UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 93-3603

UNITED STATES OF AMERICA,

Plaintiff-Appellee, Appellant, Cross-Appellant,

versus

PETER McDERMOT, II and GORDON L. RUSH, JR.,

Defendants-Appellants, Cross-Appellees,

STEVEN W. KOCHENSPARGER,

Defendant-Appellee.

Appeal from the United States District Court
For the Eastern District of Louisiana
(CR-92-218-LLM)

(June 5, 1995)

Before WISDOM, JONES, and EMILIO M. GARZA, Circuit Judges.

EMILIO M. GARZA, Circuit Judge:[*]

Gordon L. Rush, Jr., appeals from his conviction and sentence for multiple counts of mail fraud, wire fraud, and conspiracy to commit mail and wire fraud. Peter McDermot II appeals from his conviction and sentence for two counts of wire fraud and one count

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[*] Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

of conspiracy to commit mail and wire fraud. The United States cross-appeals from the district court's sentencing determinations for Rush and McDermot and appeals from the court's sentencing determination for Steven Kochensparger. We affirm Rush's conviction, we vacate and remand Rush's sentence, we affirm Kochensparger's sentence, and we dismiss McDermot's appeal.

I

A federal grand jury indicted Rush, McDermot, and Kochensparger in connection with their roles in the failure of Rush's insurance company, Presidential Fire & Casualty Company ("Presidential"). The indictment contained twenty-one counts of conspiracy, mail fraud, and wire fraud. After Rush and McDermot filed motions attacking the indictment, the grand jury returned a superseding indictment.[1] In it, the grand jury alleged two schemes to defraud. Counts 1 through 11 related to the first scheme, while counts 12 through 19 related to the second scheme.

As alleged in the superseding indictment, the first of the two schemes consisted of an attempt to defraud the Louisiana Insurance Guaranty Association ("LIGA");[2] the accounting firm of Touche, Ross; the citizens of Louisiana, Mississippi, and Texas; and the claimants and policyholders of Presidential. The alleged object of the scheme was to "place fraudulent assets on Presidential's

[1] Before the grand jury returned the superseding indictment, Kochensparger pled guilty to Count 1 of the original indictment, which charged him with conspiracy to commit mail and wire fraud.

[2] LIGA guarantees the policies of Louisiana citizens in the event an insurer becomes insolvent.

financial statements in order to allow the company to continue to operate and to provide money for the defendants' personal use." The indictment further alleged four "ways and means" that the defendants used to accomplish the scheme: (a) the false representation to the Louisiana Department of Insurance that Presidential's start-up capital was unencumbered; (b) the infusion into Presidential of approximately $13 million in fraudulent government securities, specifically Federal National Mortgage Association certificates ("FNMA's") and Government National Mortgage Association certificates ("GNMA's"); (c) the infusion into Presidential of $9 million in fraudulent FNMA's and municipal bonds; and (d) the diversion of corporate funds from Presidential and other companies operated by Rush, including a premium financing company called A & R Capital Corporation ("A & R").

In Counts 1 through 11, the Grand Jury alleged three mailings, five wire transmissions, and three conspiracies to commit mail and wire fraud in furtherance of the first scheme to defraud. Each of these eleven counts named Rush, and two of the wire fraud counts and one of the conspiracy counts named McDermot as a defendant.

The second fraudulent scheme consisted of an attempt by Rush to defraud policyholders of Lloyds of Louisiana who had financed their premiums with his premium financing company, A & R.[3] As alleged in the indictment, when Lloyds of Louisiana failed, Rush obtained refunds from LIGA, on behalf of A & R customers, of their

[3] A & R's financing arrangement allowed purchasers of Lloyds of Louisiana automobile insurance policies to pay their premiums in installments. We describe this arrangement *infra*, in part II.D.

unused premiums, and rather than remit the refunds to the customers, he wrongfully retained and diverted the funds. Counts 12 through 19 alleged eight specific refunds mailed to A & R from LIGA in furtherance of Rush's scheme.

Rush moved to dismiss the superseding indictment as duplicitous, and, in the alternative, to "sever" the first alleged scheme into two schemes. He also moved to strike as surplusage allegations of losses to the citizens of Louisiana. The district court denied Rush's motion to dismiss and granted his motion to strike. Rush later filed a second motion to dismiss the indictment on the grounds that it was not concise, but the district court denied the motion.

Also prior to trial, Rush and McDermot waived their right to a jury trial under Rule 23(a) of the Federal Rules of Criminal Procedure and moved to be tried by a judge alone. Because the government declined to consent to Rush and McDermot's waiver, the district court denied their motions. At the end of a two-week jury trial, Rush and McDermot moved for acquittal, and the court took their motions under submission. The jury then returned guilty verdicts on all counts against Rush and on three counts against McDermot.

After the trial, but before Rush, McDermot, and Kochensparger's sentencing, Judge Arceneaux, who had presided over the trial and the pre-trial proceedings, passed away. When the case was subsequently transferred to Judge Mitchell, Rush moved for a new trial on the grounds that Judge Mitchell would be unable to

decide Rush's motion for acquittal or impose Rush's sentence without having presided over Rush's trial. After reviewing the trial record, Judge Mitchell denied Rush's motion for a new trial and motion for acquittal.

