No. _____

In the
Supreme Court of the United States

_____

LEROY DONOVAN COMBS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

_____

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

_____

PETITION FOR WRIT OF CERTIORARI

_____

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QUESTION PRESENTED

Under what circumstances is a co-defendant's courtroom outburst in front of a jury inherently prejudicial, requiring a mistrial?

PARTIES TO THE PROCEEDINGS

The parties are petitioner, Leroy Donovan Combs, and respondent, United States of America. All parties appear in the caption of the case on the cover page.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Leroy Donovan Combs, respectfully prays that a writ of certiorari issue to review the judgment of the Ninth Circuit Court of Appeals, entered in the instant proceeding on December 6, 2017, Ninth Circuit Court of Appeal № 16-10102.

OPINIONS BELOW

The United States Court of Appeals for the Ninth Circuit issued an unpublished memorandum decision in this matter. App. 1a. See also at United States v. Combs, 705 Fed.Appx. 620 (9th Cir. 2017)(unpublished). The district court order from which Mr. Combs appealed is also unpublished. App. 4a. See United States v. Combs, U.S. District Court, Eastern District of California № 1:13-cr-00362-AWI.

STATEMENT OF JURISDICTION

The date on which the Ninth Circuit Court of Appeals filed its memorandum in the instant matter was December 6, 2017. 2a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . .

United States Constitution, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

A. Mr. Combs's Personal History

Leroy Combs was born in South Lebanon, Ohio seventy-five years ago. PSR[1] 1757, 1762. At the age of seven, Mr. Combs moved with his family from Ohio to California. PSR 1762. He has remained living in this State since that time. PSR 1757.

Mr. Combs married his wife, Shirley, in 1980. He has three adult children. One child lives in Texas and the other two live in California. PSR 1762. Mrs. Combs, however, died of breast cancer in 2001. PSR 1762.

Prior to his conviction in this matter, Mr. Combs had no convictions, arrests, or history of criminal conduct. PSR 1762. He does not drink or use illegal controlled substances. Although he is in fairly good health, Mr. Combs does suffer from cataracts. PSR 1763.

Mr. Combs is retired and his only source of income is social security. Prior to retiring, he operated a preschool for twenty years called "Little People's School." Until 2008, he had a printing business called "Ideas Unlimited." Mr. Combs also ran the New Covenant Church Ministry in

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[1]"PSR" refers to the pre-sentencing report filed in the Ninth Circuit Court of Appeals.

Fresno, California. PSR 1763.

The state and federal governments claimed that, as a result of Mr. Combs's engagement in his businesses and ministry, he owes a total of $ 3,298,276 in taxes. In an attempt to satisfy these debts, California and the United States have liens against Mr. Combs dating back to 1993. PSR 1763.

Mr. Combs has no significant assets and does not own a vehicle. PSR 1763. Thus, prior to his incarceration, he relied solely on the $1,423 he received monthly from social security. PSR 1763.

B. The Facts Giving Rise to Mr. Combs's Conviction

In or about 2000, co-defendant, George Uptergrove, became overwhelmed with his inability to pay back taxes owed to the United States government. ER[2] 133-134. In an attempt to figure out a way to reconcile these debts, Mr. Uptergrove began to research tax law and read related materials. ER 125-127, 130-133. Mr. Uptergrove had no legal background, rather, he was a roofer by trade. ER 100-103, 106.

---

[2]"ER" refers to the Excerpts of Record filed in the Ninth Circuit Court of Appeals.

As a result of his research, Mr. Uptergrove began to believe that he could legitimately reconcile his tax debt through a series of steps that involved issuing bonds. ER 145, 155-156, 158, 161-162. In 2008, Mr. Uptergrove shared his beliefs with, among others, Gaylene Bolanos. ER 123-124. Ms. Bolanos in turn discussed her beliefs regarding tax preparation with Mr. Uptergrove. ER 124.

Immediately after speaking with Ms. Bolanos, Mr. Uptergrove contacted Louis Calles to discuss his and Ms. Bolanos's thoughts regarding tax preparation. ER 124. Mr. Calles was a former Internal Revenue Service agent and a long time tax preparer. ER 153, 703, 720, 722, 724-725, 776-779. Thus, Mr. Uptergrove relied on Mr. Calles' advice and guidance. ER 170. In addition to speaking with Mr. Calles, Mr. Uptergrove did further research on Ms. Bolanos's ideas, and he concluded that the tax preparation method they had formulated was a legitimate procedure. ER 165, 173, 180-181. Eventually, Ms. Bolanos, Mr. Calles, and Oswald Georgner co-opted Mr. Uptergrove's income tax preparation method. ER 165. Ms. Bolanos and Mr. Calles then took a leadership role in advising others on how to prepare their tax returns in a similar

manner. ER 165-166, 703, 720, 724-725, 776-779. The tax preparation method was presented as a legitimate way to prepare tax returns. ER 778-779.

