

Appendix A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

SEP 19 2017

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

KENNETH WAYNE MORGAN, Jr.,

Defendant-Appellant.

No. 15-10441

D.C. No.
2:14-cr-01126-GMS-1

MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
G. Murray Snow, District Judge, Presiding

Argued and Submitted May 15, 2017
San Francisco, California

Before: KLEINFELD and WARDLAW, Circuit Judges, and MORRIS,** District Judge.

Defendant Kenneth Morgan, Jr. appeals his jury conviction and sentence for assault resulting in serious bodily injury. We have jurisdiction under 28 U.S.C. § 1291. We affirm.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Brian M. Morris, United States District Judge for the District of Montana, sitting by designation.

1. The district court did not clearly err when it rejected Morgan's assertion that intentional discrimination motivated the government's peremptory strike of an Asian-American prospective juror. The judge determined that the government properly struck the juror because she previously had served on a hung jury and she had expressed concerns about how fairly the defendant in that case had been treated. The district court's determination on discriminatory intent represents a "finding of fact entitled to deference." *United States v. Steele*, 298 F.3d 906, 910 (9th Cir. 2002). Service on a hung jury represents a legitimate reason to exercise a peremptory strike. *See United States v. Changco*, 1 F.3d 837, 840 (9th Cir. 1993) (an "inability to relate to other jurors" is a valid, race-neutral reason for excluding a prospective juror).

Hesitation regarding the fairness of criminal proceedings also provides a proper basis for a peremptory strike. *See Briggs v. Grounds*, 682 F.3d 1165, 1174 (9th Cir. 2012) (holding "the prosecution to a higher burden of proof than the law required" is a valid, race-neutral reason for excluding a juror). Further, concern about a juror's feelings regarding the fairness of criminal proceedings corresponds with a valid for-cause reason to strike a juror—the inability of a juror to be fair to the defendant. *See Hernandez v. New York*, 500 U.S. 352, 362–63 (1991). As noted by the Supreme Court in *Hernandez* "the reason offered by the prosecutor

for a peremptory strike need not rise to the level of a challenge for cause, the fact that it corresponds to a valid for-cause challenge will demonstrate its race-neutral character.” *Id.* (internal citations omitted).

2. The district court did not abuse its discretion when it denied Morgan’s motion to give a self-defense instruction to the jury. A criminal defendant possesses a constitutional right to have the jury instructed on his defense if the law supports the requested instruction and it has some foundation in the evidence, even if that evidence is “weak, insufficient, inconsistent, or of doubtful credibility.” *United States v. Sanchez-Lima*, 161 F.3d 545, 549 (9th Cir. 1998) (internal citations and quotations omitted). The “merest scintilla of evidence” falls short. *United States v. Jackson*, 726 F.2d 1466, 1468 (9th Cir. 1984). The district judge correctly found that no record evidence existed to support a self-defense instruction.

3. The district court did not abuse its discretion when it overruled Morgan’s objection to the government’s assertion that the defendant “was slashing at the victim” during closing and rebuttal arguments. The prosecutor’s statements represented reasonable inferences from the evidence. Prosecutors enjoy “reasonably wide latitude” in fashioning closing argument. *United States v. Gorostiza*, 468 F.2d 915, 916 (9th Cir. 1972) (per curiam). A prosecutor may

“strike hard blows” based on the evidence and all reasonable inferences derived therefrom. *United States v. Tucker*, 641 F.3d 1110, 1120 (9th Cir. 2011) (internal quotation omitted).

4. The prosecution did not violate Morgan’s Fifth Amendment right to due process by singling him out for his “Indian blood.” We and the United States Supreme Court have affirmed that 18 U.S.C. § 1153 does not violate defendants’ rights by singling them out based on their race. *See United States v. Antelope*, 430 U.S. 641, 645–47 (1977); *United States v. Zepeda*, 792 F.3d 1103, 1111–13 (9th Cir. 2015) (en banc), *cert. denied*, 136 S. Ct. 1712 (2016). “[F]ederal regulation of Indian affairs is not based upon impermissible classifications. Rather, such regulation is rooted in the unique status of Indians as ‘a separate people’ with their own political institutions.” *Id.* (quoting *Antelope*, 430 U.S. at 646).

