**IN THE UNITED STATES COURT OF APPEALS**

**FOR THE FIFTH CIRCUIT**

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No. 93-8566

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UNITES STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

CHARLES O. KALLESTAD and
DELL RAY SHAW,

Defendants-Appellants.

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Appeal from the United States District Court
for the Western District of Texas
(A 91 CR 175 01 JN)

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March 28, 1995

Before HIGGINBOTHAM, SMITH, and PARKER, Circuit Judges.

JERRY E. SMITH, Circuit Judge:[*]

I.

Defendant Charles Kallestad ran into financial trouble as he began to spend the last of his fortune. To get forbearance and continued loans from his creditors, and to hide his assets once he saw that he eventually would be forced to default on the loans, he

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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 Pursuant to that rule, the court has determined that this opinion should not be published.

deceived banks in a wide variety of ways. In this endeavor, he enlisted the assistance of his close friend, defendant Dell Shaw, a lieutenant in the Austin police force. Meanwhile, Kallestad indulged an unrelated hobby of photographing and filming women and under-age girls, recruited through various newspaper advertisements soliciting "models," in sexually explicit poses. In addition, Kallestad made photographs and videos of himself having inter-course, fellatio, and cunnilingus with some of the girls.

On December 18, 1991, Kallestad was indicted on six child pornography counts for possession of still photographs and videos in violation of 18 U.S.C. § 2252 (a)(4)(B). On April 22, 1992, a superseding indictment added bank fraud counts. Additional superseding indictments including charges against Shaw were handed down on July 23, 1992, January 19, 1993, and January 29, 1993, all retaining the six child pornography counts in their original form. The final superseding indictment charged Kallestad and Shaw with conspiring to defraud Texas Commerce Bank ("TCB") in violation of 18 U.S.C. §§ 371 (count 1) and bank fraud in violation of 18 U.S.C. § 1344 (count 2). Kallestad also was charged individually with making false statements to TCB in violation of 18 U.S.C. § 1014 (counts 3,4, and 5), mail fraud under 18 U.S.C. § 1341 (count 6), and the original child pornography counts under 18 U.S.C. § 2252(a)(4)(B) (counts 14-18 for still photographs and count l9 for video tapes). Shaw was charged individually with perjury in violation of 18 U.S.C. § 1623 (count 7), and with making false statements on credit applications to federally insured financial

institutions in violation of 18 U.S.C. § 1014 (counts 8-13).

On February 8, 1993, one of the false statement counts against Shaw (count 12) was dismissed. Both defendants went to trial on all remaining counts except the pornography counts, which were severed as misjoined. Kallestad was convicted on all but the mail fraud count; Shaw was found guilty on counts 1, 2, 8, and 12 (the former count 13, renumbered after the original count 12 was dismissed), and acquitted on counts 7, 9, 10, and 11.

In early March 1993, the pornography case was set for trial on April 5, 1993. Later in March, however, the government moved for a continuance, alleging that an unnamed material witness was unavailable. Kallestad objected and sought a dismissal, asserting speedy trial rights. The court granted the motion for continuance and rescheduled the trial for June 14, 1993.

In May, the court rescheduled the jury selection and the trial for June 1 and 7, 1993. On the same day as the rescheduling, the government moved for another continuance to accommodate the schedules of the prosecutor and an FBI agent. The court granted this continuance, rescheduling the case for trial on July 12, 1993. At trial, Kallestad was convicted on all six pornography counts.

Kallestad was sentenced to 121 months' imprisonment and five years' supervised release; the court also imposed a $50,000 fine and the mandatory $550 special assessment. The presentence report adopted by the district court had given Kallestad an adjusted offense level of 32, a criminal history category of I, and a guideline range of 121 to 151 months. Shaw was sentenced to serve

concurrent 32-month prison terms on the counts of conviction and three years' supervised release, and fined $10,000 and a mandatory $200 special assessment. The court had determined that Shaw's adjusted offense level was 19, his criminal history category was I, and his guideline range was 30-37 months.

## II.

### A. Shaw's False Statements.

In January 1990, Shaw applied for a Gold MasterCard with a bank. The application was denied; when Shaw confronted bank representatives and threatened to remove his deposits, it was later approved. Count 8 charged Shaw with false statements under 18 U.S.C. § 1014 for his misrepresentations in connection with this application.

Specifically, the government showed at trial that Shaw failed to list any sort of a loan from Kallestad on his application in response to a question requesting that he list all creditors and outstanding debts. Furthermore, the government established that Shaw listed $30,000 of funds in his personal account as an asset, despite the fact that the funds belonged to Kallestad. Count 12 (originally count 13) charged Shaw with a violation of § 1014 for the same omission of a loan from Kallestad on a credit application submitted to the Austin Municipal Federal Credit Union in an April 1992 application for a boat loan.

The false statement statute, in pertinent part, makes it an offense:

> [K]nowingly [to] make[] any false statement or report, or willfully overvalue[] any land, property or security, for the purpose of influencing in any way the action of . . . any institution the accounts of which are insured by the Federal Deposit Insurance Corporation . . . upon any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan, or any change or extension of any of the same, by renewal, deferment of action or otherwise, or the acceptance, release, or substitution of security therefor . . . .

