23-7404

DOCKET NO. ~~23-704~~

BEFORE THE UNITED STATES SUPREME COURT

WILLIAM MAXWELL

Petitioner/Appellant/Defendant

VS.

UNITED STATES OF AMERICA

Respondent/Appellee/Plaintiff

On Petition for Certiorari to the United States Court of Appeals for the Third Circuit

---

On Appeal from the United States District Court for the District of New Jersey, Camden Vicarage, Honorable Robert Kugler, presiding.

MAXWELL'S REPLY

Respectfully Submitted,

WILLIAM MAXWELL
Fed. Reg. No.: 71944-279
FCI-Beaumont-Low
Post Office Box 26020
Beaumont, Texas 77720

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Supreme Court

Circuit Court Cases

District Court Cases

Texas Supreme Court

The Government, in its response, advocates the abandonment of the rules of evidence and procedure used from time inmemoriam in the American adversarial system. These Rules, designed to ensure fundamental due process, and deviation therefrom the standard trial practice would constitute both structural error and plain error which affects "the framework within which the trial proceeds," Johnson v. United States, 520 U.S. 461, 468 (1997) and not simply an error in the trial process itself. This Court's decisions issued post Third Circuit judgment may require examination by the courts below for several determinations including plain error analysis justifying GVR.

1) Trial practice in the United States is governed by a long history of evidentiary rules. The first among these rules is that exhibts, regardless of admissible form and admissibility in the proper context, cannot be discussed or displayed before the jury prior to their admission by the trial court into evidence.[EN1] The corollary to this is that reasonable inferences may be drawn only from evidence actually admitted at trial. This applies to the jury, the trial court (Rule 29 and Rule 33 motions) and the appellate court performing de novo review.[EN2]

Typically, the admission of evidence is documented and reflected in the trial record (providing foundation and context) and in the trial court exhibit list. See Erline Co. SA v. Johnson, 440 F.3d 648, 654 (4th Cir. 2006)("Adversarial system of justice in which the parties are obligated to present facts and legal arguments before a neutral decision-maker.") This "rule of evidence" comes from the necessity to evaluate each exhibit on its own under "the rules" to determine whether the exhibit is

admissible at this point in the trial, by this particular witness, and whether a proper foundation and predicate has been lain for the context, purpose, and reason that the exhibit is being offered for admission -- not whether the exhibit is in admissible form and admissible under some hypothetical context at some point during the trial.[EN3]

This practice, procedure, and application of the trial rules of evidence also affords defendants' due process. This is due process at its most basic and fundamental level. There are no cases that Maxwell can find and the Government offers none that allow for prejudicial and material exhibits to be paraded before the jury which were neither offered for admission nor admitted by the trial court into evidence. In every case where unoffered and unadmitted exhibits were before a jury they were isolated exhibits (less than a handful) and the trial court found that the exhibits themselves were not prejudicial in the scope of the case, because of lack of prejudice.

This trial practice is of paramount importance to our jury system and our American adversarial system of trial. Limiting instructions, improper predicate, speculation, hearsay, etc..., are familiar objections. Further, for example, when exhibit "B's" admission is dependent upon exhibit "A's" prior admission -- the exclusion of exhibit A causes the exclusion of exhibit B based on context and predicate. This is true regardless of whether exhibit B is in admissible form.

The offer of exhibits for admission into evidence by the Government notices the defendant of the specific context and predicate for which the exhibits are being offered and provides

the sole opportunity (due process) for a defendant to obtain notice, in context, and opportunity to be heard (object).

2) Here, the government made a Faustian bargain pretrial in order to gain a tactical advantage -- the use of the unoffered and unadmitted exhibits in opening statements. See Ohler v. United States, 529 U.S. 753, 756 (2000)(Both Government and defendant make tactical and strategic decisions through trial and are responsible for the consequences.)(Cleaned up). In a colloquy with the court pre-trial the Government acknowledged the consequences of its Faustian bargain -- should it fail for any reason to obtain the admission of any of the six exhibits during trial -- a mistrial would be required. Not only did the Government not obtain admission of these six and 280 other exhibts,**EN4** it never even offered them for admission -- thereby triggering defendant's duty to object, during the entire time of this "monster trial." [See JAB 4090-4016] (See also Maxwell's Opening Brief Appendix 2 highlighting the offending exhibits.)

3) Now that the Government's soul, as it were, is due -- the conceded mistrial -- it offers a substitute -- the American adversarial trial system.