After conducting a hearing and reviewing extensive memoranda filed by the parties, the district court sentenced Rush to a forty-six-month term of imprisonment, a $25,000 fine, a $950 special assessment, and a three-year term of supervised release. The court sentenced McDermot to a forty-one-month term of imprisonment, a $7,500 fine, a $150 special assessment, and a three-year term of supervised release. The court sentenced Kochensparger to a six-month term of imprisonment, a $4,000 fine, a $50 special assessment, and a three-year term of supervised release.

Rush and McDermot[4] appeal from their convictions and sentences, raising seven grounds for reversal. The Government cross-appeals, contending that the district court erroneously applied the sentencing guidelines in determining Rush and McDermot's sentences. The Government also appeals from Kochensparger's sentence on the grounds that the district court erroneously calculated the amount of loss attributable to Kochensparger's fraud.

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[4] McDermot's brief on appeal consists of a photocopy of Rush's brief. McDermot stated in a cover letter accompanying the photocopy of Rush's brief that he would file his own brief at a later date, but he never filed such a brief. We hold that McDermot's submission does not comply with Rule 28 of the Federal Rules of Appellate Procedure, which provides that "[t]he argument must contain the contentions *of the appellant* on the issues presented, and the reasons therefor, with citations to the authorities, statutes, and parts of the record relied on." Fed. R. App. P. 28(a)(6) (emphasis added). Consequently, we dismiss McDermot's appeal for want of prosecution. *See* 5th Cir. Local Rules 42.3.2, 42.3.3.

II

A

Rush argues first that his case was so complex that a trial by jury deprived him of his right to due process. Rule 23(a) of the Federal Rules of Criminal Procedure provides that "[c]ases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government." Thus, Rule 23(a) requires the consent of both the government and the court before a defendant may effectively waive a jury trial. *See Serfass v. United States*, 420 U.S. 377, 389, 95 S. Ct. 1055, 1063, 43 L. Ed. 2d 265 (1975) (citing Fed. R. Crim. P. 23(a)). In *Singer v. United States*, 380 U.S. 24, 85 S. Ct. 783, 13 L. Ed. 2d 630 (1965), the Supreme Court upheld the constitutionality of this procedure, reasoning as follows:

> In light of the Constitution's emphasis on jury trial, we find it difficult to understand how the petitioner can submit the bald proposition that to compel a defendant in a criminal case to undergo a jury trial against his will is contrary to his right to a fair trial or to due process. A defendant's only constitutional right concerning the method of trial is to an impartial trial by jury. We find no constitutional impediment to conditioning a waiver of this right on the consent of the prosecuting attorney and the trial judge when, if either refuses to consent, the result is simply that the defendant is subject to an impartial trial by jury))the very thing that the Constitution guarantees him. The Constitution recognizes an adversary system as the proper method of determining guilt, and the Government, as a litigant, has a legitimate interest in seeing that cases in which it believes a conviction is warranted are tried before the tribunal which the Constitution regards as most likely to produce a fair result.

Id. at 36, 85 S. Ct. at 790. The Court thus concluded: "Having

found that the Constitution neither confers nor recognizes a right of criminal defendants to have their cases tried before a judge alone, we also conclude that Rule 23(a) sets forth a reasonable procedure governing attempted waivers of jury trials." *Id.* at 26, 85 S. Ct. at 785-86.[5]

Rush argues that *Singer* "left open the possibility that in the proper circumstances a jury could be waived over government objection." In fact, the Supreme Court stated:

> We need not determine in this case whether there might be some circumstances where a defendant's reasons for wanting to be tried by a judge alone are so compelling that the Government's insistence on trial by jury would result in the denial to a defendant of an impartial trial. Petitioner argues that there might arise situations where "passion, prejudice . . . public feeling" or some other factor may render impossible or unlikely an impartial trial by jury However, since petitioner gave no reason for wanting to forgo jury trial other than to save time, this is not such a case and petitioner does not claim that it is.

Id. at 37-38, 85 S. Ct. at 791. This language makes clear that the Court specifically reserved the question of whether a jury trial could amount to a denial of a defendant's right to an *impartial* trial. The Court's emphasis on impartiality conforms with its definition of the criminal defendant's right: "A defendant's only constitutional right concerning the method of trial is to an *impartial* trial by jury." *Id.* at 36, 85 S. Ct. at 790 (emphasis

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[5] The Supreme Court has since restated this principle in *United States v. Jackson*, 390 U.S. 570, 584, 88 S. Ct. 1209, 1217-18, 20 L. Ed. 2d 138 (1968) ("It is true that a defendant has no constitutional right to insist that he be tried by a judge rather than a jury . . . .") (citing *Singer*, 380 U.S. at 24, 85 S. Ct. at 783) and *Serfass*, 420 U.S. at 389, 95 S. Ct. at 1063 ("[O]f course, a jury trial could not be waived . . . without the consent of the Government and of the court.") (citing Fed. R. Crim. P. 23(a)).

added).

Rush does not challenge the impartiality of his trial. Rather, he argues only that a jury was incapable of understanding the issues in his case. As Rush and McDermot have not alleged a violation of their due process right to an impartial trial, we reject their argument that due process required a bench trial in this case.