In 2008, the Internal Revenue Service (IRS) reviewed Fernando and Gaylene Bolanos's 2007 federal income tax return which claimed a $1,914,757 refund. The refund amount was based largely on items listed in the return's Schedule B Form. The form listed taxable interest and dividends allegedly paid to the IRS on behalf of the Bolanoses by various entities. An investigation of the Schedule B payments revealed that the listed entities had not made the asserted payments. PSR 1760.

Further investigation determined that Ms. Bolanos and Oswald Georgner worked as tax preparers for other individuals. In preparing taxes for their clients, Ms. Bolanos and Mr. Georgner reported the taxpayers' total outstanding debt as actual interest income the taxpayer had received from the lender. These returns also reported all of this interest income had been withheld and the taxpayer was therefore entitled to a tax refund. Ms. Bolanos and Mr. Georgner told clients that the elimination of their debts and the receipt of sizable tax refunds in this

manner was legal. ER 1668; PSR 1760.

The government alleged that Ms. Bolanos and Mr. Georgner recruited Mr. Combs as a client and that on October 16, 2008, he filed a 2007 tax return prepared by them seeking a refund in excess of six million dollars. ER 1669-1670, 1690; PSR1760. The government did not pay Mr. Combs any of the refund requested. PSR 1760.

C. Mr. Combs's Indictment, Arraignment, and Bail

On September 26, 2013, the government filed an indictment against Mr. Combs and eight other defendants. ER 1666. Count Sixteen of the indictment alleged Mr. Combs made false claims against the United States in violation of 18 U.S.C. § 287. ER 1670-1671.

The district court issued a warrant for Mr. Combs, and he was arrested on October 4, 2013. PSR 1760. At his arraignment/detention hearing on the same date, he pleaded not guilty. ER 1633. The government recommended Mr. Combs be detained, but Pretrial Services recommended the contrary. ER 1637. Pretrial Services's recommendation was apparently based on the fact that Mr. Combs had no prior criminal

history and the alleged crime was not one of violence. ER 1638.

The district court allowed Mr. Combs to remain free based on a personal recognizance bond. ER 1446, 1451. In so allowing, the district court imposed a number of conditions. ER 1644-1651. Pretrial Services's records indicated that Mr. Combs complied with all court-ordered conditions of release. PSR 1759, 1768.

D. The Trial

Five of the eight defendants proceeded to trial, including Mr. Combs, and co-defendants Gaylene Bolanos, Charles Uptergrove, Donna Lee Moon and Rodney Moon. The trial lasted 12 days, beginning on October 22, 2015 and concluding on November 10, 2015. ER 1734-1739.

At trial, the government presented the defendants' 2007 tax returns and the attached Schedule Bs. These documents included Mr. Combs's 2007 tax return. ER 1690. The government then presented the testimony of the IRS, the California State Franchise Tax Board, the Social Security Administration and other entities that they had not distributed interest income to any of the defendants nor had they paid any taxes to the IRS on

behalf of the defendants as claimed on the Schedule Bs. In other words, these entities testified that they had not issued any 1099-OIDs to any of the defendants. ER 639-640. 1232-1238, 1266-1267, 1365, 1382-1407, 1481, 1497-1498, 1503-1507, 1513-1520, 1523-1540, 1620-1621. These documents and the testimony included references to Mr. Combs's 2007 tax return. ER 1237-1238, 1266-1267, 1391-1392, 1531-1540, 1622-1623, 1690-1692.

On November 2, 2015, which was the seventh day of the trial, the government rested its case in chief. ER 598, 814. In response, Mr. Combs informed the district court that he would not testify nor would he put on an affirmative defense. ER 598. All of the other defendants, except for George Uptergrove, similarly informed the district court. ER 598.

On day eight of the twelve-day trial, Mr. Uptergrove took the witness stand. ER 70. Just as Mr. Uptergrove was to begin his testimony, Ms. Bolanos made the following outburst in the presence of the jury:

> DEFENDANT BOLANOS: With all due respect, Your Honor, you are disqualified for your personal bias towards me and Chuck Uptergrove.
>
> MR. HOMOLA: Miss Bolanos, no, no, no –

DEFENDANT BOLANOS: You stop. You have just threatened Chuck with jail if he tells the truth to this jury. You have kept me incarcerated for 300 days because of my profession of Jesus Christ and because of my telling the truth. You are disqualified for your personal bias against me, all eight of us, and of Chuck Uptergrove and threatening him for jail again if he tells the jury the truth. You have conspired to withhold the truth from this jury.

