

RECEIVED

Jan 02 2025

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable Perry H. Gravely, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RAYMOND MARTINEZ,

APPELLANT

APPELLATE CASE NO. 2023-001201

RECORD ON APPEAL

ROBERT M. DUDEK
Chief Appellate Defender

ALAN WILSON
Attorney General

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

W. JEFFREY YOUNG
Chief Deputy Attorney General

DONALD J. ZELENKA
Deputy Attorney General

ATTORNEY FOR APPELLANT

MELODY J. BROWN
Senior Assistant Deputy Attorney General
1000 Assembly Street, Room 519
Columbia, SC 29201
(803)734-3727

W. WALTER WILKINS, III
Solicitor, Thirteenth Judicial Circuit
305 E. North Street
Greenville, SC 29601
(864) 467-8647

VOLUME II OF II
PAGES 501-599

ATTORNEYS FOR RESPONDENT

INDEX

INDEX	i
TRIAL TRANSCRIPT DATED JULY 17, 18, 19, AND 20, 2023	1
OPENING STATEMENT BY MR. GRESHAM.....	2
OPENING STATEMENT ON BEHALF OF DEFENDANT BELCHER BY MR. GIBSON....	6
OPENING STATEMENT ON BEHALF OF DEFENDANT MARTINEZ BY MS. DIAZ	11
TESTIMONY	
CEDRIC McKINNEY	
Direct Examination by Mr. Gresham.....	14
Cross-Examination by Mr. Gibson	35
Cross-Examination by Ms. Diaz	38
Redirect Examination by Mr. Gresham	41
TIFFANY GAMBRELL	
Direct Examination by Ms. Gary	43
Cross-Examination by Ms. Diaz.....	51
CHAD MALTBY	
Direct Examination by Mr. Gresham.....	54
DEFENSE MOTION TO EXCLUDE IMPROPER CHARACTER EVIDENCE PURSUANT TO RULE 404(b), SCRE BY MR. GRUBBS	91
RESPONSE BY MR. GRESHAM	92
COURT’S RULING GRANTING DEFENSE MOTION TO EXCLUDE IMPROPER CHARACTER EVIDENCE	94
TESTIMONY	
CHAD MALTBY	
Continued Direct Examination by Mr. Gresham	96
DEFENSE OBJECTION TO STATE’S EXHIBITS NOS. 20 AND 28 AS HEARSAY BY MR. GIBSON	103
ARGUMENT FOR ADMISSION OF EXHIBITS BY MR. GRESHAM	104

COURT’S RULING SUSTAINING DEFENSE OBJECTION TO STATE’S EXHIBITS NOS. 28 AND 30	107
---	-----

TESTIMONY

CHAD MALTBY

Continued Direct Examination by Mr. Gresham	107
Direct Examination <i>in-camera</i> by Mr. Gresham	112
Continued Direct Examination by Mr. Gresham	117
Cross-Examination by Mr. Grubbs	120
Cross-Examination by Mr. Gibson	155
Redirect Examination by Mr. Gresham	169

BARBARA HAUN

Direct Examination by Mr. Gresham	172
---	-----

BARBARA RISER

Direct Examination by Mr. Gresham	198
---	-----

SHERRY McBEE

Direct Examination by Ms. Gary	211
Cross-Examination by Mr. Gibson	225

DAVID PICONE

Direct Examination <i>in-camera</i> by Ms. Gary	239
Cross-Examination <i>in-camera</i> by Mr. Grubbs	243
Redirect Examination <i>in-camera</i> by Ms. Gary	246

DEFENSE OBJECTION TO IDENTIFICATION PURSUANT TO <i>NEIL V. BIGGERS</i> ON BEHALF OF DEFENDANT MARTINEZ BY MR. GRUBBS	249
---	-----

COURT’S RULING FINDING IDENTIFICATION ADMISSIBLE UNDER <i>NEIL V.</i> <i>BIGGERS</i> AND <i>STATE V. LIVERMAN</i>	249
--	-----

TESTIMONY

DAVID PICONE

Direct Examination by Ms. Gary	251
Cross-Examination by Mr. Grubbs	260

SHERRY McBEE

Continued Cross-Examination by Mr. Gibson	265
---	-----

DEFENSE MOTION FOR MISTRIAL ON BEHALF OF DEFENDANT MARTINEZ BY MR. GRUBBS	277
--	-----

DEFENSE MOTION JOINING IN MOTION FOR MISTRIAL ON BEHALF OF DEFENDANT BELCHER BY MR. GIBSON.....	278
RESPONSE BY MS. GARY.....	278
CONTINUED MOTION FOR MISTRIAL BY MR. GIBSON.....	279
COURT OVERRULES MOTIONS FOR MISTRIAL	281
CONTINUED MOTION FOR MISTRIAL ON BEHALF OF DEFENDANT MARTINEZ BY MR. GRUBBS.....	281
DEFENSE MOTION JOINING IN ARGUMENT ON BEHALF OF DEFENDANT BELCHER BY MR. GIBSON.....	282
COURT RENEWS RULING OVERRULING MOTIONS FOR MISTRIAL.....	282
TESTIMONY	
KIRK PORTER	
Direct Examination by Ms. Gary	284
Cross-Examination by Mr. Gibson	322
STATE’S OBJECTION TO MENTION OF SENTENCING EXPOSURE IN CROSS- EXAMINATION	344
RESPONSE ON BEHALF OF DEFENDANT BELCHER BY MR. GIBSON	347
RESPONSE ON BEHALF OF DEFENDANT MARTINEZ BY MR. GRUBBS.....	348
COURT OVERRULES STATE’S OBJECTION TO MENTION OF SENTENCING EXPOSURE.....	350
TESTIMONY	
KIRK PORTER	
Continued Cross-Examination by Mr. Gibson.....	352
Cross-Examination by Mr. Grubbs	353
Redirect Examination by Ms. Gary	371
DOCTOR MICHAEL WARD	
Direct Examination by Mr. Gresham.....	374
FRANCESCA TROISO	
Direct Examination by Ms. Gary	385
Cross-Examination by Ms. Diaz	389

CANDICE HOLSEY	
Direct Examination by Ms. Gary	390
Cross-Examination by Ms. Diaz	398
THOMAS MOORE	
Direct Examination by Ms. Gary	400
MICHAEL BOSILLO	
Direct Examination by Ms. Gary	404
Cross-Examination by Mr. Gibson	419
DAN KELLEY	
Direct Examination by Ms. Gary	422
Cross-Examination by Mr. Gibson	439
Cross-Examination by Mr. Grubbs	440
STATE RESTS	440
DEFENSE MOTION FOR A DIRECTED VERDICT ON BEHALF OF DEFENDANT BELCHER BY MR. GIBSON.....	441
COURT’S RULING DENYING MOTION FOR DIRECTED VERDICT	441
DEFENSE MOTION FOR A DIRECTED VERDICT AND RENEWING ALL PRIOR MOTIONS AND OBJECTIONS ON BEHALF OF DEFENDANT MARTINEZ BY MR. GRUBBS	441
COURT’S RULING DENYING MOTION FOR DIRECTED VERDICT AND RENEWING ALL PREVIOUS RULINGS.....	441
DEFENSE RENEWAL OF ALL PRIOR MOTIONS AND OBJECTIONS ON BEHALF OF DEFENDANT MARTINEZ BY MR. GRUBBS	445
DEFENSE MOTION JOINING IN RENEWAL OF ALL PRIOR MOTIONS AND OBJECTIONS ON BEHALF OF DEFENDANT BELCHER BY MR. GIBSON	445
COURT RENEWS ALL PREVIOUS RULINGS	445
CHARGE CONFERENCE	446
STATE’S OBJECTION TO CHARGE ON INCONSISTENT STATEMENTS.....	446
COURT OVERRULES OBJECTION TO CHARGE ON INCONSISTENT STATEMENTS FINDING EVIDENCE OF INCONSISTENCIES	446

STATE’S OBJECTION TO PROPOSED CHARGE (COURT’S EXHIBIT NO. 5) ON ACCOMPLICE TESTIMONY	447
RESPONSE ON BEHALF OF DEFENDANT BELCHER BY MR. GIBSON	447
DEFENSE MOTION JOINING IN ARGUMENT ON BEHALF OF DEFENDANT MARTINEZ BY MR. GRUBBS	449
COURT’S RULING DENYING PROPOSED CHARGE ON ACCOMPLICE TESTIMONY	449
CLOSING ARGUMENT BY MS. GARY	451
CLOSING ARGUMENT ON BEHALF OF DEFENDANT BELCHER BY MR. GIBSON	473
CLOSING ARGUMENT ON BEHALF OF DEFENDANT MARTINEZ BY MR. GRUBBS	487
CHARGE ON THE LAW	514
DEFENSE RENEWAL OF REQUEST TO CHARGE ON ACCOMPLICE TESTIMONY ON BEHALF OF DEFENDANT BELCHER BY MR. GIBSON	537
DEFENSE MOTION JOINING IN RENEWAL OF REQUEST TO CHARGE ON ACCOMPLICE TESTIMONY ON BEHALF OF DEFENDANT MARTINEZ BY MR. GRUBBS	538
COURT RENEWS DENIAL OF REQUEST TO CHARGE ON ACCOMPLICE TESTIMONY	538
JURY QUESTION.....	538
RECHARGE ON THE LAWS OF MURDER AND MALICE	540
JURY QUESTION.....	543
JURY QUESTION.....	544
JURY QUESTION.....	546
DEFENSE EXCEPTION TO CHARGING ACCOMPLICE LIABILITY AS TO POSSESSION OF A WEAPON DURING THE COMMISSION OF A CRIME	547
JURY QUESTION.....	550
RECHARGE ON THE LAW OF ACCOMPLICE LIABILITY.....	550

VERDICTS	554
POLLING OF THE JURY.....	555
SENTENCING	556
COURT’S EXHIBIT NO. 5 (REQUEST TO CHARGE)	557
COURT’S EXHIBIT NO. 8 (JURY NOTE)	594
INDICTMENT.....	595
CERTIFICATE OF COUNSEL	599

1 Maltby he was driving around for ten minutes, and then he
2 testifies he was sitting there for about five minutes. I
3 mean it's a lie, again. It's an important lie. But
4 either way, whether it's five or ten minutes, it doesn't
5 matter. Investigator Maltby said probably a little bit
6 less than a quarter mile, so I'm just going to say
7 approximately a quarter mile away.

8 And Porter testified that they walked down the road.
9 Walked. Takes me, what, probably four or five minutes to
10 walk a quarter mile at a leisurely pace. And then they
11 have to wait on somebody to leave the apartment. And then
12 they walk back to where Kirk miraculously knows where to
13 pick them up in front of Rasor Drive.

14 Let's compare that to Investigator Maltby's timeline.
15 I'm starting at 7:30 because I think this is when it gets
16 important. 7:30, Juanita and Elizabeth arrive at
17 Bruster's apartment. Jimmy Sullivan's already there.
18 7:33 Sullivan leaves. 35, Juanita and Elizabeth leave.
19 7:36 the Mercedes comes back to Crestwood. 7:39 it
20 leaves, again, five minutes, two and a half mile drive,
21 which tells you what, ladies and gentlemen? That they
22 arrive at 7:44. That's the part that was missing out of
23 Ms. Gary's illustration. If it takes him five minutes to
24 get there, then they get there at 7:44.

25 At 7:46 the first call from Shelvis to Jermaine comes

1 in. No answer, straight to voicemail. 7:48 Shelvis calls
2 Tiffany. Tiffany call Rico. At some point between 7:48
3 and 7:50, that's when Rico talks to Cedric and then Cedric
4 starts to head over there. He said he was steps away.

5 We know that the Mercedes is back at Crestwood at
6 7:53. So what do we have to go backwards and do? Find
7 out when they leave, which means that they had to leave at
8 the same time that Rico was telling Cedric, between 7:48
9 and 7:50, which means that the window for this crime to
10 happen is between 7:44 and 7:48 to 7:50, a four-to-six
11 minute window. Four to six minutes.

12 Jimmy Sullivan's phone wasn't anywhere else until
13 after that. He could have been there. He could have been
14 a lookout. He could have been the scout. I don't know.
15 I don't know his involvement, but I know it's more than
16 what the State thinks.

17 Why is all that important? Because if I'm adding up
18 Kirk Porter's times and all that, from the time that he
19 gets there to the church, it takes him from door to door
20 over 25 minutes, according to Kirk Porter's testimony.
21 Five minutes to get there, ten minutes to wait, five
22 minutes to walk there, hanging out for another little bit,
23 and then miraculously knowing when to get there. His
24 entire storyline doesn't fit with what Investigator Maltby
25 discovered, and that's why the devil's in the details. He

1 may have kept his major story consistent in that it wasn't
2 me, I was the driver. You want the trigger man, that's
3 the guy over there. Oh, yeah, yeah. That's definitely
4 him. Of course he's going to keep that part consistent.
5 That's the easy part. But the lies start to fall apart
6 when you get into the details. There's your time of the
7 crime, 7:44 to 7:50.

8 So what do we have? Kirk Porter's timeline,
9 Investigator Maltby's timeline, they don't match up. They
10 don't match up. Because they don't match up, can't
11 believe a thing he says.

12 Why wasn't the whole apartment ransacked? Elizabeth
13 Gary, the prosecutor, is exactly right. It's just not
14 enough time. It's just not enough time. Because Keyla in
15 the end got him to open that door, Porter, the muscle,
16 charged in, did the deed. Sullivan, lookout scout, I
17 don't know what he was. Maybe he got scared. Maybe he
18 thought this was just a robbery. As soon as he hears a
19 shot, he takes off, and that's why he's not there. That's
20 why he's not hanging around. I don't know.

21 Now let's talk about this jar and this Ingle's video
22 that the State has done a wonderful job presenting to you
23 evidence that Raymond Martinez went inside an Ingles and
24 got change, or got cash for change. Again, if this was
25 all this case was about, we wouldn't be here talking. But

1 that's not a murder. That's not an indicator of murder.
2 Possessing something that's stolen after the fact is not
3 murder. It's just not. That in and of itself does not
4 link you to a murder. You need more. You would have
5 needed a credible witness that could have made those
6 connections. They don't have one. Porter used him. And
7 how do we know that he used him? He's done burglaries
8 before. That's what he said. That's what the State
9 brought out. He's familiar with it. This wasn't his
10 first rodeo. He's a thief, self-admitted thief. He
11 testified that he had used Coinstar machines before.
12 Investigator Maltby confirmed that. He testified that,
13 yeah, he knows that they're in grocery stores more often
14 than not, and -- but there are cameras in grocery stores.

15 Had this just been a lick, a robbery, he might have
16 walked in there by himself. Not after what he did. Not
17 after what he did.

18 So what did he have to do? He had to have a fall
19 guy. He had to have someone to put his face on there. So
20 he got his friend, someone that would trust him.

21 He told you, Porter told you that only he drives that
22 Mercedes. No one else. He's in control of that Mercedes.
23 He decides where it goes. He knew that there were
24 cameras. That's why he parks far away. But look at the
25 Ingles video. You won't see his car anywhere in the

1 frame. He parks far away, not at the closest spaces.

2 Why? Because he knows he'll be seen.

3 Even if Porter had said to Raymond, hey, man, I just
4 did this lick, go cash this out for me, that doesn't make
5 him -- that doesn't make Raymond an accessory in this
6 murder. Raymond was used by a crafty thief who admitted
7 that he would commit crimes to further his own interest.

8 Now, what I would posit to you all is that after this
9 Mercedes, controlled, driven by Kirk Porter gets back to
10 Crestwood Apartments at 7:53, what commences for the next
11 25 minutes is a shell game. Because you're going to see
12 in this grainy video that you saw a part of a car that
13 parks at 7:53, and from 7:53 to 8:15 there are cars coming
14 and going, there are people milling about. As
15 Investigator Maltby testified, you can't identify a single
16 person in it. There are people going in Building 10,
17 coming out of Building 10.

18 Ladies and gentlemen, what I'm telling is that at
19 some point Raymond Martinez goes over at that New Year's
20 Eve party, was contacted by Kirk Porter who came back
21 after murdering Jermaine Bruster and recruited to go and
22 cash this change. The State hasn't presented you one bit
23 of corroboration from any other witness other than a
24 documented liar to prove otherwise. They have to prove
25 things. Not me.

1 Kirk Porter, once a liar, always a liar. He was
2 charged with 15 charges before he entered that plea. We
3 went through it in detail. I won't go through them all
4 again. But 190 years and a couple of life sentences,
5 that's what he avoided by getting on that stand today --
6 or yesterday.

7 Investigator Picone told him you want to be the one
8 on the better end of this. And that was early on in the
9 interview before he started identifying people in a
10 lineup. He knew. From the beginning of that, he started
11 to craft this plan. Who can I throw under the bus? That
12 guy.

13 He pled guilty to voluntary manslaughter, reduced
14 from 30 years to life to two to 30 years.

15 Porter testified Keyla Mansell got 12, and don't you
16 think he's wanting better? Keyla didn't testify, but
17 Porter did. You know in his mind he's looking for better
18 than 12 years. Wouldn't a person, a thief, a burglar say
19 anything to get that kind of time after killing a man?

20 He testified, probably the only truthful thing he
21 said on that stand was the last question I asked him: You
22 want as little time in prison as possible. And he said
23 yes. I think that's the only truthful thing he said all
24 of yesterday.

25 What are some of those charges that were dismissed?

1 Attempted murders, burglaries, discharging a weapon into a
2 vehicle, armed robberies, all gone thanks to that
3 testimony. The deal's been done. He's already gotten a
4 benefit. And that provides you with all you need to know
5 about what incentive he has to lie about every single
6 detail in order to save his own skin.

7 As much as the State wants you to believe that these
8 inconsistencies are due to lapses in memory because of
9 marijuana use, pill use, I didn't hear any testimony about
10 how long he's been doing drugs from any sort of experts
11 on, oh, I talked to Kirk Porter, and, yeah, he's got
12 definitive memory loss from all of his drug use. That's
13 speculation on their part. That's them trying to plug
14 holes. That's them trying to put a bowl under a strainer
15 that their case is running through. Don't believe it.
16 That's what they want you to believe, but there's no
17 evidence of it.

18 He lied repeatedly. He was lying to you from the
19 beginning. He testified that he never lied to
20 Investigator Maltby. That was the first lie he told to
21 you. What did I do? Proved him to be a liar.

22 He testified that, on the stand yesterday, Martinez
23 and Belcher both had guns. Well, back on February 28,
24 2018, he told Investigator Maltby only Raymond Martinez
25 had a gun. That's significant. That's a big change.

1 That's not something little. That's something huge.
2 Changed it. Why? Because he's hoping to get as little
3 time as possible, and that sounds better. Because what
4 happens when you embellish things, ladies and gentlemen?
5 That's just another form of lying. Another form of lying.

6 He claimed he never made a connection, that the lick
7 he had done was a murder, and yet Keyla sent him the link
8 the next day. He knew. And he waffled a little bit. He
9 said, "I knew by the time I did my plea." And he said,
10 "All right. All right. I must have known before I
11 confessed."

12 Again, the devil is in the details. He's lying.
13 He's squirrely up there because he knows he's not telling
14 the truth, because if he had been telling you the truth,
15 you would have had a firm story throughout. And the only
16 thing he got firm was the fact that it wasn't him. That's
17 it.

18 He said that Raymond Martinez had tied Mr. Bruster
19 up. Investigator Maltby didn't testify that there's any
20 evidence of that. Dr. Ward didn't get up here and testify
21 that there were markings on the wrist or anything like
22 that that would indicate that somebody had been tied up.
23 No. It's another lie. It's another embellishment to make
24 him sound better, to make it sound like he's giving more
25 information than he has. More lies.

1 I think it's significant that he describes Raymond
2 Martinez as wearing all black, gray and white shoes, no
3 jacket. He didn't say he was wearing a hat. Why is that
4 significant? Because in the picture in the Ingles, he's
5 wearing a gray sweater, a hat, blue and white shoes. Now,
6 Ms. Gary says that they went back and that they were there
7 for a good bit, and it makes sense that he would change
8 clothes, which I would agree that does make sense except
9 for the fact that Kirk Porter said that Raymond Martinez
10 never left the car. He said they never got out of the car
11 once they got back to Crestwood. For 25 minutes he just
12 sat there. And if he just sat there, how is he changing
13 his clothes?

14 Now, Jermaine Bruster was wearing gray and white
15 shoes that night. Maybe Kirk Porter is remembering a
16 different pair of shoes. Maybe he was remembering a pair
17 of shoes of the man he just shot. Maybe that's more of
18 what was on his mind, not what Raymond Martinez was
19 wearing.

20 Now, you can tell out-right lies, you can tell
21 embellishment kind of lies, but there's yet another kind
22 of lie, and that's a lie by omission. Lying by not
23 telling something. And this isn't a matter of just I
24 forgot to tell you everything I ate for lunch yesterday.
25 These are serious facts about the death of a human being.

1 These are the types of things that you don't just forget.

2 So he never told Investigator Maltby that Raymond and
3 Belcher came up from behind some mailbox. He never told
4 him that fact. That was brand new.

5 He never told Investigator Maltby that Raymond told
6 him the Coinstar wasn't working. You didn't hear him
7 testify to that. Don't you think if they'd wanted to
8 corroborate Kirk Porter's testimony they would have
9 brought their lead investigator to say oh, yeah, this is
10 definitely what he told me, and this is what my
11 investigation found? But you didn't hear it because Kirk
12 Porter made it up on the stand to try to make himself
13 sound better.

14 He lied to Investigator Maltby about being at a hotel
15 all night until I had to let him hear his part, and then
16 he -- begrudgingly he's like, yeah, I said I was at a
17 hotel. Another lie.

18 It's only a trial after he's gotten his deal where
19 he's going to be sentenced after this trial does he start
20 to juice up some details. It's his time. The spotlight
21 is going to be on him, and he told you that he knows that
22 his sentence is conditioned on how he testifies. So what
23 does he do? He starts dribbling in some extras. He's
24 dishonest with you. He was dishonest with this court. He
25 lied to all of us up there on that stand. And you

1 shouldn't believe a word he says.

2 He says that after Raymond and Rob had allegedly
3 committed this terrible murder, they're just casually
4 walking behind that mailbox. Well, if I was in one of
5 their shoes, if that's really what happened, I'd have been
6 running. It just doesn't make sense what he said.

7 Kirk Porter is willing to commit crimes to further
8 his own interest. And I agree with what Mr. Gibson said,
9 that his thing about I won't lie to further my own
10 interest is yet another lie. A lie within a lie. He had
11 every motivation to lie, every incentive to lie. He's
12 been proven to be a liar, and you should not trust a
13 single thing that he has said. And if you cannot trust a
14 single thing that he has said on this witness stand or
15 trust a single thing that he said to Investigator Maltby,
16 which was the glue that held their case together, which
17 was the arrow that tried to point its way to Raymond
18 Martinez, then, ladies and gentlemen, you cannot find
19 Raymond Martinez guilty. You cannot. Because the word of
20 a liar is no word at all.

