UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 94-60565
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

DONALD BREWER and STEVE POIRRIER,

Defendants-Appellants.

Appeals from the United States District Court
For the Southern District of Mississippi
(1:94 CR 5 02BRR)

(June 30, 1995)

Before KING, JOLLY and DeMOSS, Circuit Judges.

PER CURIAM:[*]

BACKGROUND

A jury found Donnie Brewer and Steve Poirrier guilty of conspiracy to possess with intent to distribute marijuana and/or cocaine. Brewer was sentenced to serve 151 months in prison and five years on supervised release. Poirrier was sentenced to serve

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[*] Local Rule 47.5 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

121 months in prison and five years on supervised release.

Brewer argues that the evidence was insufficient, that an evidentiary ruling was erroneous and that his motions for severance and new trial were erroneously denied. Poirrier argues that three evidentiary rulings were erroneous, that his counsel was ineffective, that the evidence was insufficient, that allowing the jury to read a transcript of an audiotape recording was improper and that the court should have downwardly departed from the sentencing guidelines at sentencing. We discuss these arguments under the following headings.

Sufficiency of the Evidence

Both appellants argue that the evidence was insufficient. Each defendant moved for a judgment of acquittal at the conclusion of the government's case and again after the close of all of the evidence. The court denied all of the motions.

When the sufficiency of the evidence is challenged, this court reviews the evidence in the light most favorable to the government, making all reasonable inferences and credibility choices in favor of the verdict. Glasser v. United States, 315 U.S. 60, 80 (1942). The conviction must be affirmed if any rational trier of fact could have found that the evidence established guilt beyond a reasonable doubt. United States v. Smith, 930 F.2d 1081, 1085 (5th Cir. 1991).

The jury is in a unique position to determine the credibility of the various witnesses. United States v. Layne, 43 F.3d 127, 130 (5th Cir.), cert. denied, 115 S. Ct. 1722 (1995). This court

defers to the jury's resolutions of conflicts in the evidence. Id.

To prove a drug conspiracy, the government must show the existence of an agreement between two or more persons to violate the narcotics laws, that each defendant knew of the conspiracy and intended to join it and that each defendant participated in it. United States v. Morris, 46 F.3d 410, 414-15 (5th Cir. 1995). The conspiracy may be established by circumstantial evidence. Discrete circumstances that, standing alone, would be inconclusive may prove a conspiracy when taken together and corroborated by moral coincidences. United States v. Rodriguez-Mireles, 896 F.2d 890, 892 (5th Cir. 1990). Circumstantial evidence may prove guilt beyond a reasonable doubt without excluding every reasonable hypothesis of innocence. United States v. Bell, 678 F.2d 547, 549 (5th Cir. 1982) (en banc), aff'd, 462 U.S. 356 (1983).

Specifically, Brewer argues that, though the evidence showed that he and Tim Grant had engaged in drug-related activities, the evidence did not show that Brewer was connected with Grant's drug trafficking organization or that Brewer even knew of the existence of Grant's organization. Brewer further argues that Grant was not a credible witness because he was a "ring leader" of the Longoria drug organization and a convicted felon. Brewer emphasizes, "The only testimony that in any way indicated a peripheral involvement with others who confessed to involvement with the conspiracy came from convicted felons who were also admitted drug users." Credibility, however, is for the jury to decide. Layne, 43 F.3d at 130.

Poirrier argues that no evidence showed a conspiracy or agreement between himself and Brewer or that they even knew each other. Nevertheless, "[t]he members of a conspiracy which functions through a division of labor need not have an awareness of the existence of the other members, or be privy to the details of each aspect of the conspiracy." Morris, 46 F.3d at 416.

The following testimony was given:

Grant's testimony. Tim Grant testified that he is in state prison in Mississippi for selling cocaine. He pleaded guilty to a federal marijuana conspiracy, which also included cocaine. He testified that he sold marijuana and cocaine with Brewer for about fifteen years, including the time specified in Brewer's indictment. The source of the marijuana was Juan Daniel Cortez, with whom Brewer made the contact. Royale Longoria, a/k/a Arturo Longoria, a/k/a Roy Sanchez, was the ultimate source of the marijuana. David Easterling, who lived in New Orleans, was the source of the cocaine. Grant also sold cocaine and with Poirrier.