4) The sheer number of trial exhibits (286) and the accompanying cover-up by the United States undermines the trial system. Maxwell with recognition of the plain error vis a' vis structural analysis context address both.

Justice Kennedy, writing for the Court, in Weaver v. Mass., 582 U.S. 286, 198 L.Ed.2d 420, 431-433 (2017), teaches that there are three types of structural errors. "First, an error has been deemed structural in some instances if the right at issue is not

designed to protect the defendant from erroneous conviction but instead protects some other interest." Id. at 431-433.

In this case Maxwell's due process rights were violated. A defendant "may assuredly insist upon the observance of... [structural] guarantees even when the evidence against him is so overhwhelming to establish guilt beyond a reasonable doubt." Carella v. Calif., 492 U.S. 263, 268 (1989((Scalia, J. concurring)EN5

Reversal is required because failure to follow the trial process and practice is a "fundamental flaw [ ]" and "undermines the structural integrity of the criminal tribunal itself." Vasquez v. Hillery, 474 U.S. 254, 263-64 (1986).

When there are trial errors involving one exhibit or a few exhibits, those are simply "an error in the trial process itself," Arizona v. Fulminate, 499 U.S. 279, 306 (1991) and if the Government can show "beyond a reasonable doubt that the error complained of did not contribute to the verdict" then the error is deemed harmless and the defendant is not entitled to reversal Id. But here, the Government has conceded that the 286 exhibits are prejudicial, that they were never offered and never admitted. Here, more nefariously, cover-ups are a foot.

5) The offending exhibits are highlighted in Appendix 2 to Maxwell's Opening Brief. On Page Two of Appendix 2 (Cause No. 1:11-CR-00740-RBK, Doc. 1545-6, filed 02/14/19, Page 3 of 38, Page.ID# 51218)(found in the ROA at JAD 1-70) under the Exhibit List appears the following (in relevant part):

Table Begins on Next Page.

200 Series	Miscellaneous Recordings	Date	ID	Evid
200	SP2 Session#21084	3/5/14	X	X
200A	Transcript	3/5/14	X	X
201	SPI Session#1500	4/10/14	X	X
201A	Trascript	4/10/14	X	X

These are four of the 286 unoffered and unadmitted exhibits, both material and prejudicial, as the Government has conceded. The court will note, that despite the exhibits having not been offered or admitted, ever, the United States affirmatively covered-up its structural and plain errors by denoting dates on which the offending exhibits were admitted. They were not.

6) To further complicate matters, at the February 14, 2019 hearing (filing at D.Ct. 1450 the trial court disclosed that the court's staff had lost or destroyed the court's exhibit list thereby requiring the defendants to rely on appeal on the Government's exhibit list which had 286 false entries.

Whether the Government cover-up was negligent or nefarious is immaterial; this, combined with the Government's exhibit list with 286 false entries, along with the 286 trial errors, along with the Government's Faustian bargain made pre-tiral for tactical advantage is such an attack on the trial process itself as to constitute structural error. To say nothing of the appellate court's inability to review. Inferences cannot be drawn on evidence that was never offered and never admitted.

7) Justice Kennedy also teaches that "an error has been deemed structural if the effects of the errors are simply too hard to measure." Weaver 198 L.Ed.2d at 431-433. The Court reasoned that "[b]ecause the Government will, as a result, find

it almost impossible to show the error was 'harmless beyond a reasonable doubt; (citing Chapman v. Calif., 386 U.S. 18, 24 (1967)) the efficiency costs of letting the government try to make the showing are unjustified. Id. While single trial errors can be measured for prejudicial effect, 286 trial errors, the cover-up, and the Faustian bargain -- cannot be quatifiably measured.

8) Here, each trial error would have to be measured against the other 285 exhibits as well as individually -- for context, predicate, etc..., as well as being measured against the other admitted trial exhibits. As this court teaches in Fulminate, 499 U.S at 307-08, trial error which occurs during the presentation of the case and which may "be quatitatively assessed in the context of the other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt" does not require reversal (emphasis added)(prejudice conceded). Id. However, the numerosity of the trial errors, the cover-up, the destroyed trial court exhibit list, the Faustian bargain preclude confidence in any such quantitative assessment. Further still, if the efficiency costs against the United States are unjustified, against Maxwell, an indigent confined inmate, required to use 1970's typewriters, limited legal computer access, limited access to his legal materials and the ROA, the opportunity is non-existent. Weaver's second type of structural error is appropriate here.