21 So beyond a reasonable doubt means that after all
22 this, the State has to have left you firmly convinced,
23 firmly convinced of Raymond Martinez's guilt, without
24 hesitation.

25 The bridge I talked about the State has to build you:

1 you wanted the Golden Gate Bridge and they gave you a rope
2 bridge, flimsy, broken, pieces falling apart, frayed,
3 boards breaking. Would you step foot on that bridge to
4 cross that gap? Are you firmly convinced that you're okay
5 to get to the other side? If you're not, you must find
6 Raymond Martinez not guilty.

7 The State's circumstantial evidence that they have
8 attempted to bring here to this court to use to find
9 Raymond Martinez guilty, if it doesn't all taken together
10 point conclusively to his guilt in this crime, you must
11 find him not guilty. If they just make him look
12 suspicious, you must find him not guilty.

13 The State's proof has failed. Their case has failed.
14 Their case is inconsistent. The glue that held it
15 together has fallen apart. And the only thing they've
16 shown as it relates to Raymond Martinez is that he's,
17 number one, a bad judge of friends, and that he went in
18 and changed out some change. That's what they've proven
19 to you as it relates to Raymond Martinez, and that's all.

20 Family's lost a loved one. Don't create another
21 injustice by allowing the State, with their lack of
22 evidence, with their inconsistent evidence, to convict
23 this man of a crime already admitted to by the two people
24 who were connected to the victim, and who had done
25 burglaries before, and used Coinstar machines before, and

1 knew where the cameras were. Don't create an injustice by
2 finding that man guilty of a crime the State has not
3 proven beyond a reasonable doubt that he has done. They
4 have not proven their case. They've not proven him guilty
5 beyond a reasonable doubt. Ladies and gentlemen, I ask
6 you at this time that after your deliberations you find
7 not guilty.

8 Thank you.

9 THE COURT: All right. Ladies and gentlemen, mine's
10 going to be about 25 minutes. I'm going to give you all a
11 very short break before I give you the charge on the law.
12 So don't discuss the case yet. It's not proper to do
13 that. So if you'll step back in your jury room and just
14 let the bailiffs know when you're ready to come back in
15 here.

16 (WHEREUPON, the jury exits the courtroom at 1:17 PM.)

17 THE COURT: All right. We'll take just five minutes.

18 (WHEREUPON, a recess is taken at 1:17 PM; proceedings
19 reconvened at 1:25 PM.)

20 THE COURT: Is the State ready?

21 MS. GARY: Yes, sir.

22 THE COURT: Defendant Belcher ready?

23 MR. GIBSON: Yes, Your Honor.

24 THE COURT: Defendant Martinez ready?

25 MR. GRUBBS: Yes, Your Honor.

1 THE COURT: All right. Bring the jury in.

2 (WHEREUPON, the jury entered the courtroom at 1:27 PM.)

3 THE COURT: All right. Ladies and gentlemen, I
4 usually come down here. I always feel like the Wizard of
5 Oz when I stand up there.

6 And as far as when we get through with this charge,
7 y'all can decide -- your lunch, as you probably saw, it
8 will be waiting on you. And y'all can just decide whether
9 you want to eat your lunch and then discuss the case, or
10 discuss the case while you're eating lunch. That's
11 totally up to you.

12 CHARGE ON THE LAW

13 THE COURT: It's my job at this time to tell you what
14 the law of this case is. All right.

15 Now, as I told you, you and I have two separate,
16 totally distinct duties. Your duty is to determine what
17 the facts of the case are. And what I mean by that is
18 you're going to be answering a question which is on the
19 verdict form as to each charge, as to each individual
20 guilty or not guilty. So that's how you're going to
21 determine the facts and indicate what the facts are.

22 Now, my job, as I told you, is to preside over the
23 trial, rule on objections. And as I said, the objections
24 are based on our court rules and our strict rules of
25 evidence, and therefore, that's -- a lot of times I have

1 to send you out so that we could make sure that we had a
2 clean record and that only things that were presented to
3 you were presented as allowed by our rules of evidence.

4 My final duty is to charge you on the law, and that's
5 what I'm doing at this point. Now, if you feel like you
6 have an opinion what the law should be and if you have a
7 feeling what the law is or anything that contradicts what
8 I'm telling you, you're to disregard that because you've
9 taken an oath that says I will apply the law the judge
10 tells me.

11 So now, in this matter we have several different
12 charges as to each defendant. We have a charge of murder,
13 burglary first degree, armed robbery, possession of a
14 weapon during the commission of a violent crime,
15 conspiracy and petit larceny. Now, I will give you
16 elements and more information about each of those charges.
17 But I tell you the fact that somebody was charged,
18 arrested, indicted, that is not evidence. That is not
19 anything for you to consider. That's merely the formal
20 process which brings a case to trial. You're to make your
21 decision based on the evidence that was presented in this
22 courtroom over the last few days.

23 And what are you to use in making that determination?
24 You will -- witnesses that presented testimony, evidence
25 that was introduced, any stipulation that counsel may have

1 had, any videos or anything like that that was presented,
2 that's the evidence that you are to consider. And as to
3 each piece of evidence, you're to give it the weight and
4 value which you feel is appropriate.

5 Now, there are multiple charges here as to each
6 defendant. And I'll go through this verdict form with you
7 in just a few minutes. But you will have a separate
8 verdict form for each defendant. And as to each
9 defendant, you'll have the charges listed. There are six
10 charges per -- six separate charges.

11 Now, you are to consider each of these charges as to
12 each individual separately. You will consider the charges
13 against one individual, then you'll go to the next charge.
14 And your decision on the first one doesn't control what
15 your decision on the second one is, or the third charge.
16 And your decision on one defendant is not controlling on
17 the other defendant. So what you must do is consider each
18 charge as to each individual separately, and you must
19 weigh the evidence and determine whether the State has met
20 its burden of proof as to each element as to that charge
21 as to that defendant.

22 So one of the kind of foundations of our criminal
23 judicial system, criminal justice system is the
24 presumption of evidence. And that is not merely some
25 legal theory that we throw out. That's a very important

1 part. That says that any individual charged with any
2 crime, no matter how serious the crime, how -- what level
3 of court it is, they have a presumption of innocence.
4 That presumption of innocence stays with them until you
5 have removed it. And what I mean by that is that
6 presumption stays with them throughout the trial,
7 throughout your deliberations until you have found that
8 the State has met its burden beyond a reasonable doubt.
9 If you do not find that the State has met its burden
10 beyond a reasonable doubt as to any particular charge as
11 to each defendant, then that presumption stays with them.
12 It has not been removed.

13 And what is reasonable doubt? Reasonable doubt, you
14 know, we don't require that -- you know, there's nothing
15 in this world that we can determine with absolute
16 certainty. And that is not what is required of the
17 State's burden. But their burden is that they must prove
18 each element of each charge as to each defendant beyond a
19 reasonable doubt. And it's not like in a civil case, just
20 to make sure of the cases, you may have been involved in a
21 civil matter as a juror, maybe a party or TV or whatever,
22 the civil case is much less. That's by a preponderance of
23 the evidence or more likely than not. The standard here
24 in all criminal matters is, again, beyond a reasonable
25 doubt.

1 Reasonable doubt is the kind of doubt that would make
2 a reasonable person hesitate to act. Proof beyond a
3 reasonable doubt is proof that leaves you firmly convinced
4 of the defendant's guilt.

5 If, based on the consideration of the evidence,
6 you're firmly convinced that a defendant is guilty of a
7 particular charge, you must find him guilty. But on the
8 other hand, you think there's a possibility that he's not
9 guilty, then you must give the defendant the benefit of
10 that doubt and find him not guilty. Facts and
11 circumstances that merely place the defendant a grave
12 suspicion of the crime charged or merely raise a
13 speculation or conjecture is not sufficient for a
14 conviction.

15 Now, there's also two types of evidence that the
16 State can rely on in meeting their burden. And regardless
17 -- it is direct and circumstantial. Regardless of whether
18 they use direct, circumstantial or a combination of the
19 two, it's still the same burden of beyond a reasonable
20 doubt.

21 Direct evidence is when a particular piece of
22 evidence, whether it's testimony or a document, proves a
23 specific point. That's direct evidence.

24 Circumstantial evidence is when you have to prove a
25 series of facts to prove a particular point. You must

1 have maybe three things together before you go, ah-ha,
2 that's what it is. You have to look at a series of facts
3 to determine what the circumstances were.

4 The State can rely on direct, circumstantial or a
5 combination of the two. However, to the extent the State
6 relies on circumstantial evidence, all of the
7 circumstances must be consistent with each other, and when
8 taken together, point conclusively to the guilt of the
9 accused beyond a reasonable doubt. Again, if the
10 circumstances merely portray the defendants' behavior as
11 suspicious, then that proof has failed.

12 Let's talk about credibility of witnesses because
13 that's one of the tools that you will have in making your
14 decision here today. Now, you may, in making your
15 determination of the -- credibility just means
16 believability. So when you're evaluating testimony, you
17 can consider how a particular witness looked on the stand,
18 whether they had a particular bias, whether they had some
19 interest in the outcome, all of those you can consider in
20 determining whether they're believable.

21 You may accept a portion of a witness's testimony but
22 reject the remaining portion; you may accept all of a
23 person's testimony against several other witnesses, or you
24 may reject his testimony or her testimony based on other
25 witnesses. Again, you may accept one half, one portion of

1 it and reject the remaining portion of it. As to each
2 piece of evidence, you're to look at that, and you're to
3 give it the weight and value you feel is appropriate.

4 One of the things also in talking about witnesses,
5 let's talk about expert witnesses. In this particular
6 case there was the use of someone that was designated as
7 an expert witness. And that gives a person the ability to
8 testify about a particular opinion or conclusion that they
9 had, okay, based on their experience, their education,
10 their training, and therefore, they can testify about
11 those conclusions in their fields.

12 Just because someone is designated as an expert does
13 not necessarily mean that you must accept that, even if
14 it's not contradicted. You still, just like any other
15 piece of evidence, you're to give it the weight and the
16 value which you feel is appropriate.

17 Now, another kind of very important foundation of our
18 criminal justice system is a person's Fifth Amendment
19 right. And what that means is that the fact that a
20 defendant did not testify is merely the exercise of his
21 constitutional right. The defendants in this matter have
22 no burden whatsoever, and the fact that a person exercises
23 their right not to testify cannot be used against them.
24 In fact, that's not something for you to consider or even
25 to discuss in your deliberations, because the defendants

1 have no burden. You must concentrate on the proof that
2 was presented, and the fact that somebody exercised their
3 constitutional rights is not something that should be used
4 against them.

5 Now let's talk about some statements -- prior
6 inconsistent statements. Now, there's been evidence
7 presented that witnesses may have made prior statements
8 which are not consistent with their testimony. You may
9 use this evidence to decide whether to believe the
10 witness. You may also use the evidence of the earlier
11 contradictory statement to determine the truth of those
12 statements. It's up to you to decide whether to believe
13 the earlier statement or the testimony given at trial. If
14 a witness is shown to have knowingly testified
15 untruthfully, then you may consider this in determining
16 whether the truth of the witness's testimony as to other
17 matters, you may reject all the testimony except a portion
18 of it. Again, give it the weight and value which you feel
19 is appropriate.

20 All right. So those are some general tools you will
21 have in making your evaluation. Now let me talk to you a
22 little bit about what is required generally about the
23 burden of proof as to criminal liability.

24 In order to establish criminal liability, criminal
25 intent is required. For example, the mental state

1 required to be proven by the State for a particular crime
2 might be purpose, intent, knowledge, recklessness or
3 criminal negligence. Criminal intent must be proven by
4 the State beyond a reasonable doubt.

5 Criminal intent is always a matter that must be
6 determined by the jury from the circumstances surrounding
7 the situation. You know, there's no way that you can
8 determine that with mathematical certainty. There's no
9 scientific way to determine the criminal intent of a
10 person, so therefore, they must rely on the circumstances
11 that existed at the time. And that's for you to determine
12 what the intent at the time was. It can be established by
13 inference in the same way any other fact is to be proven.
14 Criminal intent is a mental state, a conscious wrongdoing,
15 and it's up to you to determine what the defendant
16 intended to do based on the circumstances shown to have
17 existed. Criminal intent can arise from action or failure
18 to act, it may arise from negligence, recklessness, or an
19 indifference to duty or to consequences that is considered
20 by the law to be the equivalent of criminal intent.

21 Now, throughout this trial, there were information,
22 there were evidence about statements alleged to have been
23 made by one or more of the defendants prior to trial.
24 Those were admitted into evidence. While the Court has
25 determined that the statements were admissible, it's up to

1 you to make the ultimate decision to determine whether or
2 not the defendant made the statement. If the defendant
3 did make the statement, you must determine whether the
4 statements were made by the defendant voluntarily and of
5 his own free will. This means that the statement was not
6 caused by pressure, force, fear, threats, coercion,
7 intimidation or hope or promise of leniency or reward of
8 any kind.

9 In determining whether a statement is voluntary, you
10 should consider both the characteristics of the defendant
11 and the details of the questioning. Some of the factors
12 that you can consider are the age of the defendant, the
13 defendant's education or lack of education, his mental
14 ability or capacity, his IQ or intelligence, his
15 background and environment, the place and length of the
16 detention if there was a detention, the nature of the
17 questioning, and the advice or lack thereof to the
18 defendant of his constitutional rights including but not
19 limited to the right to remain silent, that any statement
20 could be used against him in a court of law, the right to
21 have a lawyer present, that if he could not afford a
22 lawyer, a lawyer could be appointed to represent him and
23 he could stop making the statement at any time. You must
24 carefully consider all of the surrounding circumstances
25 before you give any weight to this alleged statement.

1 The State has the burden of proof beyond a reasonable
2 doubt that the alleged statement was voluntary. If you
3 determine it was, you may give the statement any further
4 consideration that you deem appropriate for the weight and
5 value which you feel is appropriate. If you determine the
6 alleged statement was not the free and voluntary statement
7 of the defendant, then you should not consider the
8 statement at all.

9 Now, a person -- now talk about prior records of
10 witnesses. A person who has a past criminal record is
11 competent to testify during trial. A past record does not
12 affect his or her ability to testify. It can only be used
13 -- it can be considered by you if at all in determining
14 his or her believability. Remember, you're the sole judge
15 of the facts of the case, and believability of the witness
16 is something that you are to make the determination on.

17 Now I want to talk to you a little bit about a
18 premise which has been established by the law in this
19 state, and that is the hand of one is the hand of all. If
20 a crime is committed by two or more people who are acting
21 together in committing a crime, the act of one is the act
22 of all. Where two or more people acting with a common
23 plan or intent are present at the commission of a crime,
24 it does not matter who actually commits the crime. A
25 person who joins with another to commit an unlawful act is

1 criminally responsible for everything done by the other
2 person which happens as a probable or natural consequence
3 of the acts done in carrying out the common plan and
4 purpose. If two or more people are together, they're
5 acting together, assisting each other in committing the
6 offense, the act of one is the act of all, or sometimes as
7 we say the hand of one is the hand of all. Prior
8 knowledge that a crime is going to be committed without
9 more is not sufficient to make a person guilty of that
10 crime. Mere knowledge that another person is going to
11 commit a crime, even if the defendant is present when the
12 crime is committed, is not sufficient to convict the
13 defendant as a principal.

14 Guilt as a principal is shown by actual or
15 constructive presence at the scene as a result of a prior
16 arrangement, therefore, a finding of prior arrangement,
17 plan or common scheme is necessary for a finding of guilt
18 as a principal. However, mere presence at the scene of a
19 crime is not sufficient to convict one as a principal on
20 the theory of aiding and abetting. Intent is also a
21 necessary element where there must have been a common
22 design or intent to commit the crime, and the crime must
23 have been committed pursuant thereto with a person aiding
24 and abetting by some overt act.

25 "Intent" means intending the result which actually

1 occurs, not accidentally or involuntarily. Intent may be
2 shown by acts and conduct of the defendant and other
3 circumstances from which you may naturally and reasonably
4 infer intent. The burden for purpose of this theory, like
5 everything else, is on the State beyond a reasonable
6 doubt.

7 Now, at this time I'm going to actually discuss with
8 you the actual elements of each of the crimes being
9 charged. All right. And I'm just going in the order that
10 were listed. There's no particular reason for the order.

11 The first one is the charge of murder. As you can
12 see, the elements of murder is the killing of another
13 person with malice aforethought.

14 Malice is hatred, ill will or hostility towards
15 another person. It is the intentional doing of a wrongful
16 act without just cause or excuse and with the intent to
17 inflict an injury or under the circumstances that the law
18 will infer is an evil intent.

19 Malice aforethought does not require that malice
20 exist for any particular length of time before the act is
21 committed, but malice must exist in the mind of the
22 defendant just before and at the time the act is
23 committed, therefore, there must be a combination of the
24 previous evil intent and the act.

25 Malice aforethought may be either expressed or

1 inferred. The terms "expressed" and "inferred" do not
2 mean different kinds of malice, but merely the manner in
3 which malice may be shown to exist, that is, either by
4 direct evidence or inference from the facts and
5 circumstances which have been proven.

6 Express malice is shown when a person speaks words
7 which express hatred or ill will for another, or when the
8 person prepared beforehand to do the act which is later
9 accomplished.

10 If the facts are proven beyond a reasonable doubt
11 sufficient to raise an inference of malice to your
12 satisfaction, this inference would be simply an
13 evidentiary fact to be taken into consideration by you
14 along with other evidence in the case, and you must give
15 it the weight which you feel is appropriate.

16 All right. And then the next charge is armed
17 robbery. The elements of armed robbery are the taking of
18 personal property from another person with the intent to
19 permanently deprive the person of the property. The
20 carrying away of the personal property must have been done
21 by violence or by putting the owner of the property in
22 fear of violence and armed with a deadly weapon during the
23 robbery.

24 Now, let me kind of define some of these terms for
25 you. Property is in the presence of a person if it's

1 within the person's reach, inspection, observation or
2 control so that the person couldn't, if not overcome with
3 violence or prevented by fear, keep possession of the
4 property.

5 As to the next element, intent must be to permanently
6 deprive the owner of the property to keep the property for
7 the defendant's own use. The slightest removal of the
8 property or the complete possession of the property, even
9 for an instant by the defendant, is sufficient to show a
10 taking and carrying away of the property. The taking and
11 carrying away of the property must have been done with
12 violence or by putting the owner of the property in fear
13 of violence.

14 A deadly weapon is an article, instrument or
15 substance which is likely to cause death or great bodily
16 harm. Whether an instrument has been used as a deadly
17 weapon depends on the facts and circumstances of each
18 case. The following are examples of instruments which may
19 be deadly weapons: a pistol, shotgun, rifle, dirk,
20 dagger, knife, sling shot, metal knuckles, razor,
21 gasoline, firebomb, Molotov cocktail and lighter fluid. A
22 gun may be a deadly weapon even if it is not operational.

23 This is burglary. They're very specific. And
24 these requirements are what have been established by our
25 law to be proven. The burglary is the entering of a

1 dwelling without consent with the intent to commit a crime
2 in the dwelling and it must be one of the following,
3 either 1, 2, and it must be one of the following to
4 constitute burglary first degree: either occurred in the
5 nighttime, or the person was armed with a deadly weapon,
6 or caused physical injury to a person not participating in
7 the crime, or uses or threatens the use of a dangerous
8 instrument, or displayed what is or appears to be a knife,
9 pistol, revolver, rifle, shotgun or other firearm.

10 Just to kind of give you some definitions on that, a
11 dwelling is any building or portion of a building in which
12 a person ordinarily sleeps.

13 Also, the State does not have to prove that force was
14 used to gain entry. If a person enters a building by
15 using deception, artifice, trick or misrepresentation to
16 get the consent to enter, this is an entry without
17 consent.

18 As to the second element, the defendant intended to
19 commit a crime, either a felony or misdemeanor, at the
20 time of the entry. The mere entry into a dwelling without
21 consent is not burglary. If the intent to commit a crime
22 is formed after the entry, it is not burglary. On the
23 other hand, if the defendant intended to commit a crime at
24 the time of the entry, it is a burglary even if the intent
25 was abandoned after the entry. It does not matter that

1 the intended crime was not completed.

2 Intent may be shown by acts and conducts of the
3 defendant and any other circumstances which you naturally
4 and reasonably infer intent.

5 Finally, the State must prove beyond a reasonable
6 doubt one of the listed elements that are up there: A, B,
7 C, D or E.

8 For nighttime, the law defines that as a period
9 between sunset and sunrise during which there is not
10 enough daylight to recognize a person's face except by
11 artificial light or moonlight.

12 So those are the specific elements of burglary.

13 Now elements of possession of a weapon during the
14 commission of a violent crime. First, I will tell you
15 that for you to find a defendant guilty of this particular
16 charge, you must have also found him guilty of actually
17 committing a violent crime. And I will say for the
18 purpose of our law, violent crimes would be murder, armed
19 robbery or burglary. So, again, they have to be found
20 guilty of one of these violent crimes before they can be
21 found guilty of possession of a weapon during a violent
22 crime.

23 And, again, the elements of this are that the
24 defendant was in possession of a firearm or visibly
25 displayed what appeared to be a firearm and this is during

1 the commission of a violent crime.

2 And just to make sure the definition for this one, a
3 firearm is any machine gun, automatic rifle, revolver,
4 pistol or any weapon which is designed or may be readily
5 converted to expel a projectile.

6 In order to find the defendant guilty of a weapon
7 [sic] during a violent crime, then, again, you must find
8 either committing a violent crime. And this also is to be
9 on the same burden as everything else with beyond a
10 reasonable doubt.

11 Now, the next charge is conspiracy. Elements of
12 conspiracy is the defendant or defendants combined with
13 one or more persons for the purpose of committing an
14 unlawful act or of committing a lawful act by unlawful
15 means.

16 In order to find the defendants guilty of conspiracy,
17 there must be a mutual understanding, agreement or common
18 intention and plan. Mere passive knowledge of or consent
19 to the criminal conduct of another is not enough to make a
20 person a conspirator. There must be guilty knowledge and
21 participation. Similarly, the mere fact that the
22 defendant may have associated with another person or met
23 with another person and discussed common aims and interest
24 does not necessarily establish proof of existence of a
25 conspiracy or that the defendant was involved in a

1 conspiracy.

2 On the other hand, it's not necessary that the
3 agreement be a formal one, that it be in writing, that the
4 persons hold a meeting, expressly state the terms of the
5 common plan or that the agreement be stated in words
6 between them. The agreement of criminal conspiracy may
7 come into being through an implied mutual understanding.
8 The willful, intentional and knowing adoption by two or
9 more persons of a common plan is sufficient.