MR. RABENN: Your Honor, the Government moves that Miss Bolanos be excluded from this proceeding.

DEFENDANT BOLANOS: Absolutely. You need to arrest that judge, and you need to arrest them for their conspiracy against the jury and against us. And you have a personal bias against each and every one of us, Trustee Ishii. And you have threatened Chuck Uptergrove with jail if he tells this jury the truth, and you have imposed this de facto attorney on me against my heavily protest, and he has aided and abetted me being in jail for over 300 days because of my profession of my faith in Jesus Christ, and because I have lawfully and effectively challenged your jurisdiction, and I will not serve two masters, and this jury has had the truth withheld from them. And, jury, I hate to tell you, but you need to know, you and your kids may be next. And I am sorry for -- this is malicious prosecution against me because I ratted out an IRS agent who has committed fraud on this Court and with the conspiracy on this. This is an unescapable vortex of viciousness. And it is a game aimed against us and you.

MR. HOMOLA: Miss Bolanos –

DEFENDANT BOLANOS: Stop now. Silence in the name of Jesus. Silence.

MR. HOMOLA: Miss Bolanos, sit down.

DEFENDANT BOLANOS: I will not sit down.

MR. HOMOLA: Sit down, Miss Bolanos.

DEFENDANT BOLANOS: You are disqualified, Judge Ishii. Trustee Ishii, you are disqualified for your personal bias against me --

MR. HOMOLA: Your Honor, I ask for a 10-minute recess.

DEFENDANT BOLANOS: -- and all eight of us.

THE COURT: I'll excuse the jury.

DEFENDANT BOLANOS: We are innocent of all wrongdoing, and we are innocent of all intent of wrongdoing. And I will not let the jury be conspired against anymore.

(The jury was escorted out of the courtroom.)

ER 70-73.

Following the jury's removal from the courtroom, Ms. Bolanos continued her diatribe. ER 72-75. The outburst did not stop until she was removed from the courtroom. ER 75.

Mr. Combs as well as the other defendants requested a mistrial based on Ms. Bolanos's outburst. ER 75-76. The district court denied the defendants' request, stating it would merely give an instruction, as requested by the government. ER 77, 84. Ultimately, the district court gave what it called two "special," "admonishing," and "cautionary"instructions to the jury. ER 85-86, 88-89, 94-95.

Following its initial instruction to the jury regarding Ms. Bolanos's outburst, it asked the jurors as a group if Ms. Bolanos's conduct affected their ability to be fair and impartial. ER 100. None of the jurors indicated that it would. ER 100.

E. The Verdict, Sentencing Hearing and Appeal

1. The verdict

The trial concluded on November 10, 2015. The jury found Mr. Combs guilty of Count Sixteen of the indictment charging False Claims Against the United States in violation of 18 U.S.C. § 287. ER 211. Specifically, the jury found him guilty of making a false claim as well as making a fraudulent claim. ER 211. Guilty verdicts were also entered as

to all of Mr. Combs's co-defendants, except Rodney Moon. ER 192-212.

2. The pre-sentence report and Mr. Combs's sentencing hearing

In its Presentence Report (PSR) regarding Mr. Combs, the Office of Probation indicated that the maximum term of imprisonment for his offense was five years. PSR 1758. It calculated his sentencing guideline range as 51 to 60 months and, on that basis, recommended a custodial sentence of 51 months and a 2-year period of supervised release. PSR 1758, 1760, 1767-1768.

Mr. Combs's sentencing hearing took place on March 7, 2016. ER 9. The government requested Mr. Combs be sentenced to 60 months of incarceration. ER 15-16. Mr. Combs requested a downward variance from the 51 to 60-month sentence recommended by Probation. ER 11.

Mr. Combs explained he was a devoutly Christian man, who years earlier, had established a ministry. ER 10-11. In founding the ministry, he retained two attorneys and two CPAs to create the organization. ER 10-11. Although Mr. Combs relied on these professionals to properly establish the ministry, they apparently did not, causing the federal

government to assess more than $2 million in tax liabilities against him. ER 11-12. The State assessed additional tax liabilities. ER 13.

Mr. Combs explained that the tax liabilities were based on money never actually earned. ER 11-12. The more than $2 million debt arose from an income of only $150,000. ER 13. He further explained that his efforts to correct the problem had all been done with the proper intent. He never intended to do anyone harm. ER 11, 13.