B

Rush also challenges his indictment on two grounds: First, because it contained unnecessary argument in an introduction to Counts 1 through 11; and second, because what he refers to as "Count 1" was duplicitous. We review the sufficiency of an indictment de novo. *See United States v. Wiley*, 979 F.2d 365, 367-68 (5th Cir. 1992) (reviewing sufficiency of the indictment, including whether it was duplicitous, de novo).

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Rush argues that the district court should have granted his motion to dismiss Counts 1 through 11 or "sever" Count 1 because Count 1 was duplicitous and Counts 2 through 11 incorporated Count 1 by reference.[6] "An indictment may be duplicitous if it joins in

[6] We assume that Rush has sufficiently preserved his objection to the alleged duplicity, although we note that Rush's proper remedy was neither a motion to dismiss nor a motion to "sever." "An indictment or information charging two separate offenses in a single count is duplicitous, but this is not fatal, and does not require dismissal of the count. The proper remedy is to require the government to elect upon which charge contained in the count it will rely . . . ." 1 Charles A. Wright, *Federal Practice and Procedure* § 145, at 523 (2d ed. 1982) (footnotes omitted). *See also United States v. Salinas*, 654 F.2d 319, 325-26 (5th Cir. Unit A 1981) (noting that defendant's "motion to compel election, filed before trial, was the proper means of objecting to being charged in the same count with two or more separate offenses"), *overruled on other grounds*, *United States v. Adamson*, 700 F.2d 953 (5th Cir. Unit B) (en banc),

a single count two or more distinct offenses." *United States v. Baytank (Houston), Inc.*, 934 F.2d 599, 608 (5th Cir. 1991); *accord United States v. Cooper*, 966 F.2d 936, 939 n.3 (5th Cir.), *cert. denied*, ___ U.S. ___, 113 S. Ct. 481, 121 L. Ed. 2d 386 (1992). *See generally* 1 Charles A. Wright, *Federal Practice and Procedure* § 142 (2d ed. 1982). "If an indictment is duplicitous and prejudice results, the conviction may be subject to reversal." *Baytank*, 934 F.2d at 608.[7]

Rush's argument seriously mischaracterizes the superseding indictment. What Rush calls "Count 1," is not a separate count. It is a narrative introduction to Counts 1 through 11 entitled "Part B. The Scheme," and it contains allegations concerning the alleged scheme to defraud and Rush's role in it.

Taken in its best light, Rush's argument amounts to this: the introductory allegations in Part B concerning the alleged scheme to defraud, which are necessary to allege the offense of mail fraud, *see infra* part II.D, allege more than one scheme; therefore, Counts 1 through 11 are duplicitous because each count alleges a mailing in furtherance of what was really more than one scheme.

Rush cites no analogous cases to support his duplicity claim.

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cert. denied, 464 U.S. 833, 104 S. Ct. 116, 78 L. Ed. 2d 116 (1983).

[7] "The vice of duplicity is that there is no way in which the jury can convict of one offense and acquit on another offense contained in the same count." 1 Wright, *Federal Practice and Procedure* § 142, at 475. *See also Cooper*, 966 F.2d at 939 n.3 ("The ban against duplicitous indictments derives from four concerns: prejudicial evidentiary rulings at trial; the lack of adequate notice of the nature of the charges against the defendant; prejudice in obtaining appellate review and prevention of double jeopardy; and risk of a jury's nonunamimous verdict.") (citing Wright, *Federal Practice and Procedure* § 142).

In addition, the basis for his argument is limited to the lack of proof at trial connecting what he contends were two distinct schemes. The proof at trial, however, is irrelevant to the question of whether an *indictment* is duplicitous.[8] As the Ninth Circuit explained in *United States v. Mastelotto*, 717 F.2d 1238 (9th Cir. 1983):

> In reviewing an indictment for duplicity, our task is not to review the evidence presented at trial to determine whether it would support charging several crimes rather than just one, but rather solely to assess whether the indictment itself can be read to charge only one violation in each count.

Id. at 1244. Thus, if Part B can be read to allege a single scheme, Counts 1 through 11 are not duplicitous.

We hold that Part B clearly alleges a single, ongoing scheme. The fact that it further alleged more than one means by which Rush sought to accomplish the scheme does not render it duplicitous. *See Owens v. United States*, 221 F.2d 351, 354 (5th Cir. 1955) (holding that "the defrauding of different people over an extended period of time, using different means and representations, may constitute but one scheme"); *Weiss v. United States*, 122 F.2d 675, 680 (5th Cir.) ("A single scheme to defraud may involve a multiplicity of ways and means of action and procedure."), *cert. denied*, 314 U.S. 687, 62 S. Ct. 300, 86 L. Ed. 550 (1941).

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[8] The insufficiency of the government's proof of one scheme might have given rise to a claim of variance. *See, e.g. United States v. Faulkner*, 17 F.3d 745, 759 (5th Cir.) (addressing claim that variance existed between allegation of one conspiracy in indictment and proof at trial), *cert. denied*, ___ U.S. ___, 115 S. Ct. 663, 130 L. Ed. 2d 598 (1994); *Owens v. United States*, 221 F.2d 351, 354-55 (5th Cir. 1955) (addressing claim that proof at trial showed separate schemes to defraud in variance with single scheme alleged in indictment). However, Rush raised no such claim in the district court and does not argue variance on appeal.