10 No overt acts need to be shown to establish
11 conspiracy. The gist of the crime is the unlawful
12 combination or agreement. You may consider evidence of
13 specific overt acts done in furtherance of the conspiracy
14 to determine existence, scope and duration of the
15 conspiracy, but the crime is the agreement itself.

16 Once an agreement has been reached, the crime of
17 conspiracy has been committed. No further action needs to
18 take place. The conspiracy may be shown by circumstantial
19 evidence and the conduct of the parties. Conspiracy is an
20 ongoing or continuing crime.

21 In order to convict the defendant of conspiracy, the
22 State must prove beyond a reasonable doubt not only the
23 defendant knew of the unlawful conduct, but that the
24 defendant agreed to combine with other person or persons
25 for the purpose of accomplishing the unlawful conduct.

1 It's not necessary that the defendant know the
2 identity and role of all the other conspirators. It is
3 sufficient to prove that the defendant knew or had reason
4 to know the scope of the conspiracy and that he had reason
5 to believe that his own interests were dependent upon the
6 success of the venture. Once the existence of a
7 conspiracy has been proven, evidence establishing beyond a
8 reasonable doubt the connection of a defendant to the
9 conspiracy, even if the connection is slight, is
10 sufficient to convict him of knowing participation in the
11 conspiracy.

12 Now, the final charge which I'll give you the
13 elements of is petit larceny. Now, a lot of times you may
14 hear this referred to as simple larceny. And this is the
15 carrying away of a person's property against the will or
16 without the consent of the other person with the intent to
17 permanently deprive the owner of the property, and the
18 value of the property has a value of \$2,000 or less. And
19 like I said, this is sometimes referred to as simple
20 larceny as opposed to grand larceny which is more than
21 \$2,000.

22 So those are the elements that must be proven by the
23 State beyond a reasonable doubt for that charge and all of
24 the other charges.

25 Now, at this point I'm going to go over the verdict

1 form with you. And this is the verdict form that you will
2 have back in your jury room. And it gives you a very
3 specific outline of what you need to do.

4 Now, the top part is just the caption of the case,
5 indictment number. And then you will -- you'll have to
6 answer each of the questions. And each of the questions
7 must be answered unanimously. That means all 12 of you
8 must agree on the answer. And your answer in each case
9 will need to be either guilty or not guilty. As to
10 Mr. Belcher, do you find that the State has met its burden
11 on the charge of murder, then you would check "guilty."
12 If you found that the State has not met its burden on that
13 one, you would check "not guilty." Then you would go to
14 the next one.

15 The next one is armed robbery. And you make the same
16 analysis whether the State has met its burden on that one,
17 guilty, not guilty if you find the State has not met its
18 burden.

19 Then you would go to the next one which is burglary
20 first degree.

21 Then you would go to the second page, and Number 4,
22 that's the possession of a weapon during the commission of
23 a violent crime, but only if you found him guilty of one
24 of the violent crimes previously noted.

25 Then you'd make the analysis as to conspiracy and the

1 same analysis as to petit larceny.

2 Once you have completed, Madam Forelady, then you
3 would -- after you answered each of the questions, you
4 would sign this and date it. Okay?

5 Then the verdict form for Defendant Raymond Martinez
6 is the same. It has the same, 1, for murder, 2, armed
7 robbery, burglary. Let you do the same analysis there
8 separately from that of Mr. Belcher. Then you would go to
9 the second page the same way. And when you've completed,
10 you would sign and date that.

11 Once you have reached a verdict, you'll let the
12 bailiffs know. They'll give you the information about
13 what you need to do. That's what you're doing is you're
14 answering, determine the facts, will be answering the
15 questions on these two verdict forms.

16 Now, again, your decision must be unanimous. It
17 should not be based on any bias, any prejudice, any
18 sympathy, any emotion, anything outside the evidence.

19 Once you get back to your jury room, you may have
20 questions. If you have questions, that's one of your role
21 -- that's one of your jobs as the foreperson is to write
22 that question on a piece of paper, date and sign it. And
23 you'll give that to the bailiff. Well, the bailiff will
24 then bring that to me, and I can respond in one of two
25 ways. I may -- sometimes is that I can write out the

1 answer on the sheet of paper and send it back to you after
2 I've consulted with the attorneys, of course. But
3 sometimes it may require me to bring you back out and
4 discuss it further kind of as a charge.

5 Now, I will tell you we cannot answer facts, you
6 know. We cannot answer factual questions. And if
7 something is not in the record, we cannot tell you what
8 that would have said or what that -- a lot of times like,
9 well, what about the document that was referred to? You
10 only can consider what has been placed into evidence.

11 Now, I believe there's been several items that were
12 placed into evidence that are on DVDs or CDs. We have a
13 laptop that we can send back there with you if you need
14 that. You just need to let us know, and you can listen to
15 it or watch back there.

16 Now let me talk to my alternate. You have played
17 just as an important role as everybody else here, but
18 you're not allowed to participate in the deliberation.
19 But, you know, it's important that you were here because
20 if something -- in fact, before the trial started we had a
21 situation where we had to let one of the jurors go. And
22 if we'd gotten down to less than 12, then we would not
23 have been able to complete the trial. So your role is
24 very important even though we kick you out of here at the
25 end. But we do appreciate your service in this as well.

1 As I said, do whatever you want to as far as the
2 lunch, if you want to wait until after you've had lunch.
3 Anyway, y'all just decide that.

4 Okay. I'm going to send you back in there but I'm
5 going to have to tell you one more time you can't discuss
6 the case, and this is why. I need to make sure I haven't
7 left anything out or if I said something incorrectly. And
8 if I have, I won't go through all of that again. Don't
9 worry. I'll just bring you back in and clear up whatever
10 I messed up. But otherwise, I will send the -- I will
11 send the bailiff in, and the bailiff will indicate that
12 it's time to begin your deliberations. They'll be
13 bringing these exhibits back with the two verdict forms
14 and then grab the alternate, and at that time you can
15 finally begin discussing the case.

16 So at this time if you'd go back to your jury room
17 and wait for further signal.

18 (WHEREUPON, the jury exits the courtroom at 2:04 PM.)

19 THE COURT: All right. Exceptions to the charge from
20 the State?

21 MS. GARY: Your Honor, no new exceptions. We would
22 just renew our prior exception.

23 THE COURT: Okay. Exceptions from Belcher?

24 MR. GIBSON: Renew my request for the accomplice
25 charge, Your Honor.

1 THE COURT: All right. Exceptions from Martinez?

2 MR. GRUBBS: Just to join Mr. Belcher, Your Honor.

3 THE COURT: All right. Make sure we have all
4 exhibits there. Don't go far.

5 (WHEREUPON, a recess is taken at 2:05 PM; the jury starts
6 deliberations; Court's Exhibit Numbers 6 and 7 were marked
7 for identification; proceedings reconvened at 3:35 PM.)

8 JURY QUESTIONS

9 THE COURT: All right. Back on the record. We're
10 going to bring them in.

11 And here's the thing that -- well, wait until they
12 come in here.

13 (Pause in proceedings.)

14 THE COURT: All right. Here's kind of where we are.
15 We have -- they were not able to open up Exhibits 41, 42
16 and 43. We're not sure if they wanted all of them, but
17 we've gotten all three of them back from them. We've been
18 able to set this up on my computer, and therefore set it
19 up up there so they can see it from there. What I can do
20 is just turn my computer around, and if they need to
21 manipulate it, they can put it up here.

22 Okay. Now, in the meantime, they sent another note
23 which I've marked as Court's Exhibit 7 that says: What's
24 the textbook definition of "murder" and "malice"? Since
25 we're already going to have them in here, I can just pull

1 up and recharge them on that particular . . .

2 MR. GIBSON: Haven't they been provided the written
3 copy of that?

4 THE COURT: No. They never asked for it.

5 MR. GIBSON: Oh, they didn't.

6 THE COURT: They said -- acted like they were going
7 to at first, but then they never did.

8 MR. GIBSON: Oh, okay.

9 THE COURT: So I can read that to them.

10 All right. Here's the thing that we've got to kind
11 of figure out is with them coming in here to listen to
12 them, we don't want them to see the defendants go back in
13 there. So we can do this. We can either have them sent
14 back there before I do all this, or we can have them -- I
15 can charge them and say go back in your jury room, we'll
16 set this up, clear the courtroom of everybody. That way
17 it won't look like they're not here for any reason.

18 Let's do this. I can charge them on the murder
19 charge, tell them what we're going to do and say step back
20 in your jury room. We'll set everything up, have the room
21 cleared except for the clerk of court and then they can
22 come back and they won't notice that anybody's absent.

23 MR. GIBSON: Excellent. Thank you, Your Honor.

24 THE COURT: Okay. All right. Does that work for
25 everybody?

1 MS. GARY: Yes, sir.

2 THE COURT: Okay. Bring the jury in when they're
3 ready.

4 (WHEREUPON, the jury entered the courtroom at 3:40 PM.)

5 THE COURT: All right. I've had two separate
6 requests I'm going to address. One is I've got a note
7 that says: What's the textbook definition of "murder" and
8 "malice"? And also have -- I know that y'all attempted --
9 that y'all wanted to look at a couple of exhibits that
10 were on the DVDs and that didn't work out. So we're going
11 to have to probably run it here in the courtroom but we
12 will do it in a way that it's only y'all in here so y'all
13 can discuss it and all that. And I'll tell you how we're
14 going to do that in just a minute.

15 Let me address the first one is what's the textbook
16 definition of "murder" and "malice." What I thought I
17 would do is I'll just read the charge that I previously
18 did strictly on murder.

19 Okay. The State must prove beyond a reasonable doubt
20 that the defendants killed another person with malice
21 aforethought.

22 Malice is hatred, ill will or hostility towards
23 another person. It is the intentional doing of a wrongful
24 act without just cause or excuse and with an intent to
25 inflict an injury or under circumstances that the law will

1 infer an evil intent.

2 Malice aforethought does not require that the malice
3 exists for any particular length of time before the act is
4 committed, but malice must exist in the mind of the
5 defendant just before and at the time the act is
6 committed, therefore, there must be a combination of the
7 previous evil intent and the act.

8 Malice aforethought may be either expressed or
9 inferred. These terms "expressed" and "inferred" do not
10 mean different kinds of malice, but merely the manner in
11 which malice may be shown to exist, that is, either by
12 direct evidence or by inference from the facts and
13 circumstances which are proved.

14 Express malice is shown when a person speaks words
15 which express hatred or ill will for another or when the
16 person prepared beforehand to do the act which was later
17 accomplished.

18 If facts are proved beyond a reasonable doubt
19 sufficient to raise an inference of malice to your
20 satisfaction, this inference would be simply an
21 evidentiary fact to be taken into consideration by you
22 along with other evidence in the case, and you may give it
23 such weight as you determine it should receive.

24 So that's the definitions presented to you.

25 All right. As far as the -- and what we've got,

1 we've got all three DVDs here. And what I will do is I'm
2 going to ask y'all -- I hate to do this but this is just
3 the way we need to do it. I'm going to ask that you step
4 back in your jury room. I'm going to clear the courtroom
5 except for the bailiff and the clerk to make sure
6 everything is set up properly. Then they will step out
7 and then y'all are in here by yourself, there's nothing
8 being recorded like that, and y'all can look at it and
9 discuss it and do whatever you need to do. And then when
10 y'all are through with that process or need any help with
11 the computer, then y'all just knock on the door and the
12 clerk will come in here and do that but only for that
13 purpose. And you'll be using this one so it will be up on
14 the big screen. Does that work for you? All right.

15 If you'll step back in your jury room, let us set
16 everything up. And this should just take a minute or two.

17 (WHEREUPON, the jury exits the courtroom at 3:44 PM.)

18 THE COURT: All right. Any exception to that from
19 the State?

20 MS. GARY: No, sir.

21 THE COURT: Belcher?

22 MR. GIBSON: No, Your Honor.

23 MR. GRUBBS: No, Your Honor.

24 MR. GIBSON: There is another issue, Judge, and
25 Mr. Grubbs is bringing it up with me, address it. They

1 can hear.

2 THE DEPUTY: We're sending them downstairs.

3 THE COURT: Oh, okay.

4 MR. GRUBBS: Rather than the defendants being in the
5 upstairs holding, we just figure it's better for them to
6 be sent downstairs while they're in here.

7 THE COURT: Okay. That's a good point then.

8 (WHEREUPON, a recess is taken at 3:44 PM; Court's Exhibit
9 Number 8 was marked for identification; proceedings
10 reconvened at 4:40 PM.)

11 THE COURT: Without going into what they did, it's my
12 understanding that they looked at a couple, Teresa came in
13 and exchanged one of the DVDs, and in the middle of that
14 they said in reference to the highlighted phone calls on
15 the T-Mobile sheet, three numbers, who do the phone
16 numbers belong to? And I respond to that without giving
17 y'all -- said: You must determine that just based on the
18 evidence presented. It's not up to us to answer factual
19 questions.

20 And then I think just verbally they asked if they
21 could have the -- just that portion printed. And I told
22 them that that was -- the way the exhibit was presented
23 they -- I just said sent word back, no, you'll have to
24 just rely on that.

25 And then they indicated as they were walking out that

1 they had another question. I just figured I'd have all of
2 y'all in here for that.

3 Any objection to any of that from the State?

4 MS. GARY: No, sir.

5 THE COURT: Belcher or Martinez?

6 MR. GIBSON: No, sir.

7 MR. GRUBBS: No, Judge.

8 (Pause in proceedings.)

9 THE COURT: We have another question here. I don't
10 know if y'all want to review it. And we may want to bring
11 your clients in for this one.

12 MS. GARY: I'm sorry. I couldn't hear you.

13 THE COURT: I said we may want to bring the clients.
14 I'll just let y'all read it.

15 MS. GARY: Oh, okay.

16 THE COURT: We probably want them.

17 (Pause in proceedings; Court's Exhibit Number 9 was marked
18 for identification.)

19 THE COURT: Back on the record. This is now Court's
20 Exhibit 9.

21 We received another note that says: Deliberation
22 have a timeline? If we were to find the defendants guilty
23 on the lesser charges, does that mean they are guilty for
24 murder?

25 I believe that the response to this is have them come

1 in here, tell them that they can have as much time as they
2 need and that they are to consider each charge as to each
3 individual separately, make a determination of that and
4 indicate that on the verdict form.

5 Anything else from the State?

6 MS. GARY: No objection from the State.

7 THE COURT: From Belcher?

8 MR. GIBSON: No objection, Your Honor.

9 MR. GRUBBS: No objection, Your Honor.

10 THE COURT: All right. Bring them in.

11 (WHEREUPON, the jury entered the courtroom at 4:49 PM.)

12 THE COURT: All right. Sorry about the mix-up there
13 and stop you in mid tracks, but I just needed to make sure
14 -- any time I respond to questions, especially one that's
15 more significant, I like to make sure to discuss it with
16 the attorneys and so forth.

17 So I received a note, says: Does deliberation have a
18 timeline? No. That is up to you. You can spend as much
19 time as you need to that you feel is appropriate in making
20 your decision.

21 The second part of that question is: If we were to
22 find the defendants guilty on the lesser charges, does
23 that mean they're guilty for murder? And as I indicated
24 in my original charge, you're to take each charge against
25 each defendant, deliberate on that and render a verdict on

1 that charge, then go to the next charge and make a
2 decision on each of those independently. I think that
3 should answer your question there.

4 So at this time, just continue your deliberations in
5 your jury room. If you have any other questions, then
6 just write them down on bigger pieces of paper.

7 JURY FOREPERSON: I'm sorry.

8 THE COURT: No. That's fine. I'm just kidding.

9 JURY FOREPERSON: I will.

10 THE COURT: All right. Thank you.

11 (WHEREUPON, the jury exits the courtroom at 4:51 PM.)

12 THE COURT: All right. Any exception from the State?

13 MS. GARY: No, sir.

14 THE COURT: Belcher?

15 MR. GIBSON: No, Your Honor.

16 THE COURT: And Martinez?

17 MR. GRUBBS: No, Your Honor.

18 THE COURT: All right. Just hang tight.

19 (WHEREUPON, a recess is taken at 4:51 PM; Court's Exhibit

20 Number 10 was marked for identification.)

21 THE COURT: All right. Back on the record.

22 We have the next question: In reference to the last
23 question regarding the jury's decision on individual
24 charges, how does the hand of one is the hand of all apply
25 to separate charges?

1 They're not asking for the hand of one, hand of all
2 charge. And I can either bring them in. I think my
3 feeling is the answer to that question is you are to apply
4 the theory of hand of one hand is the hand of all to all
5 charges which you find the State has met its burden of
6 proof beyond a reasonable doubt on.

7 MR. GIBSON: Judge, my only concern about that would
8 be the possession of a weapon during the commission of a
9 violent crime charge. I don't know if you can be
10 convicted of that pursuant to the hand of one, hand of all
11 theory.

12 MS. GARY: I would disagree with that. I think you
13 can under the theory.

14 But to the extent Your Honor is asking for feedback
15 on your suggestion ---

16 THE COURT: Yes.

17 MS. GARY: --- the State would have no objection to
18 your reply.

19 THE COURT: And I'm wondering if I could just write
20 that down or just -- I hate to keep bringing them in and
21 out and all.

22 MS. GARY: Sure.

23 THE COURT: Once I come up with the proper language,
24 do you have a problem if I write it and just send that
25 back since it's going to be a simple . . .

1 MR. GRUBBS: No problem with that, Judge.

2 (Pause in proceedings.)

3 THE COURT: All right. Here's my proposed language:
4 This theory would apply to all charges in which you find
5 the State has met its burden of beyond a reasonable doubt.

6 MS. GARY: The State would have no objection to that,
7 Judge.

8 THE COURT: Belcher, other than your exception to
9 the ---

10 MR. GIBSON: I would just reassert what I said
11 before, Judge. I don't know if that applies to -- I
12 disagree that that would apply to a possession of a weapon
13 during the commission of a violent crime.

14 THE COURT: Other than that, do you have any problems
15 with it?

16 MR. GIBSON: Absolutely ---

17 THE COURT: Martinez?

18 MR. GRUBBS: Your Honor, I join Mr. Gibson. My
19 concern like his is if that, for whatever reason, any of
20 the clients are found not guilty of any of the predicate
21 violent offenses, my fear is that the jury could then
22 think that they could convict a possession of a weapon
23 during a violent crime or perhaps the acts of Kirk Porter
24 or Keyla Mansell, in which case I would disagree that
25 possession of a weapon during the commission of a violent

1 crime would apply hand of one, hand of all. I still think
2 there has to be the predicate conviction of each
3 individual defendant in order for that particular charge
4 to apply. So to the extent that I think that it wouldn't
5 apply in that way, I would make that -- that point, Judge.

6 THE COURT: Okay. Other than that, did you have any
7 objection to it otherwise?

8 MR. GRUBBS: No, Your Honor.

9 THE COURT: All right.

10 (Pause in proceedings.)

11 THE COURT: All right. The final -- this theory
12 would apply to any charge which you find the State has met
13 its burden beyond a reasonable doubt. That's what I'm
14 sending back to the jury.

15 Except as previously noted, anything else from the
16 State?

17 MS. GARY: No, sir.

18 THE COURT: Defendant Belcher?

19 MR. GIBSON: No.

20 THE COURT: Defendant Martinez?

21 MR. GRUBBS: No, Your Honor.

22 THE COURT: All right.

23 (WHEREUPON, a recess is taken at 5:08 PM; Court's Exhibit
24 Number 11 was marked for identification.)

25 THE COURT: Back on the record here.

1 We had another note: Can we please have elaboration
2 on the hand of one is the hand of all. We're getting
3 close, but some people need further explanation.

4 All right. I think that in light -- especially as
5 long as that is, the only way really to respond to that is
6 recharge them on the hand of one, hand of all.

7 MS. GARY: I would agree, Judge.

8 THE COURT: All right. Belcher, any comments on
9 that?

10 MR. GIBSON: I'd agree with that, Judge.

11 MR. GRUBBS: Judge, I would agree only as to what we
12 talked about the last time. Yes.

13 THE COURT: All right. Tell them I'm just going to
14 recharge them. If they'll come in, I'll recharge them.

15 (WHEREUPON, the jury entered the courtroom at 6:01 PM.)

16 THE COURT: All right. If anybody's keeping up with
17 you, I'm making you get your steps in.

18 All right. The question was: Can we have
19 elaboration on the hand of one is the hand of all? And I
20 thought it would be just the most efficient way is for me
21 just to recharge you on that particular section.

22 This is the theory of hand of one. If a crime is
23 committed by two or more persons -- two or more people who
24 are acting together in committing a crime, the act of one
25 is the act of all. Where two or more people acting with a

1 common plan or intent are present at the commission of a
2 crime, it does not matter who actually commits the crime.
3 A person who joins with another to commit an unlawful act
4 is criminally responsible for everything done by the other
5 person which happens as a probable or natural consequence
6 of the acts done in carrying out the common plan and
7 purpose. If two or more people are together, acting
8 together, assisting each other in committing the offense,
9 the act of one is the act of all, or as it's sometimes
10 said, the hand of one is the hand of all. Prior knowledge
11 that a crime is going to be committed without more is not
12 sufficient to make a person guilty of that crime. Mere
13 knowledge that another person is going to commit a crime,
14 even if the defendant is present when the crime is
15 committed, is not sufficient to convict the defendant as a
16 principal.

17 Guilt as a principal is shown by actual or
18 constructive presence at the scene as a result of prior
19 arrangement. Therefore, a finding of a prior arranged
20 plan or common scheme is necessary for finding of guilt as
21 a principal. However, mere presence at the scene of a
22 crime is not sufficient to convict one as a principal on
23 the theory of aiding and abetting.

24 Intent is also a necessary element, for there must
25 have been a common design or intent to commit the crime,

1 and the crime must have been committed pursuant thereto
2 with the person aiding and abetting by some overt act.

3 "Intent" means intending the result which actually
4 occurs, not accidentally or involuntarily. Intent may be
5 shown by acts and conduct of the defendant and other
6 circumstances from which you may naturally and reasonably
7 infer intent. The burden for the proof of this theory is
8 beyond a reasonable doubt.

9 So that's the definition of hand of one and hand of
10 all.

11 And y'all go back and continue your deliberations and
12 just let me know if you have any questions. Thank you.

13 (WHEREUPON, the jury exits the courtroom at 6:04 PM.)

14 THE COURT: All right. Any exception from the State?

15 MS. GARY: No, sir.

16 THE COURT: On behalf of Belcher?

17 MR. GIBSON: No, Your Honor.

18 THE COURT: And Martinez?

19 MR. GRUBBS: No, Your Honor.

20 THE COURT: All right.

21 (WHEREUPON, a recess is taken at 6:05 PM; proceedings
22 reconvened at 9:56 PM.)