18 U.S.C. § 1014.

Shaw challenges his convictions on both counts for insufficiency of the evidence, arguing that the misstatements were not material and that no intent to influence the bank through the misstatements was proven. We affirm a conviction where the evidence, "viewed in the light most favorable to the verdict, with all reasonable inferences and credibility choices made in support of it, is such that any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." United States v. Heath, 970 F.2d 1397, 1402 (5th Cir. 1992), cert. denied, 113 S. Ct. 1643 (1993). We need not exclude every reasonable hypothesis of innocence in making this determination. Id. The Due Process Clause requires that each element of the offense be proven beyond a reasonable doubt. In re Winship, 397 U.S. 358 (1970).

Shaw challenges his conviction on count 8 only on the theory that the government's allegations in that count (first, that Shaw had failed to list an outstanding loan from Kallestad as a liability, and, second, that Shaw had listed $30,000 of cash as his own asset, although the cash actually belonged to Kallestad) were inconsistent. We review the challenges with regard to count 8 for

plain error, as Shaw's counsel admitted at trial that the evidence was sufficient as to that count.

The government's allegations in count 8 are arguably inconsistent; if the debt Shaw owed Kallestad was a liability, then it follows that any funds received by Shaw from Kallestad that formed the basis of the debt would be assets under his control. As these inconsistent theories were alleged within a single count, however, we find no plain error.

Shaw's other challenges to his false statement convictions are without merit; he claims that the debt owed Kallestad was immaterial because it was payable in a lump sum twenty years hence. A debt of over a hundred thousand dollars, to be repaid by a debtor earning a police officer's salary, is material to a bank's decision to extend credit on the facts of this case, even if no payments were due immediately.

B. Financial Statements.

Defendants also challenge the sufficiency of the proof of presentation of falsified cash flow and financial statements to TCB by Kallestad in June 1989, which was alleged as overt act "a" supporting the conspiracy charged in count 1, as parts 6-8 of the aiding and abetting charge (count 2), and as substantive violations of 18 U.S.C. § 1014 in counts 3 and 4. By February 1984, Kallestad had received a $4 million unsecured line of credit from TCB. In mid-1987, Kallestad began to have trouble paying off a renewal of this loan, and he conveyed liens on his properties in Santa

Barbara, California, and Austin (the High Road property) in response to TCB's demands for increased collateral. In May 1989, a credit analyst for TCB, Martha Flores, requested financial information from Kallestad to evaluate the possibility of obtaining additional collateral. Kallestad replied to the letter in June 1989, providing two separate financial statements.

The government introduced evidence showing that Kallestad had reviewed these statements with Flores line by line, telling her that all of the properties were owned "free and clear," and giving no indication of any liens. Flores testified that the bank relied upon the information provided in the financial statements in order for Kallestad's loan to be approved.

The first statement, signed on June 9, 1989, was a valuation of assets and liabilities. The June 9 statement forms the basis of count 4. In it, Kallestad falsely claimed that he owned oil well investments worth $413,000, a one-half interest in a six-acre site in Texas valued at $100,000, a house in Thief River Falls, Minnesota, valued at $80,000, a 160-acre piece of land in Minnesota worth $50,000, and a 640-acre piece of land in Plumber, Minnesota, worth $150,000.

The government showed that Kallestad had dropped out of his partnerships and other tax shelters because the investments managed in them were worthless. Less than six months prior to his statement of assets and liabilities to the bank, Kallestad had filed an affidavit and sworn answers to interrogatories in the District Court of Hennepin County, Minnesota, stating that the so-

called I-35 Investments and Kallestad's oil well investments were without value. In addition, the government proved the existence of various encumbrances on the properties listed as assets. Finally, the interest in the Texas property Kallestad claimed was worth $100,000 was sold by him within the year for a mere $19,527. The number of misrepresentations on the statement of assets and liabilities and their egregiousness leave no doubt that the deception was intentional and knowing.

The second statement, signed on June 13, 1989, was an estimation of expected cash flow. In it, Kallestad indicated that he expected to receive a $150,000 salary from First Fidelity Acceptance Corporation during 1989 and 1990; income from various "tax shelters," including $386,000 from the "I-35 Investments" partnership; and $120,000 from an "Ensun note."

The statements of the expected income from the various partnership ventures were deceptive for the same reasons as the statements of the value of the partnership interests themselves, discussed above. The government also showed that the "Ensun note" would yield no cash payments. Furthermore, the government showed that Kallestad never had been employed by First Fidelity and had no expectation of income from that source. The government carried its burden with regard to the June 13 financial statement.

C. Interrogatories.

Count 5 charged Kallestad with making false statements to TCB in his answers to interrogatories filed in the Western District of

Texas in March 1991. The government showed that Kallestad had failed to list all of his aliases in response to an interrogatory asking for them, and had misrepresented his address in response to another. Furthermore, Kallestad claimed not to own any residences, omitting reference to his interest in the Greenslope property. When asked to describe vehicles he owned, Kallestad listed only a 1987 Toyota Tercel, omitting his Lexus, Porsche, and pick-up truck. Kallestad denied owning any valuable jewelry, although the government presented evidence tending to prove that he had purchased two Ebel watches, for $7,000 each, less than a year before his answers to the interrogatories.

When asked about recent dispositions of property, Kallestad revealed nothing about his transfer of over $100,000 in cash to Shaw or the $150,000-$200,000 he had transferred to a California attorney, Douglas Jennings. Kallestad cannot successfully claim that he failed to include these items because he considered them loans instead of transfers, as he failed to mention them in response to the question about whether anyone owed him money.