Following Mr. Combs's statements to the district court, it sentenced him to 45 months of incarceration to be followed by 24 months of supervised release. ER 2-3.

3. The appeal

On March 8, 2016, Mr. Combs filed a timely notice of appeal challenging his conviction and sentence. ER 190. In a memorandum filed on December 6, 2017, the Ninth Circuit Court of Appeals affirmed Mr. Combs's conviction. App.2a

REASONS FOR GRANTING THE WRIT

I. THE CIRCUMSTANCES UNDER WHICH A CO-DEFENDANT'S OUTBURST IN FRONT OF THE JURY IS INHERENTLY PREJUDICIAL THUS REQUIRING A MISTRIAL IS AN IMPORTANT QUESTION OF LAW THAT SHOULD BE SETTLED BY THIS COURT.

The Sixth Amendment guarantees to the criminally accused a fair trial by a panel of impartial, "indifferent" jurors. U.S. Const. amend. VI; Holbrook v. Flynn, 475 U.S. 560, 567 (1986); Irvin v. Dowd, 366 U.S. 717, 722 (1961). Indeed, "[t]here is no right more sacred than the right to a fair trial. There is no wrong more grievous than its negation." Stone v. United States, 113 F.2d 70, 77 (6th Cir. 1940). Thus, the bias of even a single juror violates the defendant's right to a fair trial. Dyer v. Calderon, 151 F.3d 970, 973 n.2 (9th Cir. 1998) (en banc); United States v. Jackson, 209 F.3d 1103, 1105 (9th Cir. 2000).

Mr. Combs's co-defendant, Gaylene Bolanos, engaged in an outburst in the presence of the jury that was so vitriolic it inherently prejudiced

Mr. Combs, thereby depriving him of his right to a fair trial. The district court, however, refused to declare a mistrial, and on appeal, the Ninth Circuit Court of Appeals affirmed the decision. ER 2-3; App 3a.

This Court has noted that a mistrial is appropriate where the event complained of is so inherently prejudicial that it denied the defendant his right to a fair trial. Holbrook, 475 U.S. at 570 (quoting Estelle v. Williams, 425 U.S. 501, 505 (1976). The essential standard in this area of jurisprudence, as articulated by this Court, is that an episode is deemed inherently prejudicial if "an unacceptable risk is presented of impermissible factors coming into play." Id.

This Court has addressed whether a variety of conduct undertaken before a jury is so inherently prejudicial that it requires a mistrial. One type of conduct that this Court has addressed is state-sponsored conduct such as:

- where a defendant is forced to wear prison clothes when appearing before the jury. Estelle, 425 U.S. at 503-504;
- where, at a defendant's trial, the customary courtroom security force was supplemented by four uniformed state troopers

sitting in the first row of spectator section. Holbrook 106 S.Ct. At 1346, 569; and,

- where the defendant was physically restrained in the presence of the jury. Deck v. Missouri, 544 U.S. 622, 626 (2005); In Illinois v. Allen, 397 U.S. 337, 344 (1970).

This Court has addressed the circumstances under which improper and prejudicial comments made during defense counsel's opening statement require a mistrial. Arizona v. Washington, 434 U.S. 497, 510 (1978). This Court has repeatedly addressed the circumstances under which a mistrial is necessitated by the conduct of the press. See Sheppard v. Maxwell, 384 U.S. 333, 363 (1966) where "bedlam reigned at the courthouse during the trial and newsmen took over practically the entire courtroom," resulting in a "carnival atmosphere at trial."; Estes v. Texas, 381 U.S. 532, 535-536 (1965) where pre-trial publicity, the trial judge's failure to adequately control the proceedings, and the intrusive telecast of a two-day, pre-trial hearing and the trial amounted to a denial of due process; Irvin, 366 U.S. at 728 where the trial atmosphere was so corrupted by press coverage that two-thirds of the jury had an opinion that the defendant was guilty before the trial began. See also Murphy v.

Florida, 421 U.S. 794, 798 (1975) where members of the jury had learned from news accounts about a prior felony conviction and certain facts about the crime with which the defendant was charged.

Beyond the above-enumerated categories, this Court has made few determinations as to what conduct taking place in front of a jury must lead to a mistrial.)See Carey v. Musladin, 549 U.S. 70, 77 (2006) noting the lack of holdings from this Court regarding the potentially prejudicial effect of spectators' courtroom conduct.) This is particularly true of conduct regarding a co-defendant.