5. The cumulative effect of error did not deprive Morgan of a fair trial. Because the district court committed no error, there can be no cumulative effect.

6. The district court committed no procedural error and did not abuse its discretion when it enhanced Morgan’s sentence under the Sentencing Guidelines based on the allegation that he had possessed a dangerous weapon, although the jury acquitted him of that charge. No Sixth Amendment violation occurs “when

sentencing judges consider conduct underlying acquitted counts.” *United States v. Mercado*, 474 F.3d 654, 657–58 (9th Cir. 2007).

7. The district court did not plainly err when it imposed supervised release conditions requiring Morgan to meet “family responsibilities,” “work regularly,” and permit a probation officer to visit “at any time” and confiscate “contraband.” The conditions are appropriate given the facts and circumstances of the case, and are “reasonably related to the goals of deterrence, protection of the public, or rehabilitation of the offender.” *United States v. Watson*, 582 F.3d 974, 982 (9th Cir. 2009). No controlling precedent existed reversing the standard and commonly imposed conditions on the grounds of vagueness or overbreadth at the time the district court issued its decision. *See United States v. Gnirke*, 775 F.3d 1155, 1164 (9th Cir. 2015) (quoting *United States v. Gonzalez-Aparicio*, 663 F.3d 419, 428 (9th Cir. 2011) (“An error ‘cannot be plain where there is no controlling authority on point and where the most closely analogous precedent leads to conflicting results.’”)).

AFFIRMED.

Appendix B

1 JON M. SANDS
2 Federal Public Defender
3 District of Arizona
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MARIA TERESA WEIDNER; #027912
Asst. Federal Public Defender
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7 IN THE UNITED STATES DISTRICT COURT
8 DISTRICT OF ARIZONA

9 United States of America,
10 Plaintiff,
11 vs.
12 Kenneth Wayne Morgan, Jr.,
13 Defendant

No. CR14-1126-PHX-GMS

**OBJECTIONS TO THE
PRESENTENCE INVESTIGATION
REPORT (PSR)**

14
15 Defendant, through undersigned counsel, respectfully submits the
16 following objections to the Presentence Investigation Report's (PSR)'s Guidelines
17 calculation in the above-captioned case:

- 18 1) Mr. Morgan objects to imposition of a 4-level enhancement pursuant to U.S.S.G.
19 § 2A2.2(b)(2)(b) for use of a deadly weapon, i.e., "a knife" during the assault.
20
21 2) Mr. Morgan also objects to the PSR's characterizations of the offense conduct, as
22 set forth in paragraphs 5-8. Information found in these paragraphs is based
23 entirely on statements made by the victim to law enforcement and often conflict
24 with the testimony of witnesses at trial.
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Mr. Morgan submits that the correct guidelines calculation in this case is as follows:

Base Offense Level per 2A2.2(a):	14
Specific Offense Characteristic per 2A2.2(b)(3)(c):	+6
Adjusted Offense Level:	20
Total Offense Level:	20
Sentencing Range:	(63-78 months)

...

I. The “dangerous weapon” enhancement is inappropriate in this case.

At trial in the above-captioned case, Mr. Morgan was acquitted by the jury of Count 2 of the Indictment, Assault with a Dangerous Weapon. The PSR writer’s recommendation includes a 4-level enhancement based on use of a “dangerous weapon”, i.e., “a knife” in the assault on the victim, Anthony Gutierrez.

A. The defense objects to the use of acquitted conduct at sentencing, but asserts that if it is to be considered per Supreme Court and Ninth Circuit precedent, the burden of proof lies with the government, and the proper standard of proof is clear and convincing, rather than preponderance.