23 THE COURT: We're back on the record. Everybody is
24 in attendance.

25 It's my understand we have a verdict. Anything from

1 the State before we bring the jury in?

2 MS. GARY: No, sir.

3 THE COURT: Defendant Belcher?

4 MR. GIBSON: No, Your Honor.

5 THE COURT: And Martinez?

6 MR. GRUBBS: No, Your Honor.

7 THE COURT: All right. Bring the jury in.

8 Before we bring the jury in, too -- hold the jury for
9 just a second.

10 Ladies and gentlemen in the gallery and also to the
11 defendants and everybody, I know this has been a long
12 ordeal. It's been many years. Regardless of the verdict,
13 I just ask everybody be in their best behavior. I don't
14 want to have to take anybody into custody that doesn't
15 need to be going in tonight. I'm just telling y'all that,
16 okay? So expect everybody to be on their best behavior.

17 All right.

18 (WHEREUPON, the jury entered the courtroom at 9:58 PM.)

19 THE COURT: All right. Madam Forelady, I understand
20 you've reached a verdict. If you could hand that to the
21 bailiff, please.

22 All right. It looks like it's in proper form. If
23 you could publish the verdict, please.

24 VERDICT

25 THE CLERK: In the case of 2020-GS-23-05541, the

1 State vs. Robert Lee Belcher, III, as to the charge of
2 murder, we the jury unanimously find the defendant Robert
3 Lee Belcher, III guilty. As to the charge of armed,
4 robbery, we the jury unanimously find the defendant,
5 Robert Lee Belcher, III guilty. As to the charge of
6 burglary first degree, we the jury unanimously find the
7 defendant Robert Lee Belcher guilty. As to the charge of
8 possession of a weapon during the commission of a violent
9 crime, we the jury unanimously find the defendant Robert
10 Lee Belcher, III guilty. As to the charge of conspiracy,
11 we the jury unanimously find the defendant Robert Lee
12 Belcher, III guilty. As to the charge of petit larceny,
13 we the jury unanimously find the defendant Robert Lee
14 Belcher, III guilty.

15 In the case of 2020-GS-23-05236, the State of South
16 Carolina vs. Raymond Martinez, Jr., as to the charge of
17 murder, we the jury unanimously find the defendant Raymond
18 Martinez, Jr. guilty. As to the charge of armed robbery,
19 we the jury unanimously find the defendant Raymond
20 Martinez, Jr. guilty. As to the charge of burglary first
21 degree, we the jury unanimously find the defendant Raymond
22 Martinez, Jr. guilty. As to the charge of possession of a
23 weapon during the commission of a violent crime, we the
24 jury unanimously find the defendant Raymond Martinez, Jr.
25 guilty. As to the charge of conspiracy, we the jury

1 unanimously find the defendant Raymond Martinez, Jr.
2 guilty. As to the charge of petit larceny, we the jury
3 unanimously find the defendant Raymond Martinez, Jr.
4 guilty.

5 Ladies and gentlemen, if this is the verdict you
6 reached in your deliberation room, please raise your right
7 hand.

8 (All jurors complied.)

9 THE CLERK: Thank you.

10 THE COURT: All right. Anything else from the
11 jury from the State?

12 MS. GARY: No, sir.

13 THE COURT: Anything from Defendant Belcher?

14 MR. GIBSON: No, Your Honor.

15 THE COURT: And Martinez?

16 MR. GRUBBS: Your Honor, we request that you poll the
17 jury.

18 THE COURT: All right.

19 MR. GIBSON: I would join in that request, Your
20 Honor.

21 THE COURT: Okay.

22 THE CLERK: The verdict that was just published was
23 the verdict you reached in your deliberation room. I ask
24 you was it your verdict then and is it your verdict now?
25 When I call your number, please answer yes or no.

1 behalf of the defendants then?

2 MR. GIBSON: No, Your Honor.

3 MR. GRUBBS: No, Your Honor.

4 SENTENCING

5 THE COURT: All right. As to Mr. Belcher, these are
6 all to run concurrent and credit for 1,674 days, sentence
7 of the Court on murder is 45 years; on the robbery is
8 30 years, armed robbery; burglary first degree is 20
9 years; possession of a weapon during a violent crime is
10 five years; conspiracy, time served; petit larceny, that
11 would be time served.

12 On Raymond Martinez, on the murder, that's also
13 45 years; on the armed robbery, 30 years; burglary first
14 degree, 20 years; possession of a weapon during a violent
15 crime, five years; conspiracy, time served. These are all
16 to run concurrent. Credit for 1,919 days by the way.
17 Petit larceny, that will be time served.

18 Good luck to you gentlemen.

19 MR. GRUBBS: Thank you, Your Honor.

20 (WHEREUPON, proceedings concluded at 10:53 PM.)

21
22
23
24
25

STATE OF SOUTH CAROLINA)
) IN THE COURT OF GENERAL SESSIONS
COUNTY OF GREENVILLE)
)
THE STATE OF SOUTH CAROLINA,) **REQUEST TO CHARGE**
)
vs.)
)
ROBERT BELCHER,)
)
)
Defendant.)

Accomplice Testimony Warning

You have heard testimony from Kirk Porter who is an “accomplice” or someone who said he or she participated in the commission of this crime.

The testimony of an accomplice should be received with great care and caution.¹

You should consider whether the particular accomplice is testifying truthfully or falsely in order to obtain a favorable recommendation by the government in the sentencing in his own case.²

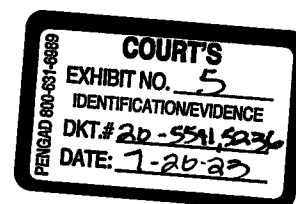
You should not convict the defendant on the uncorroborated testimony of an accomplice, unless you believe that testimony beyond a reasonable doubt.³

Pattern Jury Instructions for Federal Criminal Cases – District of South Carolina, 2020 Online Edition, VII Final Instructions, H,2, a., page 658.
<http://www.scd.uscourts.gov/pji/PatternJuryInstructions.pdf>

¹ See *United States v. Safley*, 408 F.2d 603, 605 (4th Cir. 1969).

² Cautionary instruction given by the district court in *United States v. Howard*, 590 F.2d 564, 570 (4th Cir. 1979).

³ Safley, 408 F.2d at 605. “The settled law of this circuit recognizes that the testimony of a defendant’s accomplices, standing alone and uncorroborated, can provide an adequate basis for conviction.” *United States v. Burns*, 990 F.2d 1426, 1439 (4th Cir. 1993). “[I]t [is] the better practice for courts to caution juries against too much reliance upon the testimony of accomplices, and to require corroborating testimony before giving credence to such evidence. While this is so, there is no absolute rule of law preventing convictions on the testimony of accomplices if juries believe them.” *Caminetti v. United States*, 242 U.S. 470, 495 (1917).



Pattern Jury Instructions for Federal Criminal Cases District of South Carolina

Eric Wm. Ruschky

2020 Online Edition

Miller W. Shealy, Jr., Editor

Professor of Law

Charleston School of Law

Includes updates through November 1, 2020

This work should be cited as:

Eric Wm. Ruschky, *Pattern Jury Instructions for Federal Criminal Cases,
District of South Carolina* § _____ (2020 Online Edition).

Please email comments/suggestions to: mshealy@charlestonlaw.edu

FINAL INSTRUCTIONS

greater number of witnesses, or you may find that they are not persuasive at all.²³

1. Law Enforcement

In considering the testimony of a witness who is a police officer or agent of the government, you may not give more weight to the testimony of a police officer or agent of the government than you give to the testimony of other witnesses for the mere reason that the witness is a police officer or an agent of the government.²⁴

2. Other Witnesses

a. Accomplice

You have heard testimony from an accomplice, someone who said he or she participated in the commission of a crime.

The testimony of an accomplice should be received with great care and caution.²⁵

You should consider whether the particular accomplice is testifying truthfully or falsely in order to obtain a favorable recommendation by the government in the sentencing in his own case.²⁶

You should not convict the defendant on the uncorroborated testimony of an accomplice, unless you believe that testimony beyond a reasonable doubt.²⁷

b. Addict²⁸

You have heard testimony from an addict.

²³ *United States v. Moss*, 756 F.2d 329, 334 (4th Cir. 1985). However, district courts should refrain from giving a number of witnesses instruction when the defendant has no witnesses. *Id.* at 335.

²⁴ Instruction given in *United States v. N-Jie*, No. 06-4908, 2008 WL 2001316, n.2 (4th Cir. May 9, 2008).

²⁵ See *United States v. Safley*, 408 F.2d 603, 605 (4th Cir. 1969).

²⁶ Cautionary instruction given by the district court in *United States v. Howard*, 590 F.2d 564, 570 (4th Cir. 1979).

²⁷ *Safley*, 408 F.2d at 605. "The settled law of this circuit recognizes that the testimony of a defendant's accomplices, standing alone and uncorroborated, can provide an adequate basis for conviction." *United States v. Burns*, 990 F.2d 1426, 1439 (4th Cir. 1993). "[I]t [is] the better practice for courts to caution juries against too much reliance upon the testimony of accomplices, and to require corroborating testimony before giving credence to such evidence. While this is so, there is no absolute rule of law preventing convictions on the testimony of accomplices if juries believe them." *Caminetti v. United States*, 242 U.S. 470, 495 (1917).

²⁸ The leading case in the Fourth Circuit is *United States v. Gregorio*, 497 F.2d 1253 (4th Cir. 1974), *overruled on other grounds by United States v. Rhodes*, 32 F.3d 867 (4th Cir. 1994).

In *United States v. Kinnard*, 465 F.2d 566 (D.C. Cir. 1972), the D.C. Circuit was concerned about narcotics addicts who are paid informants with criminal charges pending against them. The court observed that several courts had commented that the pressure on an addict-informer to produce results made his testimony inherently unreliable. Judges on the panel disagreed about when a charge should be given regarding the reliability of such a witness's testimony. Regardless, extrinsic evidence must be admitted to refute a denial of addiction.

408 F.2d 603 (1969)

UNITED STATES of America, Appellee,

v.

Jess Ross SAFLEY, Appellant.

UNITED STATES of America, Appellee,

v.

Augustus BUTLER, Appellant.

Nos. 12497, 12525.

United States Court of Appeals Fourth
Circuit.

Argued January 10, 1969.

Decided March 17, 1969.

Certiorari Denied June 23, 1969.

Joseph J. Duffy, Jr., Alexandria, Va., for
appellant, Butler.

Harry P. Hart, Alexandria, Va., for appellant,
Safley.

John D. Schmidlein, Asst. U. S. Atty. (C. V.
Spratley, Jr., U. S. Atty., and C. P. Montgomery,
Jr., Asst. U. S. Atty., on brief), for appellee.

Before HAYNSWORTH, Chief Judge, and
SOBELOFF and BUTZNER, Circuit Judges.

Certiorari Denied June 23, 1969. See 89 S.Ct.
2147.

[408 F.2d 604]

BUTZNER, Circuit Judge:

In these consolidated appeals Augustus Butler and Jesse Ross Safley seek reversals of their convictions under 18 U.S.C. § 2113(a) and (b) for bank robbery and theft. We affirm the judgments of the district court.

I.

Several months before the trial, Butler moved for a severance because Safley had signed a

confession that implicated Butler. Upon the government's representation that it would not offer Safley's confession in evidence, the district court denied the motion for severance. Faithful to his commitment, the district attorney did not refer to the confession or attempt to introduce it in evidence. One of the government's witnesses was an accomplice who had previously pleaded guilty and been sentenced to prison. In his direct examination he described Butler's and Safley's participation in the crime, but he made no reference to Safley's confession.¹ Counsel for Butler, in the course of persistent cross-examination, elicited information that an F.B.I. agent told the accomplice that Safley had given a statement about the robbery. The accomplice also testified that he did not read the statement and that he did not believe that Safley had given a statement. There the matter rested. Safley's confession was never introduced in evidence, and aside from the equivocal remarks of the accomplice, it was not discussed.

We find no reversible error in this incident. The vice of using a codefendant's statement lies in the denial of Sixth Amendment rights of confrontation and cross-examination when the author of the statement does not testify. It is for this reason that a severance is imperative. *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). Although Safley did not testify, and therefore could not be cross-examined, Butler was not deprived of his Sixth Amendment rights. Safley's statement was never introduced in evidence. The accomplice, when pressed, admitted he never read the statement and that he did not believe Safley made one. Here, confrontation and cross-examination of the accomplice was critical. This was preserved, and accordingly we find Butler was not prejudiced by the denial of a severance.

We also find in this incident no reversible error with respect to Safley. The possibility that an involuntary confession may be untrustworthy is not the primary reason for excluding it. Exclusion is a sanction to deter the government from extracting evidence of guilt from a defendant by coercive means. The exclusionary rule is

designed to prevent our system for the enforcement of criminal laws from degenerating into an inquisition. *Rogers v. Richmond*, 365 U.S. 534, 540, 81 S.Ct. 735, 5 L.Ed.2d 760 (1961). In this case, however, we find no violation of the exclusionary rule. The government made no attempt, directly or indirectly, to introduce the statement. Therefore, the fundamental reason for application of the rule — to deter or provide a sanction against intrusion upon Fifth Amendment rights — does not exist. Equally important is the fact that the statement was not introduced. Nor has it been suggested that the statement was obtained by improper means. Impropriety cannot be inferred because the government elected not to use a statement that implicated a codefendant.

In sum, the accomplice's reference to Safley's statement was hearsay elicited by defense counsel on cross-examination. It was qualified by the witness' observation that he never read the statement and that he did not believe Safley had made it. The inadvertent admission of this hearsay was at most harmless error that did not require a mistrial or a severance. See *Lutwak v. United States*,

[408 F.2d 605]

344 U.S. 604, 619, 73 S.Ct. 481, 97 L.Ed. 593 (1953).

II.

Both Butler and Safley complain that the evidence was insufficient to establish that the deposits of the bank were insured by the Federal Deposit Insurance Corporation.²

An employee of the bank testified that the deposits "are" insured by the corporation. Taken literally the testimony could refer to the time of the trial. In context it could refer to the time of the robbery. The defendants did not object that the employee's testimony was irrelevant, as well it might have been if it referred only to the time of trial. They did, however, raise the question of the sufficiency of the evidence by motions for judgment of acquittal which were denied. They

have never suggested that the bank was not insured by the Federal Deposit Insurance Corporation. Their argument is directed only to the paucity of the government's proof.

The district judge explained in his charge the necessity of federal insurance, and he told the jury it was for them to decide whether the employee referred to the date of the robbery or some other time. This was proper. From the evidence, viewed in context, the jury could draw the reasonable inference that the bank was insured at the time of the robbery. *Cook v. United States*, 320 F.2d 258 (5th Cir. 1963).

III.

Both defendants assign error to a portion of the charge in which the judge said:

"Ordinarily, it is assumed that a witness will speak the truth, but this assumption may be dispelled by the appearance and conduct of the witness, or by the manner in which he testifies, or the character of the testimony given, or by the evidence to the contrary of the testimony given."³

The instruction is improper. The jurors are the sole judges of the credibility of the witnesses and the weight to be given their testimony. This important function should not be encumbered by an assumption that witnesses tell the truth. Indeed, an instruction to this effect contradicts the rule that an accomplice's testimony should be received with caution. The error is magnified when a defendant does not testify. Then the assumption of the credibility of government witnesses dilutes the presumption of innocence. *United States v. Johnson*, 371 F.2d 800, 804 (3d Cir. 1967).

The defendants, however, did not object to the instruction as required by Federal Rule of Criminal Procedure 30, and in the light of the full charge we find no plain error. The district judge properly instructed the jury that they were the

sole judges of the facts, that the defendants' failure to testify created no adverse presumption or inference against them, that the accomplice's testimony should be received with care and caution, and that the defendants should not be convicted on the accomplice's uncorroborated testimony unless it was believed beyond a reasonable doubt. The court also fully explained that the burden was on the government to prove every element of the crime beyond a reasonable doubt and that the defendants did not have to produce any evidence whatever. He explained the presumption of innocence and cautioned that the defendants could not be convicted upon mere suspicion or conjecture. In view of the thorough

[408 F.2d 606]

manner in which the judge correctly charged the jury, we believe that they were not likely to have been misled by the erroneous instruction concerning the assumption of a witness' truthfulness.

Finally, we find no merit in the other assignments of error. The judgments of the district court are affirmed.

Notes:

¹ The accomplice was corroborated by testimony that Safley, using a false name, had rented the car used to flee from the bank and that he left his fingerprints in the car. Butler's fingerprints were found on a chair used by a robber to prop open the gate to the bank's vault.

² Title 18 U.S.C. § 2113(f) provides:

"As used in this section the term 'bank' means any member bank of the Federal Reserve System, and any bank, banking association, trust company, savings bank, or other banking institution organized or operating under the laws of the United States, and any bank the deposits of

which are insured by the Federal Deposit Insurance Corporation."

³ The instruction was included in Mathes & Devitt, Federal Jury Practice & Instructions § 9.01 (1965). It was deleted by the 1968 supplement, which cites a number of cases in which it was questioned.

Page 564

590 F.2d 564
UNITED STATES of America, Appellee,
v.
James E. HOWARD, Appellant.
UNITED STATES of America, Appellee,
v.
Berry L. PALMER, Appellant.
Nos. 78-5047, 78-5048.
United States Court of Appeals, Fourth
Circuit.
Argued Oct. 6, 1978.
Decided Jan. 16, 1979.
Certiorari Denied March 26, 1979.
See 99 S.Ct. 1547

Page 566

Leslie L. Gladstone, Baltimore, Md., for appellants.

Aaron Kadish, Baltimore, Md., on brief, for appellant Berry Lee Palmer.

Robert P. Trout, Asst. U. S. Atty., Baltimore, Md. (Russell T. Baker, Jr., U. S. Atty. and Gale E. Rasin, Asst. U. S. Atty., Baltimore, Md., on brief), for appellee.

Before BRYAN, Senior Circuit Judge, and WIDENER and HALL, Circuit Judges.

K. K. HALL, Circuit Judge:

Appellants Berry Lee Palmer and James Howard were both charged in the first count of a two-count indictment with conspiracy to distribute heroin in violation of 21 U.S.C. § 846; the second count charged Howard alone with engaging in a "continuing criminal enterprise" in violation of 21 U.S.C. § 848. A jury trial resulted in guilty verdicts against both on all charges.¹ Finding no reversible error in the conduct of the trial, we affirm.

The government's proof at trial showed that between 1975 and 1977 James Howard ran a drug distribution network in York and Harrisburg,

Pennsylvania, using his minor children and a number of prostitute-addicts and dealers to sell heroin that he bought in Baltimore, Maryland. Berry Lee Palmer was one of the dealers. Much of the testimony at trial came from persons who had pleaded guilty and agreed to co-operate, from unindicted co-conspirators, and from addict-witnesses who had purchased heroin from Howard or Palmer. Several witnesses described in detail their activities as dealers for Howard, and also gave testimony regarding Palmer's activities as a dealer. Other witnesses testified that they had purchased heroin directly from Howard, either for cash or, in some instances, in return for sexual favors. Finally, a number of witnesses testified that they had purchased heroin "on the street" from Palmer.

First, Howard argues that the second count of the indictment should have been dismissed for non-specificity. The second count charged that the acts alleged in the first count were undertaken "in concert with at least five other persons with respect to whom the defendant JAMES E. HOWARD, a/k/a Crusher, occupied a position of organizer, a supervisory position, and any other position of management, . . ." These other persons were not named in this count, and we agree that under the circumstances of this case, the indictment alone does not "tell the defendant all that he needs to know for his defense . . ." *United States v. Missler*, 414 F.2d 1293, 1297 (4th Cir. 1969) (citations omitted). However, this is not the end of the inquiry. In ruling that the indictment was sufficient, the trial judge relied on the case of *United States v. Sperling*, 506 F.2d

Page 567

1323 (2d Cir. 1974), Cert. denied, 420 U.S. 962, 95 S.Ct. 1351, 43 L.Ed.2d 439 (1975). There it was said:

In like vein, *Sperling's* claim that the indictment was legally deficient is little short of fatuous. He asserts that Count Two (charging continuing criminal enterprise in violation of 21 U.S.C. § 848) was defective because it failed to specify the names of the persons with whom he acted in

concert and as to whom he occupied a position of organizer, and because it failed to specify each violation constituting the continuing series of violations proscribed by the statute. These contentions are wholly devoid of merit. Count Two tracts the statutory language. It contains every element of the offense charged. . . . Moreover, Sperling was provided with a bill of particulars which identified eight persons as to whom he occupied a position of organizer, supervisor or manager. . . .

The indictment as amplified by the bill of particulars made it crystal clear to Sperling that this was the nature of the government's case and Afforded him an opportunity fairly and adequately to prepare his defense. . . .

506 F.2d at 1344-45 (emphasis added).

Here, as in Sperling, the government furnished a bill of particulars in response to Howard's request for the names of the persons as to whom he occupied a position of organizer, supervisor or manager. However, the language of that response is at issue.

"(T)he government states that those persons Include the co-defendants and the individuals named in paragraphs 4, 5, 6 and 7 of Count One of the indictment. (Emphasis added)

Howard's counsel complains that he could not adequately prepare a defense where the government was free to introduce evidence as to persons other than the 27 encompassed in the response the implication of the language "those persons Include (the 27 named persons)."

Although we agree that the government's language was ill-advised, and we disapprove its refusal to change that language, we note that no proof was submitted at trial as to any persons other than those specified in the bill of particulars. Therefore, no prejudice resulted which would warrant our reversing Howard's conviction, and we hold that the indictment as amplified by the bill of particulars afforded

Howard an opportunity fairly and adequately to prepare his defense.

Second. In 1977 Howard was convicted in the York County Court of Common Pleas, York, Pennsylvania, of one count of heroin distribution. State trooper Lucinda Hammond, whose undercover activities led to the successful state prosecution, also testified at the conspiracy trial. Since evidence from the state trial was introduced to show that the crime committed in Pennsylvania was one of a continuing series of violations required for conviction under 21 U.S.C. § 848, Howard argues that the government was obligated to follow its "Petite Policy,"² the dual prosecution guidelines formulated by the Department of Justice.

This argument is without merit. We agree with the trial judge that the federal charges large scale conspiracy over an extended period of time are totally different in nature and degree from the charge for which Howard was tried in Pennsylvania, and that the federal charges included different acts. Thus the Petite question did not come into play. And in any event, the Petite policy has consistently been held to be a mere housekeeping provision; "the

Page 568

general rule is that a defendant has no right to have an otherwise valid conviction vacated because government attorneys fail to comply with departmental policy on dual prosecutions." *United States v. Musgrove*, 581 F.2d 406, at 407 (4th Cir. 1978), and cases cited therein. Compare *United States v. Heffner*, 420 F.2d 809 (4th Cir. 1970) (government compliance with regulation having force of law).