Grant told the jury that different people in his organization performed different functions, such as transporting the drugs and selling the drugs. He had three drivers, one of whom was Jimmy Pucheu. Brewer, Poirrier and others were the sellers.

Grant also testified that he bought and sold marijuana for Brewer and Brewer bought and sold it for him. Brewer dealt mostly with "country people, you know, like river rats, people like that," Grant stated. Poirrier dealt more with an "upper-class crowd;" "[m]oney people."

At one point in the conspiracy, law enforcement officers seized from Brewer's house thirty-two pounds of marijuana and an ounce of cocaine that were part of the conspiracy. Grant estimated that, over the life of the conspiracy, Brewer sold more than two kilograms of cocaine and 200 to 300 pounds of marijuana. Poirrier sold more than one kilogram of cocaine and fifty or more pounds of marijuana.

Pucheu's testimony. Jimmy Pucheu testified that, on a couple of occasions, he accompanied Grant to Brewer's home to deliver money and marijuana. Grant owed the money to Brewer. Pucheu also accompanied Grant to deliver cocaine to Poirrier.

Bourgeois's testimony. Robert Bourgeois testified that he made deliveries of marijuana for Grant. On about six occasions, Bourgeois delivered marijuana for Grant to Poirrier for resale.

Poirrier's testimony. Poirrier testified that he knew Grant but that he did not know Brewer or Pucheu. He denied involvement with drug trafficking by Longoria, Grant and Brewer. Brewer did not testify.

The evidence showed that both Brewer and Poirrier were involved in drug trafficking with Grant and others. The evidence does not show that Brewer and Poirrier knew each other. They did not have to know each other for them both to have been engaged in the same conspiracy. Accordingly, the evidence of conspiracy was sufficient.

Admission of Evidence

As discussed below, the appellants challenge the admission of several items of evidence. Evidentiary rulings are reviewed for abuse of discretion. If abuse is found, the error is subjected to harmless error analysis, which looks to whether a party's substantial rights were affected by the erroneous ruling. United States v. Jimenez Lopez, 873 F.2d 769, 771 (5th Cir. 1989). The analysis includes inquiry into whether a curative instruction was given and whether the properly admitted evidence is overwhelming. United States v. Pace, 10 F.3d 1106, 1116 (5th Cir. 1993), cert. denied, 114 S. Ct. 2180 (1994). In direct criminal appeals, review of evidentiary rulings is "necessarily heightened." United States v. Hays, 872 F.2d 582, 587 (5th Cir. 1989).

Identifications of Poirrier

Poirrier argues that the following testimonies identifying him were erroneously admitted: (i) Arturo Longoria testified that he heard Grant say that Poirrier was part of the trafficking organization. The court overruled Poirrier's objection and allowed a standing objection. (ii) Fernanda Estrada, a driver for Grant, testified that he knew of a person with a strange name like "Porter" or "Porer . . ." The government immediately asked Estrada the context in which he heard the Poirrier name. Poirrier objected, and the court sustained the objection and struck the prosecutor's use of the name Poirrier. The court instructed the prosecutor not to suggest a name to the witness. Poirrier moved for a mistrial, which was denied. (iii) Pucheu did not mention

Poirrier as a member of the organization, so the government asked him about Norwood Office Supply, where Poirrier worked. Poirrier objected, and the court allowed the question. Pucheu was then able to recall Poirrier's name, though he could not identify Poirrier in the courtroom. (iv) Over Poirrier's objection, Easterling testified that Grant said that both Brewer and Poirrier were involved in the drug trafficking organization.

Poirrier argues that the foregoing violate the rule for admission of statements of coconspirators. "[A] statement made by a coconspirator of a party during the course and in furtherance of the conspiracy" is not hearsay. Fed. R. Evid. 801(d)(2)(E). When determining the applicability of that rule, the district court must first decide that there is evidence of a conspiracy involving the out-of-court declarant and the defendant and that the statement was made in the course of and in furtherance of the conspiracy. United States v. Ascarrunz, 838 F.2d 759, 762 (5th Cir. 1988). The government need only prove these facts by a preponderance of the evidence. Ascarrunz, 838 F.2d at 762. "The uncorroborated testimony of an accomplice or co-conspirator will support a conviction, provided that this testimony is not incredible or otherwise insubstantial on its face." United States v. Singer, 970 F.2d 1414, 1418 (5th Cir. 1992).