9) Justice Kennedy teaches that a third structural error exists in the presence of fundamental unfairness. Weaver, 198 L.Ed.2d at 431-433. Pre-trial, the United States made a Faustian

bargain in order to gain a tactical advantage and thereby use unoffered and unadmitted exhibits in opening arguments. After colloquy with the court where the Government acknowledged its obligation and the consequences of failure, all done in order to obtain the court's ruling in its favor: it cannot now avoid the consequences of its bargain (mistrial) in fundamental fairness (also Judicial estoppel is appropriate).

10) Plain error under Rule 52(b) that is conceded by the Government as follows. There are four elements: first, was there error? The use of 286 exhibits before the jury that were neither offered nor admitted into evidence, material and prejudicial exhibits, including those used in opening arguments constitutes error. See Adams, 385 F.2d at 550-51; Osborne, 351 F.2d at 113-19. Second, the error was plain. There was a pre-trial colloquy regarding the Government's use of exhibits prior to admission and the requirement of mistrial if there was even one exhibit that was not admitted. (See JAB 4090-4016) Further, as the Government concedes, the trial court was aware of the error but took no action. ("After a hearing on the matter the court noted in a letter to counsel for all parties that '[t]here were times during trial when counsel' for both sides 'failed to formally move an exhibit into evidence.'")(D.Ct. 1566, at 1 (Apr, 29, 2019); see id at 1-2; C.A. App. E3893-3894)(No unoffered and unadmitted defense exhibit has been identified by the Government.) Third, the Government conceded prejudice. (See United States v. Scarfo, Case No. 1:23-CV-22432-RBK, Doc. 7, PageI.D. 101, 03/18/24 at Page 30)("To be sure, the cases discussed above [all involving a few exhibits which were not found to be prejudicial to the

defendant] did not involve anywhere near the number of unadmitted exhibits [286] at issue here. Nor does the Government dispute that, had the unadmitted exhibits been excluded from evidence, the overall strength of the Government's case against [defendants] would have been eroded."(emphasis added). Fourth, the discretionary nature of plain error determines whether the error affected the substantial rights of the defendant. Under Rule 52, the court must be able to evaluate the affect of the error on the reliability of the jury verdict. See Sullivan v. Louisiana, 508 U.S. 275, 279 (1993). Furthermore, this Court teaches that Rule 52(b) should not be "[a]s rigid and undeviating judicially declared practice under which court's review would invariably be out of harmony with ... the rule of fundamental justice. (citing Hormel v. Helvering, 312 U.S. 552, 557 (1941)) Appellate courts should exercise discretion when the error, here the collection of 286 prejudicial exhibits, the Government cover-up, the trial court's loss of the court's exhibit list, the trial court's awarenesss of the error, collectively affect "the fairness, integrity, or public reputation of the judicial proceedings." United States v. Young, 470 U.S. 1, 15 (1985)(Internal citations omitted).

The Government's Fuastian bargain must have consequences, else why even have the trial practice and procedure? Due process requires more than admissible form, exhibits must actually be offered for admission -- the defendant allowed to object, and a ruling by a neutral magistrate obtained. Without these we lose our adversarial system of justice.**EN6**

11) Maxwell would note the Government does not dispute Maxwell's allegations and did not address the issue that inferences can only be drawn from admitted evidence for Rule 29. Rule 33 motions and de novo review on appeal.

12) The Court's decisions issued post the the Third Circuit's judgment in the case all relate to the jury instructions not the indictment. The Government's arguments regarding allegations in the indictment are misplaced.

13) The RICO conspiracy Count 1, the wire fraud conspiracy Count 3, the substantive wire fraud Counts 4-19 all had the same jury instructions. (See JAC 12370)**EN7**

14) The Government asserts that "board of director seats and thus control" are the same as a business itself, relying on Duplex Printing Co. v. Deering, 254 U.S. 443, 465 (1921). This is incongruent. Stewardship is not ownership. Board of director seats are elected positions independent of any ownership interest. Nor did the jury instructions allege ownership of FPFG. (See JAC 12379-380)**EN8** Nor did any wire fraud objective in the jury instructions ("property") allege actions post June 7, 2007, the day the Third Circuit found the alleged objective of the RICO conspiracy was complete. (Scarfo, Slip Op. at 4)

15) Duplex Printing relied on the Sherman and Clayton Acts, in which the Court made a finding of fact, in equity, in the injunction context, concerning different statutes all together. The Court did not hold that a "business of manufacturing printing presses and dispossing of them in commerce is a property right" under the wire fraud statute. Nor a traditional property right under the wire fraud statute. Nor equivalent to boards of director seats -- elected positions.

