APPEAL NO. 23-5766

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DOUGLAS WILLIAM VANCE,

Defendant-Appellant.

Appeal from the United States District Court
For the Eastern District of Kentucky
Original Crim. No. 5:20-cr-00063-DCR-MAS-1
Hon. Danny Reeves, Presiding in the District Court

APPELLANT'S PETITION FOR REHEARING EN BANC

Matthew M. Robinson, Esq.
Robinson & Brandt, PSC
629 Main Street, Suite B
Covington, KY 41011
(859) 581-7777 phone
(859) 581-5777 fax
mrobinson@robinsonbrandt.com
Counsel for Defendant-Appellant

Fed. R. App. 40(b)(2) Statement

Pursuant to Fed. R. App. 40, Defendant-Appellant Douglas Vance, through counsel, petitions the Court for Rehearing En Banc. Rehearing en banc is appropriate because the panel decision to affirm the district court's refusal to allow the introduction of co-defendant Mckinnon's letter of confession conflicts with Chambers v. Missisippi, 410 U.S. 284, 302 (1973)(the refusal to admit evidence of a codefendant's confession violates due process), and Fryman v. Fed. Crop Ins. Corp., 936 F.2d 244, 251 (6th Cir. 1991)("[d]eviation from the rule of waiver is permissible when application of the rule would result in a manifest injustice"). Superseding any procedural concerns with its admission, McKinnon made a full confession in her letter to engaging in the fraudulent conduct. The letter also fully absolved Appellant from having any knowledge of, or participating in, McKinnon's fraudulent conduct. The refusal to admit the letter deprived Appellant of the ability to present a viable defense in violation of his right to due process and a fair trial. Under the facts of this case, the decision to affirm the district court's decision to exclude the letter on procedural grounds conflicts with Chambers and Fryman. Therefore, the full court's consideration is necessary to secure or maintain uniformity of the court's decisions.

The panel decision to affirm the district court's sentencing decisions with respect to the amount of loss attributed to Appellant, conflicts with this Circuit's

precedent in United States v. McReynolds, 964 F.3d 555, 562 (6th Cir. 2020)(Griffin dissenting), and Eighth Circuit precedent in United States v. Spotted Elk, 548 F.3d 641, 674 (8th Cir. 2008). Therefore, the full court's consideration is necessary to secure or maintain uniformity of the court's decisions.

Finally, the panel decision to affirm the application of a financial hardship enhancement and the determination that Ms. Faybik was a victim who suffered a significant financial hardship conflicts with United States v. Howder, 748 F. App'x 637, 644 (6th Cir. 2018)(inferences concerning the victim's financial status must find some support in the record).The sentencing court's finding lacked evidentiary support and was refuted by other evidence on the record, including Faybik's consistent assertions that she is not a victim. The sentencing court's decision to increase Appellant's sentence based on mere speculation– speculation that is also refuted by the record cannot stand. Thus en banc review is warranted to secure or maintain uniformity of the court's decisions.

Statement of Facts and Case

On June 18, 2020, Appellant and Molly McKinnon were charged with conspiracy to commit wire fraud, in violation of 18 U.S.C. §§ 1343 and 1349 (Count One); wire fraud, in violation of 18 U.S.C. § 1343 (Counts Two-Five); and conspiracy to commit money laundering, in violation of 18 U.S.C. § 1956(h) and 18 U.S.C. §

1343 (Count Seven). RE 1, Indictment, PageID#1-11.

Trial commenced on October 4, 2022. At the close of the government's evidence, Appellant moved for judgment of acquittal arguing the evidence failed to show Appellant did not act in good faith. RE 178 Trail Day 5; PageID#1596. The court denied the motion. Id; PageID#1599-1600. Appellant subsequently testified at trial. He denied acting in bad faith or having knowledge that statements had been altered and sent to investors. PageID#1602-1757.

The next day Appellant's codefendant, McKinnon was scheduled to testify. RE 179 Trial Day 6; PageID#1763. She proffered to the court that she would testify that in June of 2017, Mr. Chamblee demanded that she change bank statements. PageID#1765. The next day she received text messages from Mr. Chamblee containing images of her in her car, in her bed asleep, and one while outside. "That placed her in fear that she could be harmed by him or someone that he would send, especially given that somebody had been in her house." PageID#1766. Approximately a month later Chamblee again demanded that she create more bank statements. PageID#1767. On June 3, 2018, her home caught on fire and Chamblee told her that he would make sure she was in the house the next time it caught on fire. Id. "Three days later [McKinnon] was assaulted in her hotel room in Hazard, Kentucky, by an unidentified assailant. Mr. Chamblee made comments to her about the incident a few

days later." PageID#1769. Also in June 2018 Chamblee grabbed McKinnon by the throat and pushed her against the wall.