Poirrier argues that any mention of his name by Grant as described by other witnesses was not made in furtherance of a conspiracy. The "in furtherance" requirement is not applied strictly. A statement made by one conspirator to a fellow

conspirator identifying yet another conspirator is admissible as having been made "in furtherance" of the conspiracy. United States v. Lindell, 881 F.2d 1313, 1320 (5th Cir. 1989), cert. denied, 493 U.S. 1087, 496 U.S. 926 (1990).

Grant's testimony showed the existence of a conspiracy. The district court did not err in admitting the challenged testimonies.

Charts

Poirrier argues that the district court erred in admitting three charts used during Grant's and Mississippi narcotics agent Roy Sandefer's testimonies. While Grant was naming the people who were part of his organization, the prosecutor asked if an organizational chart would be helpful. Defense counsel objected, stating that the government had prepared the chart based on its information and not on Grant's testimony. The court asked the government what Grant had to do with the preparation of the chart, and the prosecutor answered that Grant had supplied the information reflected on the chart. As Brewer and Poirrier were the only defendants and Grant had already identified them as co-conspirators, the court allowed the use of the chart.

When Sandefer was testifying about telephone calls to and from Grant's cellular telephone, the prosecutor asked the witness if a chart had been made to reflect telephone conversations or the relationship between telephone numbers. Sandefer said yes and that an intelligence analyst had prepared the charts at his request. Poirrier made an objection, which the court overruled.

Poirrier asserts with little argument that the charts were improperly admitted in violation of Fed. R. Evid. 1006, which provides that summaries of voluminous writings may be admitted only under certain circumstances. A summary of purely testimonial evidence, however, does not come within Rule 1006 and may be presented in the form of a chart as an aid for the jury. United States v. Winn, 948 F.2d 145, 158 & n.32 (5th Cir. 1991), cert. denied, 503 U.S. 976 (1992). Generally, the court should instruct the jury that the chart is not itself evidence.

In the instant case, the charts depict the testimony. Poirrier did not request an instruction on the use of the charts, the court did not give one and Poirrier does not argue on appeal that the court should have given one. Accordingly, Poirrier has shown no merit to the argument that the charts illustrating Grant's and Sandefer's testimonies should not have been admitted.

Other Crimes Evidence

Brewer and Poirrier both argue that the court improperly admitted evidence of prior crimes and bad acts. Evidence of other crimes is not admissible to prove character but is admissible to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . . ." Fed. R. Evid. 404(b). Admissibility requires a determination that such evidence is relevant to an issue other than the defendant's character and that the evidence bears a probative value that is not substantially outweighed by undue prejudice. United States v. Elwood, 993 F.2d 1146, 1153 (5th Cir. 1993).

Specifically, Brewer argues that the following admission was improper: the government elicited from state narcotics agent David Davenport evidence that, in 1988, which was more than five years prior to trial, law enforcement officers had found drugs at Brewer's residence. Brewer argues that the statute of limitations on his possession had run by the time of trial, meaning that evidence of the drugs found at that time could not be used in the instant trial. He also argues that the government made no showing that the 1988 possession was related to the offense that he was convicted of committing. He further argues that there was no evidence that he actually committed any crime previously.

The conspiracy, as charged, existed from 1985 to 1992. The seizure of drugs from Brewer's residence during that time is not evidence of "other crimes." It is evidence of the crime with which Brewer was charged. Furthermore, Grant also testified about the seizure.

Poirrier argues that several admissions were improper. The prosecutor asked Poirrier and other witnesses about Poirrier's arrest in 1982 for possession of methaqualone. When Poirrier testified, he denied use of drugs after the age of eighteen or nineteen. Poirrier was born in 1960. The prosecutor asked Poirrier if he had been arrested in 1982 for possession of methaqualone tablets. Before and after his counsel's objection, Poirrier responded that he had been so arrested. The prosecutor asked other witnesses about Poirrier's arrest for possession of methaqualone as impeachment.