Supreme Court precedent directs that the use of evidence of acquitted conduct at sentencing is appropriate where the government has proved such conduct by a preponderance of the evidence. *United States v. Watts*, 519 U.S. 148, 158 (1997). In so finding, the Court reasoned that, as a general matter, “an acquittal in a criminal case does not preclude the government from relitigating an issue when it is presented in a subsequent action governed by a lower standard of proof.” *Id.* at 156 (citing *Dowling v. United States*, 493 U.S. 342, 349 (1990)). However, “when a sentencing factor has an extremely disproportionate effect on the sentence relative to the offense of conviction ... a higher standard of proof” may be required. *United States v. Restrepo*, 946 F.2d 654, 659-60 (9th Cir. 1991) (en banc) (“*Restrepo II*”) overruling 903 F.2d 648 (1990) (“*Restrepo I*”). (citing *McMillan v. Pennsylvania*, 477 U.S. 79, 87-91 (1986)). *See also*,

1 *United States v. Johansson*, 249 F.3d 848, 853-855 (9th Cir. 2001). The defense asserts
2 that in this case, since the recommended enhancement results in a difference of 29-37
3 months, the heightened standard of clear and convincing evidence should be applied. *Id.*

4 The notion of considering acquitted conduct at sentencing has not been
5 without controversy and criticism, in large part because such consideration all but flies
6 in the face of basic notions of justice:

7 When a person is punished, not on the strength of convictions, but on the
8 strength of findings of fact made at sentencing hearings, we cannot
9 possibly have the same level of confidence in the outcome. Under the
10 relevant conduct provision, a defendant is punished, and punished
11 severely, based upon a sentencing judge's finding that he is guilty of other
12 crimes in the same course of conduct as the offense of conviction. The
13 evidence need not persuade the sentencing judge of guilt beyond a
14 reasonable doubt, but by a mere preponderance of the evidence—the more-
15 probable-than-not standard used in civil cases. *Restrepo II*, 946 F.2d at
16 657 (9th Cir.1991) (en banc). Moreover, the evidence used at sentencing
17 hearings need not measure up to the strict standards of reliability we insist
18 upon for evidence admitted at a criminal trial. The Sixth Amendment right
19 of confrontation of witnesses is not honored, *United States v. Petty*, 982
20 F.2d 1365, 1370 (9th Cir.1993); *United States v. Silverman*, 976 F.2d
21 1502, 1511 (9th Cir.1992) (en banc). The evidence may be hearsay, “even
22 ‘second-hand’ hearsay, from informants and unidentified sources.”
23 *Silverman*, 976 F.2d at 1513. And, of course, there is no right to have a
24 jury of your peers decide your fate. In sum, the relevant conduct guideline
25 subverts Congress' grand plan to make federal sentencing certain and fair
26 because it allows “convictions” obtained at informal sentencing hearings
27 to substitute for real convictions. *United States v. Wong*, 2F.3d 927, 935-
28 36 (9th Cir. 1993) (J. Norris, dissenting)

22 Even in light of *Watts* and other precedent to the contrary, the facts of the
23 instant case militate against this court’s consideration of acquitted conduct—
24 specifically the allegation that Mr. Morgan used a dangerous weapon. Should the
25 government opt to relitigate this issue at sentencing, the available evidence is
26 insufficient to meet either standard of proof for the following reasons:

- 1) The victim, Anthony Gutierrez, is not a credible witness. A two-time felon, Mr. Gutierrez has convictions for aggravated assault (Pima County Cause No. CR2011-00300) and attempted theft of a means of transportation (Maricopa County Cause No. CR2005-123702). Mr. Gutierrez has also been convicted of assault on at least two occasions by the Gila River Indian Community tribal government: GRIC CR-2013-1357 and GRIC CR-2003-0604. At the time of trial in this case, Mr. Gutierrez was also the subject of an active warrant in Florence/Coolidge Municipal Court for assault.
- 2) Mr. Gutierrez was interviewed by law enforcement in the hospital on February 25, 2015. At this time, he was under investigation for a stabbing on tribal land, GRPD Case No. 14-00271. In addition to making statements that incriminated Mr. Morgan and others, Mr. Gutierrez attempted to deflect attention from himself as a person of interest in GRPD Case No. 14-00271.
- 3) The above-captioned case proceeded to trial. Witnesses testified. The victim, Mr. Gutierrez, was not among testifying witnesses. While it is indisputable that Mr. Morgan and Mr. Gutierrez fought, the latter ultimately suffering a slash to his head, none of the witnesses testified that they saw “a knife” or other dangerous weapon. Rather, witnesses reported not having been in the house when the pertinent part of the assault occurred and returning to a home in complete disarray, raising the possibility that some other object caused the wound to Mr. Gutierrez’ head, or that the wound otherwise occurred in the course of the fight between the two men.
- 4) At trial, the government attempted to call Candice Thomas as a witness but she did not comply with this court’s subpoena. The defense believes that the government hoped Ms. Thomas would provide testimony inculpatory of Mr. Morgan; however, Ms. Thomas has credibility issues of her own.

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1 5) Ms. Thomas is a felon as a result of her conviction in Pima County Cause No.
2 CR2013-01113. Moreover, Ms. Thomas was and is involved in a romantic
3 relationship with another witness who did not testify at trial, Barbara Evans. Ms.
4 Thomas therefore has motive to protect her partner and inculcate Mr. Morgan.

5 **B. The right to confrontation at sentencing.**

6 The right to confrontation, like a not-guilty verdict, has gotten short shrift
7 from the courts in the context of due process rights at sentencing. *See, e.g., Williams v.*
8 *New York*, 337 U.S. 241 (1949) (affirming the use of hearsay at sentencing); *Petty*, 982
9 F.2d 1365, 1370. However, the defense objects that if Mr. Morgan's sentence is to be
10 enhanced based on the statements of others, these should be subject to confrontation.
11 This is so due to the fact that this case proceeded to trial, which is, so to speak, the most
12 explicit invocation one can make of his right to confront adverse witnesses.

13 Notwithstanding case law to the contrary, however, it is still impermissible
14 for a criminal sentence to be predicated on false information. *Townsend v. Burke*, 334
15 U.S. 736, 740-741 (1948). *See also United States v. Tucker*, 404 U.S. 443 (1972).
16 Moreover, information that is unreliable or of questionable accuracy cannot serve as the
17 basis for imposition of a greater sentence. *United States v. Weston*, 448 F.2d at 634.

18 Here, the hearsay statements that may support the PSR's recommended 4-
19 level enhancement were made by individuals with severely impaired credibility. In both
20 cases, the record reflects that each actively avoided testifying at trial: Mr. Gutierrez, by
21 fleeing to Colorado, and Ms. Thomas by violating this court's order and failing to
22 appear to testify under subpoena. This fact, together with the other motives to lie set
23 forth above illustrate that the accuracy and veracity of any proffered statements made
24 by Ms. Thomas or Mr. Gutierrez is an open question and that as a result, must be
25 disregarded by this court.

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27 ///

1 Likewise, information contained in paragraphs 5-8, which simply repeats the
2 statements made by Mr. Gutierrez in his February 2015 interview with law
3 enforcement, cannot be accepted and portrayed as fact, given the problems raised by
4 Mr. Gutierrez' lack of credibility and unwillingness to participate in the judicial
5 process, as well as the conflicts between his statements and those of the witnesses who
6 did testify at trial.

