depends upon the particular facts of that case." Id. at 1224 n. 4. We then analyzed the trial evidence and concluded that "each *1033 equipment lease in this case is the type of instrument Congress intended to and did include in the definition contained in s 2311." Id. at 1225.

FN1. Section 2311, in part, provides:
"Securities" includes any note, stock certificate, bond, debenture, check, draft, warrant, traveler's check, letter of credit, warehouse receipt, negotiable bill of lading, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate; valid or blank motor vehicle title; certificate of interest in property, tangible or intangible; instrument or document or writing evidencing ownership of goods, wares, and merchandise, or transferring or assigning any right, title, or interest in or to goods, wares, and merchandise; or, in general, any instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, warrant, or right to subscribe to or purchase any of the foregoing, or any forged, counterfeited, or spurious representation of any of the foregoing ...

[6][7] We believe that it may have been proper for the court to determine preliminarily whether or not an item could possibly be a security. See Canton, 470 F.2d at 862 (New York motor vehicle certificate not "security" as defined in s 2311); cf. In re Vericker, 446 F.2d 244, 248 (2d Cir.1971) (FBI documents not "goods," "wares" or "merchandise" under, inter alia, s 2314). But once the court concluded that the Focus 4 leases may have been securities, then, provided there was sufficient evidence in the case and upon timely request, Rogers was entitled to have the judge instruct the jury on what a security is and to let the jury decide whether the items at issue were securities. See United States v. Johnson, 718 F.2d 1317, 1323-25 (5th Cir.1983) (en banc). The district court prevented Rogers from presenting evidence in support of his claim that the Focus 4 leases were not securities, declined to instruct the jury on this issue, and the indictment did not set forth an alternative theory of prosecution for Rogers' alleged violation of s 2314. See United States v. Jackson, 576 F.2d 749, 756 (8th Cir.), cert. denied, 439 U.S. 828, 99 S.Ct. 102, 58 L.Ed.2d 122 (1978). We therefore conclude that Rogers suffered a "structural error" in the trial process and that his conviction under Count Four must be reversed, and remanded to the district court for appropriate proceedings. Sullivan, --- U.S. at ----, 113 S.Ct. at 2083; Smith, 939 F.2d at 11.

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[8] We do not agree with Rogers' further contention that a reversal on Count Four affects his convictions under Counts One through Three. Count One charged a conspiracy, the objects of which were to commit wire fraud and to transport forged and fraudulent securities in commerce. Counts Two and Three charged Rogers with substantive wire fraud. Thus, although we reverse Count Four, which supported one of the objects of the conspiracy, the indictment alleged, and the jury found, that Rogers engaged in other conspiratorial conduct, namely, the sending of a telex on approximately June 4, 1985 with intent to defraud (Count Two) and the sending of a telex on approximately June 25, 1985 with intent to defraud (Count Three). Thus, Rogers' convictions under Counts One through Three are unaffected. See Brennan v. United States, 867 F.2d 111, 114-16 (2d Cir.) (affirming general jury verdict finding conspiracy to violate and substantive RICO violation predicated upon wire fraud and violations of the Travel Act, despite subsequent invalidation by the district court of the wire fraud convictions because "[t]he very same telephone calls that formed the basis of every separate wire fraud count also formed the basis of a Travel Act count.") (emphasis in original), cert. denied, 490 U.S. 1022, 109 S.Ct. 1750, 104 L.Ed.2d 187 (1989).

CONCLUSION

We find no merit in the remaining issues Rogers raises on appeal. We affirm the district court's judgment of conviction on Counts One through Three of Rogers' indictment, charging him with conspiracy to commit wire fraud, and substantive wire fraud. However, we reverse the district court's judgment of conviction on Count Four of Rogers' indictment, charging him with transporting a fraudulent security in interstate or foreign commerce, and remand to the district court for appropriate proceedings, because the judge was erroneous on the law.

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Citation
67 S.Ct. 224
91 L.Ed. 196
(CITE AS: 329 U.S. 211, 67 S.CT. 224)

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suggests that subsequent act of concealment may be an overt act (where conspiracy is to conceal)

FISWICK et al.
v.
UNITED STATES.
No. 51.
Dec. 9, 1946.
Argued Nov. 19, 20, 1946.

Ferdinand Fiswick, Jacob F. Mayer and Fritz Gustav Rudolph were convicted of conspiring to defraud the United States in the exercise of its governmental functions, which conviction was affirmed by the Circuit Court of Appeals, 153 F.2d 176, and the defendants bring certiorari.

Reversed.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[1] CRIMINAL LAW k423(9)
110k423(9)
Where indictment charged alien defendants with conspiring from 1939 to 1944 to defraud the United States by concealing and misrepresenting their membership in the Nazi party but the last overt act alleged was the filing of a false registration by one defendant on December 23, 1940, such registration was adequate as an overt act in furtherance of conspiracy to make a false return but could not serve as an overt act in furtherance of a conspiracy to conceal from 1940 to 1944 the fact that false returns had been made so as to make admissible against codefendants separate admissions of defendants in 1943 and 1944, and instruction that admissions of each were admissible against all if there was a conspiracy and all of them were in it, was error. Alien Registration Act of 1940, s 30 et seq., 8 U.S.C.A. s 451 et seq.; Cr.Code, s 37, 18 U.S.C.A. s 88.

[1] CRIMINAL LAW k779
110k779
Where indictment charged alien defendants with conspiring from 1939 to 1944 to defraud the United States by concealing and misrepresenting their membership in the Nazi party but the last overt act alleged was the filing of a false registration by one defendant on December 23, 1940, such registration was adequate as an overt act in furtherance of conspiracy to make a false return but could not serve as an overt act in furtherance of a conspiracy to conceal from 1940 to 1944 the fact that false returns had been made so as to make admissible against codefendants separate admissions of defendants in 1943 and 1944, and instruction that admissions of each were admissible against all if there was a conspiracy and all of them were in it, was error. Alien Registration Act of 1940, s 30 et seq., 8 U.S.C.A. s 451 et seq.; Cr.Code, s 37, 18 U.S.C.A. s 88.

[2] CRIMINAL LAW k423(9)
110k423(9)

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That a conspiracy produces a continuing result does not make the conspiracy a continuing one so as to make admissible acts or declarations of a conspirator against coconspirators, but continuity of action to effect the object of the conspiracy is necessary, since a 'conspiracy' is a partnership in crime. Cr.Code, s 37, 18 U.S.C.A. s 88.
See publication Words and Phrases for other judicial constructions and definitions.

[3] CONSPIRACY k27
91k27
At common law, it was not necessary to aver or prove an overt act in order to complete the offense of conspiracy but under the Criminal Code an overt act is essential. Cr.Code, s 37, 18 U.S.C.A. s 88.

[4] CRIMINAL LAW k150
110k150
The statute of limitations, unless suspended, runs from the last overt act during the existence of the conspiracy.

[5] CRIMINAL LAW k423(1)
110k423(1)
The act of one partner in crime is admissible against the others where it is in furtherance of the criminal undertaking, but all such responsibility is at an end when the conspiracy ends.

[6] CRIMINAL LAW k423(6)
110k423(6)
The confession or admission of a conspirator after he has been apprehended is not in furtherance of the object of the conspiracy so as to be admissible against coconspirators.

[7] CRIMINAL LAW k1186.4(4)
110k1186.4(4)
Formerly 110k1186(4)
If an error in a criminal case had substantial influence on the result or if there is grave doubt about it the conviction cannot stand even if it is supported by evidence. Jud.Code, s 269, 28 U.S.C.A. s 391.

[8] CRIMINAL LAW k1186.4(4)
110k1186.4(4)
Formerly 110k1186(4)
Where court erroneously permitted separate admissions after termination of alleged conspiracy to be used against all defendants and thereby strongly bolstered a weak case the conviction could not be sustained by resort to the harmless error statute. Jud.Code, s 269, 28 U.S.C.A. s 391.

[9] FEDERAL COURTS k452
170Bk452
Formerly 106k383(1)
Where conviction of alien of conspiracy to defraud the United States would

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seriously embarrass him in event of deportation or naturalization proceedings and brand him as a felon with possible loss of civil rights a wrongful conviction would not be permitted to stand and the certiorari dismissed as moot because defendant had served the sentence imposed on him. Alien Registration Act of 1940, s 30 et seq., 8 U.S.C.A. s 451 et seq.; Cr.Code, s 37, 18 U.S.C.A. s 88.

**225 *213 Frederick M. P. Pearse, of Washington, D.C., for petitioners.

Leon Ulman, of Washington, D.C., for respondent.

Mr. Justice DOUGLAS delivered the opinion of the Court.

The Alien Registration Act of 1940, 54 Stat. 670, 8 U.S.C. s 451 et seq., 8 U.S.C.A. s 451 et seq., required aliens, with certain exceptions, to register pursuant to regulations of the Commissioner of Immigration and Naturalization. [FN1] Among the disclosures required was whether during the preceding five years the alien had been 'affiliated with or active in (a member of, official of, a worker for) organizations, devoted in whole or in part to influencing or furthering the political activities, public relations, or public policy of a foreign government.' [FN2]

FN1 See 5 Fed.Reg. 2836 for the regulations.

FN2 Regulations, supra, note 1, s 29.4(1)(15).

Petitioners are German nationals who registered under the Act, the last of the three, Mayer, registering on December 23, 1940. Each stated when he registered that he was not affiliated with or active in such an organization. Each failed to disclose in **226 answer to another question pertaining to 'memberships or activities in clubs, organizations, or societies' that he was in any way connected with the Nazi party. They were indicted in 1944 with 28 others for conspiring to defraud the United States in the exercise of its governmental functions (see Curley v. United States, 1 Cir., 130 F. 1, 4) in violation of s 37 of the Criminal Code, 18 U.S.C. s 88, 18 U.S.C.A. s 88.

*214 The indictment charges that petitioners continuously between September 1, 1939, and the date the indictment was returned, September 13, 1944, conspired with each other and with Draeger, the German consul in New York City and leader of the Nazi party in this country, with Draeger's secretary, Vogel, and with other representatives of the Third Reich, to defraud the United States by concealing and misrepresenting their membership in the Nazi party. It charges that since 1933 the Nazi party was devoted to furthering the political activities and policy of the German Reich in this country, that each petitioner during the five years prior to his registration was a member of that party, that Draeger and Vogel directed petitioners in registering under the Act to conceal and falsify their connection with the Nazi party, that petitioners followed such directions, that after their registration they continued from day to day to misrepresent to the government their connection with and activities in the Nazi party. The indictment alleges that as a means of accomplishing the conspiracy the petitioners appeared for registration and in registering falsely failed to disclose their connection with and activities in the Nazi party. The indictment sets forth 40 overt acts. Many related to instructions given by Draeger and Vogel to various defendants from September to December 1940, in

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connection with their registration. Others related to the registering by petitioners in November and December, 1940. The last over act alleged to have been committed by any of petitioners was the filing by Mayer of his registration statement on December 23, 1940.

Of the 31 indicted, only the three petitioners were convicted after a jury trial. [FN3] Fiswick and Rudolph were sentenced *215 to imprisonment for 18 months each. Mayer was sentenced to imprisonment for a year and a day. The judgments of conviction were affirmed by the Circuit Court of Appeals, one judge dissenting. 3 Cir., 153 F.2d 176. The case is here on a petition for a writ of certiorari which we granted because the rulings of the lower courts on the continuing nature of the conspiracy were apparently in conflict with decisions of this Court. See United States v. Irvine, 98 U.S. 450, 25 L.Ed. 193; United States v. Kissel, 218 U.S. 601, 31 S.Ct. 124, 54 L.Ed. 1168.

FN3 Six entered pleas of guilty. There was a dismissal as to one, a severance as to 14. Ten were tried. The jury acquitted three and disagreed as to the other four.

First. The nature and duration of the conspiracy assumed great importance at the trial for the following reason. Each petitioner after he was apprehended made damaging statements to agents of the Federal Bureau of Investigation. Mayer, in November, 1943, stated that he had applied for membership in the Nazi party and had not disclosed the fact because Vogel told him not to. Fiswick's statement made in April, 1944, was to the same effect. Rudolph made substantially the same admissions in November, 1943, and then in September, 1944, retracted them insofar as he had said that in registering under the Act and in failing to disclose his Nazi party affiliation he had followed instructions. His later reason for non-disclosure was his asserted desire to protect his family. Each of these statements was admitted at the trial. At first, each was admitted only as against the maker. At the close of the government's case, however, the District Court ruled that each of these statements was admissible against each of the other coconspirators. It so charged the jury. Later the jury returned to the courtroom for further instructions. One of the questions on which the foreman stated that they desired instruction **227 related to that part of the charge 'where you said something about all of the defendants were bound by the act of one or something, something as a group, and the other said the individuals.' *216 The judge then repeated that the admissions of each were admissible against all provided there was a conspiracy and they were all in it.

[1][2][3][4][5][6] The Solicitor General now rightly concedes that that ruling was erroneous. Though the result of a CONSPIRACY may be continuing, the CONSPIRACY does not thereby become a continuing one. See United States v. Irvine, supra. Continuity of action to produce the unlawful result, or as stated in United States v. Kissel, supra, page 607 of 218 U.S., at page 126 of 31 S.Ct., 54 L.Ed. 1168, 'continuous co-operation of the conspirators to keep it up' is necessary. A CONSPIRACY is a partnership in crime. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 253, 60 S.Ct. 811, 858, 84 L.Ed. 1129. Under s 37 of the Criminal Code, the basis of the present indictment, an overt act is necessary to COMPLETE the offense. [FN4] The statute of LIMITATIONS, unless suspended, [FN5] RUNS from the last overt act

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during the existence of the CONSPIRACY. Brown v. Elliott, 225 U.S. 392, 401, 32 S.Ct. 812, 815, 56 L.Ed. 1136. The overt acts averred and proved may thus mark the duration, as well as the scope, of the CONSPIRACY.

FN4 At common law it was not necessary to aver or prove an overt act. See Hyde v. United States, 225 U.S. 347, 359, 32 S.Ct. 793, 799, 56 L.Ed. 1114, Ann.Cas.1914A, 614. The same is true under the Sherman Anti-Trust Act, 15 U.S.C.A. ss 1--7, 15 note. Nash v. United States, 229 U.S. 373, 378, 33 S.Ct. 780, 782, 57 L.Ed. 1232; United States v. Socony-Vacuum Oil Co., supra, at page 252 of 310 U.S., at page 857 of 60 S.Ct., 84 L.Ed. 1129. But s 37 of the Criminal Code requires not only an agreement to do the unlawful act but also the doing of 'any act to effect the object of the conspiracy'. See Hyde v. United States, supra, at page 359, of 225 U.S., at page 799 of 32 S.Ct., 56 L.Ed. 1114, Ann.Cas.1914A, 614.

FN5 See, for example, s 1 of the Act of August 24, 1942, 56 Stat. 747, 18 U.S.C.Supp. II, s 590a, as amended by s 19(b) of the Act of July 1, 1944, 58 Stat. 649, 667, 18 U.S.C.Supp. IV, s 590a, 18 U.S.C.A. s 590a.

In this case the last overt act, as we have noted, was the filing by Mayer of his registration statement on December 23, 1940. That act was adequate as an overt act in furtherance of a conspiracy to make a false return. But there is difficulty in also making it serve the function of an overt act in furtherance of a conspiracy to conceal from 1940 to 1944 the fact that false returns had been *217 made. All continuity of action ended with the last overt act in December, 1940. There was no overt act of concealment which followed the act of making false statements. If the latter is permitting to do double duty, then a continuing result becomes a continuing conspiracy. If, as we think, the conspiracy charged and proved did not extend beyond the date of the last overt act, the admissions of each petitioner were improperly employed against the others. While the act of one partner in crime is admissible against the others where it is in furtherance of the criminal undertaking, Pinkerton v. United States, 328 U.S. 640, 66 S.Ct. 1180, and cases cited, all such responsibility is at an end when the conspiracy ends. Logan v. United States, 144 U.S. 263, 309, 12 S.Ct. 617, 632, 36 L.Ed. 429; Brown v. United States, 150 U.S. 93, 98, 14 S.Ct. 37, 39, 37 L.Ed. 1010. Moreover, confession or admission by one coconspirator after he has been apprehended is not in any sense a furtherance of the criminal enterprise. It is rather a frustration of it. If, as the Circuit Court of Appeals thought, the maintenance of the plot to deceive the government was the objective of this conspiracy, the admissions made to the officers ended it. So far as each conspirator who confessed was concerned, the plot was then terminated. He thereupon ceased to act in the role of a conspirator. His admissions were therefore not admissible against his erstwhile fellow-conspirators. Gambino v. United States, 3 Cir., 108 F.2d 140, 142, 143.

**228 [7] It is earnestly argued, however, that the error was harmless. The 'harmless error' statute, Judicial Code, s 269, 28 U.S.C. s 391, 28 U.S.C.A. s 391, provides that 'On the hearing of any appeal, certiorari, * * *

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or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.' We have recently reviewed the history of this statute and the function *218 it was designed to serve in criminal cases. Kotteakos v. United States, 328 U.S. 750, 66 S.Ct. 1239. The Court there stated, page 1248 of 66 S.Ct.: 'If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress. * * * But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.'

[8] We cannot say with fair assurance in this case that the jury was not substantially swayed by the use of these admissions against all petitioners. It is not enough to say that there may be a strong case made out against each petitioner. The indictment charges a conspiracy, not the substantive crime of falsely registering. The evidence that petitioners conspired with each other and with Draeger, Vogel, and others, is not strong. Though we assume there was enough evidence to go to the jury on the existence of that conspiracy, the case was one which a prosecutor would be anxious to bolster.

The prosecutor's case, apart from the admissions, may be briefly summarized. Draeger and Vogel were active in the affairs of the Nazi party in this country. Their stenographer, a government witness, testified that applications for membership in the party were received at their *219 office. Dues were paid there. A car file of members of the party and of applicants for membership was kept there. The name of each petitioner was on the list. A letter was sent to all on the list in August or September, 1940, over Draeger's signature, requesting them to discuss a matter with Draeger. Those who appeared in response to the letter were told to conceal their Nazi party membership or affiliation when they registered under the Act. Another witness for the government--a defendant in the case who was granted a severance--also testified that Vogel gave instructions to party members not to disclose their affiliation with the Nazi party. And a clerk in Draeger's office testified for the government that the party members who came to the consulate were told to say in their registration statement that they were members of an innocuous sounding association of German nationals. There was no evidence that petitioners came to the consulate seeking advice. There was no direct evidence that petitioners had received the instructions from the consulate to conceal their party membership. There was no direct evidence that petitioners came to the consulate in response to the letter which was sent. They were not identified as being with any group which called there. There was no evidence that they conferred with Draeger or Vogel or with each other.