During the co-defendant, Gaylene Bolanos's outburst in front of the jury, she engaged in a protracted invective against the judge. She accused the judge of being biased and conspiring to withhold the truth from the jury. ER 70-73. Ms. Bolanos made these statements in such a way as to appear mentally deranged, stating that the judge's bias was based on her ". . . profession of Jesus Christ. . . ." She cried, "I will not serve two masters. . . . Stop now. Silence in the name of Jesus. Silence." ER 70-73. What made this diatribe so particularly prejudicial to Mr. Combs was Ms. Bolanos's repeated statements linking her maniacal comments to Mr. Combs and her frightening, personal references to the jury. ER 70-73.

Ms. Bolanos yoked her deeply disturbing beliefs to Mr. Combs and the other defendants by stating:

> You are disqualified for your personal bias against me, all eight of us,. . . . You need to arrest that judge, and you need to arrest them for their conspiracy against the jury and against us. . . . And you have a personal bias against each and every one of us, Trustee Ishii. . . . We are innocent of all wrongdoing, and we are innocent of all intent of wrongdoing. (Emphasis added.)

ER 71-72.

In her efforts to frighten the jury Ms. Bolanos stated:

> . . .And, jury, I hate to tell you, but you need to know, you and your kids may be next. . . . And it is a game aimed against us and you. . . .

ER 71.

The circuit cases addressing the issue of courtroom outbursts by those on trial have little to no coherence. In United States v. Mannie, 509 F.3d 851 (7th Cir. 2007), the Court of Appeals reversed the district court's denial of a motion for mistrial, holding that the courtroom disruption by a co-defendant warranted a mistrial. Id. at 856-857. In so holding, the review court noted that the disruption was so inherently toxic that the potential prejudice required the grant of a mistrial. Id. The reviewing court came to this conclusion even though the district court had conducted

a voir dire of each individual juror, dismissed the two jurors who had expressed reservations about being fair, and issued a cautionary instruction to the remaining jurors. Id. at 856.

In Braswell v. United States, 200 F.2d 597 (5th Cir. 1952), the district court refused to grant a defendant's request for a mistrial following an assault perpetrated by a co-defendant in the presence of the jury. The reviewing court reversed the district court's denial and in so doing rejected the government's argument that the co-defendant's actions did not harm the nonparticipating defendants, and instead found that "[t]he misconduct of some of them [at] trial most probably prejudiced them all in the minds of the jury." Id.

In reversing the district court, the Braswell court went on to note:

> The right to trial by jury comprehends a fair determination of the guilt or innocence of the accused, free from bias, passion or prejudice. . . . And where error occurs which, within the range of a reasonable possibility, may have affected the verdict of a jury, appellant is not required to explore the minds of the jurors in an effort to prove that it did in fact influence their verdict.

Braswell, 200 F.2d at 602.

Cases such as Mannie, 509 F.3d 851 and Braswell , 200 F.2d 597

fully rely on the defendant's Sixth Amendment right to an impartial jury in determining whether to grant a mistrial. In great contrast are cases that all but fail to acknowledge the defendant's Sixth Amendment rights and instead make mistrial determinations based on the convenience of the court.

In United States v. Aviles, 274 F.2d 179, 193 (2d Cir.), the Second Circuit made its mistrial determination based primarily on the belief that, "If such conduct by a co-defendant on trial were held to require a retrial it might never be possible to conclude a trial involving more than one defendant; it would provide an easy device for defendants to provoke mistrials whenever they might choose to do so." To similar effect, see United States v. Bamberger, 456 F.2d 1119, 1128 (3d Cir. 1972). See also United States v. Kincaide, 145 F.3d 771, 781 (6th Cir.1998) where the Sixth Circuit does not mention the defendant's Sixth Amendment rights but rather relies on the defendant's "'valued right to have his trial completed by a particular tribunal'" to make its mistrial determination; United States v. Koskela, 86 F.3d 122, 124-125 (8th Cir. 1996) where the Eighth Circuit affirmed a conviction despite the district court's denial of a motion for mistrial even though a co-defendant had picked up a water

pitcher from the defense table, yelled "you'd better [expletive] convict us both," and threw the pitcher at the jury, striking one juror.

Case law further lacks coherence about whether the negative effects of an outburst by a co-defendant inures to that co-defendant or to the defendant who has requested the mistrial. In United States v. McCormac, 309 F.3d 623, 626-627 (9th Cir. 2002), the Ninth Circuit affirmed the denial of a motion for mistrial where the outburst in question was committed by the defendant requesting the mistrial. In affirming the decision, the Court noted that to reverse the judgment based on the defendant's actions would have allowed her to profit from her own misconduct. In contrast to McCormac is Bamberger, 456 F.2d 1128 where the Court of Appeals concluded that, ". . . if there resulted any prejudice from the actions of Young and Bamberger it inured to the detriment of the participating defendants only and not to the passive ones."