Kallestad argues that his false statements in the interrogatories do not violate § 1014 as a matter of law. Accordingly, he claims that the trial court erred when it overruled his motion to dismiss count 5 and his motions for judgment of acquittal on the count. Kallestad's legal theory is that the statements, made in the context of a lawsuit, were not material; in the alternative, he argues that the statute is vague and indefinite as applied to him. This circuit has not addressed whether

false statements made in post-judgment interrogatories can support a conviction under § 1014. The Supreme Court, in a case holding that check-kiting schemes do not fall within the ambit of 18 U.S.C. § 1014, explained that the statute applies to representations made in connection with conventional loans or "related transactions." Williams v. United States, 458 U.S. 279, 289 (1982) (emphasis added).

The Eleventh Circuit relied upon this language in a case very similar to the one at bar to hold that misstatements made in post-judgment settlement negotiations with the bank holding the debtor's defaulted note were an adequate basis for liability under § 1014. United States v. Greene, 862 F.2d 1512, 1515 (11th Cir.), cert. denied, 493 U.S. 809 (1989). The Greene court surveyed the relevant caselaw and upheld the conviction, reasoning that "[t]here is no logical basis for a distinction between making misstatements to a bank to delay litigation and making misstatements to obtain a favorable settlement after judgment." Id.

This conclusion is consistent with the precedents of this circuit. In United States v. Kindig, 854 F.2d 703 (5th Cir. 1988), we upheld a conviction under § 1014 where the misstatements to the bank were made after the relevant loan had been approved. The panel held that, as a matter of law, the elements of § 1014 can be made out "even when an allegedly false document has not been furnished to a bank until after a loan has actually been made." Id. at 706. Furthermore, the Kindig court interpreted § 1014 as requiring "that all statements supplied to lending institutions

which have the capacity to influence them, be accurate or at least not knowingly false." Id. (emphasis added). See also United States v. Baity, 489 F.2d 256, 257 (5th Cir. 1973) (upholding conviction under § 1014 where false statement was furnished after the bank had made the loan).

Kallestad's false statements in the post-judgment interrogatories had, in the language of Kindig, the capacity to influence the bank. They were undoubtedly made with the intent of influencing the actions of the bank, or altering the settlement value of the judgment that had been rendered in favor of the bank. We hold that under this circuit's precedents, such misstatements are, as a matter of law, sufficient basis for a conviction under § 1014.

In the alternative, Kallestad argues that if the false statements in the interrogatories are covered by § 1014, the statute is unconstitutionally vague, and he was deprived of fair notice. This argument is without merit.

D. Sufficiency))Bank Fraud.

Kallestad and Shaw challenge their convictions on the bank fraud charges on sufficiency of the evidence grounds. Their argument is that all of the transactions made to conceal or dispose of Kallestad's assets took place before the turnover order. As the properties and funds in question had not been pledged as security on the loans, the defendants argue that Kallestad was legally empowered to dispose of his personal and real property in any way

that he chose.

We need not reach the question of whether Kallestad's and Shaw's activities prior tot he turnover order can form the basis of a bank fraud conviction under 18 U.S.C. § 1344. Review of the record reveals that Kallestad transferred $30,000 into the account of an unindicted coconspirator, Ms. Johnson, after the entry of the turnover order, in December 1990. The record also reveals that Shaw refused to transfer title to real estate located on Greenslope to Texas Commerce Bank after the turnover order. Robert Gauss, vice president of Texas Commerce Bank, testified that after the turnover order, while in the process of assembling information about Kallestad's remaining assets, he read a newspaper article that listed Kallestad as the occupant of a residence at 8012 Greenslope. He ran a title search on the property and discovered that the title was in Shaw's name. After further investigation, the bank filed a lis pendens, and made demand on Kallestad and Shaw to convey the property to the bank, which they did not do. The Greenslope house was purchased with Kallestad's money, but title was taken in Shaw's name, and during the ensuring litigation Shaw produced a note that required Shaw to repay Kallestad $110,000 on January 1, 2010, plus interest. The evidence is sufficient to support the conclusion that after the turnover order, Shaw attempted to conceal that Kallestad was the real party in interest in the Greenslope property.

Accordingly, the bank had a legal interest in assets that both Shaw and Kallestad attempted fraudulently to conceal or transfer.

Their arguments to the contrary are not supported by the record and are, therefore, unavailing.

E. The Conspiracy.

Count 1 of the January 29, 1993, indictment charged Kallestad and Shaw with conspiracy to defraud TCB, obtain money by false pretenses, and make false statements to federally insured financial institutions in violation of 18 U.S.C. §§ 371, 1344, and 1014. Sixteen overt acts in furtherance of the conspiracy were alleged. To support a conviction for conspiracy under § 371, the government is required to prove (1) that the defendant agreed with a least one other person to violate the law and (2) that one of the members of the conspiracy performed an illegal act to further the objectives of the conspiracy. United States v. Parekh, 926 F.2d 402, 406 (5th Cir. 1991).

The government's bank fraud theory was that Kallestad, assisted by Shaw and others, attempted to renew his loan from TCB by falsely suggesting that he was financially well off, and by disposing of and concealing his assets to prevent the bank from collecting on its loan after this attempt proved unsuccessful. The government introduced ample evidence of a concert of action between the defendants. The two enjoyed a very close, surrogate father-and-son relationship.

Kallestad had several vehicles titled to a defunct corporation called "CC Imports," a dealership that he owned before it went out of business. In November 1989, Shaw sold a Buick Regal of

Kallestad's to a third party, Kenneth Vitale, and signed a number of documents related to the transfer of this vehicle as "manager" of CC Imports. Shaw was never actually connected with the defunct dealership as manager or in any other capacity. Acting on behalf of Kallestad as seller of the vehicle, Shaw helped Vitale underrepresent the sale price of the Buick to defraud the state of tax revenue.