The Solicitor General states with commendable candor that in this state of the proof it was manifestly important for the prosecutor 'to bring into the case

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against petitioners evidence of a character that might better convince the jury that when each failed to reveal his Party connection in registering he had done so upon Party instructions, and, hence, that he was a member of the conspiracy.' The admissions served that purpose. They supplied the first direct evidence that petitioners **229 acted pursuant to the instructions of the consulate. It is true, *220 as respondent emphasizes, that none of these admissions implicates any petitioner except the maker. But since, if there was a conspiracy, Draeger and Vogel were its hub, evidence which brought each petitioner into the circle was the only evidence which cemented them together in the illegal project. And when the jury was told that the admissions of one, though not implicating the others, might be used against all, the element of concert of action was strongly bolstered, if not added. Without the admissions the jury might well have concluded that there were three separate conspiracies, not one. Cf. Kotteakos v. United States, supra. With the admissions the charge of conspiracy received powerful reinforcement. And the charge that each petitioner conspired with the others became appreciably stronger, not from what he said but from what the other two said. We therefore cannot say with any confidence that the error in admitting each of these statements against the other petitioners did not influence the jury or had only a slight effect. Indeed, the admissions may well have been crucial. The admissions apparently became of considerable importance in the deliberations of the jury, for, as we have noted, they asked for clarification of the instructions on that point. And the admissions so strongly bolstered a weak case that it is impossible for us to conclude the error can be disregarded under the 'harmless error' statute. The use made of the admissions at the trial constituted reversible error.

[9] Second. A further question remains. As we have noted, Fiswick was sentenced to imprisonment for 18 months. No fine was imposed. It now appears that he has served his sentence. Accordingly, it is suggested that the cause is moot and that the writ of certiorari should be dismissed as to him. We followed that procedure in St. Pierre v. United States, 319 U.S. 41, 42, 63 S.Ct. 910, 911, 87 L.Ed. 1199, saying that since the sentence had been served, 'there was no longer a subject *221 matter on which the judgment of this Court could operate.' We added, however, that the petitioner had not shown that 'under either state or federal law further penalties or disabilities can be imposed on him as a result of the judgment which has now been satisfied.' At page 43 of 319 U.S., at page 911 of 63 S.Ct., 87 L.Ed. 1199.

The situation here is different. Fiswick is an alien. An alien sentenced to imprisonment for one year or more 'because of conviction in this country of any crime involving moral turpitude' is, unless pardoned, subject to deportation if the crime was committed within five years after the alien's entry into the United States. 39 Stat. 874, 889, 8 U.S.C. s 155, 8 U.S.C.A. s 155. The conspiracy with which Fiswick is charged was formed and executed within that five year period, as his last entry was in 1937. The conspiracy of which he was convicted was one to impede the government in one of its lawful functions, to prevent it from obtaining information which the Executive and Congress deemed vital to our internal security, to conceal by fraud, deceit, and perjury [FN6] the ramifications of an organization in our midst bent on our undoing. We need not determine in this collateral way whether conviction for such a crime would involve 'moral turpitude' within the meaning of the

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deportation laws. [FN7] But the judgment, **230 if undisturbed, stands as unimpeachable evidence that Fiswick committed *222 the crime charged. The hazards of deportation because of that fact are real. [FN8] To leave him to defend a deportation order on the ground that the crime of which he was convicted did not involve 'moral turpitude' is to add to his burdens by depriving him of his best defense--that he was not properly convicted.

FN6 The registration statements required by the Act were sworn statements. Regulations, supra note 1, s 29.4(g), (j).

FN7 Convictions for perjury, Kaneda v. United States, 9 Cir., 278 F. 694, for frauds on the revenues, Guarneri v. Kessler, 5 Cir., 98 F.2d 580, United States ex rel. Berlandi v. Reimer, 2 Cir., 113 F.2d 429, for frauds with respect to property, United States ex rel. Medich v. Burmaster, 8 Cir., 24 F.2d 57, have been held by the lower courts to meet that test. And counterfeiting was so classified by the Court in United States ex rel. Volpe v. Smith, 289 U.S. 422, 53 S.Ct. 665, 77 L.Ed. 1298. As to deportation for violations of the Alien Registration Act of 1940 see s 20(b)(4) and (5). See also Alien Enemy Act of 1798, Rev.Stat. ss 4067--4070, as amended 40 Stat. 531, 50 U.S.C. ss 21--24, 50 U.S.C.A. ss 21--24; Presidential Proclamation No. 2655, 10 Fed.Reg. 8947.

FN8 Although deportation is not technically a criminal punishment, it may visit great hardship on the alien. Bridges v. Wixon, 326 U.S. 135, 147, 65 S.Ct. 1443, 1449, 89 L.Ed. 2103. As stated by the Court, speaking through Mr. Justice Brandeis, in Ng Fung Ho. v. White, 259 U.S. 276, 284, 42 S.Ct. 492, 495, 66 L.Ed. 938, deportation may result in the loss 'of all that makes life worth living.'

Moreover, other disabilities or burdens may flow from the judgment, improperly obtained, if we dismiss this cases as moot and let the conviction stand. If Fiswick seeks naturalization, he must establish that during the five years immediately preceding the date of filing his petition for naturalization he 'has been and still is a person of good moral character.' 54 Stat. 1137, 1142, 8 U.S.C. s 707(a)(3), 8 U.S.C.A. s 707(a)(3). An outstanding judgment of conviction for this crime stands as ominous proof that he did what was charged and puts beyond his reach any showing of ameliorating circumstances or explanatory matter that might remove part or all of the curse. And even though he succeeded in being naturalized, he would, unless pardoned, carry through life the disability of a felon; [FN9] and by reason of that fact he might lose certain civil rights. [FN10] Thus Fiswick has a substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed on him. In no practical sense, therefore, can Fiswick's case be said to be moot.

FN9 'All offenses which may be punished by death or imprisonment for a term exceeding one year, shall be deemed felonies.' Criminal Code s 335, 18 U.S.C. s 541, 18 U.S.C.A. s 541.

FN10 Thus Mo.R.S.A. s 4561 renders such person incompetent to serve on a

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jury and forever disqualifies him from voting or holding office, unless pardoned.

*223 It is said however, that having served his sentence, Fiswick may not be resentenced on a new trial and that if his conviction is reversed, he thereby escapes deportation. The argument is that he thwarts the deportation policy by electing to serve his sentence. We cannot assume, however, that Fiswick is guilty of the conspiracy charged. He was not accorded the trial to which he is entitled under our system of government. The conviction which he suffered was not in accordance with law. The errors in the trial impeach the conviction; and he must stand in the position of any man who has been accused of a crime but not yet shown to have committed it. To dismiss his case as moot would permit the government to compound its error at Fiswick's expense. That course does not comport with our standards of law enforcement.

Reversed.

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dx conspiracy to avoid filing CTRs and conspiracy to conceal transactions.

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UNITED STATES of America
v.
DONAHUE, Joseph P., Appellant.
No. 89-5133.
United States Court of Appeals,
Third Circuit.
Submitted Under Third Circuit Rule 12(6)
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Decided Sept. 6, 1989.
Rehearing and Rehearing In Banc Denied Oct. 6, 1989.

Defendant was convicted by jury in the United States District Court for the Middle District of Pennsylvania, Richard P. Conaboy, J., of various offenses relating to his participation in money laundering scheme, and he appealed. The Court of Appeals, Greenberg, Circuit Judge, held that: (1) defendant could be convicted of conspiring to willfully and knowingly avoid filing currency transactions reports on basis of his agreement with bank branch manager to willfully conceal bank's duty to file those reports or by aiding and abetting that violation, even though he himself could not have been held liable for failure to file those reports, and (2) venue on count relating to transportation of currency to Grand Cayman Island without filing of requisite Currency and Monetary Instrument Reports was proper in district where offense "began"--i.e., where defendant, bearing that currency, boarded first of successive flights.

Affirmed.

[1] CONSPIRACY k40.2
91k40.2
Defendant could be convicted of conspiring to willfully and knowingly avoid filing currency transaction reports on basis of his agreement with bank branch manager to willfully conceal bank's duty to file currency transaction reports, even though defendant himself could not have been held liable for failure to file those reports. 18 U.S.C.A. s 371; 31 U.S.C.A. ss 5313, 5322.

[2] CRIMINAL LAW k113
110k113
Venue on charge of transporting currency without filing required reports was proper in district where offense "began," i.e., where defendant, bearing large sums of unreported currency, boarded first of successive flights to Grand Cayman Islands. 18 U.S.C.A. ss 2, 3237(a); 31 U.S.C.A. ss 5316, 5322.

*45 Gregory T. Magarity, Stanley R. Scheiner, William C. Nugent, Wolf, Block, Schorr & Solis-Cohen, Philadelphia, Pa., for appellant.

William A. Behe, Gordon A.D. Zubrod, James J. West, U.S. Atty., U.S. Attorney's Office, Harrisburg, Pa., for appellee.

OPINION OF THE COURT

Before SLOVITER and GREENBERG, Circuit Judges, and FISHER, District Judge. [FN*]

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FN* Honorable Clarkson S. Fisher, Judge, United States District Court for the District of New Jersey, sitting by designation.

GREENBERG, Circuit Judge.

On April 19, 1988, a three-count indictment was returned against appellant, Joseph Donahue, and his co-defendant Michael Coffey, in the Middle District of Pennsylvania. Count I charged both defendants, along with unindicted co-conspirator Frederick Luytjes, with conspiring in violation *46 of 18 U.S.C. s 371 [FN1] (1) to willfully and knowingly avoid filing Currency Transaction Reports (CTRs), relating to domestic currency transactions, as required by 31 U.S.C. ss 5313 and 5322; (2) to willfully and knowingly avoid filing Currency and Monetary Instrument Reports (CMIRs), relating to international transfer of currency and monetary (negotiable) instruments, as required by 31 U.S.C. ss 5316 and 5322; and (3) to defraud the United States of lawful revenue in violation of the foregoing currency transaction reporting laws, as well as 26 U.S.C. ss 7201 and 7206. Count II charged Donahue and Coffey, as well as Luytjes, with a substantive and aiding and abetting violation, 18 U.S.C. s 2, of 31 U.S.C. ss 5316 and 5322, by transporting, causing to be transported, or aiding and abetting the transportation of approximately $1,000,000 in currency from Lackawanna County, Pennsylvania, to the Grand Cayman Island, British West Indies, without filing the CMIRs. [FN2] Count III of the indictment charged Coffey alone with a substantive violation of 31 U.S.C. ss 5313 and 5322. [FN3] On motion by the government the defendants' trials were severed and, on November 16, 1988, Donahue was convicted at a jury trial on Counts I and II. He appeals his conviction on both counts. For the reasons that follow we will affirm.

FN1. 18 U.S.C. s 371 provides:
If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

FN2. Count II also charged violations of 31 U.S.C. ss 1101 and 1059, the predecessors of ss 5316 and 5322(b).

FN3. Again, Count III also charged violation of 31 U.S.C. s 1059.

I.

Donahue's conviction stems from his participation in a money laundering scheme with Coffey, branch manager of United Penn Bank in Scranton, Pennsylvania, and Luytjes, a drug trafficker. Luytjes, who had entered into a plea agreement with the government and was its primary witness at Donahue's trial, testified that in 1984, he was tried in Florida for drug trafficking and ultimately was acquitted. During the course of his trial, however, he managed to earn between $10 and $13 million from drug smuggling, which he planned to stash away in the event he was convicted. [FN4] He and his agents deposited $10 million

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of these proceeds into accounts at United Penn Bank. Luytjes testified that he told Coffey, the officer with whom he dealt at United Penn, that the money had come from the sale of his business, Air America, and that he had written up a fictitious agreement to sell the company and represented that the buyer had paid him in cash. [FN5] He further testified that Coffey asked him if he would be interested in smuggling money to the Cayman Islands in order to avoid paying taxes on it, and that they agreed that Coffey would launder $4 million in exchange for a fee of $100,000. Pursuant to this agreement, Luytjes on various occasions delivered cash to Coffey. Although Coffey refused to disclose to Luytjes how he was transporting the money to the Cayman Islands, he introduced Luytjes to Donahue, suggesting that Luytjes might want to invest in Donahue's scuba diving business in the Cayman Islands. According to Luytjes, Donahue revealed to him that he was working with Coffey in moving Luytjes' money to the Cayman Islands.

FN4. Luytjes testified as to how he did this as follows: On the weekends of the trial I scheduled approximately seven flights, seven weekends of the 11-week trial. And I would leave Tampa, the court, and fly back to Pennsylvania, get in another airplane, fly down to Colombia, spend the night, get up in the morning, fly back to the United States on Sunday morning and get back to Pennsylvania Sunday night, get in another airplane, fly back to Tampa and go back to court for the week.

FN5. Luytjes had unusual assistance in carrying out this farce, as the agreement of sale was prepared by a large Philadelphia law firm which thought the sale was legitimate.

Donahue and Coffey dealt with the cash Coffey received from Luytjes in a number *47 of different ways. On one occasion, Coffey converted a million dollars in cash received from Luytjes into five cashier's checks of $200,000 each. Coffey filled out a CTR upon receipt of the cash, but never filed it. Coffey gave the cashier's checks to Donahue, who transported them to Grand Cayman Island. On other occasions Coffey gave Donahue cash, which Donahue took to various banks in Pennsylvania and New York for conversion into cashier's checks under $10,000 which he then transported to Grand Cayman Island. [FN6] Finally, from time to time Donahue would transport cash given to him by Coffey, apparently in $200,000 allotments, from Pennsylvania to Grand Cayman Island. Coffey did not file CTRs for the cash he gave to Donahue. Donahue never filed a CMIR when he left this country.

FN6. A total of 143 cashier's checks were purchased in northern Pennsylvania in amounts less than $10,000, and deposited in Donahue's accounts in the Cayman Islands.

Upon arrival at Grand Cayman Island, Donahue would deposit the cash and cashier's checks into his own bank accounts, from which it was transferred into Luytjes' accounts there. Donahue told Luytjes that he was being paid $50,000 for his role in the money laundering scheme.

As part of his plea agreement with the government, Luytjes taped a number of his conversations with Donahue. Various statements made by Donahue on these

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tapes indicate his knowing participation in the above-described money laundering scheme. [FN7]

FN7. After his acquittal in Florida, Luytjes decided to report his drug trafficking proceeds as income and pay taxes on them. Again using the ruse of the sale of Air America, he reported the money as a long-term capital gain rather than as ordinary income so as to pay less tax. Id.

II.

[1] Donahue's primary challenge to his conviction on Count I of the indictment relates to the charge that he, Coffey and Luytjes conspired, in violation of 18 U.S.C. s 371, to willfully and knowingly avoid filing CTRs in violation of 31 U.S.C. ss 5313 and 5322. The essence of his argument is that he was held criminally liable for "structuring" currency transactions, conduct which, during the relevant time period, was not unlawful.

31 U.S.C. s 5313(a) authorizes the Secretary of the Treasury to require both financial institutions and other participants in a currency transaction to file a report on the transaction. During the time period relevant to this case, the Secretary required only financial institutions to file reports on transactions of more than $10,000. 31 C.F.R. s 103.22(a) (1983). Nothing in the Act or regulations expressly prohibited a bank customer from "structuring" transactions to keep each transaction under $10,000, in order to avoid triggering, or in an attempt to conceal, the bank's obligation to file.

In United States v. Mastronardo, 849 F.2d 799 (3d Cir.1988), we held that prior to the Act's 1986 amendment, [FN8] a customer could not be held criminally liable for structuring transactions to avoid the reporting requirements. The defendants in Mastronardo, all bank customers, had been convicted of participating in a conspiracy to defraud the United States in violation of 18 U.S.C. s 371, and participating in a scheme to conceal material facts from the United States in violation of 18 U.S.C. s 1001. We noted that "while this appeal does not involve a specific conviction for the act of 'structuring' transactions, both the s 1001 convictions and the s 371 conspiracy convictions rely upon the purported illegality of 'structuring' in order to impose criminal liability upon these defendants." Id. at 803-04. We went on to reverse these convictions, reasoning that the statute and regulations "did not give a reasonable bank customer fair notice that 'structuring' cash transactions to avoid the reporting requirement is criminal." Id. at 804.

FN8. In 1986 Congress expressly proscribed the structuring of transactions to evade the reporting requirements. See 31 U.S.C. s 5324.

Although Donahue maintains that our decision in Mastronardo mandates reversal of his conviction, we fully agree with the *48 district court's contrary determination. [FN9] As the district court recognized, the theory of the government's case on the conspiracy charge was not that Donahue conspired to violate section 5313 by structuring transactions, but rather that he did so by agreeing with Coffey to willfully conceal United Penn's duty to file CTRs or by aiding and abetting that violation. When Luytjes delivered quantities of cash exceeding $10,000 to Coffey, Coffey should have but did not file reports

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of the transactions, and Donahue collaborated in Coffey's efforts to conceal that the cash had ever been received. Donahue was convicted, then, not in the capacity as a bank customer or for conduct involving structuring, but rather as a co-conspirator or abettor in a financial institution's scheme to avoid filing CTRs. Thus, Mastronardo is inapposite. The fact that part of the scheme to conceal involved structuring transactions at other banks is immaterial.

FN9. We regard the Mastronardo issue in the context of this appeal, as well as the venue issue discussed below, as involving the interpretation and application of legal precepts and thus we are undertaking a plenary review on these issues. United States v. Adams, 759 F.2d 1099, 1106 (3d Cir.), cert. denied, 474 U.S. 906, 971, 106 S.Ct. 275, 336, 88 L.Ed.2d 236, 321 (1985).

While Donahue himself could not have been held liable for a failure to file CTRs, this does not foreclose his criminal liability for conspiring to do so. A person, even though incapable of committing the underlying substantive offense, can be convicted of conspiracy under 18 U.S.C. s 371. See, e.g., United States v. Hayes, 827 F.2d 469, 472-73 (9th Cir.1987). The same is true of aiding and abetting under 18 U.S.C. s 2(a). See United States v. Standefer, 610 F.2d 1076, 1085 (3d Cir.1979) (in banc), aff'd, 447 U.S. 10, 100 S.Ct. 1999, 64 L.Ed.2d 689 (1980). [FN10]

FN10. Although Count I of the indictment does not specifically charge Donahue with "aiding and abetting" under 18 U.S.C. s 2(a), the absence of specific reference to 18 U.S.C. s 2 in an indictment is not fatal. See United States v. Catena, 500 F.2d 1319, 1323 (3d Cir.), cert. denied, 419 U.S. 1047, 95 S.Ct. 621, 42 L.Ed.2d 641 (1975). Here, the district court in fact charged the jury under an aiding and abetting theory.