7 Respectfully submitted: July 20, 2015.

8 JON M. SANDS
9 Federal Public Defender

10 s/Maria Teresa Weidner
11 MARIA TERESA WEIDNER
12 Asst. Federal Public Defender
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1 Copy of the foregoing transmitted by ECF for filing July 20, 2015, to:

2 CLERK'S OFFICE

3 United States District Court

4 Sandra Day O'Connor Courthouse

5 401 W. Washington

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15 KEN SALMON

16 U.S. Probation Officer

17 KENNETH WAYNE MORGAN, JR.

18 Defendant

19 s/kl

Appendix C

1 UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF ARIZONA

3

4 United States of America,)
)
 5 Plaintiff,) No. CR 14-1126-PHX-GMS
)
 6 vs.) Phoenix, Arizona
) August 31, 2015
 7 Kenneth Wayne Morgan, Jr.,) 1:30 p.m.
)
 8 Defendant.)
)
 9 _____)

10 REPORTER'S TRANSCRIPT OF PROCEEDINGS

11 BEFORE THE HONORABLE G. MURRAY SNOW

12 (Sentencing Hearing)

13 Appearances:

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 18 Assistant Federal Public Defender
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21 Court Reporter: Gary Moll
 401 W. Washington Street, SPC #38
 22 Phoenix, Arizona 85003
 (602) 322-7263
 23

24 Proceedings taken by stenographic court reporter
 25 Transcript prepared by computer-aided transcription

1 there that is not correct, you can seek to obtain correction
2 informally from the probation officer or you can object here
3 and then I make the determination.

4 Your counsel has filed certain objections on your
5 behalf to the presentence investigation report, but I want to 13:31:34
6 make sure first, Ms. Weidner, that you have reviewed the entire
7 report with Mr. Morgan.

8 MS. WEIDNER: Yes, Your Honor. We reviewed it
9 together. He has also received his own copy.

10 THE COURT: Okay. And the objections you filed 13:31:48
11 basically are the objection to the 4-point upward level
12 adjustment to reflect the fact that a dangerous weapon was used
13 during the crime.

14 And I believe you've also objected -- there was one
15 other objection. Oh, that was just to some of the 13:32:03
16 characterizations provided in paragraphs 5 through 8.

17 Do you wish to be heard on your objection?

18 MS. WEIDNER: Just briefly, Your Honor. Your Honor --

19 THE COURT: Let me just tell you what concerns me as I
20 read it, so that you can address it. 13:32:22

21 I do remember seeing the photographs of the victim
22 with his head sliced open, and it seems to me -- I understand
23 and respect your argument that once the defendant has been
24 found not guilty of assault with a dangerous weapon that it
25 would be your position that that should not be usable in 13:32:43

1 arriving at a sentence or the appropriate sentencing guidelines
2 under Count 1, which is assault resulting in serious bodily
3 injury. Even though I respect that argument, I don't think
4 it's the law.

5 And so then the question is, Is it a preponderance or 13:33:02
6 clear and convincing evidence standard? because of the effect
7 that would have on the underlying guideline range.

8 It doesn't seem to me that all of the -- it doesn't
9 seem to me that after you consider the factors that this is one
10 that would require clear and convincing evidence, but even if 13:33:21
11 it is a clear and convincing evidence standard, here is what I
12 found to be pretty clear and convincing.

13 One is the photograph, as I recall presented at trial,
14 that shows the wound the defendant received -- or that the
15 victim received, and it was a sharp, cutting wound, it seemed 13:33:48
16 to me. It seems to me to be inconceivable that a wound of that
17 nature, as I recall it, would have been inflicted by something
18 that wouldn't qualify as a dangerous weapon as that is defined
19 in the Federal Sentencing Guidelines, and I'm using the
20 definition in that first section of the Federal Sentencing 13:34:09
21 Guidelines.

22 I also recall testimony from the physicians that it
23 would have had to have been a knife or sharp object, and there
24 was the testimony of the young witness who said he saw
25 something shiny. 13:34:25

C E R T I F I C A T E

I, GARY MOLL, do hereby certify that I am duly appointed and qualified to act as Official Court Reporter for the United States District Court for the District of Arizona.

I FURTHER CERTIFY that the foregoing pages constitute a full, true, and accurate transcript of all of that portion of the proceedings contained herein, had in the above-entitled cause on the date specified therein, and that said transcript was prepared under my direction and control.

DATED at Phoenix, Arizona, this 11th day of September, 2015.

s/Gary Moll