In December 1989, Kallestad negotiated the price on a home on Pinehurst Drive in Austin. Shaw signed the contract for sale and gave a check from his own account as a deposit on the property. Although this sale was not consummated, it shows Shaw's role in helping Kallestad to conceal his assets by purchasing various properties and titling them in Shaw's name.

Shaw took in large amounts of money from Kallestad and placed them into his personal accounts to keep the funds safe from Kallestad's creditors. In January 1990, Kallestad endorsed to Shaw a $10,000 check he had received for the sale of real estate in Minnesota, and the check was deposited into Shaw's personal account. On January 23, 1990, Shaw deposited $19,527, the proceeds of Kallestad's sale of his interest in a tract of land in Toro Canyon, Texas, into his personal account at a bank. In July 1990, Shaw deposited $15,391.15 of proceeds from the closure of a securities account of Kallestad's into his personal account at the Austin Municipal Federal Credit Union. In August 1990, Kallestad liquidated securities in a Shearson account and endorsed the $13,973.93 proceeds to Shaw, who deposited them into his account at

the credit union.

In July 1990, Kallestad negotiated the purchase of another home in Austin, the Greenslope house. As Kallestad would not take title on the property, the escrow agent was instructed to title it in the name of Lon Holthe, and later in the name of Shaw. The agent testified that he had no doubt the actual purchaser of the house was Kallestad, who arranged for a great deal of remodeling of the property. In August 1990, Shaw withdrew $88,753 of the funds he had deposited into his account from the various transfers from Kallestad and paid it to the Texas Professional Title Company to fund the purchase of the Greenslope residence.

In light of these financial arrangements between Kallestad and Shaw, the concert of action necessary to support a conspiracy was proven. There is also adequate evidence from which the trier of fact could infer the existence of an agreement between the parties to commit the substantive crimes and the commission of overt acts in furtherance of the conspiracy.

F. Aiding and Abetting.

Count 2 charged Kallestad and Shaw with aiding and abetting each other in the commission of bank fraud by inducing the bank to continue the extension of credit to Kallestad with false statements and false financial information and obstructing, hindering, impeding, and defeating the bank's efforts to determine Kallestad's financial condition and recover monies loaned to Kallestad. To convict defendant of aiding and abetting, the government must prove

that (1) the principal committed the substantive offense, and (2) the defendant "associated himself with the criminal venture, participated in the venture and sought by his action to make the venture succeed." Parekh, 926 F.2d at 406. The government met its burden with regard to this substantive bank fraud count, just as it did with regard to the conspiracy to commit bank fraud.

G. Multiplicity))Counts 2, 3, 4, and 5.

Kallestad argues that the false statements in counts 3, 4, and 5 were part of the same bank fraud scheme charged in count 2, and that the counts therefore are multiplicitous. We review the issue of multiplicity, a question of law, de novo. United States v. Hord, 6 F.3d 276, 280 (5th Cir. 1993), cert. denied, 114 S. Ct. 1551 (1994).

Kallestad cites United States v. Heath, 970 F.2d 1397, 1402 (5th Cir. 1992) (en banc), cert. denied, 113 S. Ct. 1643 (1993), for the proposition that punishment for the execution of multiple steps involved in a bank fraud scheme is multiplicitous. Heath, however, involved a situation where the government charged two counts of the bank fraud statute itself, 18 U.S.C. § 1344, based upon participation in a single scheme against a single bank.

The case at bar is much more like United States v. Henderson, 19 F.3d 917, 926 (5th Cir.), cert. denied, 115 S. Ct. 207 (1994), which held that a bank fraud charge under § 1344 is not multiplicitous to charges under § 1014 for false statements made in connection with the fraud. The court reasoned that because each

statute contains an element not present in the other, convictions for both do not violate the constitutional prohibition on double jeopardy. Kallestad's multiplicity argument is foreclosed by Henderson.

H. Multiplicity))Counts 3 and 4.

Next, Kallestad argues that counts 3 and 4, false statements charges based upon the submission of deceptive assets and liabilities and cash flow statements to TCB, are multiplicitous because they are based upon representations made in the same four-page document. Although the documents in question were sent to Kallestad by Flores, as agent for TCB, at the same time and were returned to the bank together by Kallestad, they were completed, signed, and dated on different days.

The district court's view that the statements were two separate documents, a finding of fact implicit in its denial of Kallestad's pretrial motion to dismiss one of the counts because of multiplicity, is entitled to review under the clearly erroneous standard. Because the documents were created and signed individually and at different times, we find no multiplicity problem.

I. Shaw's Furtherance of the Conspiracy.

Shaw argues that the trial court erred in admitting evidence showing his furtherance of the conspiracy. We review evidentiary rulings for abuse of discretion. Rule 404(b) prohibits the introduction of evidence of other crimes, wrongs, or acts to prove

the bad character of a person, but allows them "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, or absence of mistake or accident . . . ." FED. R. EVID. 404(b). First, the proponent of evidence must establish that it is relevant to an issue other than the defendant's character. United States v. Beechum, 582 F.2d 898, 911 (5th Cir. 1978) (en banc), cert. denied, 440 U.S. 920 (1979). Of course, the evidence must also "possess probative value that is not substantially outweighed by its undue prejudice" to meet the independent requirements of FED. R. EVID. 403. Id.