The prosecutor may ask the defendant about "other acts" for the purpose of impeaching the defendant. United States v. Tomblin, 46 F.3d 1369, 1388 (5th Cir. 1995). Poirrier testified that he had not used drugs for several years and the prosecutor asked questions to impeach Poirrier's truthfulness. Poirrier has identified no error.

When the prosecutor asked Grant what Poirrier did with his money, Grant responded that Poirrier snorted cocaine. The prosecutor asked Grant if he knew what Poirrier did with his proceeds from drug sales. Grant responded, "Steve has a habit for snorting that cocaine, he likes that powder, so I imagine a lot of his went up his nose." Counsel objected to what Grant imagined, and the court sustained the objection. Grant then stated, "I am not imagining it. I know. I was with him when he was snorting. Because I was snorting just as much as he was." The court instructed Grant to merely answer the question. There was no further objection.

Counsel did not object to the substance of Grant's response to the question, which was that Poirrier spent the proceeds from his illegal activities by using drugs himself. Thus, whether the court erred in admitting Grant's testimony is reviewed for plain error.

Under Fed. R. Crim. P. 52(b), this court may correct forfeited errors only when the appellant shows the following factors: (1) there is an error, (2) that is clear or obvious and (3) that affects his substantial rights. United States v. Calverley, 37 F.3d 160, 162-64 (5th Cir. 1994) (en banc) (citing United States v.

Olano, 113 S. Ct. 1770, 1776-79 (1993), cert. denied, 115 S. Ct. 1266 (1995)). If these factors are established, the decision to correct the forfeited error is within the sound discretion of the court, and the court will not exercise that discretion unless the error seriously affects the fairness, integrity or public reputation of judicial proceedings. Olano, 113 S. Ct. at 1778.

Parties are required to challenge errors in the district court. When a defendant in a criminal case has forfeited an error by failing to object, this court may remedy the error only in the most exceptional case. Calverley, 37 F.3d at 162. The Supreme Court has directed the courts of appeals to determine whether a case is exceptional by using a two-part analysis. Olano, 113 S. Ct. at 1777-79.

First, an appellant who raises an issue for the first time on appeal has the burden to show that there is actually an error, that it is plain and that it affects substantial rights. Olano, 113 S. Ct. at 1777-78; United States v. Rodriguez, 15 F.3d 408, 414-15 (5th Cir. 1994); Fed. R. Crim. P. 52(b). Plain error is one that is "clear or obvious, and, at a minimum, contemplates an error which was clear under current law at the time of trial." Calverley, 37 F.3d at 162-63 (internal quotation and citation omitted). "[I]n most cases, the affecting of substantial rights requires that the error be prejudicial; it must affect the outcome of the proceeding." Id. at 164. This court lacks the authority to relieve an appellant of this burden. Olano, 113 S. Ct. at 1781.

Second, the Supreme Court has directed that, even when the appellant carries his burden, "Rule 52(b) is permissive, not mandatory. If the forfeited error is `plain' and `affect[s] substantial rights,' the Court of Appeals has authority to order correction, but is not required to do so." Olano, 113 S. Ct. at 1778 (quoting Fed. R. Crim. P. 52(b)). As the Court stated in Olano:

> the standard that should guide the exercise of [this] remedial discretion under Rule 52(b) was articulated in United States v. Atkinson, 297 U.S. 157, 56 S. Ct. 391, 80 L. Ed. 555 (1936). The Court of Appeals should correct a plain forfeited error affecting substantial rights if the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings."

Olano, 113 S. Ct. at 1779 (quoting Atkinson, 297 U.S. at 160). Thus, this court's discretion to correct an error pursuant to Rule 52(b) is narrow. Rodriguez, 15 F.3d at 416-17.

Poirrier does not address, and has not shown how Grant's response meets, the plain error standard. Other witnesses testified about Poirrier's drug use. Poirrier has not explained how Grant's account of Poirrier's drug use prejudiced him.

The prosecutor asked Poirrier's former girlfriend if she was aware of his drug use. She told about his excessive drinking of alcohol, stealing clothing from her, beating her and convincing her to lie for him in a state prosecution. The former girlfriend testified to this without objection.