Rush also argues that the district court should have granted his motion to dismiss the indictment on the grounds that the indictment was needlessly verbose and argumentative. Rush relies on the requirement in Rule 7(c) of the Federal Rules of Criminal Procedure that the indictment contain a "plain, *concise*, definitive written statement" of the charges against the defendant. Fed. R. Crim. P. 7(c) (emphasis added). Rush cites no authority in support of his position, and he ignores the ample authority clarifying that a defendant's remedy in the face of a needlessly wordy indictment is a motion to strike surplusage under Rule 7(d). *See* 1 Wright, *Federal Practice and Procedure* § 127, at 424-27. As Professor Wright explains:

> The presence of surplusage is not fatal to the validity of the indictment, and indeed, as has been seen, the court need not submit to the jury surplus elements of an indictment not essential to the allegation of an offense. Rule 7(d) provides an additional remedy, and permits the court on motion of a defendant to strike the surplusage. The purpose of this provision is to protect the defendant against prejudicial allegations of irrelevant or immaterial facts. Prosecutors have been known to insert unnecessary allegations for "color" or "background" hoping that these will stimulate the interest of juries. The proper course is to move to strike the surplusage rather than to move to dismiss the indictment.

Id. at 424-26 (footnotes omitted). As Rush did not move to strike the surplusage of which he now complains,[9] and because no basis existed for the district court to dismiss the indictment altogether, we affirm the court's denial of Rush's motion to

[9] Rush's counsel explained at oral argument that he did not move to strike the unnecessary language because he could not identify any specific language that could be deleted while still leaving a viable indictment.

dismiss the indictment as needlessly wordy.

C

Rush also contends that Judge Mitchell should have ordered a new trial following the death of Judge Arceneaux. According to Rule 25(b) of the Federal Rules of Criminal Procedure:

> If by reason of . . . death . . . the judge before whom the defendant has been tried is unable to perform the duties to be performed by the court after a verdict or finding of guilt, any other judge regularly sitting in or assigned to the court may perform those duties; but if that judge is satisfied that a judge who did not preside at trial cannot perform those duties or that it is appropriate for any other reason, that judge may grant a new trial.

"We review a decision under Rule 25(b) for abuse of discretion." *United States v. Bourgeois*, 950 F.2d 980, 988 (5th Cir. 1992). Rush concedes that the "prevailing view seems to be" that the successor judge can perform the court's duties by reviewing the record and taking any necessary additional evidence. However, he contends that this case was too complex for Judge Mitchell to be able to perform the court's duties in this manner. Specifically, Rush contends that because a motion for acquittal "requires the new judge to weigh all of the competing evidence which he did not hear," "such an undertaking was impossible in the present case due to the overall complexity." This argument is frivolous.

Ruling on a motion for acquittal does not involve "weighing all the competing evidence." Rule 29 of the Federal Rules of Criminal Procedure provides that the district court "shall order the entry of judgment of acquittal . . . if the evidence is insufficient to sustain a conviction of such offense . . . ." In

determining whether the evidence is sufficient, the court must construe the evidence and all reasonable inferences that may be drawn from it in the light most favorable to the jury verdict, and "[i]t is the `sole province of the jury to weigh the evidence and the credibility of the witnesses.'" *United States v. Lechuga*, 888 F.2d 1472, 1476 (5th Cir. 1989) (quoting *United States v. Martin*, 790 F.2d 1215, 1219 (5th Cir.), *cert. denied*, 479 U.S. 868, 107 S. Ct. 231, 93 L. Ed. 2d 157 (1986); *accord United States v. Martinez*, 975 F.2d 159, 160 (5th Cir. 1992) ("Determining the weight and credibility of the evidence is within the sole province of the jury."), *cert. denied*, ___ U.S. ___, 113 S. Ct. 1346, 122 L. Ed. 2d 728 (1993).

Judge Mitchell denied Rush's motion for a new trial following the death of Judge Arceneaux after carefully reviewing the record, and we conclude that his decision to fulfill his functions as a successor judge without a new trial did not amount to an abuse of his discretion under Rule 25(b). *See Bourgeois*, 950 F.2d at 988 (holding that district court's decision not to order a new trial under Rule 25(b) was not abuse of discretion because court familiarized itself with case by thoroughly reviewing record).[10]

E

Rush also argues that there was insufficient evidence to convict him of mail fraud in connection with his withholding of

[10] Rush also argues that the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (1988), deprived the district court of subject matter jurisdiction over his indictment. We recently rejected the same argument in *United States v. Cavin*, 39 F.3d 1299 (5th Cir. 1994), and for the reasons stated in that case, we reject Rush's argument here.

LIGA refunds from A & R borrowers. "In reviewing a sufficiency challenge we may not reweigh the evidence or impose our preferred interpretation." *United States v. Cavin*, 39 F.3d 1299, 1305 (5th Cir. 1994). "Rather, we must view the evidence and all inferences therefrom in the light most favorable to the verdict and must affirm if a rational jury could have found that the government proved each element of the offense beyond a reasonable doubt." *Id.*

"To establish the essential elements of section 1341 mail fraud, the government must show that the defendant (1) used a scheme to defraud, (2) which involved a use of the mails, (3) and that the mails were used for the purpose of executing the scheme." *United States v. Nguyen*, 28 F.3d 477, 481 (5th Cir. 1994); *see also United States v. Ragan*, 24 F.3d 657, 659 (5th Cir. 1994) ("To establish that [the defendant] committed mail fraud in violation of 18 U.S.C. § 1341, the government was required to prove that [he] used the mails for the purpose of executing a scheme to defraud.").