Third. Howard argues that his conviction should be reversed because his trial did not begin until 95 days after he was incarcerated as a pre-trial detainee, in violation of the Speedy Trial Act, 18 U.S.C. § 3161 et seq.³

Howard was incarcerated on August 11, 1977, immediately after his arrest. On the following day

he was hospitalized for treatment of heart irregularities and remained hospitalized until August 22. Trial did not begin until November 14.

Trial was originally scheduled to begin on October 19; however, counsel for a co-defendant (who eventually pleaded guilty) requested a continuance until the first week in November to accommodate his schedule. Howard's counsel then informed the court by letter that, in light of co-counsel's inability to go to trial as scheduled and further in light of his own schedule, trial on or after November 10 would be satisfactory to him.

After trial had been set for November 14, Howard's counsel moved for dismissal or in the alternative for Howard's release from custody. The trial court denied the motion, *United States v. Howard*, 440 F.Supp. 1106 (D.Md.1977), holding that the defendant and his counsel were partially at fault for the delay and thus the interim provisions of the Speedy Trial Act, 18 U.S.C. § 3164, were not violated. Alternatively, the court held that Howard's ten-day period of hospitalization, which would be excludable from the time computation under the permanent provisions of the Act, were also excludable under the interim provisions of the Act.⁴

We find it unnecessary to determine whether the excludable time periods of 18 U.S.C. § 3161(h) are applicable to the interim provisions of 18 U.S.C. § 3164, although we note that there is a split of authority on this issue. Compare *United States v. Corley*, 179 U.S.App.D.C. 88, 548 F.2d 1043 (1976) (time periods applicable) With *United States v. Tirasso*, 532 F.2d 1298 (9th Cir. 1976); *United States v. Krohn*, 560 F.2d 293, 295 and n. 2 (7th Cir. 1977) (time periods not applicable).

First, we agree with the district court that Howard's counsel was partially at fault for the trial delay; although the initial delay until the first week of November was

beyond his control, Cf. *United States v. Becker*, 585 F.2d 703, at 708 (4th Cir. 1978), he then requested, as an accommodation to his own schedule, that the trial be set on or after November 10. Simple mathematics shows that this requested date was 91 days after Howard's incarceration a violation of the Speedy Trial Act.

In any event, the sanction for non-compliance with the interim limits is release, not dismissal of the indictment.⁵ Counsel cannot point to any prejudice occasioned by the court's failure to release Howard, other than a vague allegation that Howard at liberty may have been able to persuade a certain witness, who had been subpoenaed by the prosecution but was not called at trial, to testify on his behalf. However, at trial counsel informed the court that his client did not wish to request the issuance of a bench warrant to compel her presence; he did not make a proffer of the content of her expected testimony; and he did not move for a continuance to secure her appearance. In short, the allegation of prejudice from the court's failure to release Howard has no support in the record and is certainly no ground for reversal of a valid conviction.

Fourth. At trial co-defendant Carla Palmer elected to testify. On direct examination she stated that during plea-bargain negotiations with the government she had made no statements of any kind.

A: I didn't say anything; I just closed my eyes and shook my head, and didn't reply at all.

On cross-examination the prosecutor attempted to impeach this testimony.

Q. Didn't you tell Agent McCormack on August 12, when you were in his custody, that you weren't going to go to jail for James Howard, and that you were going to plead guilty and co-operate, but you wanted to talk it over with your family first?

A. I most certainly did not.

Q. You never said that?

A. No, never. I never said anything. I had a right to remain silent, and that is what I did.

The trial court ruled that these questions were improper and instructed the jury to disregard them.

Howard contends on appeal that the questions were a violation of *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). This argument is without merit; *Bruton* has been limited to situations where the co-defendant/declarant elects not to testify. *Nelson v. O'Neil*, 402 U.S. 622, 91 S.Ct. 1723, 29 L.Ed.2d 222 (1971).

(W)here a codefendant takes the stand in his own defense, denies making an alleged out-of-court statement implicating the defendant, and proceeds to testify favorably to the defendant concerning the underlying facts, the defendant has been denied no rights protected by the Sixth and Fourteenth Amendments.

Id. at 629-30, 91 S.Ct. at 1727. See also *Joyner v. United States*, 547 F.2d 1199 (4th Cir. 1977). Therefore, since the trial court instructed the jury to disregard the line of questioning and did not allow the prosecutor to call Agent McCormack to the stand as a rebuttal witness, Howard received a ruling more favorable than that to which he was entitled.

Fifth. Appellant Palmer contests the trial court's failure to give the following instruction to the jury:

(Heroin-addicted witnesses are) of questionable reliability because of (their) fear . . . of being deprived of . . . the substance (they) crave . . . (therefore their testimony should be) considered with caution.

Palmer argued that this instruction was appropriate because all of the witnesses who testified against him were users of heroin. The court rejected the proposed instruction and instead charged the jury:

(Consider) any matter in evidence which tends to indicate whether the witness is worthy of belief.

Page 570

A review of the record indicates that no foundation was laid for the requested instruction, since there was no evidence that any of the witnesses were still addicted to narcotics at the time of trial. In fact, each testified that he was not so addicted. Therefore, we find that the instruction given was sufficient.

Sixth. Much of the testimony against both Howard and Palmer was given by co-defendants who had pleaded guilty to charges arising from the indictment. The trial court gave the following instruction to the jury:

I would further say that the disposition of criminal charges by some agreement between the prosecution and the accused, sometimes loosely referred to as a plea agreement, or a plea bargain has been described by the Supreme Court of the United States as an essential component of the administration of justice, and when properly administered is to be encouraged; the disposition of charges after plea discussions is not only an essential part of the criminal process, but a highly desirable one, primarily because it leads to prompt and largely final disposition of most criminal cases, and for the reasons which for present purposes, I need not elaborate upon.

Appellants argue that the effect of this instruction was to put the imprimatur of the Supreme Court upon testimony given by those witnesses who had pleaded guilty and testified against them. We disagree.

First, the instruction was proper in light of the defense emphasis upon the "deals" struck between the witnesses and the government. See *United States v. Scallion*, 533 F.2d 903, 919 (5th Cir. 1976). Second, the trial court gave a further cautionary instruction:

You should consider whether the particular accomplice is testifying truthfully or falsely in

order to obtain a favorable recommendation by the government in the sentencing in his or her own case.

Viewing the instructions as a whole, we see no danger that an imprimatur was put upon the testimony of witnesses who had pleaded guilty.

Seventh. Appellants' final argument that the evidence presented was insufficient to support the convictions is conclusively refuted by a review of the record. Therefore, the verdicts of guilty are

AFFIRMED.

WIDENER, Circuit Judge, concurring:

I concur in the result and in all of the opinion of the court other than part Sixth.

While an instruction was not improper which said that the law did not discourage plea bargaining, giving it the imprint of authority of the Supreme Court, I think, should be discouraged. We should make it clear that in the usual case such an instruction will be considered error warranting serious consideration, rather than giving our approval to a practice which I consider to be too dangerous to be allowed to continue.

Many commonly used instructions to juries have their roots in Supreme Court opinions, with frequent quotations of language, and now either the government or the defendant (or even plaintiff and defendant in a civil case) may call upon the Supreme Court for its public blessing in open court by way of a charge given to a jury by the trial judge. In a more localized context, it is also now possible, I suppose, to demand instructions quoting by name the various appellate courts or even the author of an opinion.

The first Chief Justice, for example, is so widely revered that I should think his name added to a jury instruction might be a significant advantage unless the other side could come up with an instruction in its theory of the case from an equally august presence. By the same token,

and of even greater practical application, if one side, in its theory of the case, may quote the Supreme Court by name, but the other side, in its theory, has to depend on any other appellate court for its authority, even though the other appellate decision may be binding precedent, there is little doubt that any advantage would be to the side which apparently

Page 571

had the imprimatur of the Supreme Court behind its position.

My point is that it is The law which trial judges give to juries, and it should not make any difference from what source it comes. When giving the source of the law may be an advantage to one side or the other, it should be avoided.

I grant that in most cases a trial judge giving the law to the jury as coming from a statute or regulation, etc., is quite innocuous, and I know of no instance in which the same has been objected to. But I think giving the name of a court or, what would follow, the name of a judge, in an instruction to a jury is a thoroughly dangerous practice and should be disapproved rather than avowed. The possibilities for mischief under the rule we announce today are limitless. On the facts of this case, however, I do feel its use was harmless rather than reversible error.

1 Four persons also charged in the first count of the indictment pleaded guilty before or during the course of the trial. Two other persons charged in the indictment were tried as co-defendants with Palmer and Howard; the trial resulted in a hung jury as to them.

2 The United States, through the Department of Justice, has promulgated what is known as the "dual prosecution" or "Petite" policy. The policy provides that no federal case should be tried when there has already been a state prosecution for substantially the same act or acts, unless the United States Attorney first submits a positive

recommendation to the appropriate Assistant Attorney General and such recommendation is approved by the Assistant Attorney General in charge of the division, after the recommendation has been brought to the attention of the Attorney General himself. See *Petite v. United States*, 361 U.S. 529, 80 S.Ct. 450, 4 L.Ed.2d 490 (1960).

3 The permanent provisions of the Speedy Trial Act set out certain time limits within which criminal indictments or informations must be filed and arraignments and trials must be held. 18 U.S.C. § 3161. These time limits are phased in gradually until fully operative on July 1, 1979. 18 U.S.C. § 3163. Certain time periods including, *Inter alia*, time during which the accused was hospitalized, are excluded from the computation. 18 U.S.C. § 3161(h)(4). The sanction for noncompliance with the time limits is dismissal of the indictment. 18 U.S.C. § 3163.

The Act also provides certain "interim limits" for designated high-risk defendants and for pre-trial detainees. 18 U.S.C. § 3164(a). Such persons must be brought to trial "no later than ninety days following the beginning of such continuous detention." 18 U.S.C. § 3164(b). The only time periods expressly made excludable from the 90-day computation are those caused by fault of the accused or his counsel. The sanction for non-compliance is "review by the court of the conditions of release." 18 U.S.C. § 3164(c).

Rule 30,10. (a), Rules of the United States District Court for the District of Maryland, provides:

"A defendant in custody whose trial has not commenced within the time limit set forth in 18 U.S.C. § 3164(b) shall, if the failure to commence trial was through no fault of the defendant or his counsel, be released subject to such conditions as the Court may impose in accordance within 18 U.S.C. § 3146"

It is undisputed that the interim provisions of the Speedy Trial Act, 18 U.S.C. § 3164, were applicable in Howard's case.

4 With respect to one of Howard's co-defendants who was detained and also sought release, the

court also held the Speedy Trial Act unconstitutional as a legislative encroachment upon the judicial function. This co-defendant is not a party to this appeal, and therefore the constitutional issue is not properly before us.

5 We note that Howard's counsel made no further attempt to secure the release of his client, by petition for writ of mandamus to this court or otherwise.

Page 1426

990 F.2d 1426
UNITED STATES of America, Plaintiff-
Appellee,

v.

Donald Berry BURNS, Defendant-
Appellant.
UNITED STATES of America, Plaintiff-
Appellee,

v.

Joseph L. LAFORNEY, Defendant-
Appellant.

Nos. 92-5074, 92-5175.

United States Court of Appeals,
Fourth Circuit.

Argued Oct. 29, 1992.

Decided March 19, 1993.

Page 1428

Thomas Franklin Loflin, III, Durham, North Carolina, argued (William H. Dowdy, Wilmington, NC, on brief), for defendant-appellant Laforney.

David Taylor Shelledy, Crim. Div., U.S. Dept. of Justice, Washington, DC, argued (Sidney Glazer, Crim. Div., U.S. Dept. of Justice, Washington, DC, Margaret Person Currin, U.S. Atty., J. Douglas McCullough, Sr. Litigation Counsel, Raleigh, NC, on brief), for plaintiff-appellee.

Before ERVIN, Chief Judge, and PHILLIPS and WILKINSON, Circuit Judges.

OPINION

ERVIN, Chief Judge:

Following trial by jury, Donald Berry Burns and Joseph L. Laforney were convicted of charges stemming from a scheme to import marijuana and cocaine into the United States. Their cases, consolidated on direct appeal, present numerous claims in which we find no merit. We therefore affirm the judgment of the district court.

I

The manifold issues presented by this appeal rest upon procedural history of some complexity, which for clarity's sake we describe in two parts.

A.

On March 12, 1991 a grand jury in the Eastern District of North Carolina returned an eleven-count indictment against Burns, Laforney, and four other defendants. ¹ Laforney was charged with (1) conspiring to import marijuana and cocaine into the United States, 21 U.S.C. § 963; (2) conspiring to distribute and to possess with intent to distribute marijuana and cocaine,

Page 1429

id. § 846; (3) conspiring to smuggle marijuana and cocaine into the United States, 18 U.S.C. § 545; and (4) travelling in interstate commerce with intent to receive payment for promotion of a business enterprise involving distribution of cocaine, id. § 1952(a)(3). Burns was charged with (1) conspiring to import cocaine into the United States, 21 U.S.C. § 963; (2) conspiring to distribute and to possess with intent to distribute cocaine, id. § 846; (3) conspiring to smuggle marijuana and cocaine into the United States, 18 U.S.C. § 545; and (4) travelling in interstate commerce with intent to facilitate a business enterprise involving distribution of cocaine, id. § 1952(a)(3).

Upon Burns's pretrial motion, the district court dismissed the three conspiracy counts against him as breaches of a plea agreement Burns had entered in connection with an indictment returned on May 16, 1989 in the Eastern District of North Carolina. See *United States v. Hawes*, 774 F.Supp. 965, 972-977 (E.D.N.C.1991). The 1989 indictment charged Burns with essentially the same offenses as its 1991 counterpart, ² except that the drug alleged to have been the object of its importation- and distribution-conspiracy counts was marijuana, not cocaine. ³

At the time the grand jury returned the 1989 indictment, the Government had received unsubstantiated reports that Burns was involved in cocaine as well as marijuana trafficking. Based upon the facts then available to them, however, drug investigators believed that all the acts allegedly committed in furtherance of the conspiracy counts in the 1989 indictment stemmed from a single marijuana importation and distribution conspiracy. The Government knew, for example, that Burns and his supposed co-conspirators had travelled between various parts of the Caribbean and the southeastern United States in the late summer and early autumn of 1987. When the 1989 indictment proceeded to trial, the Government introduced evidence of this travel to prove the defendants' involvement in the marijuana conspiracy.

Shortly after all the evidence in Burns's 1989 marijuana-conspiracy trial had been placed before the jury, the Government's investigators obtained more facts incriminating Burns and Laforney in drug-related activities. While the jurors were deliberating, law enforcement officials learned that Luis Taboada, a Colombian citizen, had been apprehended in South Carolina together with more than 500 kilograms of cocaine. Interviews with Taboada revealed that in addition to their marijuana-related activities, Burns, Laforney, and others had brought three large cocaine shipments from the Caribbean into the United States between the summer of 1986 and October 1987. (One of the shipments, the result of a February 1987 journey to Aruba, was the basis for the single interstate travel violation charged in Burns's indictment.) Thus the Government became aware that the overt acts it had thought were committed in furtherance of the 1989 marijuana-importation conspiracy actually involved cocaine.

Burns's trial on the counts in the 1989 indictment resulted in a hung jury. Burns then entered into a plea agreement in which he pleaded guilty to the indictment's two interstate travel counts in exchange for the Government's promise that it would not oppose his motion to dismiss the marijuana-conspiracy counts. Shortly

after Burns was sentenced on his guilty plea, the magnitude of his and Laforney's involvement with cocaine importation came to light through the detailed testimony of Robert Kunhardt, an alleged participant in the conspiracy. Relying on Kunhardt's revelations, the Government sought--and the grand jury returned--a new indictment against Burns and Laforney on April 19, 1990. As the Government's knowledge of the group's activities further increased, it

Page 1430

twice sought and obtained superseding indictments against both men.

After the grand jury returned the second superseding indictment on March 12, 1991, Burns and Laforney moved to dismiss it on various grounds. Following an evidentiary hearing, the district court dismissed the conspiracy charges against Burns as breaches of his 1989 plea agreement. The court reasoned in substance that the various separate marijuana and cocaine conspiracies with which Burns was charged in the 1989 and 1991 indictments in fact constituted a single conspiracy to import both marijuana and cocaine. Because the conspiracy offenses charged in the 1991 indictment were the same as those charged in the 1989 indictment, the court held that Burns was entitled to specific performance of the terms of his plea agreement. Although the agreement did not specifically forbid the Government from further prosecuting Burns for anything other than violations of the criminal tax laws, the district court reasoned that a provision binding the Government not to oppose Burns's motion to dismiss the 1989 indictment's conspiracy counts also obliged prosecutors not to seek his subsequent indictment for the same substantive offenses. The court did not directly address Burns's motion to dismiss the interstate travel count in its memorandum opinion. That motion implicitly was denied, however, by the court's decision to grant Burns's motion only with respect to the 1991 indictment's three conspiracy counts. Laforney's motions, which challenged the substance of the indictment against him and had

no foundation in an extrinsic plea agreement, were summarily denied.

Disappointed in their efforts to have the charges against them in the 1991 indictment dismissed, Burns and Laforney were tried before the district court in a two-day proceeding. The evidence, which consisted mainly of the testimony of Kunhardt, Taboada, and others who had travelled with Burns and Laforney to procure narcotics, resulted in Burns's conviction on the interstate travel count, the sole charge remaining against him. Laforney was convicted of conspiring to import cocaine and marijuana, but acquitted on his other three charges. The district court sentenced Burns and Laforney to terms of four and five years' imprisonment, respectively, and this appeal followed.

B.

The following facts relate to Burns's subsidiary contention that the district court's refusal to appoint him a new attorney on the eve of trial infringed his Sixth Amendment right to have the assistance of counsel for his defense.

After the grand jury returned the four original counts of the 1991 indictment against Burns, the district court appointed an attorney to represent him in the forthcoming proceedings. In response to a request from Burns, the attorney successfully moved the district court to dismiss the conspiracy counts of the indictment. When Burns asked him to seek the dismissal of the interstate travel count as well, the attorney opined that his chances of persuading the district court to dismiss the count were scant. Counsel also declined to press the point at the hearing on the motions.⁴ Burns now contends that his conviction on the interstate travel count stems directly from his attorney's failure zealously to pursue the dismissal of the count in the proceedings below.

Throughout the period encompassed by the return of the 1991 indictment and the district court's grant of his motion to dismiss the conspiracy counts, Burns was serving an active

sentence in the federal prison at Butner, North Carolina.⁵ Several weeks before his scheduled release, federal corrections officials informed Burns that

Page 1431

he would be turned over to the custody of United States marshals upon the expiration of his sentence unless bail were set on the 1991 indictment. Burns then asked his appointed attorney to file a bond motion and attempt to schedule a hearing on it before his release from Butner. Four days before Burns's release, and again two days later, the attorney informed him that no bond motion had been filed. On October 11, 1991 Burns was released from the Butner facility and taken by United States marshals to a jail in Columbus County, North Carolina to await trial on the charges lodged in the indictment. Approximately two weeks later Burns's attorney informed him that the bond motion at last had been filed, and that he merely was waiting for the district court to schedule a hearing in the matter. The bond hearing took place before a federal magistrate judge on November 1, 1991. The hearing resulted in Burns's release on his own recognizance pending trial on the 1991 indictment.

When Burns came before the district court for arraignment on the 1991 charges later in November, he explained the difficulties he had experienced in prodding his attorney to file the bond motion. Burns observed to the court that he had lost confidence in the attorney's ability to represent him as a result of what appeared to him a dereliction of the attorney's duty; he then asked the court to appoint him new counsel. Citing the delays such action would foster, and noting that Burns in fact had been released, the district court denied Burns's request. One week later, at pretrial proceedings held in the absence of the jury, Burns renewed his request for substitute counsel, informing the court that he had filed a grievance against his appointed attorney with the North Carolina State Bar. Burns argued that the filing of the grievance created an irreconcilable conflict of interest between himself and the attorney, and

rendered the appointment of new counsel a virtual necessity. The district court again rejected Burns's request, and the case proceeded to trial. Burns now appeals from the court's denial of his motion.

II

Burns raises five assignments of error in challenging the district court's failure to dismiss the interstate travel count of the 1991 indictment and refusal to summon new counsel. We address these questions of law seriatim, reviewing the district court's conclusions de novo. See *United States v. Rusher*, 966 F.2d 868, 873 (4th Cir.), cert. denied --- U.S. ---, 113 S.Ct. 351, 121 L.Ed.2d 266 (1992).

Burns's sixth claim challenges the sufficiency of the evidence to establish venue for the proceedings in the Eastern District of North Carolina. In reviewing a defendant's challenge to the ability of evidence to sustain his conviction on appeal, the question we ask is familiar: whether "any rational trier of fact could have found the essential elements of the crime [charged] beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). This standard requires us to construe the evidence in the light most favorable to the Government, assuming its credibility, drawing all favorable inferences from it, and taking into account all the evidence, both direct and circumstantial. *Id.*

A.

We first address Burns's claim that the district court should have dismissed the interstate travel count of the 1991 indictment on the basis of his plea agreement with the Government.

As a preliminary matter, we observe that Burns's plea-agreement claim rests upon the assumption that the interstate travel count constituted an attempt by the Government to re prosecute him for the same conduct that the district court dismissed as violative of the plea agreement. This assumption is erroneous on two

grounds. First, Congress has made travelling in interstate commerce with intent to facilitate a business enterprise involving distribution of narcotics a substantive offense separate from conspiracy. Compare 18 U.S.C. § 1952(a)(3) (criminalizing interstate travel) with 21 U.S.C. §§ 846,

Page 1432

963 (criminalizing certain narcotics conspiracies). The mere fact that evidence of interstate travel is offered to prove the objective fact of a conspiracy does not as a matter of law prevent the Government from prosecuting an individual subsequently for the separate interstate travel violation.

Second, although evidence of interstate travel may be introduced as part and parcel of the prosecution's efforts to prove the existence of a conspiracy, interstate travel is not an essential element of that proof. The elements of the crime of conspiracy are two: (1) an agreement between two or more persons (2) to commit in concert an unlawful act. *Morrison v. California*, 291 U.S. 82, 92, 54 S.Ct. 281, 285, 286, 78 L.Ed. 664 (1934). Proof that an overt act has been committed in furtherance of the conspiracy is not a legal requirement for establishing a conspiracy under either 21 U.S.C. § 846, see *United States v. Clark*, 928 F.2d 639, 641 (4th Cir.1991) (holding that conspiracy under 21 U.S.C. § 846 does not require proof of an overt act, and citing identical holdings from other circuits), or 21 U.S.C. § 963, see *United States v. Levy Auto Parts of Canada*, 787 F.2d 946, 951 (4th Cir.), cert. denied, 479 U.S. 828, 107 S.Ct. 108, 93 L.Ed.2d 56 (1986). We therefore reject Burns's claim that his prosecution on the interstate travel count legally constituted a re prosecution for the "same conduct" dismissed by the district court along with the conspiracy charges of the 1991 indictment.