Austin Police Officer Walker testified that after he ticketed Kallestad for speeding and for failing to carry proof of insurance, he was contacted by Shaw, who displayed some form of proof of insurance and intervened on behalf of Kallestad. The government argues that this evidence went to the issue of Shaw's concealment of various assets, including the Porsche, on behalf of Kallestad.

Although the defense concedes that the evidence was relevant as to this issue, and therefore to the existence of a conspiracy, it claims that the government should not have been able to use the evidence in light of more probative and less prejudicial means at its disposal to prove the conspiracy. Shaw has made no showing of prejudice resulting from the admission of the testimony, much less prejudice substantially outweighing its probative value. There was no abuse of discretion in the admission of the testimony, which the defense admits was relevant as to the existence of a common scheme or plan, a permissible purpose under rule 404(b). Nor did the

district court abuse its discretion in excusing the government from complying with the notice requirement generally applicable to 404(b) testimony, as the defense had access to the ticket, insurance documents, and witness list prior to trial.

Similarly, Shaw complains of the testimony of Officer Bittick that he ran personal errands while on police duty. The defense did not object to this testimony, and we therefore review for plain error only. Rojas v. Richardson, 713 F.2d 116, 117 (5th Cir. 1983). Shaw claims that his failure to object at trial should be forgiven because the prosecution breached a pretrial agreement in offering the evidence before calling a bench conference. The government acknowledges the existence of an agreement, but says that it covered only Shaw's improper use of police computer files. Even if Shaw's version of the contents of the agreement is correct, it does not excuse him from compliance with the contemporaneous objection requirement. At any rate, the errands in question included trips to Kallestad's High Road address, and therefore were probative of the relationship between the two men and of the existence of their conspiracy to commit bank fraud.

The third "bad act" complained of by Shaw is the sale of the 1987 Buick Regal to Keith Vitale. Vitale, an Austin firefighter, testified that Shaw represented himself in the sale as the manager of a defunct corporation, CC Imports, and as an agent of Kallestad. Evidence of Shaw's misstatement of the purchase price so that Vitale could defraud the state by paying lower tax was also introduced.

Shaw did not object to this testimony at trial, so we review its admission for plain error. We find none. Even if he had objected, the evidence still should have come in, as the transaction with the Buick was charged as an overt act in furtherance of the conspiracy in count 1.

Next, Shaw complains of the admission of testimony concerning another incident in which he lied under oath about the sales price of a vehicle, this time a 1984 Chevy Blazer bought from Kallestad, in order to defraud tax authorities. This evidence was admitted as impeachment evidence under FED. R. EVID. 608(b), as it bore on Shaw's truthfulness and therefore his veracity as a witness. The evidence's probative value as to Shaw's credibility was not substantially outweighed by its prejudice.

J. Shaw's Relevant Conduct.

Shaw protests an eleven-point increase in his offense level on the bank fraud counts for a loss to the bank of more than $800,000, maintaining that he should be held responsible only for those losses flowing from transfers of property from Kallestad in which he was directly involved. Shaw claims that it was not reasonably foreseeable to him that TCB's losses would be so great. In addition, Shaw claims that the actual loss to the bank was miscalculated in the sentencing, and that the guidelines were therefore misapplied.

We review the trial court's factual findings under the sentencing guidelines under a clearly erroneous standard, while

legal principles are reviewed de novo. United States v. Wimbish, 980 F.2d 312, 313 (5th Cir. 1992), cert. denied, 113 S. Ct. 2365 (1993). The calculation of the amount of loss to be attributed to a defendant is a factual finding reviewed under the clearly erroneous standard. United States v. Lghodaro, 967 F.2d 1028, 1030 (5th Cir. 1992) (per curiam).

The district court's finding that the full amount of the loss intended by Kallestad was reasonably foreseeable to Shaw was correct. Shaw was deeply involved in a complex conspiracy to defraud TCB, and he knew that vast sums of money were at stake. The finding that the intended loss exceeded the sentencing guidelines' $800,000 trigger was not clearly erroneous. Shaw's argument, that the total loss to TCB ended up being less than $800,000, is irrelevant. Under the sentencing guidelines, the offense-level figure is the loss defendants intended to inflict on TCB or the actual loss suffered, whichever is greater. U.S.S.G. § 2F1.1 (n.7). That Shaw and Kallestad were less successful than they had hoped in their fraud on TCB is not ground for mitigating their offense level enhancements under the guidelines.

K. Kallestad's Relevant Conduct.

Kallestad also challenges his guidelines offense level. With regard to the bank fraud charges, this claim fails for the same reasons as does that of Shaw, discussed above. Kallestad also cites United States v. Shaw, 3 F.3d 311 (9th Cir. 1993), in which

the court remanded for a finding on whether defendant intended to repay the loan at issue before determining the amount of the intended loss. In the case at bar, no such remand is necessary, as the evidence that Kallestad intended to repay as little of the bank's funds as possible is overwhelming.

## L. Speedy Trial.

### 1. The Statute.

Kallestad assigns error to the district court's denial of his motion to dismiss the pornography counts because of alleged violations of his speedy trial rights, alleging that there were 373 "non-excludable" days under the speedy trial statute between the first indictment including all of the pornography counts and his eventual trial on those counts. The government argues that Kallestad had motions pending for the vast majority of the time he claims is non-excludable under the Speedy Trial Act.

The Speedy Trial Act requires that a defendant be brought to trial within seventy days from the filing of his indictment. 18 U.S.C. § 3161(c)(1). The defendant bears the burden of proving a violation. 18 U.S.C. § 3162(a)(2). "[D]elay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion" is excludable from the limitation period. 18 U.S.C. § 3161(h)(1)(F); United States v. Castellano, 848 F.2d 63, 65 (5th Cir. 1988).