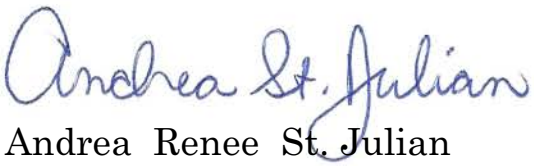
The circumstances under which a co-defendant's outburst in front of the jury is inherently prejudicial thus requiring a mistrial is an important question of law that should be settled by this Court. This is particularly true where, as here, the case law in the various circuits has little to no coherence.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: March 5, 2018

Respectfully submitted,



Andrea Renee St. Julian
Counsel of Record for Petitioner,
LEROY DONOVAN COMBS

APPENDICES

APPENDIX A

705 Fed.Appx. 620
This case was not selected for publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 9th Cir. Rule 36-3.
United States Court of Appeals,
Ninth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Leroy Donovan COMBS, Defendant-Appellant.
United States of America, Plaintiff-Appellee,
v.
Charles Wayne Uptergrove, Defendant-Appellant.
United States of America, Plaintiff-Appellee,
v.
Ladonna Lee Moon, Defendant-Appellant.

No. 16-10102, No. 16-10115, No. 16-10123
|
Argued and Submitted November 16, 2017 San Francisco, California
|
Filed December 06, 2017

Appeal from the United States District Court for the Eastern District of California, Anthony W. Ishii, District Judge, Presiding, D.C. No. 1:13-cr-00362-AWI-BAM-3, D.C. No. 1:13-cr-00362-AWI-BAM-4, D.C. No. 1:13-cr-00362-AWI-BAM-5

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Before: W. FLETCHER and PAEZ, Circuit Judges, and WILKEN, District Judge. *

* The Honorable Claudia Wilken, United States District Judge for the Northern District of California, sitting by designation.

Opinion

MEMORANDUM **

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

Leroy Donovan Combs, Charles Wayne Uptergrove and Ladonna Lee Moon appeal their convictions under 18 U.S.C. § 287. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

1. All defendants: The district court did not abuse its discretion in denying the defendants' mistrial motions based on co-defendant Gaylene Bolanos' courtroom outburst in front of the jury. *See United States v. Sarkisian*, 197 F.3d 966, 981

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(9th Cir. 1999). First, the outburst was not inherently prejudicial. *See Holbrook v. Flynn*, 475 U.S. 560, 570, 106 S.Ct. 1340, 89 L.Ed.2d 525 (1986). In contrast to the "truly rare" set of circumstances in *United States v. Mannie*, 509 F.3d 851, 857 (7th Cir. 2007), the jury in this case witnessed only a single two- to three-minute outburst ***621** from a co-defendant, rather than a "violent courtroom brawl," or a "campaign of intimidation."

Second, the district court took reasonable steps to ensure the fairness of the proceedings and jury impartiality. *See United States v. McCormac*, 309 F.3d 623, 626 (9th Cir. 2002) (holding a "district court's assessment of the jury's ability to remain impartial despite the explosion of defiance from [a] defendant is accorded substantial weight because the district court is in the best position to ascertain whether an event is prejudicial"). The court read the jury a cautionary instruction prepared by defense counsel, and approved by all counsel, and gave the jurors an opportunity to express whether the outburst impacted their ability to be fair to all defendants. No juror expressed any concern over his or her ability to be fair and impartial.

2. Uptergrove and Moon: The district court properly declined to instruct the jury that a conviction for making a false claim under § 287 requires proof of willfulness or intent to defraud. Under Ninth Circuit authority, an intent to defraud is not an element of a charge under the false prong of § 287. *See United States v. Milton*, 602 F.2d 231, 234 (9th Cir. 1979) (holding "the jury need not receive an instruction on intent to defraud the government, nor is it an element of the offense, when the government prosecutes for the submission of false claims in violation of 18 U.S.C. § 287"). Uptergrove and Moon fail to cite binding authority requiring the district court to instruct the jury on a good faith defense against false claim charges under § 287.

3. Combs: The district court committed no error in sentencing Combs to 45 months' imprisonment. We review a sentence for reasonableness, and "only a procedurally erroneous or substantively unreasonable sentence will be set aside." *United States v. Carty*, 520 F.3d 984, 993 (9th Cir. 2008) (en banc). The district court's reference to Combs' "long, long history of failing to comply with the tax laws" is well supported by the undisputed presentence report as well as by evidence in the trial record, upon which the district court was permitted to rely in fashioning an appropriate sentence. *See United States v. Fitch*, 659 F.3d 788, 790-791 (9th Cir. 2011).