Our recent decision in United States v. American Investors of Pittsburgh, Inc., 879 F.2d 1087 (3d Cir.1989), lends support to our analysis here. There, we affirmed the conviction of one of the defendants [Zytnick] for conspiring with a financial institution to circumvent the currency reporting laws in violation of 18 U.S.C. s 371 and/or aiding and abetting the scheme in violation of 18 U.S.C. s 2(a). The evidence established that Zytnick collaborated in the financial institution's violation, not by structuring transactions, but by concealing the extent of his transactions through various other means. [FN11] We recognized that "under United States v. Mastronardo, Zytnick could not be charged with the substantive offense of failing to file CTRs since he had no duty to do so." 879 F.2d at 1103. We nonetheless affirmed his liability on conspiracy and aiding and abetting grounds, noting that "the relief afforded to customers under Mastronardo does not apply to Zytnick...." 879 F.2d at 1103 n. 20. [FN12]

FN11. In fact, one of Zytnick's arguments was that "if he had been aware of the CTR requirement he could have structured his transactions to avoid any violation." 879 F.2d at 1103 n. 20.

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FN12. We also held in American Investors that a customer of a financial institution could be held criminally liable for willfully causing the institution to fail to file CTRs pursuant to 31 U.S.C. s 5313 and 18 U.S.C. s 2(b), and that Mastronardo did not compel a contrary holding because there the defendants had been acquitted of violating 18 U.S.C. s 2(b). Under American Investors, liability under sections 5313 and 2(b) can be imposed on a customer if (1) the financial institution had the legal obligation to file CTRs--i.e., the legal capacity to commit the crime--and if (2) the customer had the intent to preclude the financial institution from filing CTRs.

In sum, we reject Donahue's argument that under Mastronardo his conviction on Count I must be reversed. Because we find Donahue's remaining objections to his conviction on that count likewise lacking in merit, we will affirm his conviction on Count I. [FN13]

FN13. Donahue challenges his conviction on Count I on an alternative ground in relation to that portion of the count charging him with conspiring to defraud the United States by participating in a scheme to evade income taxes in violation of 31 U.S.C. ss 5313, 5316 and 5322 and 26 U.S.C. ss 7201 and 7206. He maintains, inter alia, that the district court improperly failed to charge the jury that in order to convict Donahue on this charge, the evidence had to establish that he had the specific intent to help Luytjes evade his taxes, and that in any event such evidence was lacking. The district court charged the jury that it had to find a "mutual understanding" to "move money in such a way, money of Mr. Luytjes in such a way that the government would be deprived of the ability ... to decide whether or not there was a tax ... due," in which scheme Donahue "willfully and intentionally" joined. Thus, the district court apprised the jury of exactly what Donahue claims it did not know. Furthermore, we find that the evidence introduced by the government was sufficient to sustain the jury's verdict on this charge.

*49 III.

[2] Donahue's principal contention that his conviction on Count II of the indictment must be reversed is predicated on a claim that venue of the charge on that count was improper in the Middle District of Pennsylvania. "Congress has incorporated the basic constitutional provisions on venue in Rule 18 of the Federal Rules of Criminal Procedure which provides, in relevant part, that 'the prosecution shall be had in a district in which the offense was committed.' " United States v. Passodelis, 615 F.2d 975, 977 (3d Cir.1980). Donahue contends that the crime charged in Count II was not committed in the Middle District of Pennsylvania. We, however, agree with the government that Count II involves an offense "begun in one district"--the Middle District of Pennsylvania--"and completed in another" under 18 U.S.C. s 3237(a) and therefore could be prosecuted in the Middle District of Pennsylvania.

As noted earlier, Count II charged Donahue with violating 31 U.S.C. ss 5316 and 5322 by knowingly transporting currency from Pennsylvania to Grand Cayman Island without filing reports required by the Secretary of the Treasury. [FN14] Section 5316(a) provides in relevant part:

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FN14. Count II charged that such transportation was "part of a pattern of illegal activity involving transactions of more than one hundred thousand dollars ($100,000) in a 12-month period" so as to invoke the enhanced penalty provided by 31 U.S.C. s 5322(b). The count also charged Donahue with aiding and abetting the substantive violation, thus leading the government to contend, brief at 20, that his "accessorial acts in the Middle District of Pennsylvania" justified venue there. While there may be force to this contention, inasmuch as Donahue in Pennsylvania assisted Coffey and Luytjes in the transportation of the money and they might each be viewed as a person who "has transported" monetary instruments, we prefer to predicate our decision on Donahue's direct conduct as a transporter.

(a) ... a person or an agent or bailee of the person shall file a report under subsection (b) of this section when the person, agent, or bailee knowingly--
(1) transports, is about to transport, or has transported, monetary instruments of more than $10,000 at one time--
(A) from a place in the United States to or through a place outside the United States[.] [FN15]

FN15. In October of 1984, section 5316(a)(1) was amended to raise the amount transported from $5,000 to $10,000. The text of section 5316(a) was amended in 1984 and 1986 but not materially to this case. We quote the 1986 version.

Section 5316(b) directs that the report be filed "at the time and place the Secretary of the Treasury prescribes." In turn, the applicable regulations provide that the report must be filed "at the time of departure," "with the Customs officer in charge at any port of ... departure." 31 C.F.R. s 103.26(b)(1), (3).
In its efforts to prove the charges in Count II, the government introduced evidence at trial that on a variety of occasions Donahue flew from Pennsylvania to Miami, where he changed planes and continued directly on to Grand Cayman Island. [FN16] Donahue asserts, and the government does not dispute, that "[a]ll of the evidence showed that Donahue went through Customs in Miami," and that "the government neither alleged nor proved that Donahue had a legal duty to file CMIRs in the M.D. of Pa." Appellant's brief at 33. Asserting *50 that " 'where the crime charged is failure to do a legally required act, the place fixed for its performance fixes the situs of the crime,' " Donahue maintains that the government failed to establish venue in Pennsylvania because the "situs of the crime" was Miami--the place where the reports should have been filed. Brief at 28-34 (citing Johnston v. United States, 351 U.S. 215, 220, 76 S.Ct. 739, 742, 100 L.Ed. 1097 (1956)).

FN16. The government introduced, inter alia, some of Donahue's plane tickets and travel itineraries documenting various of his trips to and from Grand Cayman Island. Government Exhibits 18.1, 18.2. The exhibits showed that the layovers in Miami were only a few hours at most.

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The problem with this analysis is that it focuses on one aspect of the conduct proscribed by section 5316, the failure to file a report, to the exclusion of the other element of the offense--the transportation of currency. It is true, as Donahue notes, that it is often helpful to look at the statutory verb in the description of the offense in determining where an offense was committed. See, e.g., 2 Wright, Federal Practice & Procedure: Criminal 2d s 302 (1982). However, his choice of "file" in 31 U.S.C. s 5316(a) as the only relevant verb in the section ignores the fact that standing alone the failure to file a report is not unlawful; such failure must be accompanied by the knowing transportation of currency out of the country to become a crime. Although Donahue cites a case, addressing issues other than venue, for the proposition that " 'the crime which [s 5316] punishes is not the transportation of more than [$10,000] in currency out of the United States, but rather the failure to file the required report,' " appellant's brief at 37, [FN17] the fact remains that absent the transportation or intent to transport the failure to file is unobjectionable. [FN18] Thus, Count II of the indictment charged that the offense was the transportation of the currency, without the filing of the report.

FN17. Donahue cites United States v. Rojas, 671 F.2d 159, 162 (5th Cir.1982). See also United States v. Warren, 612 F.2d 887, 891 (5th Cir.) (en banc), cert. denied, 446 U.S. 956, 100 S.Ct. 2928, 64 L.Ed.2d 815 (1980).

FN18. Moreover, in making his venue argument Donahue relies not upon the language of section 5316 itself, which merely requires a report to be filed "at the time and place the Secretary of the Treasury prescribes," but upon the federal regulations implementing the Act. The fact that Congress did not explicitly designate the place of filing weakens any argument that it intended to restrict venue in the manner Donahue suggests.

In view of the foregoing, we agree with the government that the conduct underlying Donahue's conviction on Count II constituted an offense "begun in one district and completed in another" under 18 U.S.C. s 3237(a). [FN19] The evidence established that Donahue, bearing large sums of currency, on various occasions boarded a plane in Pennsylvania, [FN20] changed planes in Florida without filing the requisite report, and proceeded on to Grand Cayman Island. In our view, this uninterrupted series of events is properly regarded as one continuing offense for purposes of venue, beginning in Pennsylvania and ending in Grand Cayman Island. Cf. United States v. Rigdon, 874 F.2d 774, 779-80 (11th Cir.1989) (venue for failure to file CTR as required by 31 U.S.C. s 5313 not only proper in Washington, D.C., where CTRs can be filed, but also in *51 Northern District of Florida where cash was exchanged for cashier's checks.)

FN19. That section provides:
s 3237. Offenses begun in one district and completed in another
(a) Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and

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prosecuted in any district in which such offense was begun, continued, or completed.
Any offense involving the use of the mails, transportation in interstate or foreign commerce, or the importation of an object or person into the United States is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce, mail matter, or imported object or person moves.

FN20. Donahue's airline tickets indicate that he flew from Scranton/Wilkes Barre in the Middle District of Pennsylvania to Philadelphia, then from Philadelphia to Miami, and then on to the Grand Cayman Island. The stop in Philadelphia does not affect the existence of venue in the Middle District of Pennsylvania under our analysis. We, of course, are not concerned with whether venue would have been proper if Donahue had picked up the currency in Miami, rather than leaving Pennsylvania with it.

We agree with the government that this case is distinguishable from Travis v. United States, 364 U.S. 631, 81 S.Ct. 358, 5 L.Ed.2d 340 (1961), cited by Donahue. In Travis, the defendant was charged with filing a false non-Communist affidavit with the National Labor Relations Board in violation of section 9(h) of the National Labor Relations Act, and section 35A of the Criminal Code (since replaced by 18 U.S.C. s 1001). Although the affidavits were filed in Washington, D.C., the defendant was tried in Colorado, where he had executed and mailed them. The Court held that venue lay only in Washington, D.C., rejecting the government's argument that the charged offense was a continuing one under section 3237 beginning in Colorado. The Travis court did state that "[w]hen a place is explicitly designated where a paper must be filed, a prosecution for failure to file lies only at that place." Id. at 636, 81 S.Ct. at 362. While, viewed in a vacuum, this statement arguably lends support to Donahue's position, in Travis "only the single act of having a false statement at a specified place [was] penalized." Id. at 637, 81 S.Ct. at 362. [FN21] Transportation of the document was not an element of the offense in Travis. Here, however, as discussed above, the elements of the offense included not only a failure to file but also the transportation of currency outside of the country, and thus Travis is not controlling. [FN22]

FN21. Significantly, the Court noted that section 9(h) provided only that the Board could not make investigations or issue complaints on questions raised by labor organizations unless non-Communist affidavits were filed, and did not require the filing of such affidavits. It stated that "[i]f it had, the whole process of filing, including the use of the mails, might logically be construed to constitute the offense." Id. at 635, 81 S.Ct. at 361. Here, in contrast to Travis, filing was required by the applicable regulations.

FN22. A number of courts have limited Travis to its particular facts. See, e.g., United States v. Mendel, 746 F.2d 155, 165 (2d Cir.1984), cert. denied, 469 U.S. 1213, 105 S.Ct. 1184, 84 L.Ed.2d 331 (1985) (

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" 'the decision [in Travis] surely was meant to be confined to the facts on the unusual statute involved' " (citations omitted)); United States v. Herberman, 583 F.2d 222, 227 (5th Cir.1978) (Travis does not mandate that every defendant whose forms are filed in another district must defend there). We also note that Donahue relies on our decision in United States v. Valenti, 207 F.2d 242 (3d Cir.1953), which was approved in Travis. For the same reasons we find Travis not controlling, Valenti is not applicable here.

Indeed, the second paragraph of section 3237(a), which has been described as "a specific application of the general provision about continuing offenses in the first paragraph of the section," Wright, supra, s 303, expressly provides that offenses involving foreign commerce are continuing and may be prosecuted in any district "from, through or into which such commerce ... moves" (emphasis added). We think that for venue purposes, this case is more analogous to those involving the transportation of stolen objects in interstate or foreign commerce than to "one-step crime" [FN23] cases like Travis, where the only act of significance was the false filing. Cf. United States v. Infanti, 474 F.2d 522, 527 (2d Cir.1973) (prosecution for transporting stolen stock certificates in foreign commerce in violation of 18 U.S.C. s 2314 proper in district where stolen certificates in possession of co-defendant before transportation began.) [FN24] While the mere transportation of the currency outside of the country was not unlawful, it became so when coupled with Donahue's failure to file the CMIRs.

FN23. See United States v. Dekunchak, 467 F.2d 432, 438 (2d Cir.1972).

FN24. We see no reason to hold that the fact that no national boundary had yet been crossed when Donahue left Pennsylvania defeats venue there. While we will assume, arguendo, that under 31 U.S.C. s 5316 the offense was not completed in Pennsylvania, undoubtedly the commission of the offense was eventually completed and the transportation in the Middle District of Pennsylvania was an integral part of it. Cf. United States v. Hankish, 502 F.2d 71 (4th Cir.1974) (offense of transporting goods stolen from interstate commerce committed as soon as defendants began transporting them, not when they crossed state line, and venue under section 3237 proper in district where transportation began.)

*52 In sum, we hold that Donahue's commission of the offense proscribed by section 5316--the transportation of currency from the United States to a place outside the country without filing a report--began in the Middle District of Pennsylvania, where he boarded the first of the successive flights which ultimately would land him in Grand Cayman Island, and that venue was proper there, even assuming that the report required by section 5316 could only have been filed in Miami. [FN25]

FN25. Because of our holding it is unnecessary to address the government's alternative argument that Donahue waived his right to challenge venue by not timely raising the challenge.

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IV.

Although Donahue voices a variety of other objections to his conviction, we find them to be lacking in merit. [FN26] Accordingly, we will affirm his conviction on both counts of the indictment.

FN26. Donahue contends that a recorded conversation between himself and Luytjes introduced at trial should have been suppressed under 18 U.S.C. s 2515, which prohibits the use as evidence of certain intercepted wire or oral communications. Although 18 U.S.C. s 2511(2)(c) sets forth an exception to 18 U.S.C. s 2515 when the communication is intercepted by a "person acting under color of law" and "one of the parties to the communication has given prior consent to such interception," Donahue maintains that the exception is inapplicable here because Luytjes did not voluntarily consent to the interception but was misled into doing so by false promises in his plea agreement. Despite Donahue's efforts to characterize his objection as involving Luytjes' consent to the interception, what he is really challenging is the government's authority to grant Luytjes what he indisputably received by virtue of his plea agreement; he maintains, for instance, that the government lacked the authority to compromise Luytjes' civil tax liability in the agreement but does not claim that the government reneged on this promise. We therefore reject Donahue's challenge to his conviction on this basis.
Donahue raises a number of other grounds for reversal of his conviction, including claims that the Assistant United States Attorney should have been recused; that he breached a rule of professional conduct; and that certain hearsay testimony was improperly allowed at trial. We have examined these arguments and find them lacking in merit.

END OF DOCUMENT

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① Co-conspirators are liable for reas. foreseeable criminal acts done in furtherance.
② Illegal acts not specifically contemplated by Δ may be part of conspiracy

Citation 616 F.2d 2
Rank(R) R 5 OF 8
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5 Fed. R. Evid. Serv. 373
(CITE AS: 616 F.2D 2)

UNITED STATES of America, Appellee,
v.
Harold V. GLEASON, Paul Luftig and J. Michael Carter, Defendants-Appellants.

Nos. 125, 126 and 137, Dockets 79-1147, 79-1151 and 79-1208.
United States Court of Appeals,
Second Circuit.
Argued Oct. 9, 1979.
Decided Dec. 19, 1979.
Certiorari Denied March 17, 1980. See 100 S.Ct. 1320.

Former officers of national bank were convicted before the United States District Court for the Southern District of New York, Thomas P. Griesa, J., of making false entries in bank records with intent to defraud and CONSPIRING to perpetrate such frauds on the federal Government, bank shareholders and prospective lenders, and they appealed. The Court of Appeals, Mansfield, Circuit Judge, held that: (1) although improper, instruction likening job of jury's drawing an inference to a spectator at a football game who, having observed quality of play, makes certain inferences concerning the coaching provided was not reversibly erroneous; (2) since object of alleged CONSPIRACY was to falsify operating statements for the first quarter to make it appear that the bank had earned a profit, it was not necessary that each coconspirator have comprehended full scope of the scheme, i. e., false evaluation of securities as well as fictitious foreign exchange transactions; (3) instruction that term "individual" in false entry statute included depositors was not inflammatory; and (4) although deceptive foreign exchange transactions actually took place and were reflected in bank's books, the subject entries, showing a profit rather than loss, were "false entries".

Affirmed.

[1] CRIMINAL LAW k1172.2
110k1172.2
Although circumstantial evidence instruction likening the job of the jury drawing an inference to the spectator at a football game who, having observed the quality of play, makes certain inferences concerning the coaching being provided, was ill-conceived, confusing and inappropriate it did not require reversal of conviction of high bank officers of making false entries in bank records with intent to defraud as jury was otherwise advised of nature of circumstantial evidence, was repeatedly told to use common sense in drawing inferences and court carefully stated that "football coach" example was an illustration and had nothing to do with the case. 18 U.S.C.A. ss 1005, 1014.

[2] CRIMINAL LAW k785(3)
110k785(3)
It is the trial court's duty, in instructing on witness' credibility, to give balanced instructions.

[3] CRIMINAL LAW k785(3)
110k785(3)

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Where the trial court points out that testimony of certain types of witnesses may be suspect and should therefore be scrutinized and weighed with care, such as that of accomplices or coconspirators, those who have made plea bargains or are awaiting sentence, those who have been granted immunity, and defendants, it must also direct the jury's attention to the fact that it may well find such witnesses to be truthful in whole or part; in short, the court should not emphasize the suspect nature of the testimony of certain witnesses without pointing out that they may be believed.

[4] CRIMINAL LAW k811(5)
110k811(5)
Although a trial judge has the right to comment on credibility of specific witnesses, such right is limited and its exercise is appropriate only when necessary to assist the jury.

[5] CRIMINAL LAW k742(1)
110k742(1)
Credibility issues are left solely to the jury which, as the conscience of the community, is expected to act with sound judgment.