Defense counsel, however, also asked the former girlfriend about Poirrier's abuse of alcohol, domestic violence, and having

her lie for him in court. Poirrier has not shown plain error, especially in light of his own counsel asking similar questions.

The prosecutor asked other witnesses about Poirrier's drug use. As Poirrier denied use of drugs, the questions went to his veracity. Poirrier has not shown how admission of the witnesses' account of his drug use is plain error.

Use of Transcript

Poirrier argues that the court improperly allowed the jury to see the transcript of an audiotape that was played in court. During the testimony of agent Sandefer, the prosecution offered a tape recording of a dialogue purporting to be a telephone conversation to Brewer initiated by informant Paul Ray Allen. The jurors had the transcript in their hands only for as long as they listened to the tape. They did not have it for deliberations.

Brewer's counsel objected to both the playing of the tape and the publishing of the transcript to the jury. The court overruled the objection. Brewer's counsel objected to the jury's use of the transcript on the grounds that it would distract the jurors from listening to the tape recording and that counsel could not determine the accuracy of the transcript because he had not yet heard the tape. Poirrier's counsel did not object to either the playing of the tape or the publishing of the transcript.

"Whether the jury should have the use of transcripts is a matter left to the sound discretion of the trial judge." United States v. Rena, 981 F.2d 765, 767 (5th Cir. 1993). This court has held that allowing the jury to use a transcript as an aid in

following a tape recording was proper where the court instructed the jury that the transcript was just an aid and that any discrepancy between the transcript and the recording should be resolved in favor of the recording. United States v. Chase, 838 F.2d 743, 748 (5th Cir.), cert. denied, 486 U.S. 1035 (1988).

Poirrier did not object to the use of the transcript. It does not refer to him. The taped conversation deals with Brewer's activities, not Poirrier's.

Poirrier does not tell this court how the use of the transcript had anything to do with him. Neither Poirrier nor Brewer alleged in the district court, or in this court, that the transcript was not an accurate report of the contents of the audio tape.

In sum, the transcript does not refer to the appellant who complains about its use. This appellant has shown neither error nor harm accruing to him.

Ineffective Assistance of Counsel

Poirrier argues that the attorney who represented him at trial, who was different from the attorney who represented him at sentencing, was ineffective. This court generally does not address on direct appeal a claim of ineffective assistance of counsel unless the appellant presented the claim to the district court. United States v. Fry, 51 F.3d 543, 545 (5th Cir. 1995). When the allegations of ineffectiveness are based on matters outside the record, appellate review is disfavored until a record is made on motion for post-conviction relief. United States v. Navejar, 963

F.2d 732, 735 (5th Cir. 1992). If counsel's effectiveness were to be considered, Poirrier would have the burden to show that counsel's performance fell below an objective standard of reasonable competence and that he was prejudiced by his counsel's deficient performance. Lockhart v. Fretwell, 113 S. Ct. 838, 842 (1993); Strickland v. Washington, 466 U.S. 668, 689 (1984).

At sentencing, Poirrier's counsel told the court that he believed that Poirrier was not effectively represented at trial. Sentencing counsel alleged the following: Poirrier was not told that he could plead guilty on the day of trial. He was told just the opposite, that he could not plead guilty, even though trial counsel knew that he could. Poirrier wanted to plead guilty all along, but trial counsel advised against it. Poirrier admits to being part of a smaller conspiracy but not part of the larger conspiracy of which he was convicted. Trial counsel accordingly told Poirrier that he could not plead guilty. Poirrier's sentencing counsel said, "There is no way, based upon the evidence and the evaluation of the case, that it was in the best interest of Mr. Poirrier to fight this. But that's what happened." The attorney also said that if Poirrier had accepted a plea offer by the government, he would have been sentenced to less prison time than that which the probation officer recommended in accordance with the Guidelines.

On the basis of trial counsel's ineffectiveness, sentencing counsel asked the court to downwardly depart from the Guidelines sentence. The judge then met in chambers with Poirrier's

sentencing counsel, the Assistant United States Attorney and the probation officer. The court found that defense counsel "did a very competent job" in representing Poirrier at trial. The court added:

> But the issue is, what can a sentencing judge do under the circumstances here. The answer is, my hands are absolutely tied. I cannot -- the law does not allow me to depart downwardly under the circumstances.