Having disposed of this segment of Burns's challenge to his prosecution under the interstate travel count of the 1991 indictment, we turn to the dispositive issue: whether the plea agreement prohibits such a prosecution. The question is a

narrow one. The parties do not dispute that an agreement was reached and evidenced in a fully integrated written document. Nor does the Government deny that Burns has fully performed his obligations under the agreement by pleading guilty, so that he is entitled to an appropriate remedy if the Government has breached the agreement. See *Santobello v. New York*, 404 U.S. 257, 262, 92 S.Ct. 495, 499, 30 L.Ed.2d 427 (1971) (plurality opinion).

The specific question before us is likewise narrowly confined to the nature of the Government's assumed obligations with respect to further prosecutions. The text of the plea agreement memorandum is itself the best evidence of those obligations. It reads in pertinent part:

3. The Government agrees as follows:

(a) That it will not oppose Defendant's motion to dismiss Count(s) One and Two of the Superceding [sic] Indictment.

....

(c) The Government will not prosecute the Defendant for any violations of federal criminal tax laws for the years of 1984 through 1988.

(d) The Government certifies that it will not seek the prosecution of Lynn Jones, who resides with the [D]efendant at ... Hillsborough, North Carolina, or the [D]efendants [sic] mother Margaret [sic] Burns, for any acts they may have committed relative to the conspiracies set forth in the Superceding [sic] Indictment.

(e) The Government represents that it has contacted the District Attorney for New Hanover and Pender Counties and the State of North Carolina has agreed to not prosecute the Defendant for the acts set forth in the Superceding [sic] Indictment.

The memorandum also contains a so-called "merger" clause, which provides: "This Memorandum ... constitutes the full and complete

record of the plea agreement in this matter. There are no other terms of this agreement in addition to or different from the terms contained herein."

Pointing to clause 3(a) of the plea agreement, Burns contends that the district court erroneously failed to dismiss the interstate travel count of the 1991 indictment because interstate travel was a criminal overt act subsumed in the conspiracy charges the court already had dismissed. The Government insists to the contrary that no term of the agreement ever contemplated

Page 1433

the dismissal of interstate travel as a separate substantive offense. The Government therefore argues, based upon the Memorandum's fully integrated character, that the agreement should be enforced strictly, according to its terms.

In construing integrated plea agreements, we naturally and necessarily have found guidance in a closely analogous body of private law: the principles governing the formation and interpretation of commercial contracts. See *United States v. Harvey*, 791 F.2d 294, 300 (4th Cir.1986); see also Peter Westen & David Westin, *A Constitutional Law of Remedies for Broken Plea Bargains*, 66 *Calif.L.Rev.* 471, 473-539 (1978) (discussing caselaw dealing with plea bargains in these terms). Of course, we recognize that the analogy of plea bargains to private contracts is not precise; as the Supreme Court has observed, the constitutional concerns undergirding the defendant's "contract" rights in a plea agreement demand broader and more vigorous protection than that accorded private contractual commitments. See *Mabry v. Johnson*, 467 U.S. 504, 509, 104 S.Ct. 2543, 2547, 81 L.Ed.2d 437 (1984). Burns suggests that the district court's decision to permit the Government to re prosecute him for the separate substantive offense established by 18 U.S.C. § 1952(a)(3) contravenes these well-established constitutional principles. Although we acknowledge the gravity of criminal defendants' constitutional interests where plea agreements are concerned, the interpretive principles we derive from the private law of

contracts "may be wholly dispositive in an appropriate case." *Id.* Our comments in *Harvey* are instructive on this point:

[W]hether a written agreement is ambiguous or unambiguous on its face should ordinarily be decided by the courts as a matter of law. If it is unambiguous as a matter of law, and there is no suggestion of government overreaching of any kind, the agreement should be interpreted and enforced accordingly. Neither side should be able, any more than would private contracting parties, unilaterally to renege or seek modification simply because of uninduced mistake or change of mind. Such an approach is conformable not only to the policies reflected in private contract law from which it is directly borrowed, but also to constitutional concerns of fundamental fairness in "bargaining" for guilty pleas, ... and in the wider concerns expressed in the exercise of supervisory jurisdiction over the administration of federal criminal justice.

Harvey, 791 F.2d at 300 (citing *Santobello*, 404 U.S. at 261, 92 S.Ct. at 498; *U.S. v. Carter*, 454 F.2d 426, 428) (4th Cir.1972).

Applying these principles here, we agree with the district court's interpretation of the disputed 1989 plea agreement provisions. First, the agreement is unambiguous as a matter of law. Its only promises with respect to subsequent prosecutions are contained in provisions 3(a), (c), (d), and (e). In these clauses the Government never expressly covenanted that it would not prosecute Burns for travelling in interstate commerce with intent to facilitate a business enterprise involving distribution of cocaine. Although the district court correctly concluded that clause 3(a) implicitly bound the Government not to re prosecute Burns for the marijuana-importation and distribution conspiracies alleged in those counts, clause 3(a) makes no promises about what other charges might or might not be brought subsequently. The objective standards we employ to resolve disputes over the meaning of contract terms reveal no ambiguity in the Government's agreement with respect to re prosecution. Burns's contention that the

Government promised not to re prosecute him for a violation of 18 U.S.C. § 1952(a)(3) is simply an attempt to introduce new terms into a fully integrated plea agreement. Yet as Burns and the Government have executed a writing that purports to set forth a complete statement of their agreement, "the described exchange may not be supplemented with unenumerated terms." *United States v. Fentress*, 792 F.2d 461, 464 (4th Cir.1986) (citing *Restatement (Second) of Contracts* § 216 (1981)).

Nor is there sign or suggestion of the Government's having over-reached or employed

Page 1434

unconscionable bargaining tools in coming to terms with Burns. Burns was represented by counsel throughout the plea negotiations and has not raised doubts that his lawyer provided him effective assistance within the meaning of the Sixth Amendment to the Constitution in the bargaining process. Post-agreement claims of uninduced mistake in reaching a bargain are of no avail. The Government owed Burns nothing more than fidelity to the terms of the agreement; the facts indicate that they were observed to the letter. None of the three other provisions that dealt with future prosecutions--clauses 3(c), (d), and (e)--mention interstate travel. The settled plea-bargaining law of this circuit is dispositive: "While the government must be held to the promises it made, it will not be bound to those it did not make. To do otherwise would strip the bargaining process itself of meaning and content." *Fentress*, 792 F.2d at 464-65.

We hold, therefore, that the district court correctly concluded that Burns's plea agreement did not bind the Government to forswear future prosecution of the discrete substantive offense of travelling in interstate commerce with intent to facilitate a business enterprise involving distribution of cocaine. Because the agreement may safely be enforced according to its terms, and because no evidence of over-reaching tainted the bargaining process, the fairness concerns rooted

in the Fifth Amendment and enunciated in Santobello are not implicated here.

B.

Burns's second assignment of error alleges that the district court should have dismissed the interstate travel charge as a violation of the Double Jeopardy Clause of the Fifth Amendment.

The Double Jeopardy Clause provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. As we noted in *United States v. Ragins*, 840 F.2d 1184 (4th Cir.1988), there are two distinct components to this guarantee:

The first provides protections against the imposition of cumulative punishments for the 'same offen[c]e' in a single criminal trial; the second against being subjected to successive prosecutions for the "same offen[c]e," without regard to the actual imposition of punishment.

Id. at 1187 (citing *Brown v. Ohio*, 432 U.S. 161, 165, 97 S.Ct. 2221, 2225, 53 L.Ed.2d 187 (1977); *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 2077, 23 L.Ed.2d 656 (1969)). Double jeopardy bars a succeeding prosecution if the proof actually used to establish the first offense would suffice to convict the defendant of the second offense. *Id.* at 1188; *Jordan v. Virginia*, 653 F.2d 870, 873-74 (4th Cir.1980).⁶ Invoking this guarantee against successive prosecutions, Burns argues that his trial on the interstate travel count is barred by the decision of the Supreme Court in *Grady v. Corbin*, 495 U.S. 508, 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990), and by our own holdings in *Ragins* and *Jordan*, because the travel count "grows out of the same misconduct" as the conspiracy counts of the 1989 indictment.

Burns's arguments ignore the fact that he was not actually "tried" for double jeopardy purposes in the 1989 prosecution. The only trial Burns faced on the charges in the 1989 indictment ended in a hung jury, and a mistrial was declared. Ever since Justice Story delivered the Supreme

Court's opinion in *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 6 L.Ed. 165 (1824), it has been settled law that a mistrial declared on account of jury deadlock does not prevent the Government from reindicting and retrying the defendant. *Id.* at 579-80; see also *Richardson v. United States*, 468 U.S. 317, 324, 104 S.Ct. 3081, 3085, 82 L.Ed.2d 242 (1984) (stating that "settled line of cases" holds that following hung

Page 1435

jury with retrial does not constitute double jeopardy). Burns therefore must rely upon the theory that the district court's dismissal of the conspiracy counts of the 1991 indictment creates a bar to subsequent prosecution on the interstate travel count.

Burns fails to understand, however, that double jeopardy applies after a pretrial dismissal only to the extent of collateral estoppel: the Government may not relitigate an issue of ultimate fact that has been resolved in a defendant's favor by a valid and final judgment in a criminal proceeding, if the fact necessarily determined in the first trial is an element of the second offense. *Ashe v. Swenson*, 397 U.S. 436, 444, 90 S.Ct. 1189, 1194, 25 L.Ed.2d 469 (1970); *Ragins*, 840 F.2d at 1194. As we have noted elsewhere herein, the settled law of this circuit holds that overt acts are not essential elements that must be proved in order to obtain convictions under either 21 U.S.C. § 846 or 21 U.S.C. § 963. Recently, in *United States v. Blackwell*, 900 F.2d 742 (4th Cir.1990), we recognized that dismissal of a conspiracy charge need not imply a determination that overt acts did not occur, and held that such dismissals do not bar prosecution of a substantive offense. *Id.* at 745-46. Indeed, even if Burns had been convicted or acquitted of the conspiracy counts of the 1989 indictment, the Double Jeopardy Clause would not have barred the interstate travel prosecution in the instant case. Conspiracies are separate and distinct from the acts done in furtherance of them; the "same overt acts charged in a conspiracy count may also be charged and proved as substantive offenses." *United States v. Bayer*, 331 U.S. 532, 542, 67 S.Ct.

1394, 1399, 91 L.Ed. 1654 (1947); see also *United States v. Felix*, --- U.S. ---, --- S.Ct. 1377, 1384-85, 118 L.Ed.2d 25 (1992) (reaffirming *Bayer* and the permissibility of successively prosecuting conspiracies and substantive offenses).

Hence we conclude that Ragins, Jordan, and Grady offer no support for Burns's arguments, and hold that the Double Jeopardy Clause was not offended by his prosecution on the indictment's travel count.

C.

Third, Burns argues that the Government deliberately delayed indicting him for the interstate travel violation until after he had been sentenced for the crimes charged in the 1989 indictment, in order to reap the benefits of his bargained guilty plea while denying him the opportunity to seek a concurrent sentence for related offenses in the earlier indictment. He claims that this deliberate delay effectively deprived him of liberty without due process of law.

We do not question that it would offend the Due Process Clause for the government deliberately to delay indicting an individual suspected of crime in order "to gain tactical advantage over the accused." *United States v. Marion*, 404 U.S. 307, 324, 92 S.Ct. 455, 465, 30 L.Ed.2d 468 (1971) (plurality opinion). But whether the Government actually has delayed in order to gain advantage in the prosecutorial fray is a question of fact, and questions of fact are the trial courts' special province. We are therefore not free to disturb the district court's findings of fact unless they are clearly erroneous. E.g., *United States v. Campbell*, 980 F.2d 245, 248 (4th Cir.1992), petition for cert. filed, 61 U.S.L.W. ____ (U.S. Feb. 1, 1993) (No. 92-7444).

In deference to the district court, we cannot say that the factual findings with respect to the Government's alleged delay in indicting Burns on the interstate travel count were clearly erroneous. In ruling on Burns's motion to dismiss, the court

found that the Government had exhibited good faith throughout the investigations and "was justified in believing [until September 1989] that the involvement of [Burns] in the scheme was limited to marijuana and did not involve cocaine." Moreover, the evidence offered at trial tended to prove that when the Government indicted Burns in 1989 on marijuana importation and distribution charges, it could not prove that he had trafficked in cocaine.

Because the Government did not deliberately delay indicting Burns on the interstate travel charge in order to gain tactical

Page 1436

advantage over him, we hold that the Due Process Clause was not violated by his prosecution on that travel charge.

D.

Fourth, Burns contends that we should exercise our "supervisory powers" over the administration of federal criminal justice to dismiss the interstate travel count.

Although it is true that the lower federal courts possess certain supervisory powers to control their own procedures in the interests of the fundamental principles of liberty and justice, see *McNabb v. United States*, 318 U.S. 332, 340-41, 63 S.Ct. 608, 612-13, 87 L.Ed. 819 (1943); *United States v. Williams*, --- U.S. ---, ---, 112 S.Ct. 1735, 1741, 118 L.Ed.2d 352 (1992), it is equally true that the Supreme Court never has fully explored the source of or the limitations on these powers. See Sara S. Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 Colum.L.Rev. 1433, 1433-34 (1984). The Court has made one principle quite clear, however: the supervisory power of the federal courts of appeals may not be used to prescribe prosecutorial conduct "in the first instance," before a grand jury. *Williams*, --- U.S. at ---, ---, 112 S.Ct. at 1741-42. "Because the grand jury is an institution separate from the

courts, over whose functioning the courts do not preside," *id.*, no supervisory judicial authority exists with respect to its workings.

Guided by these limiting precepts, we find it unnecessary to decide whether we should invoke our supervisory powers to bar the Government's prosecution of the interstate travel charge against Burns. As a matter of law, the interstate travel count of the 1991 indictment has significance independent of the conspiracy counts with which it originally was coupled. Moreover, we note that the Constitution commits the prosecutorial function to the Executive Branch, not the Judicial. See U.S. Const. art. II, § 2. It is the province of the Government to decide the terms on which it will bring criminal indictments, and to inscribe the charges it will post in them. So long as those charges are grounded upon solid legal predicates not contravened by the Constitution or other laws of the United States, we are unlikely to invoke transcendent powers of ambiguous scope to destroy them.

Therefore, we reject Burns's contention that the district court should have drawn upon its supervisory powers to dismiss the interstate travel count.

E.

Fifth, Burns argues that the district court erred in not granting his motion for judgment of acquittal after the evidence adduced at trial failed to establish that he travelled from the Eastern District of North Carolina to the Caribbean in February 1987 with specific intent to facilitate a business enterprise involving distribution of cocaine. The insufficiency of the Government's proof on this point, Burns says, made the Eastern District of North Carolina an improper venue for trial of the interstate travel count.

Rule 18 of the Federal Rules of Criminal Procedure sets forth the proper place of prosecution and trial for a criminal offense: "Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed."

Fed.R.Crim.P. 18 (emphasis added). Venue in federal criminal cases is a question of fact in which the burden of proof rests with the Government. See *United States v. Rinke*, 778 F.2d 581, 584 (10th Cir.1985). Unlike other facts in the Government's case, however, venue may be proven by mere preponderance of the evidence. *United States v. Porter*, 821 F.2d 968, 975 (4th Cir.1987), cert. denied, 485 U.S. 934, 108 S.Ct. 1108, 99 L.Ed.2d 269 (1988). We join the courts of appeals for the Fifth, Ninth, Tenth, and Eleventh Circuits⁷ in holding that for purposes of

Page 1437

U.S.C. § 1952 "venue lies in any district in which the travel occurred, including the district in which it originated," *United States v. Pepe*, 747 F.2d 632, 660 n. 44 (11th Cir.1984), even if intermediate destinations were involved. See *United States v. McLean-Davis*, 795 F.2d 957, 958 (11th Cir.1986), cert. denied, 479 U.S. 1060, 107 S.Ct. 941, 93 L.Ed.2d 991 (1987).

Applying these standards, we affirm the district court's ruling that venue was proper in the Eastern District of North Carolina. The evidence at trial showed that (1) Burns dwelt in Burgaw, in the Eastern District of North Carolina, from 1985 until 1988; (2) Pender County was the headquarters for all three of the Caribbean cocaine shipments proved by the Government at trial; (3) 100 kilograms of cocaine brought by Burns from Aruba in the summer of 1986 were stored in Burgaw; (4) Burns was paid in Burgaw for his participation in the shipment of fifty kilograms from the Caicos Islands later the same summer; and (5) a \$200,000 share of the proceeds from Burns's February 1987 journey to Aruba was set aside for him in Burgaw shortly after his return to the United States. We acknowledge that this evidence does not prove conclusively that Burns began or ended his 1987 trip to Aruba--on which the interstate travel charge was based--in Burgaw. Because venue need only be established by a preponderance of the evidence viewed in the light most favorable to the Government, however, we cannot say that the

district court erred in inferring that the trip originated or terminated in Burgaw.

F.

Finally, Burns contends that his right "to have the assistance of counsel for his defence," U.S. Const. amend. VI, was violated by the district court's failure to appoint new counsel to represent him after Burns filed a grievance against his court-appointed lawyer with the North Carolina State Bar. Citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), Burns asserts that his conviction must be reversed on two grounds: first, because his attorney failed to file a bond motion that would have timely effected his release from federal custody; second, because the grievance created in his trial lawyer an irreconcilable conflict of interest that, in turn, constructively denied Burns effective assistance of counsel.

As a preliminary matter, we note that although an indigent defendant has an absolute right to have counsel appointed to represent him, see *Johnson v. Zerbst*, 304 U.S. 458, 463, 58 S.Ct. 1019, 1022, 82 L.Ed. 1461 (1938), the Sixth Amendment does not guarantee representation by a lawyer in whom the defendant reposes special confidence or with whom the defendant is able to establish a "meaningful relationship." *Morris v. Slappy*, 461 U.S. 1, 13-14, 103 S.Ct. 1610, 1617-18, 75 L.Ed.2d 610 (1983). Therefore, a defendant's disappointment with appointed counsel can undermine his conviction only if counsel's performance fell below an objective standard of reasonableness under all the circumstances, *Strickland*, 466 U.S. at 668, 104 S.Ct. at 2052-55, and if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S.Ct. at 2068.

Even if the allegations of the disciplinary complaint Burns filed with the North Carolina State Bar are accepted as true, they cannot meet the stringent standard enunciated in *Strickland*. The grievance argues at most that Burns's pre-trial release would have occurred sooner rather

than later. That Burns was imprisoned temporarily before trial does not prove that the trial itself was unfair; as the district court rightly observed, whether the lawyer's unprofessional dereliction contributed to the delay in Burns's release has no bearing upon the lawyer's performance in defending him on the merits.

Page 1438

The attorney's failure to press the dismissal of the interstate travel count also breaks down before the *Strickland* hurdle: it cannot be said that "but for" counsel's decision to admit the viability of the interstate travel charge, the count would have been dismissed. For the reasons announced above, interstate travel is an offense entirely separate from conspiracy. In addition, we merely repeat what the Supreme Court clearly has stated when we observe that judicial scrutiny of an attorney's performance must be highly deferential. As Justice O'Connor stated in *Strickland*, "[i]t is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065. Under these circumstances, we decline to take the easy route.

Thwarted in his attempt to undermine his conviction by pointing to his attorney's failure to live up to expectations, Burns claims that his state bar grievance petition created a conflict of interest precluding adequate representation by appointed counsel. Burns quite rightly observes that he need not meet the *Strickland* "but for" test when he urges that a conflict of interest hobbled his defense. *Id.* at 692, 104 S.Ct. at 2067. Yet the Supreme Court never has suggested that a conflict between defendant and lawyer arising from a wholly separate proceeding—one that, as we have noted, had no bearing upon the attorney's ability zealously to represent Burns at trial—requires automatic reversal of a conviction. The Court in *Strickland* simply held that prejudice is presumed only if "an actual conflict of interest adversely

affected [the] lawyer's performance.' " *Id.* (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 350, 100 S.Ct. 1708, 1719, 64 L.Ed.2d 333 (1980)). We do not think that Burns's appointed attorney could have gleaned any advantage for himself in disciplinary proceedings before the state bar by failing to employ his best exertions on Burns's behalf at trial. We divine from the record below no stitch of evidence tending to show that Burns's attorney failed to represent him in an objectively reasonable manner. In rejecting his Sixth Amendment claim, we are moved also by another consideration: to hold otherwise on such unpersuasive facts would invite criminal defendants anxious to rid themselves of unwanted lawyers to queue up at the doors of bar disciplinary committees on the eve of trial. Such is not an invitation we wish to extend.

Therefore, we hold that the district court did not contravene the Sixth Amendment by refusing to appoint new counsel for Burns in light of his expressed dissatisfaction with his trial lawyer.

III

We now address Laforney's two claims in turn.

A.

In his first assignment of error, Laforney asks us to reverse his conviction because, in his view, the charges against him were tainted with multiplicity and duplicity.

Although the terms "multiplicity" and "duplicity" are often confused, their meanings are distinct, and the remedies for their commission disparate. On the one hand, duplicity is "the joining in a single count of two or more distinct and separate offenses." ¹ Charles A. Wright, *Federal Practice and Procedure* § 142, at 469 (2d ed. 1982). Multiplicity, on the other hand, is "the charging of a single offense in several counts." *Id.* The signal danger in multiplicitous indictments is that the defendant may be given multiple sentences for the same offense; hence reversal is warranted if the defendant actually was convicted

on multiplicitous counts and subjected to multiple punishments. *Id.* § 145, at 524-26. Even where the defendant has suffered multiple convictions and faces multiple sentences, the appropriate remedy is to vacate all of them but one. See *Ball v. United States*, 470 U.S. 856, 864-65, 105 S.Ct. 1668, 1673-74, 84 L.Ed.2d 740 (1985).

Laforney's suggestion that his indictment was duplicitous is a misnomer, because he does not contend that the indictment joined several offenses in a single

Page 1439

count. In truth, Laforney's argument is that the indictment was multiplicitous because it charged, in three separate counts, that he conspired to import, smuggle, and possess with intent to distribute marijuana and cocaine. Even if Laforney is correct and the indictment indeed is multiplicitous, his acquittal on the conspiracy to distribute (21 U.S.C. § 846), conspiracy to smuggle (18 U.S.C. § 545), and interstate travel (18 U.S.C. § 1952(a)(3)) counts renders moot any decision we might render on this point. Convicted and sentenced on only one count, Laforney is already in precisely the position the remedy authorized by *Ball* would leave him. Therefore, we decline to address directly the question presented by Laforney's assignment of error, and leave his sole conviction at rest.