The evidence at trial, viewed in the light most favorable to the verdict, depicted the following: A & R financed premiums for individuals seeking to purchase automobile insurance from Lloyds of Louisiana. A & R's financing arrangement allowed a prospective policyholder to pay 35% of the price of the insurance as a down payment, while A & R financed the balance. The borrower/policyholder would then pay the balance to A & R in three, five, seven or nine installments. The financing agreement gave A

& R a power of attorney with respect to the policy.[11]

When Lloyds of Louisiana failed in 1986, A & R,[12] exercising its power of attorney with respect to its customers' policies, attempted to obtain refunds of the customers' unused premiums from LIGA. At first, LIGA refused to pay refunds directly to A & R without the signatures of the insureds on the necessary proofs of claim. LIGA apparently changed its position some time later and mailed refunds to A & R Capital on proofs of claim submitted without the insured's signature.

Eight of these LIGA refunds formed the basis for counts 12 through 19, and each of the mailings followed a similar pattern. First, A & R would prepare a proof of claim indicating that it had financed the insured's premiums. Sometimes they would submit it to the borrower/insured for his or her signature, and sometimes Martha Hunt, the President of A & R, would sign the proof of claim herself. Then, either the borrower/insured or A & R itself submitted the proof of claim to LIGA. Days later, LIGA sent A & R Capital a refund check for the amount of the claim, which A & R Capital promptly deposited. After checking the borrower's account, Martha Hunt then prepared a refund check with the borrower's name

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[11] This power of attorney included the power to cancel the policy if the borrower/policyholder failed to pay the installments. A & R timed the installments in such a way that if a borrower defaulted, A & R could cancel the policy, obtain a refund from Lloyds, apply this refund to the balance due from the borrower, and thereby break even.

[12] A & R Capital changed its name to Emerald Financial and Mortgage, Inc. in 1986. For ease of reference, we refer to the company as A & R throughout.

and address on it for the amount due the borrower.[13]

The intended recipients of these checks never received them, however, because Hunt withheld the checks at Rush's instruction.[14] Hunt testified at trial that Rush told her not to send a refund check unless a customer called to ask for it and then only if Rush personally authorized the refund.

Rush concedes that the evidence was sufficient to prove beyond a reasonable doubt that he employed a scheme to defraud the customers of A & R. However, he contends that the evidence was insufficient to prove that the mails were used *for the purpose of executing* that scheme. "The federal mail fraud statute does not purport to reach all frauds, but only those limited instances in which the use of the mails is a part of the execution of the fraud, leaving all other cases to be dealt with by appropriate state law." *Kann v. United States*, 323 U.S. 88, 95, 65 S. Ct. 148, 151, 89 L. Ed. 88 (1944). "To be part of the execution of the fraud, however, the use of the mails need not be an essential element of the scheme. It is sufficient for the mailing to be `incident to an essential part of the scheme,' or `a step in [the] plot.'" *Schmuck v. United States*, 489 U.S. 705, 710-11, 109 S. Ct. 1443, 1447-48, 103 L. Ed. 2d 734 (1989) (citations omitted) (quoting *Pereira v.*

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[13] If the borrower had an outstanding balance, the LIGA refund was first applied to that balance, and if there were funds left over, Hunt prepared a check for that amount.

[14] The government entered into evidence a large box of refund checks made out to A & R borrowers that were never sent. Although Hunt testified that she withheld all of the checks at Rush's instruction, Rush was not charged with mail fraud in connection with these checks.

United States, 347 U.S. 1, 8, 74 S. Ct. 358, 362, 98 L. Ed. 435 (1954) and *Badders v. United States*, 240 U.S. 391, 394, 36 S. Ct. 367, 368, 60 L. Ed. 706 (1916)). Furthermore, "the Government need not prove that the accused used the mails himself or actually intended that the mails be used. The requisite statutory purpose exists if the alleged scheme's completion could be found to have been dependent in some way upon the information and documents which passed through the mails." *United States v. Pazos*, 24 F.3d 660, 665 (5th Cir. 1994).

Rush concedes that the LIGA mailings were the "sine qua non" of the alleged scheme))that without them the scheme would not have succeeded. He argues, however, that "there was no testimony that [the LIGA] mailings were in any way part of the scheme to defraud." According to Rush, the act that the Government proved was fraudulent (his instructions to Hunt not to send out a refund check unless the borrower so requested) occurred only after Rush received the checks. In other words, because the scheme to defraud did not exist until after the mailing, the mailing was not "for the purpose of executing the fraud."