[6] CRIMINAL LAW k785(3)
110k785(3)
Although credibility was essential issue in view of diametrically conflicting testimony of government witnesses, including accomplices, and the defendants, charge on credibility was not weighted in favor of the Government where court pointed out that the Government is frequently required to rely on participants, accomplices and persons who have committed crimes and that jury must view such witnesses with particular caution and scrutinize them with great care and it did not follow that because a person had a vital interest he was not capable of telling the truth and that it was for the jury to determine credibility.

[7] BANKS AND BANKING k62
52k62
Alleged motives of bank officials, charged with falsifying operating statements with intent to defraud, were relevant but were not elements of the crime and were not required to be proven. 18 U.S.C.A. ss 371, 1005, 1014.

[7] CRIMINAL LAW k342
110k342
Alleged motives of bank officials, charged with falsifying operating statements with intent to defraud, were relevant but were not elements of the crime and were not required to be proven. 18 U.S.C.A. ss 371, 1005, 1014.

[8] CONSPIRACY k40.1
91k40.1
To be convicted as a member of a CONSPIRACY, a defendant need not know every objective of the CONSPIRACY, every detail of its operation or means employed to achieve the agreed-upon criminal objective or even the identity of every coconspirator; however, there must be agreement on the essential nature of the plan and on the kind of criminal conduct in fact contemplated. 18

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[9] CONSPIRACY k24.5
91k24.5
Formerly 91k23
A CONSPIRATOR must agree to and participate in a scheme which he knows to have an illegal objective. 18 U.S.C.A. s 371.

[10] CONSPIRACY k40.1
91k40.1
If in course of a CONSPIRACY there occur other illegal acts not specifically contemplated by an individual CONSPIRATOR but reasonably akin to the anticipated illegality and in furtherance or in consequence of the scheme, a CONSPIRATOR may not on that account escape liability for participation in the CONSPIRACY. 18 U.S.C.A. s 371.

[11] CONSPIRACY k48.2(2)
91k48.2(2)
CONSPIRACY instruction in prosecution of high bank officers for CONSPIRING to make false entries in bank records was sufficient, notwithstanding contention that CONSPIRACY involved two distinct transactions, i. e., false evaluation of securities and fictitious foreign exchange transactions, since instructions described general goal and various federal offenses alleged to have been committed, with court selecting one of the alleged objects in interest of simplicity and expounding thereon, and jury was told that to convict they must find a single CONSPIRACY of the type alleged and that acquittal was necessary if jury found two separate, independent CONSPIRACIES. 18 U.S.C.A. ss 371, 1005.

[12] CONSPIRACY k40.1
91k40.1
As long as jury, in prosecution of high bank officials for CONSPIRING to make false entries in bank records with intent to defraud and making false statements to federally insured bank to influence fulfillment of loan commitment, found one CONSPIRACY to falsify bank books in order to produce a false income statement and that each defendant played a part in the CONSPIRACY it was unnecessary for the Government to establish that each defendant agreed to each of the unlawful acts, i. e., false evaluation of securities and entry into fictitious foreign exchange contracts, or means that might be used to achieve that goal. 18 U.S.C.A. ss 371, 1005, 1014.

[13] CRIMINAL LAW k1173.2(2)
110k1173.2(2)
Even if it was error to deny bank president a charge that if jury found a CONSPIRACY to falsify quarterly earnings statement solely by fictitious exchange transactions it should not convict him, error was harmless as jury could have found that CONSPIRACY was not carried out solely by fictitious foreign exchange transactions. 18 U.S.C.A. ss 371, 1005, 1014.

[14] CONSPIRACY k48.2(2)

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91k48.2(2)
Evidence that each defendant, including high bank officers, in his own way joined in a scheme to falsity bank's earnings statement was sufficient to permit the giving of a Pinkerton charge with respect to the reasonably foreseeable crimes that might be committed by fellow CONSPIRATORS in furtherance of that scheme, especially since obvious purpose of falsifying earnings statement was to commit frauds, notwithstanding that there was little evidence of bank president's knowledge of or participation in fictitious foreign exchange transactions or of chairman of the board's participation in false evaluation of the trading account securities. 18 U.S.C.A. ss 371, 1005, 1014.

[15] INDICTMENT AND INFORMATION k144.1(1)
210k144.1(1)
Count charging senior vice-president of bank's investment division with making false entries in bank records with intent to defraud by causing bank to enter into fictitious foreign exchange contracts showing a nonexisting profit would not be dismissed on ground that the vice-president had not personally participated in foreign exchange transactions since under the evidence the jury could find that the vice-president joined a CONSPIRACY to falsify bank's first-quarter financial statement and could reasonably anticipate that his partners in crime might commit other criminal acts, including use of fictitious foreign exchange transactions. 18 U.S.C.A. ss 371, 1005.

[16] CONSPIRACY k48.2(2)
91k48.2(2)
Pinkerton charge that CONSPIRACY count related to bank entry statute and that some substantive counts related to Securities Exchange Act and false statements statute but that if any defendant was found guilty on CONSPIRACY count the jury was obliged to reconsider guilt on substantive count under consideration was not objectionable as committing jury, once it found a CONSPIRACY to violate one statutory provision, to hold a CONSPIRATOR liable for violations of other provisions not among the objects of the CONSPIRACY and not done in furtherance thereof, especially when viewed in context and considering the evidence as to substantive violations. 18 U.S.C.A. ss 371, 1005, 1014, 1623; Securities Exchange Act of 1934, ss 10(b), 32, 15 U.S.C.A. ss 78j(b), 78ff.

[17] CRIMINAL LAW k62
110k62
A person who causes an innocent party to commit an act which, if done with the requisite intent, would constitute an offense may be found guilty as a principal even though he personally did not commit the criminal act. 18 U.S.C.A. s 2(b).

[18] CRIMINAL LAW k792(1)
110k792(1)
Since there was sufficient evidence to permit finding that at least one defendant or coconspirator participated in each of the alleged criminal acts, either as a principal, an aider and abettor or under Pinkerton as a

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coconspirator who could reasonably foresee that substantive crimes might be committed by fellow CONSPIRATORS in furtherance of the CONSPIRACY and absent indication that there was a failure to prove that a defendant committed one of the alleged criminal acts or participated knowingly in commission of such an act by another, refusal to require jury first to identify the principals and then, the aiders and abettors was proper. 18 U.S.C.A. ss 2, 371.

[19] CRIMINAL LAW k792(3)
110k792(3)
It is sufficient that the court instruct the jury that in order to convict someone on basis of aiding and abetting, the criminal actions must have been committed by someone. 18 U.S.C.A. s 2.

[20] JURY k31.3(1)
230k31.3(1)
Formerly 230k31(11)
Instruction that term "any * * * individual person" in statute governing false entries in bank records includes depositors and other customers did not destroy bank officers' right to an impartial jury on ground that most jurors were undoubtedly bank depositors since there was no indication that any juror was a depositor of subject bank and there was nothing inflammatory or unfair about such accurate description of the type of person whom the statute is designed to protect or an indication that any defendant was prejudiced. 18 U.S.C.A. s 1005.

[21] CRIMINAL LAW k1172.1(1)
110k1172.1(1)
To warrant reversal, error in instructions must be shown to have been prejudicial or likely to have been so.

[22] WITNESSES k270(2)
410k270(2)
Although showing that prior to false evaluation of bank securities at issue bank's vice-chairman of investment division engaged in prior similar misconduct without knowledge of vice-president would have some probative value on issue whether he was acting under latter's direction at time of instant transactions it would not preclude a finding that both officers, charged with making false entries in bank records, had joined together in such misconduct and, hence, trial court properly limited vice-president's cross-examination of vice-chairman as to prior transactions, permitting evidence as to one transfer on ground that matter had been opened up on cross-examination. 18 U.S.C.A. s 1005.

[23] CRIMINAL LAW k1153(4)
110k1153(4)
Trial court ruling limiting cross-examination is tested by the standard of whether exclusion of evidence constituted clear abuse of discretion.

[24] CRIMINAL LAW k338(1)

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110k338(1)
Refusal to permit bank's chief executive officer, charged with making false entries, to testify that several weeks after principal conduct at issue he opposed issuance of press release, as favored by principal stockholder, which failed to disclose certain hidden foreign exchange transactions unrelated to transactions at issue was not abuse of discretion since any dispute between the pair was collateral to matters at issue. 18 U.S.C.A. ss 1005, 1014.

[25] WITNESSES k269(8)
410k269(8)
It was not abuse of discretion, in prosecution of bank officials for making false entries, to preclude chief administrative officer from cross-examining vice-chairman of investment division to bring out that the latter had vigorously opposed before board of directors a management proposal to disband municipal dealer department, which evidence allegedly indicated unlikelihood that vice-chairman would have done president's bidding to falsely value securities by backdating transfers from trading to investment account, as such was outside scope of cross-examination, was tenuous and would have opened up collateral matters. 18 U.S.C.A. s 1005.

[26] CRIMINAL LAW k427(5)
110k427(5)
Testimony of partner in CERTIFIED public accounting firm that he was told by senior vice-president of bank's investment division that backdated transfer of government securities had been ordered by someone superior to vice-chairman of investment division was not objectionable as a postconspiracy narrative as to the president, charged with making FALSE entries, as there was sufficient independent evidence that a CONSPIRACY was still alive on date of statement and that president and senior vice-president were participants. Fed.Rules Evid. Rule 801(d)(2)(E), 28 U.S.C.A.; 18 U.S.C.A. s 1005.

[27] CRIMINAL LAW k361(1)
110k361(1)
Underlying corporate memorandum authorizing transfer of securities from trading to investment account and entry confirming the instruction were properly admitted, as a record made in regular course of business, in prosecution of bank officers for making false entries in bank records, and, hence, testimony of chief financial officer that after chief administrative officer left the bank the financial officer ordered vice-president of investment division to reverse such transfers and to revise quarterly financial statement was admissible to explain the background of the document and, in any event, assuming that admission was error, it was harmless. Fed.Rules Evid. Rule 803(6), 28 U.S.C.A.; 18 U.S.C.A. ss 1005, 1014.

[27] CRIMINAL LAW k436(3)
110k436(3)
Formerly 110k436
Underlying corporate memorandum authorizing transfer of securities from trading to investment account and entry confirming the instruction were properly admitted, as a record made in regular course of business, in prosecution of

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bank officers for making false entries in bank records, and, hence, testimony of chief financial officer that after chief administrative officer left the bank the financial officer ordered vice-president of investment division to reverse such transfers and to revise quarterly financial statement was admissible to explain the background of the document and, in any event, assuming that admission was error, it was harmless. Fed.Rules Evid. Rule 803(6), 28 U.S.C.A.; 18 U.S.C.A. ss 1005, 1014.

[27] CRIMINAL LAW k1169.1(2.1)
110k1169.1(2.1)
Formerly 110k1169.1(2)
Underlying corporate memorandum authorizing transfer of securities from trading to investment account and entry confirming the instruction were properly admitted, as a record made in regular course of business, in prosecution of bank officers for making false entries in bank records, and, hence, testimony of chief financial officer that after chief administrative officer left the bank the financial officer ordered vice-president of investment division to reverse such transfers and to revise quarterly financial statement was admissible to explain the background of the document and, in any event, assuming that admission was error, it was harmless. Fed.Rules Evid. Rule 803(6), 28 U.S.C.A.; 18 U.S.C.A. ss 1005, 1014.

[28] CRIMINAL LAW k627.7(2)
110k627.7(2)
Rule obligating the government, on request, to permit a defendant to inspect any relevant written or recorded statements made by him and in possession of the government is intended to enable a defendant to obtain prior to trial any of his own statements relevant to the crime charged against him so that he will be able to prepare properly to face the evidence that may be introduced against him. Fed.Rules Cr.Proc. Rule 16(a), 18 U.S.C.A.

[29] CRIMINAL LAW k627.7(2)
110k627.7(2)
Neither ten-year-old letter written by chairman of board of directors of national bank, at a time he was aspiring to presidency, urging that the head of the bank closely follow its earnings nor notations in his handwriting on various financial statements and agenda of board meetings around time of alleged false entries at issue and after he had become chairman were required to be disclosed under criminal discovery rule; such statements became "relevant" for impeachment only after he testified that he did not personally keep acquainted with day-to-day operations, and prior to trial he had been provided with an inventory of such documents and was not hindered in preparing a defense. Fed.Rules Cr.Proc. Rule 16(a), 18 U.S.C.A.; 18 U.S.C.A. ss 1005, 1014.
See publication Words and Phrases for other judicial constructions and definitions.

[30] CRIMINAL LAW k627.7(2)
110k627.7(2)
Rule obligating the government, on request, to permit a defendant to inspect

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any relevant statement made by him within government's possession does not obligate the government to anticipate every possible defense, assume what a defendant's trial testimony will be if he decides to testify, and then furnish him with otherwise irrelevant material that might conflict with his testimony; with respect to any such material, if any obligation to disclose exists under the rule, it is satisfied by making underlying files available to defendant prior to trial. Fed.Rules Cr.Proc. Rule 16(a), 18 U.S.C.A.

[31] CRIMINAL LAW k1166(10.10)
110k1166(10.10)
Formerly 110k1166(1)
Any violation of rule obligating the government, on request, to permit a defendant to inspect any relevant written statement made by him and in possession, etc., of the government did not require reversal of conviction absent showing of any legally cognizable prejudice as result of failure to have the documents in advance of trial. Fed.Rules Cr.Proc. Rule 16(a), 18 U.S.C.A.

[32] CRIMINAL LAW k726
110k726
Had defendant's summation been the first occasion for argument that profit figure which defendant allegedly had told codefendant the bank's foreign exchange department must have to avoid showing a loss was product of codefendant's imagination, Government's reply that adding machine tape showing loss on liquidation of government securities almost precisely matched such figure might be persuasive on claim of improper rebuttal as the Government could argue that it had no intention of referring to the computation until source of figures was challenged, although fairness would dictate that a copy be furnished defendant in advance instead of confronting him with a new theory, albeit based on record evidence, at last minute of a long trial. Fed.Rules Cr.Proc. Rule 29.1, 18 U.S.C.A.

[33] CRIMINAL LAW k1171.7
110k1171.7
Where Government represented that it was only after defendant's summation that it determined that total losses from bank's liquidation of government securities almost precisely matched figure used in the summation, wherein it was stated that figure which defendant allegedly told codefendant the bank must have to avoid showing a loss was product of codefendant's imagination, with Government referring to identity of such figures in rebuttal summation, reversal was not required in view of trial court's offering defendants an opportunity to respond by way of surrebuttal; also, absent showing that computation was erroneous, refusal of cautionary instruction was not abuse of discretion. Fed.Rules Cr.Proc. Rule 29.1, 18 U.S.C.A.; 18 U.S.C.A. s 1005.

[34] INDICTMENT AND INFORMATION k127
210k127
Each allegedly false financial statement of national bank could properly be charged in a separate count against defendant former officers. 18

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[35] CRIMINAL LAW k700(3)
110k700(3)
Formerly 110k700
Former chairman of board of national bank was not denied a fair trial on charges of making false entries on ground that government suppressed exculpatory evidence by withholding evidence supporting multicount indictments filed against codefendants charging latter with falsifying average monthly foreign exchange profit and loss report and permitting one defendant to testify that he engaged in falsification on only three occasions during relevant period since the fraudulent transactions during such period were relatively few and were reflected in monthly and quarterly statements which were many and some statements were also charged as violations of other statutes. 18 U.S.C.A. s 1005.

[36] CRIMINAL LAW k1130(3)
110k1130(3)
Unjustified scurrilous statements indicating a reckless disregard for facts of record exceed the bounds of responsible advocacy. ABA Code of Professional Responsibility, DR7-102(A)(1, 2).

[37] CRIMINAL LAW k700(3)
110k700(3)
Formerly 110k700
Although following conviction of former chairman of board of national bank for making false entries superseding indictments were filed against principal stockholder and director of holding company charging the pair with causing the bank to conceal losses by misvaluing securities, the chairman was not deprived of a fair trial by failure to disclose evidence underlying such indictments notwithstanding that misvaluation of securities underlay false entries count against chairman, since subject indictments did not refer to the others' personal participation in the evaluation but merely to acts committed by their coconspirators in furtherance of CONSPIRACY to falsify earnings statement for subject quarter, for which Pinkerton liability would attach. 18 U.S.C.A s 1005.

[38] CONSTITUTIONAL LAW k257
92k257
Defendant's due process rights were not violated by failure to grant use immunity to alleged principal accomplice and coconspirator, who was named in a separate indictment charging participation in same false foreign exchange transactions as those forming a major part of case against defendant former bank officer, as there was no representation that if granted immunity the accomplice would furnish specific exculpatory evidence unobtainable from any other source and case was not one where government deliberately manipulated grants of immunity to get an unfair advantage. 18 U.S.C.A. s 1005; U.S.C.A.Const. Amends. 5, 14.

[39] SECURITIES REGULATION k195

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349Bk195
Counts charging former officers of national bank with using interstate commerce to employ manipulative and deceptive devices in connection with purchase and sale of bank stock by use of false financial statements was not insufficient as failing to contain specific allegations of misconduct and failing to set forth all elements of the crime, where each count followed precisely the language of section 10(b) of the Securities Exchange Act, and by incorporating by reference specified paragraphs of CONSPIRACY count the Government established nature of alleged conduct in sufficient detail to enable defendants to prepare a defense and bar future prosecution for the same offense. Securities Exchange Act of 1934, s 10(b), 15 U.S.C.A. s 78j(b).

[40] INDICTMENT AND INFORMATION k144.1(3)
210k144.1(3)
Counts charging former officer of national bank with manipulative or deceptive practices in connection with purchase and sale of bank stocks by issuance of false financial statements were not required to be dismissed on ground of alleged failure to prove any reliance by specific purchasers on the false statements since the government need only prove that a false representation is one that a reasonable stockholder would rely on in purchasing or selling the relevant corporate shares, and trial court so instructed the jury. Securities Exchange Act of 1934, s 10(b), 15 U.S.C.A. s 78j(b).

[41] SECURITIES REGULATION k60.48(1)
349Bk60.48(1)
Formerly 349Bk119
Same standard, i. e., proof that the false representation is one that a reasonable stockholder would rely on in purchasing or selling relevant corporate shares, applies to civil and criminal liability under the securities law. Securities Exchange Act of 1934, s 10(b), 15 U.S.C.A. s 78j(b).

[41] SECURITIES REGULATION k193
349Bk193
Same standard, i. e., proof that the false representation is one that a reasonable stockholder would rely on in purchasing or selling relevant corporate shares, applies to civil and criminal liability under the securities law. Securities Exchange Act of 1934, s 10(b), 15 U.S.C.A. s 78j(b).