16) The Government's theory of the case, as to Maxwell, was that he used his lawful legal services agreement under the terms of that agreement, and pursuant to that lawful agreement, hired Seven Hills a company alleged to be controlled by co-defendant Pelullo. Both Maxwell and FirstPlus itself executed the Seven Hills employment contracts. There is no allegation that any of Maxwell's actions were outside the scope of his employment (legal services agreement). Rather, the Government alleged Maxwell owed a duty to third party shareholders. Maxwell was outside counsel not corporate counsel. Maxwell was actively in litigation with the shareholders in the Southern District of Texas and in Cameron County District Court, in Texas, representing FPFG at the same time the Government alleges he had a duty to those shareholders. Nor does the Government allege that Maxwell's legal fees or expenses were fraudulent. See John Maxwell v. United States, Civ. No.: 1:33-CV-23001(RBK); United States Opposition to John Maxwell's Motion to Vacate Sentence under 28 U.S.C. §2255[EN9], Page 35.[EN10]

Under Texas law, where Maxwell is immune from suit from third parties for tort or contract allegations, his conduct (arguing in the alternative) is the type this court described in Ciminelli as governed by state tort and contract law not federal fraud statutes. See Cantey Hanger LLP v. Boyd, 467 S.W.3d 477, 484 (Tex. 2015).(on immunity) All of which would need to be addressed below.

17) Throughout, the Government makes assertions to the indictment as its justification and defense for the complaints made by Maxwell. The Supreme Court cases, post Third Circuit

judgment, are not attacks on the indictment. Rather, they are attacks on the jury instructions. Ciminelli concerned an "instructional error, not the sufficiency of the indictment." United States v. Xv, No. 23-CR-133(JMF), 2024 U.S. Dist. LEXIS 56442, 2024 WL 1332548, at *2 n.1 (S.D.N.Y. Mar. 28, 2024); Ciminelli, 598 U.S. at 317 (Alito, J. concurring)("I do not understand the Court's opinion [to address] the indictment's sufficiency....")

18) In Macquarie Infrastructure Corp. v. Moab Partners, L.P., 601 U.S. 257 (2024)(see Maxwell's Second Supplemental Brief) Maxwell noted that attached to his Opening Brief was selected jury instructions. (See App.1.10-13)(JAC 12395-400). Each of the alelged acts were "disclosure" obligations not fraud allegations. They were, the Government alleged, omissions -- not half-truths. Further, no statement is identified in the jury instructions as a half-truth for which a further statement is required to make the statement truthful.

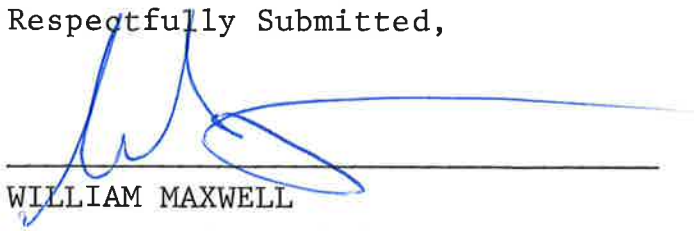
19) Bruen and Rahimi, the Government alleges are not applicable to Maxwell's "as applied" challenge. It relies on United States v. Sanches, 86 F.4th 680 (5th Cir. 2023). Sanches involved Sanches' false statement under oath on an ATF form 4473 and subsequent transfer to a violent felon. There was no allegations of false statement (no alleged conspiracy to make a false statement) simply an alleged transfer -- not by Maxwell -- to a non-violent felon. A felon who, though non-violent was permanently barred from possession of a firearm. (Jury instructions alleged non-violent felon. Pelullo had farud convictions, Scarfo's convictions, the court instructed the jury, were none of their concern.)

18) Regarding Fischer v. United States, 603 U.S. __ (2024), the Government again relies on the indictment's language not the jury instructions. (Maxwell does not have a copy of the indictment and cannot locate it in the ROA provided to him). However, the four separate actions alleged in the jury instructions (JAC 12378:13-15)(JAC 12466-468) do not relate to §1512(b)(3)(letter between counsel, Scarfo's three allegedly false statements to his supervision officer). The Government's reading of §1512(b)(3) would impose a disclosure requirement on counsel. Maxwell did no know of nor was Maxwell privy to discussions, if any, about Scarfo's untruthfulness to his supervised release officer. Maxwell was not primary counsel regarding Scarfo's supervised release. To impose such far reaching disclosure obligations on conferring counsel to review all such actions and filings by primary counsel or primary counsel's client would destroy the function of counsel and the ability of counsels to confer for fear of criminal liability for actions taken by another's counsel. This issue would certainly need to be addressed by the lower courts on GVR and prior to new trial.