Rush's argument is legally flawed. In *Schmuck*, the Supreme Court upheld a defendant's mail fraud conviction because the mailing was incident to an essential part of his fraudulent scheme. In that case, the defendant's fraud consisted of rolling back the odometers of used cars and then selling the cars at artificially inflated prices to retail dealers. *Id.* at 707, 109 S. Ct. at 1446. The mailing occurred when the retail dealers sold the cars and

submitted a title application through the mail on behalf of the retail customer. *Id.* The Supreme Court reasoned that "although the registration-form mailings may not have contributed directly to the duping of either the retail dealers or the customers, they were necessary to the passage of title, which in turn was essential to the perpetuation of Schmuck's scheme." *Id.* at 712, 109 S. Ct. at 1448. Thus, under *Schmuck*, a mailing satisfies the "for the purpose of executing the fraud" requirement of § 1341 if it is essential to the success of the scheme to defraud, something Rush basically concedes when he admits that the LIGA mailings were the *sine qua non* of his fraudulent scheme.

Of course, this case differs from *Schmuck* in one sense because the timing of the mailings is reversed. In *Schmuck*, the mailing came after the fraudulent act but was held to be part of the fraudulent scheme. In this case, Rush received the LIGA mailings before the fraudulent act of withholding the checks from their intended recipients, and we must determine whether the mailings were nevertheless part of his fraudulent scheme. However, the cases share what the Supreme Court identified as the key factor in its analysis in *Schmuck*))the existence of an ongoing scheme to defraud:

> Thus, Schmuck's was not a `one-shot' operation in which he sold a single car to an isolated dealer. His was an ongoing fraudulent venture. A rational jury could have concluded that the success of Schmuck's venture depended upon his continued harmonious relations with, and good relations among, retail dealers, which in turn required the smooth flow of cars from the dealers to their Wisconsin customers.
>
> Under these circumstances, we believe that a rational jury could have found that the title-

> registration mailings were part of the execution of the fraudulent scheme, a scheme which did not reach fruition until the retail dealers resold the cars and effected transfers of title. Schmuck's scheme would have come to an abrupt halt if the dealers had lost faith in Schmuck or had not been able to resell the cars obtained from him.

Id. at 711-12, 109 S. Ct. at 1448. Similarly here, the evidence depicted an ongoing scheme to defraud A & R borrowers by withholding their refunds as they came in from LIGA.

Furthermore, Rush's argument that the LIGA mailings and the fraudulent scheme were entirely separate depends in part on his incomplete depiction of the evidence in this case. According to Rush, A & R requested the refunds from LIGA in 1986, and LIGA refused. Then, "[t]here was a change of position two years later in 1988 and LIGA at that time unilaterally sent the refunds to A & R Capital/Emerald." Based on this view of the evidence, Rush suggests that because the LIGA mailings simply arrived unilaterally, they could not have been part of a preconceived fraudulent scheme. However, the evidence, viewed in the light most favorable to the jury's verdict, depicts an entirely different scenario.

Specifically, Government Exhibits 12 through 19 demonstrate that A & R received each LIGA refund check that formed the basis of counts 12 through 19 in direct response to a proof of claim that it prepared and submitted to LIGA or prepared for a borrower to submit to LIGA. In all eight instances, LIGA mailed A & R the check days after the proof of claim was submitted. Thus, there was nothing unilateral about the LIGA refunds that formed the basis for counts

12 through 19. Furthermore, Hunt testified that Rush instructed her to withhold the refunds several times, in 1988 and later, and the LIGA refunds at issue in this case are dated between August of 1988 and December of 1990.

Viewing the evidence in the light most favorable to the jury's verdict, we conclude that a rational jury could find that each of the checks was part of an ongoing scheme to withhold funds to which borrowers were entitled from LIGA. Following the Court's reasoning in *Schmuck*, we further hold that a rational jury could have found that the LIGA mailings were part of the execution of Rush's scheme because Rush's continuing scheme to fraudulently withhold the LIGA refunds depended on his receipt of the checks through the mails. *See id.* at 711-12, 109 S. Ct. at 1448; *see also United States v. McClelland*, 868 F.2d 704, 707-08 (5th Cir. 1989); *Pazos*, 24 F.3d at 665; *United States v. Duncan*, 919 F.2d 981, 990-92 (5th Cir. 1990).[15]

F

Rush also argues that the district court's determination of his sentence depended on an erroneous calculation of the amount of

[15] Rush has cited to no factually similar cases supporting his sufficiency argument, and we have found only one arguably analogous case supporting reversal. In *United States v. Vontsteen*, 872 F.2d 626 (5th Cir. 1989), we reversed a mail fraud conviction because the evidence was insufficient to prove that the mailings were "for the purpose of" executing the scheme. In *Vontsteen*, the defendants were charged with fraudulently buying pipe on credit during a down period in the market, short-selling it, and then refusing to pay the suppliers. *Id.* at 628. The alleged mailings were invoices the defendants received through the mail from suppliers of the pipe, *id.*, and we held that the invoices did not further the scheme to defraud and consequently could not support convictions under § 1341, *id.* at 629. We distinguished *Schmuck* on the grounds that while the scheme involved multiple fraudulent acts and mailings, perpetration of the scheme did not *depend* on the mailings. *Id.* In this case, however, the success of Rush's scheme absolutely depended on his receipt of the LIGA checks.

loss caused by his actions. "Because the calculation of amount of loss is a factual finding, we review that determination for clear error. As long as a factual finding is plausible in light of the record as a whole, it is not clearly erroneous." *United States v. Wimbish*, 980 F.2d 312, 313 (5th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S. Ct. 2365, 124 L. Ed. 2d 272, *abrogated on other grounds by Stinson v. United States*, ___ U.S. ___, 113 S. Ct. 1913, 123 L. Ed. 2d 598 (1993). Section 2F1.1(b)(1) of the Sentencing Guidelines provides for incremental offense level increases depending on the amount of loss. United States Sentencing Commission, *Guidelines Manual*, § 2F1.1(b)(1) (Nov. 1991). The commentary to § 2F1.1 states that "the loss need not be determined with precision. The court need only make a reasonable estimate of the loss, given the available information." U.S.S.G. § 2F1.1, comment. (n.8).