[42] FRAUD k68.10(1)
184k68.10(1)
A false entry statute may be violated by entering on the books a transaction known to be fraudulent, even though the entry might be accurate. 18 U.S.C.A. s 1005.

[43] FRAUD k69(2)
184k69(2)
While an entry is not false merely because the underlying transaction is illegal, counts charging making of false entries in bank records, as based on deceptive foreign exchange transactions showing the bank to have earned a profit, were not to be dismissed since profits shown on records of such

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transactions were known by bank officials to be false and fictitious and were concocted for very purpose of distorting financial statement; such was a violation of statute prohibiting making of false entries in bank records with intent to defraud. 18 U.S.C.A. s 1005.

[44] JURY k136(7)
230k136(7)
Trial court's grant of one extra peremptory challenge to the Government without defendant's consent, after granting three peremptories to the defendants, although not in compliance with criminal rule, was not shown to have resulted in selection of a jury that was underrepresentative of the community or biased in any other way and proportional advantage accorded defendants by the rule, ten peremptories as against six for the Government, was approximately maintained, although court's action was improper absent defense counsel's consent. Fed.Rules Cr.Proc. Rule 24(b), 18 U.S.C.A.

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John J. Kenney, Asst. U. S. Atty., New York City (Robert B. Fiske, Jr., U. S. Atty. for the Southern District of New York, Mary Ellen Kris, Charles M. Carberry, Richard D. Weinberg, Asst. U. S. Attys., New York City, of counsel), for appellee.

Moore, Berson, Liflander & Mewhinney, New York City (Earle K. Moore, Matthew L. Lifflander, New York City, of counsel), for amici curiae Group of Bankers.

Before LUMBARD, MANSFIELD and MESKILL, Circuit Judges.

MANSFIELD, Circuit Judge:

Harold V. Gleason, former Chairman of the Board of the Franklin National Bank [FNB], Paul Luftig, its former president and chief administrative officer, and J. Michael Carter, its former senior vice president in charge of its Investment Division, appeal from judgments of the District *9 Court of the Southern District of New York, entered on March 27, 1979, by Judge Thomas P. Griesa after an eight-week jury trial, convicting them (except for dismissal of charges in Count Three against Carter) of (1) making false entries in the bank's records on or about March 31, 1974, by false evaluation of securities with intent to defraud, thereby concealing operating losses in excess of $5 million and making it appear that FNB had a profit of $79,000, for the first quarter of 1974, all in violation of 18 U.S.C. s 1005 [FN1] (Count Two), (2) making false entries in the bank's records on or about March 31, 1974, with intent to defraud, by causing FNB to enter into fictitious foreign exchange contracts showing a non-existent profit in excess of $2 million, which falsely made the bank appear to have a profit for the first quarter of 1974 when in fact it had suffered heavy losses, also in violation of 18 U.S.C. s 1005

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(Count Three),[FN2] (3) making false statements to the Manufacturers Hanover Trust Company on or about April 18, 1974, to influence its action in fulfilling a $35 million loan commitment previously made to FNB, by submitting to Manufacturers Hanover a consolidated income statement for the first quarter of 1974, ending March 31, showing a profit of $79,000 when in fact the bank had suffered losses of over $7 million, in violation of 18 U.S.C. s 1014 [FN3] (Count Four), (4) employing a manipulative scheme or device during March 1974 and on various dates in April and May 1974, in connection with the purchase and sale of FNB stock by using the foregoing falsifications of bank records to make it appear that the bank had realized a profit for the first quarter of 1974, when in fact it had suffered heavy losses, in violation of 15 U.S.C. ss 78j(b) and 78ff [FN4] (Counts Five through Fourteen), and (5) CONSPIRACY to commit each of the foregoing crimes, in violation of 18 U.S.C. s 371 (Count One). In addition, Luftig alone was convicted of making false material declarations *10 on or about March 15, 1977, with respect to some of the matters that are the subject of the foregoing charges in his testimony before a grand jury in violation of 18 U.S.C. s 1623 (Count Fifteen). Appellants claim that numerous errors were committed in the trial of the case. After careful consideration of each of these contentions we affirm the convictions.

FN1. Title 18 U.S.C. s 1005 provides in pertinent part:
"Whoever makes any false entry in any book, report, or statement of such BANK with intent to injure or defraud such BANK, or any other company, body politic or corporate, or any individual person, or to deceive any officer of such BANK, or the Comptroller of the Currency, or the Federal Deposit Insurance Corporation, or any agent or EXAMINER appointed to examine the affairs of such BANK, or the Board of Governors of the Federal Reserve System
"Shall be fined not more than $5,000 or imprisoned not more than five years, or both."

FN2. The charge in Count Three against Carter was dismissed by the court at the end of the Government's case.

FN3. Title 18 U.S.C. s 1014 provides in pertinent part:
"Whoever knowingly makes any false statement or report, or willfully overvalues any land, property or security, for the purpose of influencing in any way the action of . . . any bank the deposits of which are insured by the Federal Deposit Insurance Corporation, any member of the Federal Home Loan Bank System, the Federal Deposit Insurance Corporation, the Federal Savings and Loan Insurance Corporation, or the Administrator of the national Credit Union Administration, upon any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan, or any change or extension of any of the same, by renewal, deferment of action or otherwise, or the acceptance, release, or substitution of security therefor, shall be fined not more than $5,000 or imprisoned not more than two years, or both."

FN4. Title 15 U.S.C. s 78j(b) provides:
"It shall be unlawful for any person, directly or indirectly, by the use of

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any means or instrumentality of interstate commerce or of the mails.
"(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."
Title 15 U.S.C. s 78ff provides:
"(A)ny person who willfully and knowingly makes, or causes to be made any statement in any application, report, or document required to be filed under this chapter or any rule or regulation thereunder . . . which statement was false or misleading with respect to any material fact, shall upon conviction be fined not more than $10,000, or imprisoned not more than two years, or both . . . ."

The evidence, viewed favorably to the Government (as it must be at this stage, Glasser v. United States, 315 U.S. 60, 80, 62 S.Ct. 457, 86 L.Ed. 680 (1942)), shows that, although FNB suffered an operating loss in excess of $7 million during the three-month period ending March 31, 1974, it issued a financial statement on April 18, 1974, for the same first quarter of 1974 falsely representing that it had realized earnings of approximately $79,000. The financial statement was of special significance to FNB because of its anticipated influence in obtaining Government approval of a proposed FNB merger with Talcott National Corporation, a factoring and finance company, and in borrowing some $35 million from Manufacturers Hanover to be used by FNB for the purchase from Michele Sindona, the principal stockholder of FNB, of his interest in Talcott.[FN5]

FN5. FNB, with deposits at the end of 1973 of $3.7 billion and assets of $5 billion, was a subsidiary of Franklin New York Corporation, registered with the Federal Reserve Bank of New York as a bank holding company. In 1972 Sindona purchased 21.6% of the holding company's outstanding stock for $40 million. In the spring of 1973 Sindona, through a company controlled by him (Fasco) purchased 1.6 million shares of Talcott for $27 million, which he later offered to sell to FNB for a price equal to his cost plus expenses and interest, subject to approval of the Board of Governors of the Federal Reserve Bank pursuant to the Bank Holding Company Act of 1956.

FNB had begun to suffer substantial losses during the first three months of 1974, partly due to a decline in the market value of government securities, which had been acquired with a view to realization of a profit when interest rates declined, but which then fell in value when interest rates increased. By the end of March those losses together with others had swelled to approximately $7 million. The loss was concealed to the extent of about $5 million by falsely showing FNB-owned securities as worth more than the prices at which they should have been carried. The balance of the loss was concealed by having FNB engage in four fictitious foreign exchange transactions with European banks controlled by Sindona and his colleague Carlo Bordoni, who at Sindona's request had served as a director of the holding company, Franklin New

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York Corporation, which controlled FNB. These bogus transactions made it appear, by using fictitious exchange rates, that FNB had a $2.2 million unrealized profit when in fact its foreign exchange department had suffered a loss.

The false evaluation of securities was accomplished in part by backdating two transfers of government bonds from FNB's bond trading account to its investment account at inflated prices and by one such transfer of municipal and corporate securities at prices which had not been reduced to show losses in value. Securities in the bank's trading account, having been acquired for resale, were required to be carried at the lower of cost or market value, which was computed by determining the value of each security so held at the end of each month. Securities held in FNB's investment or portfolio account, on the other hand, were carried at cost with a straight line adjustment to amortize premiums or discounts. Upon transfer of a security from the bank's trading to its investment account, the bank was required to value the security at the lower of cost or market value on the date of transfer.

On March 26, 1974, Luftig, FNB's President, faced with mounting losses on the part of the bank, learned this evaluation rule from John Sadlik, FNB's chief financial officer, and asked Sadlik whether such a transfer could be backdated if instructions previously given to make the transfer had not been executed. After checking with Cornell Wright of Ernst & Ernst, FNB's independent certified public accountants, *11 Sadlik responded that backdating was permissible if there was documentary verification of the earlier instructions. Luftig then advised Sadlik that he had documentation showing that instructions had been given on March 8, 1974, to transfer $100 million in United States Treasury certificates from the bank's trading to its investment account. The market value of these securities on March 11, 1974, the next business day after March 8th, had been approximately $2 million higher than their value on March 26. Sadlik thereupon arranged for Wright to visit the bank on March 27 in order to verify the documentation of the March 8th instruction which Luftig represented he had given.

On March 27, 1974, according to the testimony of Howard D. Crosse, the bank's Vice-Chairman in charge of its Investment Division, Luftig advised Crosse that if Ernst & Ernst could be convinced that the claimed instruction to transfer the securities had been given on March 8th it would not object to the bank's evaluating the securities as of March 11, 1974, and asked Crosse in substance to assist in making this possible and falsely to tell Wright that the instruction had been given. As Crosse left the room, he first noticed Gleason standing in the doorway. Gleason patted him on the shoulder and said, "Good luck." At a meeting with Wright and Sadlik later the same day, after initial documentation proved unacceptable to Ernst & Ernst, Luftig falsely stated to Wright that the instruction had been given by him earlier in March and prepared a confirmatory memorandum.

On the following day, March 28, at a meeting with Sadlik, Wright and a more senior Ernst & Ernst partner, James Russell, Crosse corroborated Luftig's fraudulent representation by falsely confirming that he had been instructed by Luftig in early March to make the transfer and had relayed the instruction to Carter. The failure to carry out the instruction was then explained to Wright and Russell by J. Michael Carter, the bank's Senior Vice-President in charge of its Investment Division, who falsely told them that the transfer had not been

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made because he had in effect misunderstood the earlier instruction as one to liquidate rather than to make a transfer between accounts.[FN6] Crosse added support to this explanation by furnishing to Ernst & Ernst his own handwritten memorandum falsely summarizing directions supposedly given to him by Luftig in early March and stating that the failure to execute them had only just been discovered.

FN6. Even assuming that an order to liquidate had been made by Luftig, Carter at trial testified it was not made until March 18, 1974.

Relying upon these false representations Ernst & Ernst did not object to the bank's March 29 transfer of the $100 million in Government securities to its investment account at March 11 market values, which enabled FNB to conceal a loss of about $2 million.

In the meantime, on March 27, 1974, Carter directed employees of the bank to transfer $62.5 million in U.S. Treasury and government agency bonds from the bank's trading account to its investment account at cost rather than at lower market prices in response to his false representation in writing that the securities had been purchased by traders without his consent when he had been instructed to keep security trading positions as low as possible. In fact, as Carter later conceded, the purchases had been authorized by him and he had not received any such instructions to the contrary prior to March 20, 1974. The effect of the transfer of $62.5 million of Government securities at cost was to conceal approximately $2 million in losses suffered by the bank during the first quarter of 1974.

The third transfer, which concealed a loss of approximately another $1 million during the first quarter, was made after Crosse, on or about April 12, 1974, was advised by Carter that municipal and corporate securities in the trading account had not been "marked to market" (i. e., evaluated at the lower of cost or market) at the end of March as was required. This information *12 was passed on by Crosse to Luftig who told Crosse to "transfer them to portfolio (investment account) as best you can." Crosse thereupon directed Carter to transfer the securities to the bank's investment account at March 11 market values, thus concealing an intervening decline in market value of approximately $1 million that had occurred by March 31.

The generation of approximately $2.2 million in fictitious profits from contrived foreign exchange transactions for the quarter ending March 31, 1974, was arranged by Gleason and Peter R. Shaddick, Executive Senior Vice-President of FNB and director of Franklin New York Corp., who was in charge of its International Division. Following a conference with Sindona in London on March 26, 1974, Gleason returned to New York where he advised Shaddick on March 27, 1974, that unless the foreign exchange department showed a $700,000 profit for the month of March the bank would have a loss for the quarter. After advising Gleason that the department would actually have a loss for the month of March Shaddick, upon learning from Andrew N. Garofalo, the head of the bank's foreign exchange department, that the loss would be from $1 million to $11/2 million, told Garofalo that they would probably have to "pass an entry" with Bordoni that would wipe out the loss and create an apparent profit of $700,000. The term "pass an entry" meant entering into a fictitious foreign exchange contract with a European bank controlled by Sidonona and Bordoni, showing a purchase or

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sale of foreign currencies for future delivery at prices that would permit the bank to show a profit on the bank's earning statement.

Shaddick thereupon revealed to Gleason the loss and the steps that would be taken to reflect the fictitious $700,000 profit, receiving the latter's thanks. On March 28, after Bordoni was advised by Gleason of the foreign exchange department's predicament and agreed to help, Shaddick and Bordoni arranged for the FNB to "pass a contract" with the Amincor Bank in Zurich. Gleason was informed of the arrangement by Shaddick. Thereupon, pursuant to instructions from Shaddick, Garofalo entered into four contracts for future delivery of foreign exchange, two with the Amincor Bank and two with Banca Unione in Milan, a bank controlled by Sindona, of which Bordoni was managing director. The contracts were made at fictitiously high exchange rates unrelated to market prices, enabling the bank's foreign exchange department to show an unrealized profit of $2.2 million on the transactions and a $700,000 profit for the quarter.

The foregoing falsifications enabled FNB and its holding company to show a profit of $79,000 in their quarterly statement published and sent on April 18, 1974, to the bank's stockholders and to Manufacturers Hanover Trust Company, whereas in fact FNB had suffered a loss of over $7 million. In the meantime on April 3, 1974, FNB received from Manufacturers Hanover $30 million of the $35 million loan which the latter had obligated itself to make to FNB.

At trial the Government presented its case principally through accomplices (Crosse, Shaddick, Bordoni, Garofalo), various FNB employees, Ernst & Ernst partners Wright and Russell, Government agents, and documentary proof. Each of the three appellants testified in his own defense. Luftig denied knowledge of or participation in the making of any of the alleged false entries. He testified that on March 8, 1974, he had directed Crosse to transfer the $100 million in Government securities from the bank's trading to its investment account, ordering a liquidation of the trading account, and that when he found out on March 26 from Sadlik that the direction for the transfer had not been carried out he asked Sadlik to review the matter with Ernst & Ernst, furnishing a memorandum confirming his earlier instruction and later learning that Ernst & Ernst did not object to the transfer as of the date when the transfer order had been given. Luftig did acknowledge that on April 11, 1974, he had been advised by Crosse that a trader had failed to mark some securities to market.

*13 Carter testified that after the bank had with his approval increased its trading position in government securities by purchasing up to $100 million in December, 1973, he was authorized by Luftig on March 18, 1974, to liquidate these securities at a loss, which he undertook to do over the following weeks; that on March 27 he was instructed by Crosse to transfer all but $100 million of the securities from the trading account to the investment account at cost, with a memorandum noting that the securities being transferred had been purchased without Carter's knowledge and consent at a time when he had been instructed to keep the bank's trading accounts as low as possible; that he gave the instruction and he signed the memorandum knowing it to be false but did it because ordered; that with respect to the March 28 meeting with Sadlik, Crosse, Russell and Wright, he could only recall stating in response to an inquiry that he had heard of a bank transferring securities from its trading account to its investment account but that this had not been done at the Chase Manhattan Bank where he had previously worked; that thereafter at Crosse's directions he had

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transferred the $100 million in Government securities at March 11th prices; and that in the first week of April under Crosse's orders he directed that municipal and corporate bonds be transferred to the investment account at cost although they had depreciated in value by $1 million and had not been marked to market at the end of March.

Gleason testified that his duties as Chairman were principally of a customer and public relations nature and that he did not involve himself in the day-to-day operations of the bank. He denied discussing the bank's earnings or the proposed Talcott merger with Sindona at their March 26, 1974, meeting in London, denied asking Shaddick to create a false profit through fictitious foreign exchange transactions or having any conversations about the matter, and denied having known that the bank's financial statement for the first quarter of 1974 was false.

Thus the trial of the case boiled down to a battle of credibility between each of the three defendants, on the one hand, and the Government witnesses, including accomplices, on the other, who gave diametrically opposed testimony with respect to material aspects of each of the alleged dishonest transactions forming the basis of the indictment.

DISCUSSION

Since certain errors claimed by appellants to have been committed during the trial apply to all and some to only specific appellants, we initially consider the jointly-shared arguments. The first of these relates to the trial judge's instructions to the jury, which, including post-instruction discussions with counsel, cover some 157 trial transcript pages and were discussed extensively by the judge with counsel before the charge was given.

The Instructions

(1) Circumstantial Evidence and Credibility

Appellants contend that they were irreparably prejudiced by a portion of the trial judge's charge in which he sought to illustrate the nature of circumstantial evidence and the drawing of inferences by reference to a football game. The pertinent portion of the instruction is footnoted.[FN7] Briefly *14 summarized, it advised the jury that on the basis of common sense and experience a jury could infer from a team's performance on the field what previous instructions and training had been given by the coach and what had been done by the players in preparation for the game, even though the jury had not been present in the locker room or on the training field and hence had not witnessed the instructions and training.

FN7. "Sometimes judges give illustrations to jurors about the use of circumstantial evidence. A familiar one is the one where if you look out the window and see a lot of people with umbrellas, you can infer it's raining. I never know how that is helpful to a jury. You are not really trying to decide whether some weather condition exists, at least I don't know that that's a major problem in this case. But the point is that I think if you thought for a minute you would realize that this is not a novel or unusual or super human kind of process that the lawyers and that the Court have asked you to give consideration to. Frequently in our every-day life, without calling it circumstantial evidence, we draw conclusions about what people must have done, must have thought, and must have said.

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"Here is a little illustration that may show you that this is a matter which can well be accomplished by the use of common sense and common good judgment and experience. This is an illustration that quite obviously has nothing to do with the present case. Let's assume that you attend a football game. You see the players and the teams performing certain plays. You observe on the field many details about how well or how poorly the teams perform, whether there are a lot of passes or a lot of runs, whether there are many penalties or few penalties, whether there are many injuries or few injuries, whatever details go on before you.