McKinnon had written a letter to Appellant explaining that because of the threats made by Chamblee, she had engaged in the fraudulent conduct and used Appellant's email credentials to send fabricated financial information. PageID#1771-78. The letter exonerated Appellant because it demonstrated that Appellant was unaware that McKinnon had engaged in fraud and had not knowingly participated in fraudulent conduct. The government objected to admission of the letter because (1) Appellant did not attempt to admit the letter during his case in chief; (2) the government had not received the letter through reciprocal discover under Rule 16; and (3) the letter was a statement of a non-testifying party that is not a party opponent and impermissible hearsay. PageID#1778. For the reasons argued by the government, the court denied the request to permit the introduction of the letter and its contents at trial for the jury to consider. PageID#1779. The court prohibited reference to the letter or its contents in the presence of the jury because the court believed the letter to be hearsay. PageID#1779.

On October 13, 2022, the jury returned a verdict of guilty on all counts. RE 133 Verdict; PageID#485-488; RE 180 Trial Day 7; PageID#1905-1907.

A presentence investigation report (PSR) was prepared for sentencing. RE 210

PSR. Based on the chart of victims and losses in paragraph 33 of the PSR, it was determined that the total loss attributable to the Appellant was $2,479,240.90, resulting in a 16-level enhancement under § 2B1.1(b)(1)(I). A 2-level enhancement under § 2B1.1(b)(2)(A)(i) and (iii) was also applied based on the allegation the offense involved 10 or more victims or resulted in substantial financial hardship to one or more victims. Id. The total offense level was determined to be 33. RE 210 PSR ¶ 33. Based on a Criminal History Category II and an offense level 33, Appellant faced a guideline range of 151 to 188 months' imprisonment. RE 210 PSR ¶ 88.

Appellant objected to the enhancements and guideline calculations in the PSR. RE 210 Final PSR (Sealed), p 23-29. The district court found that the loss exceeded $1.5 million based on any "person or [] individual or entity [who] suffered a loss as a result of being a victim in the case through the fraudulent activities of one or both defendants." RE 210 Hearing; PageID#1109. The starting date for the amount of loss calculation was April 2017. Id. The court found the victims included Shumard, with a loss of $801,819; Koch Minerals and Dragon Technologies, with a loss of $373,500; GGC Funding and Mendie Hogan, with losses in the amount of $232,983.79; Shannon Wells with a loss in the amount of $50,000, Creola Holdings, with a loss of $123,400; Mr. Chamblee, with a loss in the amount of $53,938.11; and Ms. Faybik, with a loss of $495,900. PageID#2210-2211.

The court found that a sentence above the middle of the guideline range was appropriate and imposed a sentence of 174 months imprisonment. Id; 2253-2254. RE 220 Sentencing; PageID#2224-2261.

Arguments in Support of En Banc Review

I. Appellant's right to a fair trial was violated when the district court refused to permit the defense to introduce into evidence a codefendant's letter admitting to the fraudulent conduct and exonerating the Appellant.

The trial court barred the introduction of a letter written by codefendant McKinnon who took responsibility for the fraudulent conduct and absolved the Appellant of wrongdoing. The court refused to allow admission of the letter because (1) Appellant did not attempt to admit the letter during his case in chief; (2) the government had not received the letter through reciprocal discover under Rule 16; and (3) the letter was a statement of a non-testifying party that is not a party opponent and impermissible hearsay.

If the letter was hearsay, it was admissible hearsay because McKinnon was available and willing to testify about the contents of the letter. The letter was also reliable because, as McKinnon's confession, it was a statement against her interest. Therefore, these reasons provided by the court to exclude McKinnon's letter were plainly incorrect. Further, the letter was not subject to reciprocal discovery because the government was aware of the letter and its contents and because it was

McKinnon's letter. But even if Appellant should have attempted to introduce the letter during his case-in-chief, and even if Appellant should have provided the letter to the government prior to trial, the failure to allow Appellant to introduce McKinnon's letter of confession deprived Appellant of the ability to present a viable defense in violation of his right to due process and a fair trial. Chambers v. Missisippi, 410 U.S. 284, 302 (1973)(refusal to admit evidence of a codefendant's confession violates due process), Fryman v. Fed. Crop Ins. Corp., 936 F.2d 244, 251 (6th Cir. 1991) ("Deviation from the rule of waiver is permissible when application of the rule would result in a manifest injustice.").