The district court increased Rush's offense level by fourteen levels under § 2F1.1(b)(1)(O) after finding that Rush's fraud resulted in a loss of between $5 and $10 million. The Presentence Investigation Report ("PSR") suggested a fifteen-level increase for a loss of between $10 and $20 million. This recommendation was based on the finding that the losses caused by the failure of Presidential, as calculated by LIGA and Presidential's liquidator at the time of the PSR's preparation, were $11,105,018.00. The PSR noted that additional losses were expected as the liquidation process continued. Rush objected to these findings on the grounds that Presidential's failure was caused not by Rush's fraudulent

scheme, but rather by the failure of Presidential's reinsurer in 1986. In fact, Rush contended, his alleged fraud allowed him to continue operating Presidential and thereby reduce the losses that would otherwise have resulted had he allowed Presidential to fail in 1989.

The district court, after considering numerous exhibits and the testimony of twelve witnesses at a lengthy sentencing hearing, found that the losses caused by the failure of Presidential's reinsurer amounted to approximately $8 million. He therefore subtracted this amount from the $12 million total loss caused by Presidential's failure. However, he added $4 million to that amount to reflect losses incurred by insureds outside of Louisiana whose policies are not guaranteed by LIGA. Finally, the court added $60,000 for the refund checks that Rush withheld from A & R borrowers. After noting that "some more losses could probably be calculated" based on additional items in the record, the court found that the total amount of loss fell between $5 and $10 million.

After reviewing the sentencing record, we conclude that the district court's findings in connection with its calculation of loss under § 2F1.1 are "plausible in light of the record as a whole," *Wimbish*, 980 F.2d at 313, and its estimate of between $5 and $10 million was "a reasonable estimate of the loss, given the available information." U.S.S.G. § 2F1.1, comment. (n.8); *cf. United States v. Robichaux*, 995 F.2d 565, 571 (5th Cir.), *cert.*

denied, ___ U.S. ___, 114 S. Ct. 322, 126 L. Ed. 2d 268 (1993).[16]

III

A

The Government cross-appeals from the district court's sentencing determinations for Rush and McDermot, arguing that the district court erred in failing to increase their offense levels under U.S.S.G. § 2F1.1(b)(6). "We will uphold a sentence imposed under the guidelines unless it is imposed in violation of law, is the result of an incorrect application of the guidelines, or is an unreasonable departure from the applicable guideline range." *United States v. Guadardo*, 40 F.3d 102, 103 (5th Cir. 1994). Section 2F1.1(b)(6)(A) provides: "If the offense substantially jeopardized the safety and soundness of a financial institution . . . increase by 4 levels. If the resulting offense level is less than level 24, increase to level 24." The commentary to § 2F1.1(b)(6) provides:

> An offense shall be deemed to have "substantially jeopardized the safety and soundness of a financial institution" if, as a consequence of the offense, the institution became insolvent; substantially reduced benefits to pensioners or insureds; was unable on demand to refund fully any deposit, payment or investment; was so depleted of its assets as to be forced to merge with

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[16] In *Robichaux*, we upheld the district court's enhancement of Robichaux's sentence under § 2F1.1 based on its estimate of the loss resulting from the failure of Presidential as between $5 and $10 million. *Id.* at 571. (Robichaux was separately indicted for his role in Rush's scheme to defraud the Louisiana Department of Insurance.) We held that the district court's estimate, which is the same figure reached by the district court in this case, was reasonable and not clearly erroneous. *Id.* We note that although *Robichaux* supports our holding in this case, it does not, *ipso facto*, dictate our conclusion because the records in the two cases are different, and under the clearly erroneous standard, we review the entire record, *see Anderson v. City of Bessemer City*, 470 U.S. 564, 573-74, 105 S. Ct. 1504, 1511, 84 L. Ed. 2d 518 (1985).

> another institution in order to continue active operations; or was placed in substantial jeopardy of any of the above.

U.S.S.G. § 2F1.1(b)(6) comment. (n.15). The district court rejected an enhancement under § 2F1.1(b)(6) because it found that Presidential "had already become insolvent by the failure of the reinsurer" and therefore the language in application note 15, "if, as a consequence of the offense, the institution becomes insolvent," did not apply. The Government does not argue that this finding was clearly erroneous, but rather that the district court applied the wrong legal standard when it ignored the other factors listed in application note 15.[17]

We agree. Application note 15 lists four types of dangers to the safety of a financial institution, only one of which is insolvency. *Cf. United States v. Bullard*, 13 F.3d 154, 158 n.10 (5th Cir. 1994) (noting that application note 10 to § 2B1.1(b)(7)(A), which is worded identically to note 15 to § 2F1.1(b)(6), "does not limit the meaning of the terms `substantially jeopardized the safety and soundness of a financial institution' to the situation where the institution becomes insolvent as a consequence of the defendant's conduct"). As we are unable to discern from the sentencing hearing transcript whether the district court considered and rejected the other three factors, we remand to the district court for specific findings on the

[17] In particular, the government contends that "[t]he fraudulent manipulations with the non-existent unencumbered securities allowed Presidential to continue to accept premium payments from parties who were unaware that Presidential was unable to refund on demand any such payments or to fulfill its obligation to pay claims under the policies issued."

remaining bases for enhancement under § 2F1.1(b)(6). *Cf. United States v. Humphrey*, 7 F.3d 1186, 1190-91 (5th Cir. 1993) (remanding to district court where it was unclear whether sentencing determination reflected implicit finding or disregard of guideline factor).