"Now, on the basis of common experience and common sense, and on the basis of whatever information you know about football and about your observing this game, you can logically and reasonably infer some things about what people did and said and thought before that game and in preparation for that game, although you were not present in the locker room or on the training field and although no witnesses come to tell you what went on. You can infer that there are some things that you will be able to infer about whether the coach gave good or bad training, what instructions he gave, what he must have said in substance, what acts were done by the coach and the players in preparation for that game. There will be some things that a person in the audience could reasonably and logically infer and know beyond any doubt; there will be some things that they could not reasonably and logically infer beyond a doubt. But that kind of thought process, if anybody went through it, would be something which would not be a super human effort or bizarre or unusual.

"Now, you're being asked in this case to not only evaluate the direct evidence but to determine what the circumstantial evidence shows as to what various people did, said, and thought. The question for you is: What you can infer and what you cannot reasonably infer?"

[1] Unquestionably the example used in the instruction was ill-conceived, confusing and inappropriate. Since the three defendants were top officers of the FNB, the example exposed them to the risk that the jury might interpret it as implying that they could be considered to have played the role of "football coaches" who had from behind the scenes directed bank officials or employees on the "team" (e. g., Crosse, Shaddick, Garofalo, etc.) to commit the alleged crimes. As we thought we had made clear in United States v. Dizdar, 581 F.2d 1031 (2d Cir. 1978), the choice of an example too close or analogous to the facts of the case on trial is likely to be more prejudicial than "helpful" and is quite unnecessary when other clearly non-prejudicial examples are available.

Moreover, the example was inaccurate. Experience demonstrates that one cannot logically or reasonably infer that players' actions on a football field are necessarily or even probably the result of a coach's directions or training. It hardly requires an expert to appreciate that some "plays," "passes," "runs," "penalties" and "injuries," see n. 7 supra, may arise from circumstances unrelated to a coach's training or instructions, such as a quarterback's inspiration of the moment or sheer luck or happenstance. Well-trained and coached teams have been known to perform poorly and vice-versa. In effect, therefore, the example could be viewed as an invitation to speculate rather than to use logic and reason in drawing inferences from circumstantial

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evidence.
Notwithstanding these weaknesses in the example, we are not persuaded that it calls for a reversal in this case. When the entire charge on the subject is viewed in context, as it must be, see United States v. Hanlon, 548 F.2d 1096, 1101 (2d Cir. 1977); United States v. Guillette, 547 F.2d 743, 750 (2d Cir. 1976), cert. denied, 434 U.S. 839, 98 S.Ct. 132, 54 L.Ed.2d 102 (1977); United States v. Gentile, 530 F.2d 461, 469 (2d Cir.), cert. denied, 426 U.S. 936, 96 S.Ct. 2651, 49 L.Ed.2d 388 (1976), we do not view the example as having any serious prejudicial effect. The jury was adequately advised of the nature of circumstantial evidence. It was repeatedly told to use "common sense," "common experience" and "common good judgment" in drawing inferences from facts found by them and that inferences depended on the jury's acting "logically and reasonably." Moreover, before launching *15 into the "football coach" example the court carefully stated "This is an illustration that quite obviously has nothing to do with the present case." We believe it would be denigrating the intelligence of the average jury to conclude that it would forsake its own common sense and experience for the suggestions implied in the court's ill-conceived "example."
Turning to the court's instructions on the subject of credibility, we recognize that the witnesses' credibility was a central issue and played a decisive role in the case, in view of the diametrically conflicting testimony of the Government's witnesses, on the one hand, and the defendants, on the other, with respect to crucial material facts. Appellants contend that with this background the court's charge precluded a balanced assessment of the witnesses' credibility because it failed adequately to warn of the inherently suspect nature of the testimony of the accomplices called by the Government, some of whom had admitted to a series of frauds, perjury and other criminal acts, and others of whom had pleaded guilty pursuant to plea bargains and were awaiting sentence, and because it exaggerated the reasons for distrusting a defendant's testimony. We disagree.
[2][3][4][5] Unquestionably, it is the court's duty, in instructing a jury on the subject of witnesses' credibility, to give balanced instructions. Where the court points out that testimony of certain types of witnesses may be suspect and should therefore be scrutinized and weighed with care, such as that of accomplices or coconspirators, e. g., United States v. Santana, 503 F.2d 710, 715-16 (2d Cir.), cert. denied, 419 U.S. 1053, 95 S.Ct. 632, 42 L.Ed.2d 649 (1974), those who have made plea bargains or are awaiting sentence, see, e. g., United States v. Corcione, 592 F.2d 111, 116-17 (2d Cir.), cert. denied, 440 U.S. 975, 99 S.Ct. 1545, 59 L.Ed.2d 794 (1979); United States v. Projansky, 465 F.2d 123, 136 (2d Cir.), cert. denied, 409 U.S. 1006, 93 S.Ct. 432, 34 L.Ed.2d 299 (1972); Good v. United States, 410 F.2d 1217, 1221 (5th Cir. 1969), cert. denied, 397 U.S. 1002, 90 S.Ct. 1131, 25 L.Ed.2d 413 (1970), those who have been granted immunity, United States v. DeLoach, 174 U.S.App.D.C. 138, 530 F.2d 990, 994 & n. 5 (D.C.Cir.1975), cert. denied, 426 U.S. 909, 96 S.Ct. 2232, 48 L.Ed.2d 834 (1976), and defendants, United States v. Rucker, 586 F.2d 899, 903-04 (2d Cir. 1978); United States v. Martin, 525 F.2d 703, 707 & n. 3 (2d Cir. 1975), it must also direct the jury's attention to the fact that it may well find these witnesses to be truthful, in whole or in part. United States v. Vega, 589 F.2d 1147, 1154 (2d Cir. 1978). In short, the court should not emphasize the suspect nature of
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the testimony of certain witnesses without pointing out that they may be believed. Although a trial judge has the right to comment on credibility of specific witnesses, this right is limited and its exercise is appropriate only when necessary to assist the jury. Quercia v. United States, 289 U.S. 466, 469-71, 53 S.Ct. 698, 77 L.Ed. 1321 (1933). Confidence in our jury system leads us to leave credibility solely to the jury which, as the conscience of the community, is expected to act with sound judgment.

[6] Applying these basic principles here we conclude that Judge Griesa's credibility charge, viewed in its entirety, satisfied all legal requirements and was neither unfair to the appellants nor weighted in favor of the Government's witnesses. The court pointed out that the Government is frequently out of necessity required to rely on participants, accomplices, and persons who have committed crimes including perjury, as witnesses and that "you must view these witnesses with particular caution and scrutinize them with particular care." Similarly, although Judge Griesa noted that a defendant "has a deep personal interest in the result of this prosecution" and "the greatest kind of stake in its outcome" which "creates, at least potentially, a motive for false testimony" and "is of a character possessed by no other witness," which has been the standard language used by district judges for many years, he continued with the same boiler-plate language to the effect that "it by no means follows that simply because a person has a vital interest in the end result *16 of a case he is not capable of telling a truthful, candid, and straight-forward story" and that it was for the jury, after weighing these factors, and giving "the most careful and fair consideration to the testimony of each defendant and to the factors which . . . could weigh for or against its credibility" to determine its credibility. Thus the instructions were balanced and did not preclude the jurors from making a fair assessment of the credibility of the witnesses who had appeared before them.

(2) CONSPIRACY

Appellants contend that since the alleged CONSPIRACY was one to engage in fraudulent falsification of entries (in violation of 18 U.S.C. ss 1005, 1014 and 15 U.S.C. ss 78j(b), 78ff) by means of two distinct types of transactions (i. e., false evaluation of securities and fictitious foreign exchange transactions), the trial judge was not only required to instruct the jury regarding the entire alleged plan or scheme, including all means to be used to effectuate it, but to advise the jury that no defendant could be convicted unless he comprehended its full scope and knew of every means which the jury found to have been employed in furtherance of the CONSPIRACY. They cite United States v. Peoni, 100 F.2d 401, 403 (2d Cir. 1938), for this proposition. Failure to give such a charge, they claim, allowed the jury to convict defendants who may not have been knowing parties to the entire scheme.

The scope of the CONSPIRACY alleged in the present case, while rather broad and encompassing conduct that would violate several laws, was by the time of trial sufficiently defined to be clearly comprehensible and if proven, to warrant a conviction for violation of 18 U.S.C. s 371.

[7] The objective of the alleged CONSPIRACY was to falsify FNB's operating statement for the first quarter of 1974 so that the bank would appear to have made a profit when in fact it had suffered a loss of over $7 million, and thereby to deceive anybody who might normally be expected to rely on the statement (e. g., federal authorities, lenders, stockholders, etc.) as an

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honest and accurate representation of the bank's operations for the quarter. The alleged motives, which were relevant but not elements of the crime and need not be proven, included the desire to gain approval of the proposed Talcott merger by Federal bank authorities. Two principal means were allegedly used to accomplish the goal of the CONSPIRACY: (1) false evaluation of securities, and (2) fictitious foreign exchange transactions.

[8][9][10] Review of a few basic principles of CONSPIRACY law is essential to determine whether the charge here was sufficient. To be convicted as a member of a CONSPIRACY, a defendant need not know every objective of the CONSPIRACY. United States v. DiGeronimo, 598 F.2d 746, 755 (2d Cir. 1979); United States v. Bernstein, 533 F.2d 775, 793-94 & n. 12 (2d Cir.), cert. denied, 429 U.S. 998, 97 S.Ct. 523, 50 L.Ed.2d 608 (1976); United States v. Papadakis, 510 F.2d 287, 297 (2d Cir.), cert. denied, 421 U.S. 950, 95 S.Ct. 1682, 44 L.Ed.2d 104 (1975), every detail of its operation or means employed to achieve the agreed-upon criminal objective, Blumenthal v. United States, 332 U.S. 539, 557, 68 S.Ct. 248, 92 L.Ed. 154 (1947); United States v. Rosenblatt, 554 F.2d 36, 38 (2d Cir. 1977), or even the identity of every CO-CONSPIRATOR, United States v. Sperling, 506 F.2d 1323, 1340 (2d Cir. 1974); United States v. Sisca, 503 F.2d 1337, 1345 (2d Cir.), cert. denied, 419 U.S. 1008, 95 S.Ct. 328, 42 L.Ed.2d 283 (1974). There must, however, be agreement on the "essential nature of the plan," Blumenthal v. United States, supra, and on the "kind of criminal conduct . . . in fact contemplated." United States v. Gallishaw, 428 F.2d 760, 763 n. 1 (2d Cir. 1970). See also United States v. Rosenblatt, supra, 554 F.2d at 38-39. In addition

> "a person may be held to intend that which is the anticipated consequence of a particular action to which he agrees, when that action is unreasonable in view of that consequence."

Developments in the Law CONSPIRACY, 72 Harv.L.Rev. 920, 932 (1959). See also 1 *17 Wharton's Criminal Law and Procedure s 90, at 197 (1957). In short, the CONSPIRATOR must agree to and participate in a scheme which he knows to have an illegal objective. If, in the course of the CONSPIRACY, there occur other illegal acts not specifically contemplated by an individual CONSPIRATOR but reasonably akin to the anticipated illegality and in furtherance or in consequence of the scheme, the CONSPIRATOR may not on that account escape liability for participation in the CONSPIRACY.

[11] With these principles in mind we are satisfied that Judge Griesa's CONSPIRACY charge was sufficiently clear to provide the jury with the basic legal principles it needed to determine whether there was a CONSPIRACY in violation of 18 U.S.C. s 371 and whether each defendant joined it with knowledge of its illegal objective. At the outset he accurately summarized Count One as charging generally that the three defendants "CONSPIRED to falsify the first-quarter 1974 financial statement of the Franklin National Bank, for various purposes." Having thus described the general goal, Judge Griesa described the various federal offenses which were alleged to have been committed in the course of the CONSPIRACY and correctly noted that in order to convict a defendant the jury need not find that he "CONSPIRED to achieve all of the objects alleged or to violate all of the statutes or rules referred to." (A.67).

The court's next step, stated as being in the interest of simplicity, was to select one of the alleged objects of the CONSPIRACY violation of 18 U.S.C. s

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1005, which makes it a crime for an officer or director of a national bank to make a false entry in a report or statement of the bank with the intent to defraud as the vehicle for explaining the basic elements that must be proved beyond a reasonable doubt to establish the alleged CONSPIRACY. The court properly instructed that there must be proof of an agreement between two or more persons "to make a false entry, namely, the $79,000 net income item in the statement of earnings of the Franklin National Bank for the first quarter of 1974, with the purpose of defrauding or deceiving;" that "the particular defendant you are considering, knowingly joined in the CONSPIRACY;" and "that at least one of the CONSPIRATORS committed at least one overt act charged in the indictment." The jury was then accurately instructed that the FNB was a national bank within the meaning of s 1005 and that the $79,000 item in its first quarter statement of earnings was an "entry," as were the other figures in the quarterly statement including the earnings figures of $1,301,000 for the trading account and $2,454,000 for the foreign exchange trading account.

After defining accurately the term "false entry," "defraud," and "intent to deceive" as used in the statute and indictment, the district judge focused on the two means charged in Paragraphs 5 and 6 of Count One of the indictment as those whereby the CONSPIRACY was allegedly to be effectuated, i. e., by concealment of depreciation in the value of securities in the trading account and by fictitious foreign exchange contracts to create the false appearance of profits, pointing out that the jury was not required to find that both means had been used in order to convict the defendants, and that it might convict all three defendants if it found they had CONSPIRED to falsify the financial statement and used either or both means. This instruction was qualified by the statement that Carter could not be found guilty if the jury found that the CONSPIRACY was solely to falsify through foreign exchange contracts. The reason for this qualification and the court's dismissal of the Count Three charge (fictitious foreign exchange contracts) against Carter was that there was no evidence that he had anything to do with such contracts. Lastly, the court properly charged the jury that to convict on the CONSPIRACY count it must find a single CONSPIRACY of the type alleged. It also advised the jury that if it found two separate independent CONSPIRACIES it must acquit.[FN8]

FN8. This instruction was more favorable to the defendants than the law required, since it is subject to the qualification that where there is proof of the CONSPIRACY charged in an indictment, a finding of other CONSPIRACIES would not mandate acquittal. United States v. Tramunti, 513 F.2d 1087, 1108 (2d Cir.), cert. denied, 423 U.S. 832, 96 S.Ct. 54, 46 L.Ed.2d 50 (1975).

*18 [12] Thus the CONSPIRACY instructions were adequate and conformed to basic principles of CONSPIRACY law as they have evolved. As long as the jury found one CONSPIRACY to falsify the bank's books in order to produce a false income statement for the first quarter of 1974 and that each defendant played a part in that CONSPIRACY it was unnecessary for the Government to establish that each defendant agreed to each of unlawful acts or means that might be used to achieve that goal.

It hardly necessitated any great mental gymnastics for any reasonable person logically to conclude in the present case that when a bank officer participated

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in the falsification of bank entries designed to hide a huge depreciation in the value of the bank's assets he did so for the purpose of enabling the bank to falsify its quarterly financial statement, not for his own edification or to alter the bank's internal bookkeeping system but to mislead others who would normally rely upon the statement as a true representation of the bank's financial picture. Any major participant aware of the ultimate objective and its achievement through one type of false entry could also reasonably foresee that other types of entry falsification, such as fictitious foreign exchange transactions, might well be used to achieve that goal. There was an abundance of evidence from which the jury could infer that each of the appellants agreed to the general objective of fraudulently falsifying FNB's first quarter 1974 earnings statement.

Our earlier decisions in United States v. Peoni, supra, and United States v. Falcone, 109 F.2d 579 (2d Cir. 1939), affd., 311 U.S. 205, 61 S.Ct. 204, 85 L.Ed. 128 (1940), relied upon by appellants, do not require a contrary conclusion. In each of those cases there was simply no evidence from which a jury could infer an agreement to which the defendant could have been a party or that he willfully or knowingly participated in the alleged CONSPIRACY. Here, on the other hand, there was ample evidence to permit a jury to infer a general agreement on the part of FNB's top officials to falsify its financial statement for the first quarter of 1974 and that each played some part in it.

No defendant here was held liable beyond "the fair import of the concerted purpose or agreement as he understands it." United States v. Peoni, supra, 100 F.2d at 403. The appellants would have us read this broadly, to mean that to be a CONSPIRATOR, one must have full knowledge of each facet of the CONSPIRACY. We have, however, read Peoni and Falcone more narrowly than this, see, e. g., United States v. Calabro, 467 F.2d 973, 981 (2d Cir. 1972), cert. denied, 410 U.S. 926, 96 S.Ct. 1357, 35 L.Ed.2d 587 (1973); United States v. Tramaglino, 197 F.2d 928, 930 (2d Cir.), cert. denied, 344 U.S. 864, 73 S.Ct. 105, 97 L.Ed. 670 (1952), and we do not believe they contradict our statement above of the legal principles involved here.

[13] Luftig contends that the court erred in failing to instruct the jury, as it did with respect to Carter, that if the jury found a CONSPIRACY to falsify FNB's quarterly earnings statement solely by fictitious foreign exchange transactions it should not convict him. We doubt that Carter, who did not participate in or know of the foreign exchange transactions, was entitled to this instruction, since there was evidence of his participation in the broad CONSPIRACY to falsify FNB's quarterly earnings statement and, as we stated above, it was unnecessary for the Government to prove that he knew of each means used to carry it out. Moreover, even if there was error in denying Luftig the charge, the error was harmless. Since the jury convicted Carter, it had to have found that the CONSPIRACY was not carried out solely by fictitious foreign exchange transactions. Thus Luftig's conviction could not have been based on a CONSPIRACY carried out solely by that means.

In any event, the jury found all defendants guilty of falsification by concealment of the depreciation in value of the securities in its trading account (Count Two) and Luftig guilty of perjuring himself before the *19 grand jury when he swore that he had in early March ordered the transfer of the $100 million from the bank's trading account to its investment account. Thus there was ample evidence to support a finding of CONSPIRACY to falsify the

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bank's earnings statement in which Luftig played a major part.