B.

Second, Laforney argues that the district court erred in denying his motions to set aside his guilty verdict because the evidence adduced against him at trial was insufficient to sustain the verdict.

The gravamen of Laforney's claim is that the evidence at trial failed to establish one of the elements of the importation conspiracy count of the indictment. To expose this alleged gap in the Government's proof, Laforney challenges the credibility of the prosecution witnesses, condemning them as his "cohorts in crime, ...

capable of lying to save themselves, and having obvious motive to do just that..." This argument must be evaluated in light of the standard of review we are bound to employ on appeal: whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). The settled law of this circuit recognizes that the testimony of a defendant's accomplices, standing alone and uncorroborated, can provide an adequate basis for conviction. E.g., *United States v. Figurski*, 545 F.2d 389, 392 (4th Cir.1976); *United States v. Clark*, 541 F.2d 1016, 1018 (4th Cir.1976). Therefore, Laforney's challenge to the credibility of the Government's witnesses fails by application of the Jackson standard of review.

Nor is Laforney's attack on the actual testimony of the Government's witnesses availing. Laforney does not contest the sufficiency of the evidence to establish the first element of the conspiracy offense, viz., "an agreement between two or more persons to undertake conduct that would violate the laws of the United States." *United States v. Clark*, 928 F.2d 639, 641-42 (4th Cir.1991). He does dispute, however, that the Government's proof was enough to sustain the second element: his own "wilful joinder" in the agreement. *Id.* at 642. Yet our careful examination of the record in the proceedings below, read in light of the Jackson standard, leaves us with no doubt that Laforney knowingly and wilfully joined in the conspiracy of which he was convicted. Robert Kunhardt testified that Laforney accompanied Burns and the other co-conspirators on two trips to procure cocaine in the Caribbean, and aided in bringing the drugs back into the United States. The record reveals that Laforney was fully aware of the trip's purpose: Kunhardt testified that Laforney suggested removing a part of a cocaine shipment they had brought from Aruba as payment for his participation. Luis Taboada testified that Laforney sailed to South Caicos on a third journey to collect fifty kilograms of cocaine the co-conspirators had buried there. Kunhardt stated

that Laforney was paid \$35,000 for his role in the shipment.

Viewing this evidence in the light most favorable to the Government, and drawing all reasonable inferences from it in the Government's favor, we are left with the clear and firm impression that the jury's guilty verdict against Laforney should not be overturned for insufficiency of the evidence.

IV

For the foregoing reasons, we find Burns's and Laforney's arguments meritless. Accordingly, their convictions are

AFFIRMED.

1 Three of the other defendants entered guilty pleas pursuant to plea agreements with the Government. All charges against the fourth, Thomas Jackson Hawes, were dismissed as breaches of a plea agreement he had entered in connection with an earlier indictment. See *United States v. Hawes*, 774 F.Supp. 965, 970-972 (E.D.N.C.1991).

2 The 1989 indictment charged Burns with (1) one count of conspiring to import marijuana, 21 U.S.C. § 963; (2) one count of conspiring to possess with intent to distribute marijuana, *id.* § 846; and (3) two counts of interstate travel to facilitate these unlawful activities, 18 U.S.C. § 1952(a)(3).

3 Laforney was not made a defendant to the charges in the 1989 indictment.

4 At the motions hearing, Burns's attorney conceded that the interstate travel count was "a separate substantive thing" from the indictment's conspiracy counts, and that "the Government [could] proceed with prosecution" on the travel charge.

5 The sentence was imposed upon Burns following his guilty plea to the marijuana-related charges raised in the 1989 indictment.

6 Burns concedes that for double jeopardy purposes the interstate travel count is a separate offense from conspiracy under the legislative-intent test set forth in *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932), because the formal elements of section 846 and section 963 conspiracies require proof of facts that interstate travel does not.

7 See *United States v. Pepe*, 747 F.2d 632, 660 n. 44 (11th Cir.1984); *United States v. Bilstein*, 626 F.2d 774, 782-83 (10th Cir.1980), cert. denied, 449 U.S. 1102, 101 S.Ct. 898, 66 L.Ed.2d 828 (1981); *United States v. Polizzi*, 500 F.2d 856 (9th Cir.1974), cert. denied, 419 U.S. 1120, 95 S.Ct. 802, 42 L.Ed.2d 820 (1975); *United States v. Guinn*, 454 F.2d 29, 33 (5th Cir.), cert. denied sub nom. *Grimes v. United States*, 407 U.S. 911, 92 S.Ct. 2437, 32 L.Ed.2d 685 (1972).

242 U.S. 470

37 S.Ct. 192

61 L.Ed. 442

F. DREW CAMINETTI, Petitioner,

v.

UNITED STATES. NO 139. MAURY I. DIGGS, Petitioner, v. UNITED STATES. NO 163. L. T. HAYS, Petitioner, v. UNITED STATES. NO 464.

Nos. 139, 163, and 464.

Argued November 13 and 14, 1916

Decided January 15, 1917.

[Syllabus from pages 470-472 intentionally omitted]

Page 472

Messrs. Joseph W. Bailey, Marshall B. Woodworth, and Robert T. Devlin for petitioners in Nos. 139 and 163.

[Argument of Counsel from pages 472-480 intentionally omitted]

Page 480

Mr. Harry O. Glasser for petitioner in No. 464.

[Argument of Counsel from pages 480-482 intentionally omitted]

Page 482

Assistant Attorney General Wallace for the United States.

Mr. Justice Day delivered the opinion of the court:

These three cases were argued together, and may be disposed of in a single opinion. In each of the cases there was a conviction and sentence for violation of the so-called White Slave Traffic Act of June 25, 1910 (36 Stat. at L. 825, chap. 395, Comp. Stat. 1913, § 8813), the judgments were

affirmed by the circuit courts of appeals, and writs of certiorari bring the cases here.

In the Caminetti Case, the petitioner was indicted in the United States district court for the northern district of California, upon the 6th day of May, 1913, for alleged violations of the act. The indictment was in four counts, the first of which charged him with transporting and causing to be transported, and aiding and assisting in

Page 483

obtaining transportation for a certain woman from Sacramento, California, to Reno, Nevada, in interstate commerce, for the purpose of debauchery, and for an immoral purpose, to wit, that the aforesaid woman should be and become his mistress and concubine. A verdict of not guilty was returned as to the other three counts of this indictment. As to the first count, defendant was found guilty and sentenced to imprisonment for eighteen months and to pay a fine of \$1,500. Upon writ of error to the United States circuit court of appeals for the ninth circuit, that judgment was affirmed. 136 C. C. A. 147, 220 Fed. 545.

Diggs was indicted at the same time as was Caminetti, upon six counts, with only four of which are we concerned, inasmuch as there was no verdict upon the last two. The first count charged the defendant with transporting and causing to be transported, and aiding and assisting in obtaining transportation for, a certain woman from Sacramento, California, to Reno, Nevada, for the purpose of debauchery, and for an immoral purpose, to wit, that the aforesaid woman should be and become his concubine and mistress. The second count charged him with a like offense as to another woman (the companion of Caminetti) in transportation, etc., from Sacramento to Reno, that she might become the mistress and concubine of Caminetti. The third count charged him (Diggs) with procuring a ticket for the first-mentioned woman from Sacramento to Reno in interstate commerce, with the intent that she should become his concubine and mistress. The fourth count made a like charge as

to the girl companion of Caminetti. Upon trial and verdict of guilty on these four counts, he was sentenced to imprisonment for two years and to pay a fine of \$2,000. As in the Caminetti case, that judgment was affirmed by the circuit court of appeals. 136 C. C. A. 147, 220 Fed. 545.

In the Hays Case, upon June 26th, 1914, an indictment

Page 484

was returned in the United States district court for the western district of Oklahoma against Hays and another, charging violations of the act. The first count charged the said defendants with having, on March 17th, 1914, persuaded, induced, enticed, and coerced a certain woman, unmarried and under the age of eighteen years, from Oklahoma City, Oklahoma, to the city of Wichita, Kansas, in interstate commerce and travel, for the purpose and with intent then and there to induce and coerce the said woman, and intending that she should be induced and coerced to engage in prostitution, debauchery, and other immoral practices, and did then and there, in furtherance of such purposes, procure and furnish a railway ticket entitling her to passage over the line of railway, to wit, the Atchison, Topeka, & Santa Fe Railway, and did then and there and thereby, knowingly entice and cause the said woman to go and to be carried and transported as a passenger in interstate commerce upon said line of railway. The second count charged that on the same date the defendants persuaded, induced, enticed, and coerced the same woman to be transported from Oklahoma City to Wichita, Kansas, with the purpose and intent to induce and coerce her to engage in prostitution, debauchery, and other immoral practices at and within the state of Kansas, and that they enticed her and caused her to go and be carried and transported as a passenger in interstate commerce from Oklahoma City, Oklahoma, to Wichita, Kansas, upon a line and route of a common carrier, to wit: The Atchison, Topeka, & Santa Fe Railway. Defendants were found guilty by a jury upon both counts, and Hays was sentenced to imprisonment for eighteen months. Upon writ of error to the

circuit court of appeals for the eighth circuit, judgment was affirmed (145 C. C. A. 294, 231 Fed. 106).

It is contended that the act of Congress is intended to reach only 'commercialized vice,' or the traffic in women

Page 485

for gain, and that the conduct for which the several petitioners were indicted and convicted, however reprehensible in morals, is not within the purview of the statute when properly construed in the light of its history and the purposes intended to be accomplished by its enactment. In none of the cases was it charged or proved that the transportation was for gain or for the purpose of furnishing women for prostitution for hire, and it is insisted that, such being the case, the acts charged and proved, upon which conviction was had, do not come within the statute.

It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the lawmaking body which passed it, the sole function of the courts is to enforce it according to its terms. *Lake County v. Rollins*, 130 U. S. 662, 670, 671, 32 L. ed. 1060, 1063, 1064, 9 Sup. Ct. Rep. 651; *Bate Refrigerating Co. v. Sulzberger*, 157 U. S. 1, 33, 39 L. ed. 601, 610, 15 Sup. Ct. Rep. 508; *United States v. Lexington Mill & Elevator Co.* 232 U. S. 399, 409, 58 L. ed. 658, 661, L.R.A.1915B, 774, 34 Sup. Ct. Rep. 337; *United States v. First Nat. Bank*, 234 U. S. 245, 258, 58 L. ed. 1298, 1303, 34 Sup. Ct. Rep. 846.

Where the language is plain and admits of no more than one meaning, the duty of interpretation does not arise, and the rules which are to aid doubtful meanings need no discussion. *Hamilton v. Rathbone*, 175 U. S. 414, 421, 44 L. ed. 219, 222, 20 Sup. Ct. Rep. 155. There is no ambiguity in the terms of this act. It is specifically made an offense to knowingly transport or cause to be transported, etc., in interstate commerce, any woman or girl for the purpose of prostitution

or debauchery, or for 'any other immoral purpose,' or with the intent and purpose to induce any such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice.

Statutory words are uniformly presumed, unless the contrary appears, to be used in their ordinary and usual sense, and with the meaning commonly attributed to

Page 486

them. To cause a woman or girl to be transported for the purposes of debauchery, and for an immoral purpose, to wit, becoming a concubine or mistress, for which Caminetti and Diggs were convicted; or to transport an unmarried woman, under eighteen years of age, with the intent to induce her to engage in prostitution, debauchery, and other immoral practices, for which Hays was convicted, would seem by the very statement of the facts to embrace transportation for purposes denounced by the act, and therefore fairly within its meaning.

While such immoral purpose would be more culpable in morals and attributed to baser motives if accompanied with the expectation of pecuniary gain, such considerations do not prevent the lesser offense against morals of furnishing transportation in order that a woman may be debauched, or become a mistress or a concubine, from being the execution of purposes within the meaning of this law. To say the contrary would shock the common understanding of what constitutes an immoral purpose when those terms are applied, as here, to sexual relations.

In *United States v. Bitty*, 208 U. S. 393, 52 L. ed. 543, 28 Sup. Ct. Rep. 396, it was held that the act of Congress against the importation of alien women and girls for the purpose of prostitution 'and any other immoral purpose' included the importation of an alien woman to live in concubinage with the person importing her. In that case this court said:

'All will admit that full effect must be given to the intention of Congress as gathered from the words of the statute. There can be no doubt as to what class was aimed at by the clause forbidding the importation of alien women for purposes of 'prostitution.' It refers to women who, for hire or without hire, offer their bodies to indiscriminate intercourse with men. The lives and example of such persons are in hostility to 'the idea of the family, as consisting in and springing from the union for life of one

Page 487

man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement.' *Murphy v. Ramsey*, 114 U. S. 15, 45, 29 L. ed. 47, 57, 5 Sup. Ct. Rep. 747. . . . Now the addition in the last statute of the words, 'or for any other immoral purpose,' after the word 'prostitution,' must have been made for some practical object. Those added words show beyond question that Congress had in view the protection of society against another class of alien women other than those who might be brought here merely for purposes of 'prostitution.' In forbidding the importation of alien women 'for any other immoral purpose,' Congress evidently thought that there were purposes in connection with the importations of alien women which, as in the case of importations for prostitution, were to be deemed immoral. It may be admitted that, in accordance with the familiar rule of *ejusdem generis*, the immoral purpose referred to by the words 'any other immoral purpose' must be one of the same general class or kind as the particular purpose of 'prostitution' specified in the same clause of the statute. 2 *Lewis's Sutherland, Stat. Constr.* § 423, and authorities cited. But that rule cannot avail the accused in this case; for the immoral purpose charged in the indictment is of the same general class or kind as the one that controls in the importation of an alien woman for the purpose strictly of prostitution. The prostitute may, in the popular sense, be more degraded in character than the concubine, but the latter none

the less must be held to lead an immoral life, if any regard whatever be had to the views that are almost universally held in this country as to the relations which may rightfully, from the standpoint of morality, exist between man and woman in the matter of sexual intercourse.'

This definition of an immoral purpose was given prior to the enactment of the act now under consideration, and

Page 488

must be presumed to have been known to Congress when it enacted the law here involved. (See the sections of the act¹ set forth in the margin.)

Page 489

But it is contended that though the words are so plain that they cannot be misapprehended when given their usual and ordinary interpretation, and although the sections in which they appear do not in terms limit the offense defined and punished to acts of 'commercialized vice,' or the furnishing or procuring of transportation of women for debauchery, prostitution, or immoral practices for hire, such limited purpose is to be attributed to Congress and engrafted upon the act in view of the language of § 8 and the report which accompanied the law upon its introduction into and subsequent passage by the House of Representatives.

In this connection, it may be observed that while the title of an act cannot overcome the meaning of plain and unambiguous words used in its body (*United States v. Fisher*, 2 Cranch, 358, 386, 2 L. ed. 304, 313; *Goodlett v. Louisville & N. R. Co.* 122 U. S. 391, 408, 30 L. ed. 1230, 1233, 7 Sup. Ct. Rep. 1254; *Patterson v. The Eudora*, 190 U. S. 169, 172, 47 L. ed. 1002, 1003, 23 Sup. Ct. Rep. 821; *Cornell v. Coyne*, 192 U. S. 418, 430, 48 L. ed. 504, 509, 24 Sup. Ct. Rep. 383; *Lapina v. Williams*, 232 U. S. 78, 92, 58 L. ed. 515, 520, 34 Sup. Ct. Rep. 196), the title of this act embraces the regulation of interstate commerce 'by

prohibiting the transportation therein for immoral purposes of women and girls, and for other purposes.' It is true that

Page 490

§ 8 of the act provides that it shall be known and referred to as the 'White Slave Traffic Act,' and the report accompanying the introduction of the same into the House of Representatives set forth the fact that a material portion of the legislation suggested was to meet conditions which had arisen in the past few years, and that the legislation was needed to put a stop to a villainous interstate and international traffic in women and girls. Still, the name given to an act by way of designation or description, or the report which accompanies it, cannot change the plain import of its words. If the words are plain, they give meaning to the act, and it is neither the duty nor the privilege of the courts to enter speculative fields in search of a different meaning.

Reports to Congress accompanying the introduction of proposed laws may aid the courts in reaching the true meaning of the legislature in cases of doubtful interpretation (*Blake v. National City Bank*, 23 Wall. 307, 319, 23 L. ed. 119, 120; *Bate Refrigerating Co. v. Sulzberger*, 157 U. S. 1, 42, 39 L. ed. 601, 613, 15 Sup. Ct. Rep. 508; *Chesapeake & P. Teleph. Co. v. Manning*, 186 U. S. 238, 246, 46 L. ed. 1144, 1147, 22 Sup. Ct. Rep. 881; *Binns v. United States*, 194 U. S. 486, 495, 48 L. ed. 1087, 1090, 24 Sup. Ct. Rep. 816). But, as we have already said, and it has been so often affirmed as to become a recognized rule, when words are free from doubt they must be taken as the final expression of the legislative intent, and are not to be added to or subtracted from by considerations drawn from titles or designating names or reports accompanying their introduction, or from any extraneous source. In other words, the language being plain, and not leading to absurd or wholly impracticable consequences, it is the sole evidence of the ultimate legislative intent. See *Mackenzie v. Hare*, 239 U. S. 299, 308, 60 L. ed. 297, 300, 36 Sup. Ct. Rep. 106.

The fact, if it be so, that the act as it is written opens the door to blackmailing operations upon a large scale, is no reason why the courts should refuse to enforce it according to its terms, if within the constitutional authority of Congress. Such considerations are more appropriately

Page 491

ADDRESSED TO THE LEGISLATIVE BRANCH OF THE government, which alone had authority to enact and may, if it sees fit, amend the law. *Lake County v. Rollins*, 130 U. S. 673, 32 L. ed. 1064, 9 Sup. Ct. Rep. 651.

It is further insisted that a different construction of the act than is to be gathered from reading it is necessary in order to save it from constitutional objections, fatal to its validity. The act has its constitutional sanction in the power of Congress over interstate commerce. The broad character of that authority was declared once for all in the judgment pronounced by this court, speaking by Chief Justice Marshall, in *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. ed. 23, and has since been steadily adhered to and applied to a variety of new conditions as they have arisen.

It may be conceded, for the purpose of the argument, that Congress has no power to punish one who travels in interstate commerce merely because he has the intention of committing an illegal or immoral act at the conclusion of the journey. But this act is not concerned with such instances. It seeks to reach and punish the movement in interstate commerce of women and girls with a view to the accomplishment of the unlawful purposes prohibited.

The transportation of passengers in interstate commerce, it has long been settled, is within the regulatory power of Congress, under the commerce clause of the Constitution, and the authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question.

Moreover, this act has been sustained against objections affecting its constitutionality of the character now urged. *Hoke v. United States*, 227 U. S. 308, 57 L. ed. 523, 43 L.R.A.(N.S.) 906, 33 Sup. Ct. Rep. 281, Ann. Cas. 1913E, 905; *Athanasaw v. United States*, 227 U. S. 326, 57 L. ed. 528, 33 Sup. Ct. Rep. 285, Ann. Cas. 1913E, 911; *Wilson v. United States*, 232 U. S. 563, 58 L. ed. 728, 34 Sup. Ct. Rep. 347. In the *Hoke* Case, the constitutional objections were given consideration and denied upon grounds fully stated in the opinion (pages 308 et seq.). It is true that the particular case arose from a prosecution of one charged with

Page 492

transporting a woman for the purposes of prostitution in violation of the act. But, holding as we do, that the purposes and practices for which the transportation in these cases was procured are equally within the denunciation of the act, what was said in the *Hoke* Case as to the power of Congress over the subject is as applicable now as it was then.

After reviewing the *Lottery Case* (*Champion v. Ames*) 188 U. S. 321, 357, 47 L. ed. 492, 501, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561, and other cases in this court decided since the decision of that case, it was said in the *Hoke* Case (page 323):

'The principle established by the cases is the simple one, when rid of confusing and distracting considerations, that Congress has power over transportation 'among the several states;' that the power is complete in itself, and that Congress, as an incident to it, may adopt not only means necessary but convenient to its exercise, and the means may have the quality of police regulations. *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 215, 29 L. ed. 158, 166, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; *Cooley*, Const. Lim. 7th ed. 856. We have no hesitation, therefore, in pronouncing the act of June 25, 1910, a legal exercise of the power of Congress.'

Notwithstanding this disposition of the questions concerning the construction and constitutionality of the act, certain of the questions made are of sufficient gravity to require further consideration.

In the Diggs Case, after referring to the fact that the defendant had taken the stand in his own behalf, and that his testimony differed somewhat from that of the girls who had testified in the case, and instructing the jury that it was their province to ascertain the truth of the matter, the court further said: 'After testifying to the relations between himself and Caminetti and these girls down to the Sunday night on which the evidence of the government tends to show the trip to Reno was taken, he stops short and has given none of the details or incidents of that trip nor any direct statement of the intent or purpose with

Page 493

which that trip was taken, contenting himself by merely referring to it as having been taken, and by testifying to his state of mind for some days previous to the taking of that trip. Now this was the defendant's privilege, and, being a defendant, he could not be required to say more if he did not desire to do so; nor could he be cross-examined as to matters not covered by his direct testimony. But in passing upon the evidence in the case for the purpose of finding the facts you have a right to take this omission of the defendant into consideration. A defendant is not required under the law to take the witness stand. He cannot be compelled to testify at all, and if he fails to do so, no inference unfavorable to him may be drawn from that fact, nor is the prosecution permitted in that case to comment unfavorably upon the defendant's silence; but where a defendant elects to go upon the witness stand and testify, he then subjects himself to the same rule as that applying to any other witness, and if he has failed to deny or explain acts of an incriminating nature that the evidence of the prosecution tends to establish against him, such failure may not only be commented upon, but may be considered by the jury with all the other circumstances in reaching their conclusion as to his guilt or innocence; since

it is a legitimate inference that, could he have truthfully denied or explained the incriminating evidence against him, he would have done so.'

This instruction, it is contended, was error in that it permitted the jury to draw inferences against the accused from failure to explain incriminating circumstances when it was within his power to do so, and thus operated to his prejudice and virtually made him a witness against himself, in derogation of rights secured by the 5th Amendment to the Federal Constitution.