The court added that, in most situations, the Guidelines are appropriate but that they are not appropriate in this case. The ten-year mandatory minimum sentence, the court stated, was too severe in this case. The court stated that, if it could, it would reduce the sentence. Poirrier's sentence is 121 months.

In the instant case, Poirrier's sentencing counsel did present to the district court his claim that trial counsel was ineffective. Sentencing counsel made the following allegations in support of the claim: people in the courtroom could testify that Poirrier wanted to plead guilty and that trial counsel received compensation from Brewer. He additionally alleged that everything that he said about trial counsel could be proven and that the government would not disagree.

Though sentencing counsel made the claim, the only allegations that he made in support of that claim were about matters outside of the record. He put on no evidence in support of his claim and asked for no opportunity to do so. In arguing in his brief that trial counsel had a conflict of interest, Poirrier concedes that nothing in the record shows that conflict. As the record made in the district court does not address the details of an

ineffectiveness claim, this court will decline to rule on it, delaying the matter until such time as Poirrier might bring a motion for post-conviction relief.

Furthermore, his making the ineffectiveness claim at sentencing raises the question whether he presented any cognizable claim at all. Poirrier made the claim by way of asking for a downward departure. The remedy for the deprivation of the constitutional right to counsel is the setting aside of the conviction. 28 U.S.C. § 2255. Poirrier has cited no authority for allowing a conviction obtained when counsel was constitutionally ineffective to stand, with the court merely shortening the sentence.

Poirrier also asked for a downward departure because he would have gotten a better deal if he had pleaded guilty rather than proceeding to trial. Poirrier provided no evidence of an offer that the government made that could have resulted in a shorter sentence. Additionally, Poirrier has not explained how his plea of guilty to one part of the conspiracy would have resulted in a sentence that did not encompass the entire conspiracy.

On appeal, Poirrier mentions that trial counsel was ineffective for not objecting to prejudicial testimony. Poirrier did not make this claim in the district court. He may not make it for the first time on appeal. United States v. Garcia-Pillado, 898 F.2d 36, 39 (5th Cir. 1990).

In sum, Poirrier's argument raises far more questions than it answers. It illustrates the soundness of this Court's policy of

not considering an ineffectiveness claim that has not been fully developed on the record in the district court.

No Downward Departure

Poirrier argues that the district court erred in stating that it would have departed downward but that it lacked the authority to do so. Poirrier argues that the court should have made a downward departure.

A district court's refusal to downwardly depart is not reversed unless it was a violation of law. United States v. Jackson, 978 F.2d 903, 914 (5th Cir. 1992), cert. denied, 113 S. Ct. 2429, 3055 (1993). When the defendant fails to put before the district court a basis upon which it may downwardly depart, a refusal to depart is not a violation of law. Id.

Poirrier asked for the downward departure on the basis of trial counsel's performance. He has not shown that this is a proper basis for a downward departure.

No Severance

Brewer argues that the district court erred in denying his motion for severance and his motion for new trial. He argues that the evidence of Poirrier's guilt, especially as provided by Grant and Sandefer, was so overwhelming that it was impossible for Brewer to get a fair trial. Alternatively, Brewer argues that the district court should have granted his motion for new trial when it became apparent that the trials should have been severed.

After trial, Brewer filed a Motion for Judgment Non Obstante Veredicto or for a Mistrial/or New Trial, which the district court

denied. The motion does not mention severance. The court found the motion to be untimely and Brewer does not argue that it was timely. Before trial, however, Brewer did move for severance, and the district court denied the motion.

"Severance is a matter left to the sound discretion of the trial court, and a defendant is not entitled to severance unless he can demonstrate specific compelling prejudice that actually results in his having received an unfair trial." United States v. Capote-Capote, 946 F.2d 1100, 1104 (5th Cir. 1991), cert. denied, 504 U.S. 942 (1992). As discussed earlier, Grant testified about the distinct roles that Brewer and Poirrier played in the conspiracy. Also, as discussed earlier, the telephone conversation with Brewer, but not Poirrier, was played for the jury. Brewer has shown no specific compelling prejudice.

AFFIRMED.