(3) Pinkerton Charge

The Supreme Court in Pinkerton v. United States, 328 U.S. 640, 66 S.Ct. 1180, 90 L.Ed. 1489 (1946), held that a CONSPIRATOR may be found guilty of a substantive offense committed by a CO-CONSPIRATOR in furtherance of and as part of an alleged CONSPIRACY even though he personally did not commit the acts constituting the substantive crime itself. In accordance with Pinkerton Judge Griesa instructed the jury that if it found that a defendant was a member of the CONSPIRACY alleged in Count One but did not commit the acts constituting one of the alleged substantive crimes (e. g., violation of 18 U.S.C. ss 1005 (Count Two), 1014 (Count Three), or s 10(b) of the Securities Exchange Act), it might nevertheless find him guilty of a substantive crime committed by a CO-CONSPIRATOR in furtherance of the CONSPIRACY and as part of it, provided the conduct "was within the scope of the CONSPIRACY and a foreseeable consequence of it," since the defendant committing the substantive crime, like a partner, might then be treated as an agent of the other members of the CONSPIRACY.

Appellants contend that this instruction was erroneous. First they argue that no Pinkerton charge at all should have been given because there was insufficient evidence of the existence of a general CONSPIRACY, in furtherance of which the substantive offenses were committed, to warrant such a charge, cf. United States v. Sperling, supra, 506 F.2d at 1341-42. We disagree.

[14][15] There was ample evidence independent of the substantive crimes themselves from which the jury could find beyond a reasonable doubt that the top officers of FNB joined in a plan to falsify its first quarter earnings statements so that it would appear to show a profit and that to accomplish the unlawful objective some engaged in criminal acts that were either known or should have been reasonably foreseeable to the others. Although there was little evidence of Luftig's knowledge of or participation in the fictitious foreign exchange transactions or of Gleason's participation in the false evaluation of the bank's trading account securities, there was ample proof, crediting as we must the testimony of Crosse and Shaddick, that each defendant in his own way joined in a scheme to falsify the bank's earnings statement. This was sufficient to permit the giving of a Pinkerton charge with respect to the reasonably foreseeable crimes that might be committed by fellow CONSPIRATORS in furtherance of that scheme. Indeed, the obvious purpose of falsifying the bank's earnings statement was to commit frauds.[FN9]

FN9. Although the court dismissed Count Three against Carter on the ground that he had not personally participated in the foreign exchange transactions, this was not required since, upon the evidence before it, the jury could find that Carter joined the CONSPIRACY to falsify FNB's first quarter 1974 financial statement and could reasonably anticipate that his partners in crime might commit other criminal acts, including use of fictitious foreign exchange transactions, to misrepresent the bank's earnings.

Appellants' second objection is that the court's Pinkerton charge permitted the jury to find them guilty of substantive crimes which were not part of the CONSPIRACY. We disagree.

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[16] When Judge Griesa explained the CONSPIRACY count to the jury, he used the s 1005 violation, which was one of the alleged objectives of the CONSPIRACY, as an example. He did not go through the s 1014 and Rule 10b-5 counts at that time; rather he stated that he had not stricken the others, but was trying to simplify his explanation. However, when it came time to explain the Pinkerton rule, the court said:

"And remembering that the CONSPIRACY count relates to 1005, and of course some of these substantive counts relate to other statutes 1014, SECTION 10(b) of the *20 Exchange Act, and so forth but nevertheless, if you have found any defendant guilty under Count one (the CONSPIRACY count), then you are obliged to reconsider his guilt on the substantive count you are considering."

Appellants argue that this statement permitted the jury, once it found a CONSPIRACY to violate one statutory provision, to use Pinkerton to hold a CONSPIRATOR liable for violations of other provisions not among the objects of the CONSPIRACY and not done in furtherance of the CONSPIRACY.

A diligent reading of the charge, however, reveals that Judge Griesa properly instructed the jury. He followed the passage quoted above with the instruction that in order to convict:

"You must find that the crime charged in the substantive count was committed by CO-CONSPIRATOR and that it was committed during and in furtherance of the CONSPIRACY charged in the CONSPIRACY count. You must find that the crime charged in the substantive count was within the scope of the CONSPIRACY and a foreseeable consequence of the unlawful agreement."

As already noted, he had previously instructed the jury that the alleged objective of the CONSPIRACY was to falsify FNB's first quarter 1974 financial statement by making a false entry to the effect that it had a net income of $79,000 when it had in fact suffered losses, all with a view to defrauding others. Thus the court's Pinkerton charge was in accordance with the principles enunciated by the Supreme Court, see Nye & Nissen v. United States, 336 U.S. 613, 618, 69 S.Ct. 766, 93 L.Ed. 919 (1949), and by this court, see United States v. Molina, 581 F.2d 56, 60-61 (2d Cir. 1978). The instruction was therefore sufficient, and there was ample evidence from which the jury could have concluded that the substantive violations were committed in furtherance of the CONSPIRACY charged, if indeed the jury found it necessary to reach the question of Pinkerton liability at all.

(4) Aiding and Abetting

The indictment charged and the court gave instructions regarding liability of the defendants for "aiding and abetting" or "causing" the various crimes, pursuant to 18 U.S.C. s 2.[FN10] Appellants argue that the court erred in failing to instruct the jury that before it might find any defendant guilty as an aider and abettor the principal must be identified, or in failing to identify the principal himself.

FN10. 18 U.S.C. s 2 provides:
"(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
"(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

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[17] We have held that under 18 U.S.C. s 2(a) a person charged as an aider and abettor "cannot be found guilty . . . unless a principal whom he has aided and abetted committed the criminal act." United States v. Bernstein, 533 F.2d 775, 799 (2d Cir. 1976). See also United States v. Erb, 543 F.2d 438, 446 (2d Cir.), cert. denied, 429 U.S. 981, 97 S.Ct. 493, 50 L.Ed.2d 590 (1976). Under 18 U.S.C. s 2(b) a person who causes an innocent party to commit an act which, if done with the requisite intent, would constitute an offense may be found guilty as a principal even though he personally did not commit the criminal act.[FN11]

FN11. We are not confronted here with a case where any defendant was legally incapable of committing an alleged offense. See United States v. Ruffin, 613 F.2d 408, Dkt. No. 78-1361 (2d Cir.); United States v. Lester, 363 F.2d 68, 72-73 (6th Cir. 1966), cert. denied, 385 U.S. 1002, 87 S.Ct. 705, 17 L.Ed.2d 542 (1967).

[18][19] In the present case there was sufficient evidence to permit the jury to find that at least one defendant or CO-CONSPIRATOR participated in each of the alleged criminal acts, either as a principal, an aider and abettor, or under Pinkerton as a CO-CONSPIRATOR who could reasonably foresee that the substantive crimes might be committed by fellow CONSPIRATORS in furtherance of the CONSPIRACY.

*21 Absent some indication that there was a failure to prove that a defendant committed one of the alleged criminal acts or participated knowingly in the commission of such an act by another, we believe that the court's refusal to require the jury first to identify the principals and then to identify the aiders and abettors was proper. Several other circuits have held that there is no such requirement, see United States v. Staten, 189 U.S.App.D.C. 100, 109, 581 F.2d 878, 887 (D.C.Cir. 1978); United States v. Bryan, 483 F.2d 88, 93-94 (3d Cir. 1973) (en banc); United States v. Austin, 462 F.2d 724, 731 (10th Cir.), cert. denied, 409 U.S. 1048, 93 S.Ct. 518, 34 L.Ed.2d 501 (1972); Feldstein v. United States, 429 F.2d 1092, 1095 (9th Cir.), cert. denied, 400 U.S. 920 (1970), and we agree. It is sufficient that the court instruct the jury that in order to convict under 18 U.S.C. s 2 the acts must have been committed by someone. Judge Griesa's charge was entirely adequate in this respect, and there was sufficient evidence to permit the jury to find that at least one defendant or CO-CONSPIRATOR acted as principal in the commission of each of the crimes charged.[FN12]

FN12. We are not here confronted with a case where a possible principal was acquitted. See United States v. Ruffin, 613 F.2d 408, Dkt. No. 78-1361 (2d Cir.); United States v. Standefer, 610 F.2d 1076 (3d Cir. 1979).

(5) Potential Adverse Effect on Bank Depositor-Jurors

[20][21] Appellants contend that by implying in his charge that bank depositors were victims of the crimes alleged, Judge Griesa destroyed appellants' Sixth Amendment right to an impartial jury, since most of the jurors were undoubtedly bank depositors and one had been a depositor in FNB.

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The claim is so speculative as to border on the frivolous.
In the first place, the record gives no indication that any juror had been an FNB depositor. Regardless of this side-issue, the court's instruction did not suggest that depositors were victimized. Judge Griesa quite properly stated that the term "any other company or body politic or corporate or any individual person," as used in s 1005, "obviously includes persons who are depositors and other customers of the bank, borrowers from the bank; it also includes other banks which lend money to the particular bank."
We find nothing inflammatory or unfair about this accurate description of the type of persons whom the statute was designed to protect. Nor is there any indication that any defendant was prejudiced or likely to have been prejudiced by the description, which must be shown for reversal. Mikus v. United States, 433 F.2d 719, 724 (2d Cir. 1970). Cf. Irvin v. Dowd, 366 U.S. 717, 723, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961); United States v. Tramunti, 513 F.2d 1087, 1114 (2d Cir.), cert. denied, 423 U.S. 832, 96 S.Ct. 54, 46 L.Ed.2d 50 (1975).
Evidentiary Rulings
(1) Prior Similar Conduct by Crosse
[22][23] Luftig contends that the district court erred in refusing to permit him to offer certain evidence tending to establish his innocence of any false evaluation of FNB's securities and unduly restricted his cross-examination of Crosse on the same subject. We disagree.
As evidence of Luftig's participation in the false evaluation of bank securities by backdating the transfer of some from the bank's trading to its investment account in March, 1974, and by failing to "mark to market" other securities in the trading account, the Government introduced Crosse's testimony regarding Luftig's instructions. In his defense Luftig sought to introduce a series of eight items, including evidence that during the period 1971-74 Crosse, both prior to and after Luftig's joining FNB, had without Luftig's knowledge repeatedly transferred securities from the bank's trading to its investment account without proper evaluation and had failed to reevaluate or "mark to market" securities in the trading account or establish adequate depreciation reserves, thus concealing hundreds of thousands of dollars of depreciation. *22 The purpose of the offer, of course, was to try to show that in March, 1974, as on prior occasions, Crosse had acted on his own without Luftig's knowledge and that Crosse's testimony implicating Luftig was incredible.
Judge Griesa restricted Luftig to two items, one a transfer at Crosse's discretion on September 20, 1973, of $37.85 million of securities at cost from FNB's trading to its investment account, which allegedly concealed more than $695,000 of depreciation and the other a failure in July, 1973, to "mark to market" securities in four trading accounts or to establish adequate reserves for some $3 million in losses, which were concealed from Crosse's superiors. Evidence regarding the other six items was excluded on the ground that whatever probative value the evidence might have was outweighed by the danger of confusing the jury regarding the issues on trial by diverting its attention to collateral issues.
Upon this review the propriety of the district court's ruling must be tested by the standard of whether the exclusion of the evidence constituted a clear abuse of discretion. Hamling v. United States, 418 U.S. 87, 124-25, 94
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S.Ct. 2887, 41 L.Ed.2d 590 (1974); United States v. Corr, 543 F.2d 1042, 1051 (2d Cir. 1976). Given the circumstances before the trial judge, we find no such abuse.

A clear showing that Crosse had engaged in prior similar misconduct without Luftig's knowledge would have some probative value (though far from conclusive) on the issue of whether he later acted under Luftig's directions in March and April 1974. See, e. g., United States v. Matot, 146 F.2d 197, 198 (2d Cir. 1944) (exclusion of evidence of offer by one charged with fraud based on overdrafts to make good on deficiencies held error); United States v. Platt, 435 F.2d 789, 793 (2d Cir. 1970). Crosse's engagement in earlier wrongdoing, on the other hand, would not preclude a finding that Luftig and he joined together in the later misconduct, with Luftig willing to take the lead for obvious reasons. Moreover, where such proof, though of some relevance, may lead to confusing and time-consuming disputes with respect to collateral issues the trial judge may properly reject or limit it. United States v. King, 560 F.2d 122, 134 (2d Cir.), cert. denied, 434 U.S. 925, 98 S.Ct. 404, 54 L.Ed.2d 283 (1977); Fed.R.Evid. 403. This appears to have been the situation confronting the district court in this case.

Even with respect to the September 20, 1973, transfer of securities, serious collateral issues were raised regarding the extent of Crosse's involvement in the transfer and whether it was made by lesser employees (possibly by mistake), possibly without his knowledge. Moreover, the Government contended that some purchases of securities ostensibly for the bank's trading account were in fact made from the outset for the investment account, which had no traders of its own, using trading account traders and then transferring acquisitions to the investment account. If this were established, the transfer from trading to investment at cost might have been justified or excused as a mistake. Lastly, Carter vigorously opposed introduction of evidence as to the earlier security transfers and failures to "mark to market" since they might reflect upon his honesty as vice-president in charge.

Faced with these complexities, which could lead to "trials within the trial," Judge Griesa sensibly in our view limited Luftig to two of the earlier examples, permitting evidence as to the September, 1973, transfer on the ground that the matter had been opened up by the Government on its examination of Crosse.[FN13] We find no abuse of discretion in this ruling.

FN13. Even as to the September, 1973, transfer the record discussion regarding the side issues created by its introduction covered almost 50 pages of transcript.

(2) The May 12 Press Release

[24] Luftig next argues that the court erred in refusing to permit him to testify that on May 12, 1974, several weeks after the principal fraudulent conduct which was the subject of the indictment, he opposed *23 the issuance by FNB of a press release, favored by Sindona, which failed to disclose certain hidden foreign exchange transactions concededly "unrelated" to the transactions that were the subject of the indictment. We find no abuse of discretion in this ruling which properly avoided getting into more complicated collateral issues with respect to other differences that developed later between Luftig and Sindona, leading to the former's being asked to resign. At most the

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evidence would show a disagreement between the two having nothing to do with the criminal conduct alleged in the indictment. Further evidence of Luftig's differences with Sindona over unrelated matters would be of doubtful probative value with respect to the issues on trial and could confuse the jury.[FN14]

FN14. Luftig was permitted to testify that beginning on May 6, 1974, despite Sindona's strong opposition, he actively supported a merger of FNB with Manufacturers Hanover, and that he (Luftig) requested an FBI investigation into the bank's non-disclosure of certain unrelated foreign exchange transactions.

(3) Cross-Examination of Crosse

[25] Similarly we find no merit in Luftig's claim that it was error to bar him from bringing out that Crosse had vigorously opposed before FNB's board of directors a management proposal to disband the bank's municipal dealer department. Luftig argues that the evidence indicates unlikelihood that Crosse would have done Luftig's bidding to falsely value $100 million of the bank's securities by backdating to March 11, 1974, their transfer from its trading to its investment account. Here again, aside from the tenuousness of the inference sought to be drawn and the fact that the subject was beyond the scope of cross-examination, since it had not been opened up on direct, see Fed.R.Evid. 611(b), to permit such questions could open up a flood of evidence regarding a possibly confusing collateral issue, with the Government seeking to establish dissimilarities or reasons why Crosse would act differently under one circumstance than under the other. We find no abuse of discretion in the judge's precluding cross-examination of Crosse on this subject matter. See United States v. Carr, 584 F.2d 612, 617 (2d Cir. 1978).

(4) Testimony Challenged as Hearsay

[26] Appellant Luftig argues that the court erred in admitting testimony by Cornell Wright, an Ernst & Ernst partner, that on May 17, 1974, he was told by Carter that the March 27, 1974, transfer at cost of $62.5 million of U. S. Government agency securities had been "ordered by someone superior to Howard Crosse." Luftig contends that the statement was POST-CONSPIRACY, narrative hearsay as to him, see United States v. Birnbaum, 337 F.2d 490, 494-95 (2d Cir. 1964). We disagree.

There was sufficient independent evidence to justify a finding by the trial judge that the CONSPIRACY was still alive on May 17 and that Luftig and Carter were participants. Carter's quoted statement was therefore admissible against Luftig under Fed.R.Evid. 801(d)(2)(E) as a statement in furtherance of it designed to allay suspicion on Wright's part regarding the propriety of the March transfer. United States v. Ruggiero, 472 F.2d 599, 607 (2d Cir.), cert. denied, 412 U.S. 939, 93 S.Ct. 2772, 37 L.Ed.2d 398 (1973); United States v. Geaney, 417 F.2d 1116 (2d Cir. 1969), cert. denied, 397 U.S. 1028, 90 S.Ct. 1276, 25 L.Ed.2d 539 (1970).

[27] The testimony of John Sadlik, the bank's chief financial officer, to the effect that after Luftig had left FNB Sadlik had ordered Carter to reverse the March, 1974, transfer from the bank's trading to its investment account and to revise the March 31 quarterly financial statement is also objected to by Luftig as hearsay. However, the underlying corporate memorandum and entry confirming the instruction was properly admitted as a record made in the

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regular course of business, Fed.R.Evid. 803(6), and Sadlik's testimony was admissible to explain the background of the document. In any event, assuming the admission of the memorandum was error, it was harmless.

*24 Claims of Prosecutorial Misconduct

(1) Alleged Violation of F.R.Cr.P. 16(a) by Non-Disclosure of Statements

Appellant Gleason, formerly FNB's chief executive officer, argues that the Government violated F.R.Cr.P. 16(a)(1)(A) by failing to disclose before trial a letter written by him on August 30, 1965, to FNB's then Chairman, years before the events here in issue, and notations in his handwriting on various financial statements and agenda of FNB board meetings during the period from December 20, 1973, to March 28, 1974, after Gleason had himself become Chairman. We disagree.

The issue arose when the Government sought to use the foregoing material in its cross-examination of Gleason, who had testified on direct that following the creation in November, 1973, of the "Office of Chairman" at the bank (consisting of himself, Shaddick and Luftig) he (Gleason) ceased to be involved in the day-to-day activities of the bank. He testified that thereafter he devoted himself primarily to public relations activities on behalf of FNB, visiting important domestic customers and cultivating its foreign relationships with a view to improving its image, while Shaddick supervised the bank's international operations and Luftig its domestic operations. He denied being privy to any instructions by Luftig to Crosse to falsify the value of the bank's securities by backdating their transfer and denied asking Shaddick to create false profits by fictitious foreign exchange transactions. Thus Gleason sought to divorce himself from sufficient responsibility for the bank's earnings' statements to have been involved in the falsification of its earnings' report for the first quarter of 1974.

On cross-examination the Government, in an effort to impeach Gleason's denials and his posture of ignorance, confronted him with the August 1965 letter in which, in advocating himself for the presidency of the bank, he had urged that the bank's head should closely follow its earnings. He was also faced with his various handwritten notations on FNB Board agendas and earnings statements in early 1974 to indicate that he had been keeping himself advised of the bank's financial operations in some detail at the very time when, according to his direct testimony, he had been ignorant of these essential financial facts.