4. Uptergrove: The district court properly denied Uptergrove a two-level reduction for acceptance of responsibility. The court's actions were reasonable in light of Uptergrove's "decision to take the case to trial, where he vigorously denied the '[knowingly]' element of the offense." *United States v. Chastain*, 84 F.3d 321, 324 (9th Cir. 1996). The record neither shows nor suggests that the district court deemed Uptergrove ineligible for the reduction merely because he went to trial and contested his factual guilt. *United States v. Cortes*, 299 F.3d 1030, 1038 (9th Cir. 2002), *United States v. Ochoa-Gaytan*, 265 F.3d 837, 844 (9th Cir. 2001), and *United States v. McKinney*, 15 F.3d 849, 853 (9th Cir. 1994), are therefore distinguishable.

5. Uptergrove: Uptergrove's sentence was substantively reasonable. *See United States v. Ressam*, 679 F.3d 1069, 1086 (9th Cir. 2012) (en banc). The district court carefully considered the 18 U.S.C. § 3553(a) factors and imposed a reasonable sentence below the low end of the advisory Guidelines range.

AFFIRMED.

All Citations

705 Fed.Appx. 620

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APPENDIX B

AO 245B-CAED(Rev. 09/2011) Sheet 1 - Amended Judgment in a Criminal Case (NOTE: Identify Changes with Asterisks*)

UNITED STATES DISTRICT COURT
Eastern District of California

UNITED STATES OF AMERICA

v.

LEROY DONOVAN COMBS

Date of Original Judgment: **March 07, 2016**
(Or Date of Last Amended Judgment)

FIRST AMENDED JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number: **1:13CR00362-003**

Defendant's Attorney: Barbara O'Neill, Appointed

Reason for Amendment:

[ ] Correction of Sentence on Remand (Fed R. Crim. P. 35(a))

[ ] Reduction of Sentence for Changed Circumstances (Fed R. Crim. P. 35(b))

[ ] Correction of Sentence by Sentencing Court (Fed R. Crim. P. 35(c))

[✓] Correction of Sentence for Clerical Mistake (Fed R. Crim. P. 36)

[ ] Modification of Supervision Conditions (18 U.S.C. § 3563(c) or 3583(e))

[ ] Modification of Imposed Term of Imprisonment for Extraordinary and Compelling Reasons (18 U.S.C. § 3582(c)(1))

[ ] Modification of Imposed Term of Imprisonment for Retroactive Amendment (s) to the Sentencing Guidelines (18 U.S.C. § 3582(c)(2))

[ ] Direct Motion to District Court Pursuant to [ ] 28 U.S.C. §2255, [ ] 18 U.S.C. §3559(c)(7), [ ] Modification of Restitution Order

THE DEFENDANT:

[ ] pleaded guilty to count(s) ___ .
[ ] pleaded nolo contendere to count(s) ___ which was accepted by the court.
[✓] was found guilty on count 16 after a plea of not guilty.

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offense (s):

Title & Section	Nature Of Offense	Date Offense Concluded	Count Number
18 U.S.C. § 287	False Claims Against the United States (CLASS D FELONY)	10/16/2008	16

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) ___ and is discharged as to such count(s).
[✓] Count 2-15 are dismissed on the motion of the United States.
[ ] Indictment is to be dismissed by District Court on motion of the United States.
[✓] Appeal rights given. [ ] Appeal rights waived.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution or fine, the defendant must notify the court and United States Attorney of material changes in economic circumstances.

3/7/2016
Date of Imposition of Judgment

/s/ Anthony W. Ishii
Signature of Judicial Officer

Anthony W. Ishii, United States District Judge
Name & Title of Judicial Officer

3/15/2016
Date

AO 245B-CAED(Rev. 09/2011) Sheet 2 - Imprisonment

DEFENDANT:**LEROY DONOVAN COMBS**
CASE NUMBER:**1:13CR00362-003**

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: 45 months.

[ ] No TSR: Defendant shall cooperate in the collection of DNA.

[✓] The court makes the following recommendations to the Bureau of Prisons:
The Court recommends that the defendant be incarcerated in a California facility, but only insofar as this accords with security classification and space availability. Specifically Taft or Lompoc, CA

[ ] The defendant is remanded to the custody of the United States Marshal.

[ ] The defendant shall surrender to the United States Marshal for this district
- [ ] at ___ on ___.
- [ ] as notified by the United States Marshal.