Any pretrial motion is covered under subsection (h)(1)(F); the

exclusion is automatic, United States v. Ballard, 779 F.2d 287, 294 (5th Cir.), cert. denied, 475 U.S. 1109 (1986), and "all but absolute," United States v. Horton, 705 F.2d 1414, 1416 (5th Cir.), cert. denied, 464 U.S. 997 (1983). All days between the filing of a motion and its disposition constitute excludable delay. United States v. Santoyo, 890 F.2d 726, 728 (5th Cir. 1989), cert. denied, 495 U.S. 959 (1990). The actual filing and decision dates are also excludable. United States v. Kington, 875 F.2d 1091, 1107 (5th Cir. 1989). This court reviews facts supporting the district court's speedy trial ruling for clear error, but reviews legal conclusions de novo. United States v. Ortega-Mena, 949 F.2d 156, 158 (5th Cir. 1991).

From Kallestad's first indictment on the pornography counts through February 23, 1993, there were numerous pretrial motions, superseding indictments, a mental exam for Kallestad, and a trial on the bank fraud charges. We agree with the government that there were only eleven non-excludable days during this period.

On February 8, 1993, Kallestad filed a motion to reconsider his earlier motion to suppress. The government argues that the five months between this motion and the eventual pornography trial should be excluded because this motion remained pending until just before trial.

This argument is foreclosed by United States v. Johnson, 29 F.3d 940 (5th Cir. 1994), which construed the two subsections of the Speedy Trial Act applicable to the delay at issue. Subsection (h)(1)(F) excludes "delay resulting from any pretrial motion, from

the filing of the motion through the conclusion of the hearing on, or other prompt disposition of such motion." 18 U.S.C. § 3161(h)(1)(F). A companion provision, subsection (h)(1)(J), excludes "delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court." 18 U.S.C. § 3161(h)(1)(J).

Reading these two provisions together in light of Henderson v. United States, 476 U.S. 321 (1986), the Johnson court held that where, as here, a motion does not require a hearing, subsection (F) allows the exclusion of only so much time as is needed for a "prompt" disposition," and therefore adds nothing to subsection (J)'s allowance of thirty days from the time a motion is actually "under advisement." Johnson, 29 F.3d at 943. Since the pending motion here was a motion to reconsider, requiring no hearing or further filing of papers, thirty days is the maximum reasonably allowable under either subsection.

Therefore, the February 8, 1993, motion to reconsider tolled the speedy trial clock only until March 10, 1993. Accordingly, on March 10, 1993, there were still only eleven speedy trial days elapsed.

The government also relies upon two orders for continuance. The first grants a continuance from April 5 to June 14 on the basis of the government's naked assertion that a witness was unavailable. (A later order set jury selection for June 1 and evidence for June 7.) Unavailability is a factual determination, subject to

clearly erroneous review. Subsection (h)(3)(B) of § 3161 sets out detailed requirements for finding unavailability.

Neither the motion nor the order articulated the presence of these requirements or in any other way provided the basis for a subsection (h)(3)(B) finding, and no hearing was held on the motion. As there was no factual support in the record for the district court's unavailability finding, we must declare that finding clearly erroneous.[1] Wright v. Western Elec. Co., 664 F.2d 959, 963 (5th Cir. Dec. 1981); Danner v. United States Civil Serv. Comm'n, 635 F.2d 427, 430-31 (5th Cir. Unit A Jan. 1981); Humphrey v. Southwestern Portland Cement Co., 488 F.2d 691, 694 (5th Cir. 1974).

The second continuance at issue allowed the trial to be postponed from June 7 until July 12 to accommodate the travel schedules of the prosecutor and the case agent, on motion of the government. The government alleged, in relevant part, that on May 21, 1993, it had received notice that the case, which had previously been set for trial on June 14, 1993, had been reset for jury selection on June 1 and trial on June 7.

The government requested a continuance, stating that the

[1] For clarity, we stress that we are not relying upon the language of the Speedy Trial Act in holding the district court's grant of the continuance on unavailability grounds to be clearly erroneous. Although 18 U.S.C. § 3161(h)(8)(A) does not allow days to be excluded from speedy trial calculations where a court fails to set forth "its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial," this continuance was granted under a different subsection, (h)(3)(B), which requires no statement of reasons. Our holding rests on this circuit's precedents to the effect that there must be some basis in the record for this court to uphold any finding of fact by the district court.

prosecutor, Mark Marshall, and the case agent, FBI Special Agent Matt Gravelle, would be "out of the office" until June 1, and from May 26 until June 6, respectively. On May 24, the district court granted the continuance.

The court's finding that, in the language of 18 U.S.C. § 3161(h)(8)(B)(iv), "the failure to grant such a continuance in this case would deny counsel for the government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence," is a finding of fact we review for clear error. We find none here. If the district court had failed to grant this continuance, the prosecutor would have been forced to start jury selection on the day he returned, and the case agent would have had to be ready to testify the day after he returned. In view of the fact that the trial dates causing these conflicts were a departure from the district court's previous order, there was no lack of due diligence on the part of the government. Accordingly, under § 3161(h)(3)(8)(A), the period from June 7 until the trial began is properly excluded.

To determine whether Kallestad is entitled to dismissal of the indictment on speedy trial grounds, we must now examine whether there were fifty-nine or more non-excludable days between March 10 and June 7, 1993. We conclude that there were not, and that there was therefore no violation of the Speedy Trial Act.