There is a difference of opinion expressed in the cases upon this subject, the circuit court of appeals in the eighth circuit holding a contrary view, as also did the

Page 494

circuit court of appeals in the first circuit. See *Balliet v. United States*, 64 C. C. A. 201, 129 Fed. 689; *Myrick v. United States*, 134 C. C. A. 619, 219 Fed. 1. We think the better reasoning supports the view sustained in the court of appeals in this case, which is that where the accused takes the stand in his own behalf and voluntarily testifies for himself (Act of March 16, 1878, 20 Stat. at L. 30, chap. 37, Comp. Stat. 1913, § 1465), he may not stop short in his testimony by omitting and failing to explain incriminating circumstances and events already in evidence, in which he participated and concerning which he is fully informed, without subjecting his silence to the inferences to be naturally drawn from it.

The accused, of all persons, had it within his power to meet, by his own account of the facts, the incriminating testimony of the girls. When he took the witness stand in his own behalf he voluntarily relinquished his privilege of silence, and ought not to be heard to speak alone of those things deemed to be for his interest, and be silent where he or his counsel regarded it for his interest to remain so, without the fair inference which would naturally spring from his speaking only of those things which would exculpate him and refraining to speak upon matters within his knowledge which might incriminate him. The

instruction to the jury concerning the failure of the accused to explain acts of an incriminating nature which the evidence for the prosecution tended to establish against him, and the inference to be drawn from his silence, must be read in connection with the statement made in this part of the charge which clearly shows that the court was speaking with reference to the defendant's silence as to the trip to Reno with the girls named in the indictment, and as to the facts, circumstances, and intent with which that trip was taken; and the jury was told that it had a right to take into consideration that omission.

The court did not put upon the defendant the burden

Page 495

of explaining every inculpatory fact shown or claimed to be established by the prosecution. The inference was to be drawn from the failure of the accused to meet evidence as to these matters within his own knowledge and as to events in which he was an active participant and fully able to speak when he voluntarily took the stand in his own behalf. We agree with the circuit court of appeals that it was the privilege of the trial court to call the attention of the jury in such manner as it did to this omission of the accused when he took the stand in his own behalf.

See, in this connection, *Brown v. Walker*, 161 U. S. 591, 597, 40 L. ed. 819, 821, 5 Inters. Com. Rep. 369, 16 Sup. Ct. Rep. 644; *Sawyer v. United States*, 202 U. S. 150, 165; 50 L. ed. 972, 979, 26 Sup. Ct. Rep. 575, 6 Ann. Cas. 269; *Powers v. United States*, 223 U. S. 303, 314, 56 L. ed. 448, 452, 32 Sup. Ct. Rep. 281.

It is urged as a further ground of reversal of the judgments below that the trial court did not instruct the jury that the testimony of the two girls was that of accomplices, and to be received with great caution and believed only when corroborated by other testimony adduced in the case. We agree with the circuit court of appeals that the requests in the form made should not have been given. In *Holmgren v. United States*,

217 U. S. 509, 54 L. ed. 861, 30 Sup. Ct. Rep. 588, 19 Ann. Cas. 778, this court refused to reverse a judgment for failure to give an instruction of this general character, while saying that it was the better practice for courts to caution juries against too much reliance upon the testimony of accomplices, and to require corroborating testimony before giving credence to such evidence. While this is so, there is no absolute rule of law preventing convictions on the testimony of accomplices if juries believe them. 1 Bishop, *Crim. Proc.* 2d ed. § 1081, and cases cited in the note.

Much is said about the character of the testimony adduced and as to certain facts tending to establish the guilt or innocence of the accused. This court does not weigh the evidence in a proceeding of this character, and it is enough to say that there was substantial testimony tending to support the verdicts rendered in the trial

Page 496

courts. Other objections are urged upon our attention, but we find in none of them a sufficient reason for reversing the judgments of the Circuit Courts of Appeals in these cases.

The judgment in each of the cases is affirmed.

Mr. Justice McReynolds took no part in the consideration or decision of these cases.

Mr. Justice McKenna, dissenting:

Undoubtedly, in the investigation of the meaning of a statute we resort first to its words, and, when clear, they are decisive. The principle has attractive and seemingly disposing simplicity, but that it is not easy of application, or, at least, encounters other principles, many cases demonstrate. The words of a statute may be uncertain in their signification or in their application. If the words be ambiguous, the problem they present is to be resolved by their definition; the subject matter and the lexicons become our guides. But here, even, we are not

exempt from putting ourselves in the place of the legislators. If the words be clear in meaning, but the objects to which they are addressed be uncertain, the problem then is to determine the uncertainty. And for this a realization of conditions that provoked the statute must inform our judgment. Let us apply these observations to the present case.

The transportation which is made unlawful is of a woman or girl 'to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice.' Our present concern is with the words 'any other immoral practice,' which, it is asserted, have a special office. The words are clear enough as general descriptions; they fail in particular designation; they are class words, not specifications. Are they controlled by those which

Page 497

precede them? If not, they are broader in generalization and include those that precede them, making them unnecessary and confusing. To what conclusion would this lead us? 'Immoral' is a very comprehensive word. It means a dereliction of morals. In such sense it covers every form of vice, every form of conduct that is contrary to good order. It will hardly be contended that in this sweeping sense it is used in the statute. But, if not used in such sense, to what is it limited and by what limited? If it be admitted that it is limited at all, that ends the imperative effect assigned to it in the opinion of the court. But not insisting quite on that, we ask again, By what is it limited? By its context, necessarily, and the purpose of the statute.

For the context I must refer to the statute; of the purpose of the statute Congress itself has given us illumination. It devotes a section to the declaration that the 'act shall be known and referred to as the 'White Slave Traffic Act.' And its prominence gives it prevalence in the construction of the statute. It cannot be pushed aside or subordinated by indefinite words in other sentences, limited even there by the context. It is a peremptory rule of construction that all parts of

a statute must be taken into account in ascertaining its meaning, and it cannot be said that § 8 has no object. Even if it gives only a title to the act, it has especial weight. *United States v. Union P. R. Co.* 91 U. S. 72, 82, 23 L. ed. 224, 229. But it gives more than a title; it makes distinctive the purpose of the statute. The designation 'white slave traffic' has the sufficiency of an axiom. If apprehended, there is no uncertainty as to the conduct it describes. It is commercialized vice, immoralities having a mercenary purpose, and this is confirmed by other circumstances.

The author of the bill was Mr. Mann, and in reporting it from the House committee on interstate and foreign commerce he declared for the committee that it was not

Page 498

the purpose of the bill to interfere with or usurp in any way the police power of the states, and further, that it was not the intention of the bill to regulate prostitution or the places where prostitution or immorality was practised, which were said to be matters wholly within the power of the states, and over which the Federal government had no jurisdiction. And further explaining the bill, it was said that the sections of the act had been 'so drawn that they are limited to the cases in which there is an act of transportation in interstate commerce of women for the purposes of prostitution.' And again:

'The White Slave Trade.—A material portion of the legislation suggested and proposed is necessary to meet conditions which have arisen within the past few years. The legislation is needed to put a stop to a villainous interstate and international traffic in women and girls. The legislation is not needed or intended as an aid to the states in the exercise of their police powers in the suppression or regulation of immorality in general. It does not attempt to regulate the practice of voluntary prostitution, but aims solely to prevent panderers and procurers from compelling thousands of women and girls against their will and desire to enter and continue in a life

of prostitution.' Cong. Rec. vol. 50, pp. 3368, 3370.

In other words, it is vice as a business at which the law is directed, using interstate commerce as a facility to procure or distribute its victims.

In 1912 the sense of the Department of Justice was taken of the act in a case where a woman of twenty-four years went from Illinois, where she lived, to Minnesota, at the solicitation and expense of a man. She was there met by him and engaged with him in immoral practices like those for which petitioners were convicted. The assistant district attorney forwarded her statement to the Attorney General, with the comment that the element of traffic was absent from the

Page 499

transaction and that therefore, in his opinion, it was not 'within the spirit and intent of the Mann Act.'² Replying, the Attorney General expressed his concurrence in the view of his subordinate.³

Of course, neither the declarations of the report of the committee on interstate commerce of the House nor the opinion of the Attorney General are conclusive of the meaning of the law, but they are highly persuasive. The opinion was by one skilled in the rules and methods employed in the interpretation or construction of laws, and informed, besides, of the conditions to which the act was addressed. The report was by the committee charged with the duty of investigating the necessity for the act, and to inform the House of the results of that investigation, both of evil and remedy. The report of the committee has, therefore, a higher quality than debates on the floor of the House. The representations of the latter may indeed be ascribed to the exaggerations of advocacy or opposition. The report of a committee is the execution of a duty and has the sanction of duty. There is a presumption, therefore, that the measure it recommends has the purpose it declares and will accomplish it as declared.

Page 500

This being the purpose, the words of the statute should be construed to execute it, and they may be so construed even if their literal meaning be otherwise. In *Church of the Holy Trinity v. United States*, 143 U. S. 457, 36 L. ed. 226, 12 Sup. Ct. Rep. 511, there came to this court for construction an act of Congress which made it unlawful for anyone in any of the United States 'to prepay the transportation, or in any way assist or encourage the importation or migration of any alien or aliens, any foreigner or foreigners, into the United States . . . under contract or agreement . . . to perform labor or *service of any kind* [italics mine] in the United States, its territories or the District of Columbia.' The Trinity Church made a contract with one E. W. Warren, a resident of England, to remove to the city of New York and enter its service as rector and pastor. The church was proceeded against under the act and the circuit court held that it applied, and rendered judgment accordingly. 36 Fed. 303.

It will be observed that the language of the statute is very comprehensive,—fully as much so as the language of the act under review,—having no limitation whatever from the context; and the circuit court, in submission to what the court considered its imperative quality, rendered judgment against the church. This court reversed the judgment, and, in an elaborate opinion by Mr. Justice Brewer, declared that 'it is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.' And the learned justice further said: 'This has been often asserted, and the reports are full of cases illustrating its application.'

It is hardly necessary to say that the application of the rule does not depend upon the objects of the legislation, to be applied or not applied as it may exclude or include good things or bad things. Its principle is the simple one that the words of a statute will be extended or restricted to execute its purpose.

Page 501

Another pertinent illustration of the rule is *Reiche v. Smythe*, 13 Wall. 162, 20 L. ed. 566, in which the court declared that if at times it was its duty to regard the words of a statute, at times it was also its duty to disregard them, limit or extend them, in order to execute the purpose of the statute. And applying the principle, it decided that in a tariff act the provision that a duty should be imposed on horses, etc., and other *live animals* imported from foreign countries should not include canary birds, ignoring the classification of nature. And so again in *Silver v. Ladd*, 7 Wall. 219, 19 L. ed. 138, where the benefit of the Oregon Donation Act was extended by making the words 'single man' used in the statute mean an unmarried woman, disregarding a difference of genders clearly expressed in the law.

The rule that these cases illustrate is a valuable one and in varying degrees has daily practice. It not only rescues legislation from absurdity (so far the opinion of the court admits its application), but it often rescues it from invalidity,—a useful result in our dual form of governments and conflicting jurisdictions. It is the dictate of common sense. Language, even when most masterfully used, may miss sufficiency and give room for dispute. Is it a wonder, therefore, that when used in the haste of legislation, in view of conditions perhaps only partly seen or not seen at all, the consequences, it may be, beyond present foresight, it often becomes necessary to apply the rule? And it is a rule of prudence and highest sense. It rescues from crudities, excesses, and deficiencies, making legislation adequate to its special purpose, rendering unnecessary repeated qualifications, and leaving the simple and best exposition of a law the mischief it was intended to redress. Nor is this judicial legislation. It is seeking and enforcing the true sense of a law notwithstanding its imperfection or generality of expression.

There is much in the present case to tempt to a violation of the rule. Any measure that protects the purity of

women from assault or enticement to degradation finds an instant advocate in our best emotions; but the judicial function cannot yield to emotion—it must, with poise of mind, consider and decide. It should not shut its eyes to the facts of the world and assume not to know what everybody else knows. And everybody knows that there is a difference between the occasional immoralities of men and women and that systematized and mercenary immorality epitomized in the statute's graphic phrase 'white slave traffic.' And it was such immorality that was in the legislative mind, and not the other. The other is occasional, not habitual, inconspicuous,—does not offensively obtrude upon public notice. Interstate commerce is not its instrument as it is of the other, nor is prostitution its object or its end. It may, indeed, in instances, find a convenience in crossing state lines, but this is its accident, not its aid.

There is danger in extending a statute beyond its purpose, even if justified by a strict adherence to its words. The purpose is studied, all effects measured, not left at random,—one evil practice prevented, opportunity given to another. The present case warns against ascribing such improvidence to the statute under review. Blackmailers of both sexes have arisen, using the terrors of the construction now sanctioned by this court as a help—indeed, the means—for their brigandage. The result is grave and should give us pause. It certainly will not be denied that legal authority justifies the rejection of a construction which leads to mischievous consequences, if the statute be susceptible of another construction.

United States v. Bitty, 208 U. S. 393 52 L. ed. 543, 28 Sup. Ct. Rep. 396, is not in opposition. The statute passed upon was a prohibition against the importation of alien women or girls,—a statute, therefore, of broader purpose than the one under review. Besides, the statute finally passed upon was an amendment to a prior statute, and the words construed were an addition to the

prior statute, and necessarily, therefore, had an added effect. The first statute prohibited the importation of any alien woman or girl into the United States *for the purpose of prostitution* [*italics mine*]. The second statute repeated the words and added '*or for any other immoral purpose*.' Necessarily there was an enlargement of purpose, and besides, the act was directed against the importation of foreign corruption, and was construed accordingly. The case, therefore, does not contradict the rule; it is an example of it.

For these reasons I dissent from the opinion and judgment of the court, expressing no opinion of the other propositions in the cases.

I am authorized to say that the CHIEF JUSTICE and Mr. Justice Clarke concur in this dissent.

¹ Sections 2, 3, and 4 of the act are as follows:

'Sec. 2. That any person who shall knowingly transport or cause to be transported, or aid or assist in obtaining transportation for, or in transporting, in interstate or foreign commerce, or in any territory or in the District of Columbia, any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice; or who shall knowingly procure or obtain, or cause to be procured or obtained, or aid or assist in procuring or obtaining, any ticket or tickets, or any form of transportation or evidence of the right thereto, to be used by any woman or girl in interstate or foreign commerce, or in any territory or the District of Columbia, in going to any place for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent or purpose on the part of such person to induce, entice, or compel her to give herself up to the practice of prostitution, or to give herself up to debauchery, or any other immoral practice, whereby any such woman or girl shall be transported in interstate or foreign commerce, or in any territory or the District of Columbia, shall

be deemed guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding five thousand dollars, or by imprisonment of not more than five years, or by both such fine and imprisonment, in the discretion of the court.

'Sec. 3. That any person who shall knowingly persuade, induce, entice, or coerce, or cause to be persuaded, induced, enticed, or coerced, or aid or assist in persuading, inducing, enticing, or coercing any woman or girl to go from one place to another in interstate or foreign commerce, or in any territory or the District of Columbia, for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose on the part of such person that such woman or girl shall engage in the practice of prostitution or debauchery, or any other immoral practice, whether with or without her consent, and who shall thereby knowingly cause or aid or assist in causing such woman or girl to go and to be carried or transported as a passenger upon the line or route of any common carrier or carriers in interstate or foreign commerce, or any territory or the District of Columbia, shall be deemed guilty of a felony and on conviction thereof shall be punished by a fine of not more than five thousand dollars, or by imprisonment for a term not exceeding five years, or by both such fine and imprisonment, in the discretion of the court.

'Sec. 4. That any person who shall knowingly persuade, induce, entice or coerce any woman or girl under the age of eighteen years, from any state or territory or the District of Columbia, to any other state or territory or the District of Columbia, with the purpose and intent to induce or coerce her, or that she shall be induced or coerced to engage in prostitution or debauchery, or any other immoral practice, and shall in furtherance of such purpose knowingly induce or cause her to go and to be carried or transported as a passenger in interstate commerce upon the line or route of any common carrier or carriers, shall be deemed guilty of a felony, and on conviction thereof shall be punished by a fine of not more than ten thousand dollars, or by imprisonment for a term not exceeding ten years, or by both

such fine and imprisonment, in the discretion of the court.'

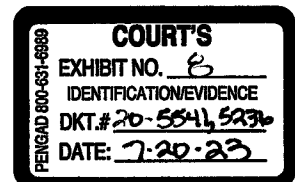
² 'Careful consideration of the facts and circumstances as related by Miss Cox fails to convince me that her case came within the spirit and intent of the Mann act. The element of traffic is entirely absent from this transaction. It is not a case of prostitution or debauchery and the general words 'or other immoral practice' should be qualified by the particular preceding words and be read in the light of the rule of ejusdem generis. This view of the statute is the more reasonable when considered in connection with § 8, where Congress employs the terms 'slave' and 'traffic' as indicative of its purpose to suppress certain forms of abominable practice connected with the degradation of women for gain.'

³ 'I agree with your conclusion that the facts and circumstances set forth in your letter and its inclosure do not bring the matter within the true intent of the White Slave Traffic Act, and that no prosecution against Edwards should be instituted in the Federal courts unless other and different facts are presented to you.'

In reference to the highlighted phone calls
on the T-Mobile sheet (3 numbers),
who do the phone numbers belong to?

You must determine this
based on evidence
presented.

Planned 7/20/23

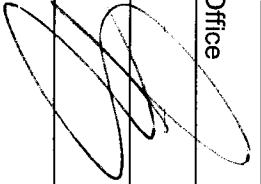


WITNESSES

Chad C Maltby

Greenville County Sheriffs Office

3/7/2018



ARREST WARRANT NUMBER(S)

2018A2330201810; 2018A2330201811
2018A2330201812; 2018A2330201813
2018A2330201814; 2018A2330201815

ACTION OF GRAND JURY
TRUE BILL



FOREMAN GRAND JURY

Foreperson of Grand Jury

VERDICT

Foreperson of Petit Jury
Date:

DOCKET NO. 2020-GS-23- 005236
EMG

The State of South Carolina

County of Greenville

COURT OF GENERAL SESSIONS

Spring 2020 TERM 2020

THE STATE

vs.

RAYMOND MARTINEZ, JR.

Indictment(s) for

0116/ 0139/ 0079 / 0549 / 0049 / 3419

MURDER; ARMED ROBBERY; BURGLARY, FIRST
DEGREE; POSS WEAPON DURING COMMISSION
OF A VIOLENT CRIME; CONSPIRACY; PETIT
LARCENY

VIOLATION(S) \$ 16-03-0010; \$16-11-330(A); \$16-
11-311; \$16-23-0490; \$16-17-410; \$16-13-30(A)

ENTERED
ACCT.

STATE OF SOUTH CAROLINA	)	INDICTMENT FOR
	)	MURDER; ARMED ROBBERY; BURGLARY, FIRST DEGREE;
COUNTY OF GREENVILLE	)	POSS WEAPON DURING COMMISSION OF A VIOLENT CRIME;
		CONSPIRACY; PETIT LARCENY

At a Court of General Sessions, convened on

the Grand Jurors of Greenville

County present upon their oath:

SEP 22 2020

COUNT I- MURDER

That RAYMOND MARTINEZ, JR., did in Greenville County, on or about the 31st day of December, 2017, unlawfully and with malice aforethought kill JERMAINE BRUSTER by means of shooting him with a firearm, and that JERMAINE BRUSTER died as a proximate result thereof. This is in violation of §16-3-10 of the South Carolina Code of Laws (1976) as amended.

COUNT II- ARMED ROBBERY

That RAYMOND MARTINEZ, JR., did in Greenville County, on or about the 31st day of December, 2017, while armed with a deadly weapon, or while alleging either by action or words he was armed while using a representation of a deadly weapon or any object which a person present during the commission of the robbery would reasonably believe to be a deadly weapon, take by means of force or intimidation, goods or monies described as: money and/or a change jar, from the person or presence of JERMAINE BRUSTER. This is in violation of §16-11-330 of the South Carolina Code of Laws (1976) as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

COUNT III- BURGLARY, FIRST DEGREE

That RAYMOND MARTINEZ, JR., did in Greenville County, on or about the 31st day of December, 2017, willfully and unlawfully enter the dwelling of JERMAINE BRUSTER located at [REDACTED] Rasor Drive, Apt [REDACTED] Greenville, SC, 29617, without consent and with the intent to commit a crime therein, and the burglary was accompanied by circumstances of aggravation, to wit: armed with a deadly weapon and/or caused physical injury to a person who is not a participant in the crime and/or used or threatened the use of a dangerous instrument and/or displayed what is or appears to be a pistol, revolver, rifle, shotgun, machine gun, or other firearm and/or the entering and/or remaining did occur during the night time hours. This is in violation of §16-11-0311 of the South Carolina Code of Laws (1976) as amended.

COUNT IV- POSSESSION OF A WEAPON DURING THE COMMISSION OF A VIOLENT CRIME

That RAYMOND MARTINEZ, JR., did in Greenville County, on or about the 31st day of December, 2017, possess or visibly display a firearm during the commission or attempted commission of a violent crime, to wit: Murder and/or Burglary First Degree and/or Armed Robbery. This is in violation of §16-23-490 of the South Carolina Code of Laws (1976) as amended.

COUNT V- CONSPIRACY

That RAYMOND MARTINEZ, JR., did in Greenville County, on or about the 31st day of December, 2017, willfully and unlawfully combine with Kirk Porter and/or Keyla Mansell and/or Robert Belcher for the purpose of accomplishing an unlawful object or a lawful object by unlawful means, to wit: Robbery and/or Burglary and/or Murder. This is in violation of §16-17-0410 of the South Carolina Code of Laws (1976) as amended.

COUNT VI- PETIT LARCENY

That RAYMOND MARTINEZ, JR., did in Greenville County, on or about the 31st day of December, 2017, feloniously take and carry away the personal property of JERMAINE BRUSTER, to wit: money and/or a change jar with a total value of less than Two Thousand Dollars (\$2,000.00) with intent to deprive the owner permanently of such property. This is in violation of §16-13-0030 of the South Carolina Code of Laws (1976) as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

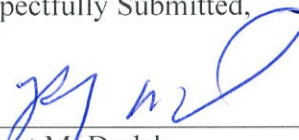

SOLICITOR

BAR # 100086

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material and that this Record on Appeal complies to the best of my ability with the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

Respectfully Submitted,



Robert M. Dudek
Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

ATTORNEY FOR APPELLANT

RECEIVED

Jan 02 2025

SC Court of Appeals

This 2nd day of January, 2025.

RECEIVED

Jan 02 2025

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable Perry H. Gravely, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

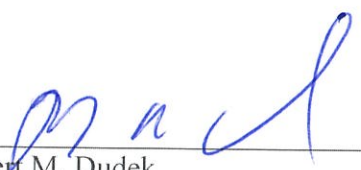
RAYMOND MARTINEZ,

APPELLANT

APPELLATE CASE NO. 2023-001201

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Record on Appeal in the above-referenced case has been served upon Melody J. Brown, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 2nd day of January, 2025.



Robert M. Dudek
Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

ATTORNEY FOR APPELLANT