[✓] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
- [✓] before 2:00 PM on 5/9/2016 .
- [ ] as notified by the United States Marshal.
- [ ] as notified by the Probation or Pretrial Services Officer.

If no such institution has been designated, to the United States Marshal for this district.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

_____
United States Marshal

_____
By Deputy United States Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of :
24 months.

The defendant must report to the probation office in the district to which the defendant is released within seventy-two hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two (2) periodic drug tests thereafter, not to exceed four (4) drug tests per month.

[✓] The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse.

[✓] The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

[✓] The defendant shall cooperate in the collection of DNA as directed by the probation officer.

[ ] The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, et seq.), as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of qualifying offense.

[ ] The defendant shall participate in an approved program for domestic violence.

If this judgment imposes a fine or a restitution obligation, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without permission of the court or probation officer;
2. the defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer;
3. the defendant shall answer truthfully all inquiries by the probation officer and follow instructions of the probation officer;
4. the defendant shall support his or her dependents and meet other family responsibilities;
5. the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training or other acceptable reasons;
6. the defendant shall notify the probation officer ten days prior to any change in residence or employment;
7. the defendant shall refrain from excessive use of alcohol;
8. the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10. the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere, and shall permit confiscation of any contraband observed in plain view by the probation officer;
11. the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12. the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
13. as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall submit to the search of his person, property, home, and vehicle by a United States probation officer, or any other authorized person under the immediate and personal supervision of the probation officer, based upon reasonable suspicion, without a search warrant. Failure to submit to a search may be grounds for revocation. The defendant shall warn any other residents that the premises may be subject to searches pursuant to this condition.
2. The defendant shall apply all monies received from income tax refunds, lottery winnings, inheritance, judgments and any anticipated or unexpected financial gains to any unpaid restitution ordered by this Judgment to any unpaid IRS taxes and fines.
3. The defendant shall provide the probation officer with access to any requested financial information.
4. The defendant shall not open additional lines of credit without the approval of the probation officer.
5. The defendant shall cooperate with the IRS in the determination and payment of any taxes which may be owed.

AO 245B-CAED(Rev. 09/2011) Sheet 5 - Criminal Monetary Penalties

DEFENDANT:**LEROY DONOVAN COMBS**
CASE NUMBER:**1:13CR00362-003**

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the Schedule of Payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$100		

[ ] The determination of restitution is deferred until ___ . An Amended Judgment in a Criminal Case (AO 245C) will be entered after such determination.

[ ] The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment colunm below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
Totals	$____	$____	

[ ] Restitution amount ordered pursuant to plea agreement $ ___

[ ] The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalities for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

[ ] The court determined that the defendant does not have the ability to pay interest and it is ordered that:

[ ] The interest requirement is waived for the [ ] fine [ ] restitution

[ ] The interest requirement for the [ ] fine [ ] restitution is modified as follows:

[ ] If incarcerated, payment of the fine is due during imprisonment at the rate of not less than $25 per quarter and payment shall be through the Bureau of Prisons Inmate Financial Responsibility Program.

[ ] If incarcerated, payment of the restitution is due during imprisonment at the rate of not less than $25 per quarter and payment shall be through the Bureau of Prisons Inmate Financial Responsibility Program.

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

AO 245B-CAED(Rev. 09/2011) Sheet 6 - Schedule of Payments

DEFENDANT:**LEROY DONOVAN COMBS**
CASE NUMBER:**1:13CR00362-003**

SCHEDULE OF PAYMENTS

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A. [✓] Lump sum payment of $ 100.00 due immediately, balance due

[ ] Not later than ___, or

[ ] in accordance [ ] C, [ ] D, [ ] E,or [ ] F below; or

B. [ ] Payment to begin immediately (may be combined with [ ] C, [ ] D, or [ ] F below); or

C. [ ] Payment in equal ___ (e.g. weekly, monthly, quarterly) installments of $ ___ over a period of ___ (e.g. months or years), to commence ___ (e.g. 30 or 60 days) after the date of this judgment; or

D. [ ] Payment in equal ___ (e.g. weekly, monthly, quarterly) installments of $ ___ over a period of ___ (e.g. months or years), to commence ___ (e.g. 30 or 60 days) after release from imprisonment to a term of supervision; or

E. [ ] Payment during the term of supervised release/probation will commence within ___ (e.g. 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendants ability to pay at that time; or

F. [ ] Special instructions regarding the payment of crimimal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

[ ] Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate:

[ ] The defendant shall pay the cost of prosecution.

[ ] The defendant shall pay the following court cost(s):

[ ] The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.