On March 12, 1993, the government moved for reciprocal discovery and inspection. The record reflects no entry of any ruling by the district court on that motion during the relevant

window of time, from the date of the motion until June 7. Assuming, as is most favorable to the defense, that the motion for discovery and inspection required no additional filings or hearings for consideration, 30 days is excludable under 18 U.S.C. § 3161(h)(1)(J). The speedy trial clock would start to run again on April 11, with 12 days on the clock. Assuming that the clock ran untolled until May 20, an additional 39 days would have accrued, for a total of 51.

On May 21, the government moved for the second continuance in the case, based upon the travel schedules of the prosecutor and the case manager. This motion tolled the clock until the court granted the continuance on May 24. On May 25, the defense moved for a dismissal of the charges against Kallestad. The record reflects no ruling on that motion until the start of trial, and therefore at least the time until June 7 is excludable under subsection (h)(1)(J).

The days from June 7 until the trial actually began are excludable under the continuance granted on May 24 pursuant to § 3161(h)(8)(A). Thus, the grand total of non-excludable speedy trial days when Kallestad went to trial was no more than 51, a permissible number under the Speedy Trial Act.

2. The Constitution.

The Supreme Court laid out the framework for evaluating a constitutional speedy trial claim in Barker v. Wingo, 407 U.S. 514 (1972), drawing this court's attention to the length of the delay,

what the reasons for the delay are, and who is responsible for them, whether the defendant has consistently asserted his constitutional right to a speedy trial, and whether the defendant was prejudiced by the delay. Id. at 530-33. Two of these factors, the length of the delay and Kallestad's consistent assertion of his speedy trial rights, weigh in defendant's favor.

The Supreme Court examined the "reasons for the delay" prong of Barker in Doggett v. United States, 112 S. Ct. 2686 (1992). Under Doggett, a post accusation delay is presumptively prejudicial when it approaches the length of one year. Id. at 2691 n.1. The Court also recognized, however, that "pretrial delay is often both inevitable and wholly justifiable." Id. at 2693. Here, the length of the delay is substantially more than a year and thus is presumptively prejudicial under Doggett.

The possibility of prejudice was enhanced by the fact that the delay made Kallestad a convicted felon on the bank fraud charges by the time he went to trial on the pornography counts. Kallestad, however, has not shown that the government intentionally held back in the prosecution of the pornography counts for any tactical reason. See Doggett, id.

Moreover, Kallestad may have actually benefited from the increased age of his victims by the time the case went to trial, and by having more latitude to challenge their recollections of the events in question. Keeping in mind the breathtakingly incriminating nature of the evidence against Kallestad (photographs and videotapes, found in his home in a search conducted pursuant to

a valid search warrant, of minor females alone in nude poses, minor females performing cunnilingus on other nude minor females, Kallestad receiving fellatio from minor nude females, and Kallestad fornicating with a minor nude female and a log book in Kallestad's own handwriting recording the ages of the girls as under eighteen), the abundance of that evidence, and the undeniable fact that the females in question were in fact minors when the pictures were taken, it is hard to see how Kallestad suffered any prejudice from a delay in going to trial. In fact, it is hard to imagine that he ever could have mounted any successful defense whatsoever in this case.

Both Kallestad and the government share the responsibility for the delay. The government is to blame for the improvident misjoinder of the bank fraud and pornography counts, which were factually unrelated, and which had to be tried separately after the court later found that they had been misjoined in the first place. If the government had proceeded after the first indictment, instead of waiting for each of the superseding indictments (none of which modified or added anything to the pornography counts), the case would have been processed a lot more quickly. Since Kallestad was not prejudiced by the delay in going to trial, a consideration of the Barker factors supports the finding that there was no Sixth Amendment speedy trial violation here.

M. Mens Rea of Statute.

Kallestad claims that 18 U.S.C. § 2252 (a)(4)(B), the federal

child pornography statute, is facially unconstitutional because it does not contain a mens rea requirement. In a recent case under the statute, this court rejected that argument and implied a requirement of "actual knowledge or reckless disregard of a performer's minority." United States v. Burian, 19 F.3d 188, 191 (5th Cir. 1994). Even more recently, the Supreme Court addressed the circuit split that had arisen on the scienter required to violate the child pornography statute. The Court held that in § 2252, the term "knowingly" modifies the phrase "use of a minor," applying the standard presumption in favor of a scienter requirement for each element of a statute criminalizing otherwise "innocent" conduct. United States v. X-Citement Video, Inc., 115 S. Ct. 464, 472 (1994). Kallestad's argument is therefore meritless.

N. Jury Charge.

Under federal law, a "minor" is defined as anyone under eighteen years of age. 18 U.S.C. § 2256(1). The child pornography statute concerns a "visual depiction involv[ing] the use of a minor engaging in sexually explicit conduct." 18 U.S.C. § 2252(a)(4)(B). Kallestad was charged with possession of photographs of "a person under the age of eighteen engaging in sexually explicit conduct."

Kallestad contends that this charge prevented him from arguing that he did not believe the subjects were minors because of his perception concerning the age of consent under Texas law (He claims to have believed that it was seventeen.). This "ignorance of the

law" argument is utterly meritless.

Kallestad also makes a related argument, that the trial court erroneously excluded evidence that would have undercut the government's case on the pornography counts. Specifically, Kallestad asserts that Officer Staton of the Austin Police Department would have testified about Kallestad's fear that prosecution by state authorities would follow if he had sex with a girl of sixteen years of age or less.