B

The Government also appeals from Kochensparger's sentence. Kochensparger pled guilty to one count of conspiracy to commit mail and wire fraud. The charges against Kochensparger stemmed from his false representations that his securities firm held assignments of GNMA's purportedly owned by Presidential.

The Government contests the following findings by the district court:

> I don't think Mr. Kochensparger is anywhere near as culpable as the other two [McDermot and Rush]. There's no way I think you should be held accountable for the amount of loss. I realize the Probation Officer wrote it up the way he felt like he had to and I understand that he did that and why he did that and I'm not faulting him for it, but I just don't think that this kind of loss was reasonably foreseeable to Mr. Kochensparger and I think the guidelines and the case law dealing with conspiracy will support this finding. Mr. Kochensparger is undoubtedly guilty of fraud, nothing more, nothing less.
>
> Based on his Criminal History Category 1, his level offense should be "6" and the guideline range should be 0 to 6 months.
>
> I've decided against giving him a two-level reduction for minor participation only because I'm giving him such a big break on the loss, anyway, and the Sentencing Guidelines are the same whether it is Level 4 or 6. In the alternative, even if he can technically be found to be held accountable for the loss, the Court feels that there are mitigating circumstances with this Defendant not taken into consideration . . . by the Sentencing Commission for the guidelines; namely, overall in involvement and lack of profit.

Record on Appeal, vol. 10, at 9-10. The Government contends that

the district court's finding "arbitrarily disregard[ed] an appropriate calculation of loss," and suggests that the court's conclusions find no basis in the guidelines.

We do not address the merits of the district court's first alternative determination regarding the amount of loss attributable to Kochensparger; instead, we affirm Kochensparger's sentence because the Government does not challenge the district court's second alternative finding that the circumstances of Kochensparger's crime warranted a downward departure from the guideline range. By statute, the court may depart downward from a guideline range if it finds that "there exists [a] . . . mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines and that should result in a sentence different from that described." 18 U.S.C. § 3553(b) (1988); *see* U.S.S.G. § 5K2.0, p.s. (noting the district court's authority to depart from the guidelines under § 3553(b)). The district court determined that such circumstances existed in this case, namely Kochensparger's minimal involvement and his lack of profit.[18]

The Government's sole argument is that the district court's calculation of the amount of loss attributed to Kochensparger was

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[18] We note that according to the Supreme Court's interpretation of Rule 32 of the Federal Rules of Criminal Procedure, the district court was required to provide notice to the government before *sua sponte* departing downward from the applicable guideline range. *See Burns v. United States*, 501 U.S. 129, 131 & 135 n.4, 111 S. Ct. 2182, 2183 & 2185 n. 4, 115 L. Ed. 2d 123 (1991); *accord United States v. Andruska*, 964 F.2d 640, 643-44 (7th Cir. 1992). The government did not object on those grounds, however, and it does not raise the issue on appeal.

We also do not address whether the district court's "in the alternative" sentencing determinations are permissible under the guidelines because the government has not raised the issue on appeal.

clearly erroneous, a finding not relevant to the court's alternative determination that mitigating circumstances warranted a downward departure. Although the Government does indirectly suggest that the mitigating circumstances on which the district court relied were improper, its argument depends on a mischaracterization of the sentencing record. In its quotation of the district court's reasons for departing from the guideline range, the Government conveniently deletes the "namely, overall in involvement and lack of profit" language from the court's statement. The Government then suggests that the mitigating circumstances the district court had in mind were letters written by Kochensparger's children.[19] This argument is beside the point, however, because the district court actually relied on Kochensparger's minimal involvement and lack of profit. Furthermore, because the Government does not challenge the district court's reliance on those grounds, we do not decide whether minimal involvement and lack of profit are permissible grounds for a downward departure .

[19] Had the district court relied on Kochensparger's family ties and responsibilities, its departure might indeed have been improper. *See* U.S.S.G. § 5H1.6, p.s. ("Family ties and responsibilities . . . are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range."); *see also United States v. Fierro*, 38 F.3d 761, 775 (5th Cir. 1994) (holding that family ties and responsibilities are "improper grounds for departure" (citing U.S.S.G. § 5H1.6)), *cert. denied*, 63 U.S.L.W. 3690 (U.S. Mar. 20, 1995).

III

For the foregoing reasons, Rush's conviction is AFFIRMED, Rush's sentence is VACATED and REMANDED for further proceedings consistent with this opinion, Kochensparger's sentence is AFFIRMED, and McDermot's appeal is DISMISSED.