Summary

The structural error/plain error requires reversal and a new trial at which time the courts below can address the issues form the Court's new decisions. Alternatively, GVR is appropriate to address structural error or plain error analysis along with other issues. Alternatively, the Court's supervision is appropriate to address the structural and plain errors and address the effect of the Court's decisions post Third Circuit judgment under certiorari.

Respectfully Submitted,

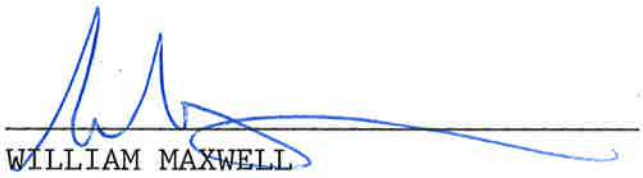


WILLIAM MAXWELL
Fed. Reg. No.: 71944-279
FCI-Beaumont-Low
Post Office Box 26020
Beaumont, Texas 77720

VERIFICATION

I hereby verify that all material facts contained in the foregoing Reply are true and correct to the best of my knowledge and belief. I make this verification under penalties of perjury and pursuant to 28 U.S.C. §1746.

September 3, 2024



WILLIAM MAXWELL

ENDNOTES

EN1 United States v. Adams, 385 F.2d 548, 550-51 (2d Cir. 1967)("[T]he principle that the jury may consider only matters that [have] been received in evidence is so fundamental that a breach of it should not be condoned if there is the slightest possibility that harm could have resulted."); c.f. Osborne v. United States, 351 F.2d 111, 113-19 (8th Cir. 1965)("The delivery to the jury for their consideration of an exhibit not received in evidence constitutes error." Citing Sawyer v. United States, 303 F.2d 392, 395 (D.C. Cir. 1961).

EN2 Lockhart v. Nelson, 488 U.S. 33, 40-42 (1988); Burks v. United States, 437 U.S. 1, 16, 17 (1978); Warden v. Brown, 599 U.S. 120, 137 (2010)(Thomas, J. and Scalia, J. concurring).

EN3 That exhibits are admissible in any possible context during trial or excluded or subject to exclusion under the Fourth Amendment or for other rule or Constituional violation is typically handled pre-trial in a suppression motion, outside the presence of the jury.

EN4 In Maxwell's Opening Brief he noted 276 offending exhibits, material and prejudicial exhibits. Maxwell, on further review, has discovered that there were 286 offending exhibits. The Government confesses this is so.

EN5 Maxwell argues in the alternative throughout and does not concede that the evidence supports conviction or that it was ever admitted -- which further augurs against the Government under structural and plain error analysis in this case. There would be no record of admitted evidence for appellate review, Rule 29 motions, or Rule 33 motions. And no record from which reasonable inferences ccould be drawn, without performing analysis for each of the 286 offending exhibits. This is independent of the opening argument error.

EN6 Erline Co. SA v. Johnson, 440 F.3d 648, 654 (4th Cir. 2006)

EN7 "Both Racketeering Act 2[wire fraud] of count one [RICO conspiracy] of the indictment as well as counts three through nineteen of the indictment relate to wire fraud. Count one alleges ... [that co-defendants] agreed that a co-conspirator

would commit wire fraud ... while count three charges the same defendants with conspiracy to commit wire fraud. Counts four through nineteen charge the defendants actually committed wire fraud .... the instructions I give you will also relate to counts three through nineteen." (Emphais added) See also EN2 in Maxwell's Opening Brief. The only object of the wire fraud counts defined in the jury instructions were the board of director seats, the incidental fees paid the directors, and thus control of FPFG. The directors' fees were not even calculated or part of the loss calculation (on information and belief -- Maxwell can not locate any calculation regarding director's fees in the loss calculation).

EN8 (JAC 12379-380) "The term 'property' [under RICO extortion predicate, 'property' is not defined elsewhere in the jury instruction -- and the RICO instructions for counts 1, 2, 3 - 19 all applied to wire fraud counts] includes money and other tangible and intabgible things of value. The property at issue in count one of the indictment consists of the seat on the board of directors, including compensation due to those members, and thus control of FPFG."(Emphasis added)

EN9 Maxwell does not have access to a file stamped copy nor PACER.

EN10 "The Government never argued that the amount of William Maxwell's fees were part of the fraud." at 35.