[28] Rule 16(a) obligates the Government upon request to permit a defendant to inspect "any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government." The rule, of course, is intended to enable a defendant to obtain prior to trial any of his own statements relevant to the crime charged against him so that he will be able to prepare properly to face the evidence that may be introduced against him at trial.

[29] Gleason's 1965 letter, which predated by almost 10 years the events in issue, and his mere notations on agenda and financial statements, were hardly "relevant" to the crimes charged against him; they did not tend to show that he had participated in any falsification of the bank's earnings statement for the first quarter of 1974. The fact that a bank officer once believed that its president should follow its earnings statements does not implicate him in any dishonest underlying transaction that is not in the bank's earnings reports.

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The Government was not therefore required by Rule 16(a) to disclose the documents because they were not "relevant . . . statements" within the meaning of that Rule. The documents became relevant for impeachment purposes only after Gleason testified on direct that he did not personally keep acquainted with the bank's day-to-day operations, thus seeking to corroborate his denials of involvement in the transactions at issue. See United States v. Hodges, 480 F.2d 229, 232-33 (10th Cir. 1973); United States v. Skillman, 442 F.2d 542, 550 (8th Cir.), cert. denied, 404 U.S. 833, 92 S.Ct. 82, 30 L.Ed.2d 63 (1971).

*25 The Government's failure to turn over the documents prior to trial, moreover, did not prevent Gleason from preparing to meet the charges against him. The documents were at all times in the custody of the Federal Deposit Insurance Corporation (FDIC) as liquidator of FNB and were as available to Gleason as they were to the Government, which obtained them on the eve of trial, approximately November 27, 1978. Although the FNB records in custody of the FDIC were voluminous,[FN15] Gleason had long before trial been provided with an inventory of them and in preparing a strategy of ignorance should have known that Board minutes and earnings statements to which he might have been exposed would be important and should, with the aid of the inventory, have been extracted from the mass for examination.

FN15. Gleason's counsel did visit the FDIC depository, but only once, and may have attended a deposition in a civil suit, In re Franklin National Bank & Securities Litigation, MDL 196 (E.D.N.Y.), at which the documents may have been used in the examination of Gleason.

[30] The Government is not obligated by Rule 16(a) to anticipate every possible defense, assume what the defendant's trial testimony (if he decides to testify) will be, and then furnish him with otherwise irrelevant material that might conflict with his testimony. With respect to such material, if any obligation to disclose existed under Rule 16(a) it was satisfied by making the underlying files available to the defendant prior to trial. United States v. Haldeman, 181 U.S.App.D.C. 254, 559 F.2d 31, 74 n. 80, 76 n. 93 (D.C.Cir. 1976), cert. denied, 431 U.S. 933, 97 S.Ct. 2641, 53 L.Ed.2d 250 (1977) (White House files); United States v. Cirillo, 499 F.2d 872, 882 (2d Cir.), cert. denied, 419 U.S. 1056, 95 S.Ct. 638, 42 L.Ed.2d 653 (1974) (wiretaps). From that point on it was Gleason's task to prepare his defense.

[31] Lastly, Gleason has failed to show any legally cognizable prejudice as a result of the failure to have the documents in advance of trial. It is not suggested that if he had received them he would have decided not to testify. Indeed, no request was made for a continuance to permit preparation of a more plausible reconciliation between the documents and his direct testimony.

(2) Alleged Improper Rebuttal Summation

Gleason argues that he was denied a fair trial because the prosecutor, in his rebuttal summation pursuant to F.R.Cr.P. 29.1, introduced prejudicial new matter and the court refused to give a curative instruction.

The controversy arose out of the apparent absence from the record of any explanation or basis for the $700,000 profit figure which Gleason told Shaddick that the bank's foreign exchange department must have for the month of March,

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1974, if FNB was to avoid showing a loss for the first quarter. During his main summation the prosecutor commented sardonically that the defendants would probably claim the $700,000 figure was dreamt up by Shaddick on the beaches of Acapulco. Accepting this suggestion, Gleason's counsel in his summation then argued that the figure was indeed the product of Shaddick's imagination. The prosecutor responded in his rebuttal summation with an adding machine tape which totalled losses from the liquidation of government securities during the period March 15-27, 1974, at $699,431.86, almost precisely the same as the figure of $700,000 that had been used by Gleason in stating the profit needs of the foreign exchange department.

Gleason contends that it was unfair and improper to introduce such new material in a reply summation, citing Moore v. United States, 120 U.S.App.D.C. 173, 344 F.2d 558, 560 (D.C.Cir. 1965), and United States v. Rubinson, 543 F.2d 951, 956-66 (2d Cir.), cert. denied, 429 U.S. 850, 97 S.Ct. 139, 50 L.Ed.2d 124 (1976), to which the Government replies that the material was not new but a response, based entirely on exhibits already in evidence, negating Gleason's claim in his counsel's summation that Shaddick invented the $700,000 figure.

*26 [32] Had Gleason's summation been the first occasion for the latter argument, the Government's reply might be persuasive, because it could then argue that it had no intention of referring to the computation unless and until Gleason challenged the source of the $700,000 figure. Fairness would dictate that a copy be furnished to Gleason well enough in advance of its use to permit a reply rather than confront him with a new theory (albeit based on record evidence) at almost literally the last minute of a long trial. See 1975 House Judiciary Committee Report regarding proposed F.R.Cr.P. 29.1 (H.R.Rep.No.94-247).[FN16] Since the argument of this appeal, however, the Government has represented in writing that only after Gleason's summation did it for the first time calculate the total losses and discover that they totalled approximately $700,000, which led to its use of the tabulation in its rebuttal summation.

FN16. The House Judiciary Committee commented:
"The Committee believes that . . . fair and effective administration of justice is best served if the defendant knows the arguments actually made by the prosecution in behalf of conviction before the defendant is faced with the decision whether to reply and what to reply."

[33] Had no action been taken by the court after the Government's surprise reply summation, a reversal might be required. But Judge Griesa, recognizing the eleventh-hour unfairness and surprise, offered Gleason and the other defendants the opportunity to respond by way of a surrebuttal summation after they had sufficient time to confer and review the trial transcript and exhibits forming the basis of the Government's computation. This in our view adequately protected the defendants against any prejudice. For reasons best known to themselves, possibly their inability to find any material errors in the Government's computation, defense counsel refused the court's offer and instead asked for a curative instruction.[FN17] Absent proof that the Government's computation was erroneous, the trial judge did not abuse his discretion in refusing a cautionary instruction.

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FN17. We disagree with Gleason's argument that additional summations which might result in introduction of the Government's computation, could not resolve the problem because they would only serve to magnify the unfair impact of the prosecutor's rebuttal. If the computation, based on evidence already in the record, was accurate, the jury was entitled to have the summary as an aid in analyzing the complex proof before it rather than be forced to the laborious task of making its own computation.
The situation here is clearly distinguishable from that in cases relied upon by Gleason where the Government improperly referred to matter not in the record. See, e. g., Moore v. United States, supra; United States v. Rubinson, supra, 543 F.2d at 966.

(3) Alleged Suppression of Exculpatory Evidence

Gleason charges that the Government suppressed exculpatory evidence and permitted witnesses to give materially false testimony, thereby depriving him of a fair trial. The record reveals these charges to be both baseless and irresponsible.

Specifically Gleason contends that the Government withheld from the jury evidence supporting multicount indictments, filed on September 29, 1975, January 5, 1977, and March 19, 1979, against Sindona, Shaddick and Bordoni in the Southern District of New York, charging that prior to the falsification of FNB's March 1974 statement those three men, without Gleason's knowledge, had falsified every single monthly foreign exchange profit and loss report beginning with the month of January, 1973, yet permitted Shaddick to testify that he had engaged in falsifying the bank's books on only three occasions during this period and Bordoni to testify that he had participated in only six such transactions. In addition, Gleason argues that the superseding indictment filed against Sindona and Bordoni on March 19, 1979, after Gleason had been convicted, contains a paragraph [FN18] revealing that the Government had *27 evidence that Bordoni and Sindona were involved in the misevaluation of securities in FNB's bank trading account.

FN18. "On or about March 31, 1974, Sindona and Bordoni, the defendants, and other CO-CONSPIRATORS caused the Franklin National Bank to hide losses in the bond trading operation by misvaluing securities held in bond trading account." Indictment S75 Cr. 948, count I, Par. 54 (S.D.N.Y. March 19, 1979).

[34][35] The fallacy of Gleason's claims with respect to the 1973-74 false foreign exchange transactions lies in his failure to distinguish between a fraudulent transaction and a false financial statement. Although the fraudulent transactions during this period of time were relatively few, they were reflected in subsequent monthly and quarterly financial statements, which were many. Since each one of the financial statements could properly be charged in a separate count, see United States v. Huber, 603 F.2d 387, 398-99 (2d Cir. 1979), and some statements were also charged as violations of federal mail and wire fraud statutes, the number of counts in the superseding indictment far exceeded the number of fraudulent transactions. There is thus no proof that the Government knowingly allowed false testimony.

[36] Were Gleason's counsel unaware of this differentiation, his specious

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charges might be pardonable. But the earlier superseded indictments (one filed on Sept. 29, 1975, and another on Jan. 5, 1977), which contain basically the same allegations with respect to the 1973-74 foreign exchange transactions, were made available to defense counsel before the trial of the present case, were used extensively by Gleason's counsel on his cross-examination of Bordoni and Shaddick, and could have been used to reveal the supposed perjury on their part. Under the circumstances, Gleason is wholly unjustified in labelling the Government's conduct, as he does in his brief on appeal, as "prosecutorial misconduct," "suppression of evidence," "knowing use of false testimony," failure "to correct false testimony," silence "in the face of their witnesses' perjury," "foul conduct," and resort to "slippery and less than thoroughly upright conduct." [FN19]

FN19. These scurrilous statements, which indicate a reckless disregard by counsel for the facts of record, exceed the bounds of responsible advocacy in our adversarial system and merit consideration by the Bar Association Grievance Committee for appropriate action. ABA Code of Professional Responsibility, DR 7-102(A)(1), (2).

[37] As for the allegation in the last superseding indictment that on March 31, 1974, Sindona and Bordoni caused FNB to conceal losses in its bond trading account by misvaluing securities, the simple and complete answer is that it does not refer to their personal participation in the false security evaluation but merely to acts committed by their CO-CONSPIRATORS in furtherance of the CONSPIRACY to falsify the bank's earnings statement for the first quarter of 1974, for which they could be held criminally responsible under Pinkerton v. United States, supra.

GOVERNMENT'S REFUSAL TO CONFER IMMUNITY ON SINDONA

[38] Gleason contends that his due process rights were violated by the Government's failure to accede to his request that use immunity (i. e., immunity from the use of his testimony and evidence derived from it in subsequent prosecution) be extended to an alleged principal accomplice and co-CONSPIRATOR, Sindona, who was at the time and remains a defendant named in a separate indictment, 75 Cr. 948, charging him and Bordoni with participation in the same false foreign exchange transactions as those forming a major part of the case against Gleason. We disagree.

As we pointed out in United States v. Lang, 589 F.2d 92, 95-96 (2d Cir. 1978), the law is

"well settled that the power of the Executive Branch to grant immunity to a witness is discretionary and no obligation exists on the part of the United States Attorney to seek such immunity. United States v. Bautista, 509 F.2d 675, 677 (9th Cir.), cert. denied sub nom. Monsivais v. United States, 421 U.S. 976, 95 S.Ct. 1976, 44 L.Ed.2d 467 (1975); United States v. Ramsey, 503 F.2d 523, 532-33 (7th Cir. 1974), cert. denied, 420 U.S. 932, 95 S.Ct. 1136, 43 L.Ed.2d 405 (1975); United States v. Berrigan, 482 F.2d 171, 190 (3d Cir. 1973); Earl v. United States, 124 *28 U.S.App.D.C. 77, 80, 361 F.2d 531, 534 (1966) (Burger, J.), cert. denied, 388 U.S. 921, 87 S.Ct. 2121, 18 L.Ed.2d 1370 (1967); People v. Sapia, 41 N.Y.2d 160, 166, 391 N.Y.S.2d 93, 359 N.E.2d 688 (1976), cert. denied, 434 U.S. 823, 98 S.Ct. 68, 54 L.Ed.2d 80 (1977).

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"We note that this court has held that the government is not obligated to grant immunity to witnesses so that they may be made available to testify on behalf of the defendant. United States v. Stofsky, 527 F.2d 237, 249 (2d Cir. 1975), cert. denied, 429 U.S. 819, 97 S.Ct. 65, 50 L.Ed.2d 80 (1976)."

Moreover, there was no representation that if granted immunity Sindona would furnish specific exculpatory evidence unobtainable from any other source. The most that was suggested through Sindona's counsel, who refused to permit Sindona to talk with Gleason, was that Sindona "would deny any wrongdoing or conversations in furtherance of any wrongdoing with Gleason," which would at best be merely cumulative of Gleason's testimony and from an obviously interested witness who would be subject to intensive cross-examination that might well destroy his credibility.

Nor is this a case where the Government deliberately manipulated grants of immunity to gain an unfair advantage over any defendant, United States v. Lang, supra, 589 F.2d at 96-97. The major accomplices who testified (Crosse, Shaddick, Bordoni and Garofalo) were not granted immunity. Only two lesser figures, Thomas Murphy and Bruce Carlton, were promised by the United States Attorney that their statements to him would not be used against them. No sound reason exists, therefore, for departing from the general rule that the Government may refuse to grant immunity.

THE ALLEGED INSUFFICIENCY OF THE CHARGES AND PROOF OF USE OF DECEPTIVE DEVICES IN CONNECTION WITH THE SALE OF SECURITIES

[39] Gleason contends that Counts 5-14, which allege that the defendants, in violation of s 10(b) of the Securities Exchange Act, 15 U.S.C. s 78j(b) and Rule 10b-5, used interstate commerce and the mails to employ manipulative and deceptive devices in connection with the purchase and sale of FNB's stock, which was purchased by 12 identified persons on specified dates after the issuance of the false FNB financial statement for the first quarter of 1974, are insufficient for failure to contain specific allegations of misconduct and to set forth all of the elements of a crime. The contention must be rejected for the reason that each count of the indictment followed the precise language of s 10(b), thus alleging all of the essential elements of the crime charged, see Hamling v. United States, 418 U.S. 87, 117, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974); United States v. Carr, 582 F.2d 242, 244 (2d Cir. 1978). Moreover, by incorporating by reference paragraphs 6-8 of Count One into Counts Five through Fourteen the Government specified the nature of the alleged criminal conduct in sufficient detail to enable the defendants to prepare their defenses and to plead an acquittal or conviction in bar of any future prosecution for the same offense.

[40][41] Gleason's further contention that the counts should have been dismissed for the Government's failure to prove any reliance by the specified purchasers of FNB shares upon the bank's false financial statement for the first quarter of 1974 must also be rejected. Despite contrary suggestions in earlier decisions relied on by appellants, the law is settled that the Government need only prove that the false representation is one that a reasonable stockholder would rely on in purchasing or selling the relevant corporate shares, SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 860 (2d Cir. 1968) (en banc), cert. denied, 394 U.S. 976, 89 S.Ct. 1454, 22 L.Ed.2d 756 (1969); cf. TSC Indus. v. Northway Inc., 426 U.S. 438, 449, 96 S.Ct. 2126,

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48 L.Ed.2d 757 (1976), and Judge Griesa so instructed the jury. It is also settled that the same standards apply to civil and criminal liability under the securities law. United States v. Peltz, 433 F.2d 48, 53 (2d Cir. 1970), cert. denied, 401 U.S. 955, 91 S.Ct. 974, 28 L.Ed.2d 238 (1971).

*29 THE CLAIM THAT THE RECORDS OF THE FRAUDULENT FOREIGN EXCHANGE TRANSACTIONS ARE NOT "FALSE ENTRIES" WITHIN THE MEANING OF 18 U.S.C. s 1005

Gleason's last contention, derived principally from Coffin v. United States, 156 U.S. 432, 462-63, 15 S.Ct. 394, 39 L.Ed. 481 (1895), is that those counts of the indictment based on the four deceptive foreign exchange transactions which showed FNB as earning a profit must be dismissed because the transactions took place and were reflected in the bank's books, thus precluding a claim that they were "false entries" within the meaning of s 1005. The argument disregards the indictment and later authority controlling the interpretation of the term "false entry."

The indictment (e. g., Count Three) alleges that the defendants caused a false entry to be made in the bank's books and earnings statement by representing in its financial statement that the bank had earned a profit of $79,000 for the first quarter of 1974 when in fact it had suffered a loss of over $7 million and that this had been accomplished "by means of fictitious and false foreign exchange contracts between said bank and Amincor Bank, Zurich, Switzerland, and Banca Unione, Milan, Italy, which reflected a fictitious profit in the foreign exchange operations of approximately $2,000,000."

[42][43] It is true that in Coffin the Court stated that a crime of making a false entry is not committed if the transaction entered on the books actually took place and was entered as it occurred. 156 U.S. at 463, 15 S.Ct. 394. However, this was modified by Agnew v. United States, 165 U.S. 36, 52-54, 17 S.Ct. 235, 41 L.Ed. 624 (1897), holding that a false entry statute may be violated by entering on the books a transaction known to be fraudulent, even though the entry might be accurate. See United States v. Darby, 289 U.S. 224, 226-27, 53 S.Ct. 573, 77 L.Ed. 1137 (1933); United States v. Huber, 603 F.2d 387, 397-98 (2d Cir. 1979). While an entry is not false merely because the underlying transaction is illegal, see United States v. Manderson, 511 F.2d 179, 180-81 (5th Cir. 1975), here the profit shown on the record of the foreign exchange transactions was known by the defendants to be false and fictitious, concocted for the very purpose of distorting the financial statement. The result was a violation of 18 U.S.C. s 1005. See Billingsley v. United States, 178 F. 653, 663 (8th Cir. 1910).

[44] We find no merit in appellants' remaining contentions, which require little or no discussion. The district court's grant of one extra peremptory challenge to the Government without the defendants' consent after granting three peremptories to the defendants, while not in compliance with F.R.Cr.P. 24(b), [FN20] is not shown to have resulted in the selection of a jury that was unrepresentative of the community, or biased in any other way. Nor is any prejudice to appellants shown. The proportional advantage accorded defendants by Rule 24(b) (10 peremptories as against 6 for the Government) was approximately maintained. While the court's action was improper in the absence of defense counsels' consent, we do not believe that reversal is warranted in the absence of prejudice to the defendants.

FN20. Although F.R.Cr.P. 24(b) does not authorize the granting of

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additional peremptories to the Government, it is not uncommon for the court to condition the grant of a defendant's request for additional peremptories on his consent to a proportionate increase being accorded to the Government.

The judgments of conviction are affirmed.

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