Apparently, "Sixteen will get you twenty." was one of Kallestad's favorite sayings. Unfortunately, he did not realize that under federal law, "Seventeen will get you up to ten." Because Kallestad's ignorance of the law defense is worthless, the exclusion of this testimony did not hurt him in any way. Ironically, it may have even helped him: A person who believed that no legal consequences attached to photographing of, sodomizing of, and fornication with girls so long as they were over sixteen years of age would almost necessarily have knowledge of whether his subjects were at least seventeen years old.

O. Sufficiency))Child Pornography.

Next, Kallestad argues that there was insufficient evidence supporting his mens rea with regard to the age of the minor girls he photographed and with whom he engaged in sexual conduct. Kallestad's "log," in which he recorded the names and ages of his subjects as well as other "pertinent information" (such as breast measurements), lists many of his subjects as being age seventeen.

This evidence alone is sufficient to establish knowledge of the minority of his victims.

Kallestad, however, argues that we also should consider the testimony that was excluded from Staton regarding Kallestad's belief that seventeen-year-olds were "legal." If we do consider this testimony, it will only hurt Kallestad, since it further supports the existence of knowledge on his part for the age of his seventeen-year-old subjects. There was also oral testimony at trial from the girls, tending to prove Kallestad's knowledge of their minority. We find no sufficiency problem with regard to any of the pornography connections.

P. Multiplicity))Child Pornography.

Kallestad raises an interesting multiplicity argument, claiming that he was charged more than once for the continuous act of possessing the same photographs. Here, the counts each relied upon three unique photos or videos not charged in the other counts. The government did not simply seize a huge pile of pornographic material, divide it into piles of three pictures each to satisfy the statutory requirement, and charge the resulting number of counts.

Here, the dates charged in the possession counts were based upon the dates on which Kallestad developed the pictures. In other words, the photos and videos in the various counts came into Kallestad's possession at different times and from the development of different rolls of film. This is not, as Kallestad alleges, a

case of multiple counts based upon a single continuous act of possession; accordingly, the multiplicity challenge fails.

Q. Kallestad's Offense Level))Pornography.

The sentencing guidelines in effect at the time of sentencing are the appropriate source for determining a sentence, absent an ex post facto problem. United States v. Gonzales, 988 F.2d 16, 18 (5th Cir.), cert. denied, 114 S. Ct. 170 (1993). An amendment to the guidelines that exposes a defendant to a longer term of imprisonment than the guideline in place at the time the crime was committed creates an ex post facto problem. United States v. Suarez, 911 F.2d 1016, 1022 (5th Cir. 1990).

The 1990 guidelines had no provision addressing substantive violations of 18 U.S.C. § 2252(a)(4)(B), which was only enacted in November 1990. Section 2G2.4 of the 1990 guidelines, however, contained a cross-reference to a guideline under another statute, 18 U.S.C. § 2251, criminalizing the solicitation of a minor to engage in sexual conduct for the purpose of producing a visual depiction of such conduct. This cross-reference provision provided a base offense level of 25. The trial court applied this cross-reference provision, arriving at a base offense level of 25.

Kallestad argues that the district court erred in determining his offense level under the 1990 guidelines for the pornography convictions. Specifically, he claims that under U.S.S.G. § 2X5.1, which states that in the absence of a guideline addressing a particular federal criminal statue the offender should be sentenced

under the most analogous guideline, he should have been sentenced under 18 U.S.C. § 2252(a) and received a base offense level of 13. In the alternative, Kallestad argues that the district court should have applied the guidelines in effect at the time of the sentencing.

We are persuaded by Kallestad's alternative argument. In November 1991 the guidelines were amended, and a provision for simple possession as charged in this case was added. After the 1991 amendments, U.S.S.G. § 2G2.4 established a base offense level of 13 for violating 18 U.S.C. § 2252(a)(4)(B).

The base level of 13 set forth by guideline § 2G2.4 was in effect when Kallestad was sentenced, as this occurred after October 1991. Under our precedents, we start with the assumption that Kallestad should be sentenced under the amended provision. Because here use of the guideline in effect at the time of sentencing does not create an ex post facto problem, but in fact results in a lower sentence than defendant was entitled to, using either analogous provision of the 1990 guidelines, the 1991 provision specifying a base offense level of 13 should have been used in the first place.

The government counters by asserting that under the provision in effect at the time of sentencing, the base offense level would still have been 25. In its brief, the government assumes, without demonstrating, that the appropriate guideline is § 2G2.2. The statutory index to the guidelines specifies that both §§ 2G2.2 and 2G2.4 apply to violations of § 2252, without being more specific by subsection of that statute. In light of the fact, however, that

the simple possession of the materials charged under § 2252(a)(4)(B) is less severe than the crimes in other subsections of the statute, we agree with Kallestad that § 2G2.4 applies to his conduct.

Kallestad also challenges the application of § 2G2.1(b)(1) to add two points to his base offense level. Because his sentence should have been calculated under § 2G2.4 rather than § 2G2.1, we conclude that the increase under § 262.1(b)(1) was error.

Finally, Kallestad challenges the district court's application of U.S.S.G. § 3D1.4 to increase his offense level by five. This argument is wholly meritless, as Kallestad's situation is squarely within the language of the guideline.

## III.

In summary, Kallestad's and Shaw's convictions on all counts are AFFIRMED. Kallestad's sentence for the child pornography convictions is VACATED and REMANDED for proceedings consistent with this opinion.