Simply put, the letter was admissible because it was evidence that corroborated Appellant's testimony and demonstrated he had no knowledge of McKinnon's fraudulent conduct. Thus, the district court's decision to exclude the letter violated due process and the right to a fair trial because it deprived him of the ability to provide a viable defense. Chambers. And even if Appellant was at fault for failing to provide the letter to the government during discovery; and even if Appellant should have sought admission of the letter in his case-in-chief, admission of the letter was mandatory in order to maintain due process and a fair trial. Thus, the panel decision to affirm the trial court conflicts with Chambers and Fryman.

The government knew of the evidence contained in McKinnon's letter long

before trial. It was the government who first brought up McKinnon's letter during the testimony of Agent Hubbuch. Trial Day 4; PageID#1489-1521. Agent Hubbuch was asked by the prosecutor about a recorded interview he conducted of the Appellant, entered as Government Exhibit 401. See Exhibit 401; PageID#1489-91. Although Agent Hubbuch did not take possession of the letter, Hubbach testified that he knew about the letter. And audio was played of Agent Hubbach speaking with Appellant about the letter. PageID#1521.

The district court's Rule 16 finding was "(1) error, (2) that was obvious or clear, (3) that affected [Appellant's] substantial rights, and (4) that affected the fairness, integrity, or public reputation of the judicial proceedings." United States v. Prater, 766 F.3d 501, 518 (6th Cir. 2014). Because the government was aware of the letter and its contents, the claim the letter was inadmissible because of unfair surprise was entirely disingenuous. Furthermore, the letter was written by McKinnon. Therefore, the refusal to admit McKinnon's letter because of a discovery violation was obvious or clear error because under a plain reading of Fed.R Crim.P. 16(b)(1)(A)(ii) and (b)(2)(B) there was no obligation for the defense to provide the letter to the government.

Additionally, the finding that McKinnon's letter was inadmissible hearsay was also plainly erroneous. First, the defense sought to enter McKinnon's letter into

evidence in order to corroborate Appellant's testimony, not to prove the truth of the matter asserted in the letter. Therefore, the letter was not hearsay under Fed. R. Evid. 801(c)(2). Further, the letter was not hearsay under Fed. R. Evid. 801(d)(1) because McKinnon wrote the letter and she was subject to cross-examination about the letter. And even if the letter qualifies as hearsay, it was admissible under Fed. R. Evid. 804(b)(3)(A) because the letter was contrary to McKinnon's interest and exposed her to criminal liability. Fed. R. Evid. 804(b)(3)(A). Williamson v. United States, 512 U.S. 594, 599 (1994) ("Self-inculpatory statements have long been recognized as bearing strong indicia of reliability").

The Supreme Court has held "the hearsay rule may not be applied mechanistically to defeat the ends of justice." Chambers v. Missisippi, 410 U.S. 284, 302 (1973). That is precisely what occurred in the instant case, where the court excluded a letter containing reliable self-inculpatory statements from McKinnon that also exonerated the Appellant. The letter was excluded despite other evidence corroborating the statements made in the letter. McKinnon's confession in her letter was corroborated at trial when she testified that she created the fraudulent financial materials and used Appellant's email to transmit those materials to the victims without Appellant's knowledge. She testified that she had created the fraudulent financial materials and used Appellant's email to transmit those materials to the

victims and that Appellant was unaware of the fact she had altered bank statements or illegally transferred funds. PageID#1840. Evidence was submitted that McKinnon would send emails from Appellant's account purporting to be the Appellant and that Appellant was unaware that she was sending false information to others using his email credentials. PageID#1841-1842. She further testified that she had access to Appellant's email username and password and that she would send emails from that account purporting to be the Appellant. Id. See Chambers, 410 U.S. at 300("corroboration of the contents of that statement with other evidence is a factor weighing in favor of its reliability").

"[W]hen a hearsay statement bears persuasive assurances of trustworthiness and is critical to the defense, the exclusion of that statement may rise to the level of a due process violation." Chambers, 410 U.S. at 302. The letter was reliable as a statement against McKinnon's interest and was corroborated by other evidence at trial. McKinnon's letter was critical evidence because it corroborated Appellant's testimony at trial that he did not know about the falsehoods sent to victims in this case or why the false financial materials had been sent from his email.

Superseding any procedural concerns with admitting the letter, McKinnon made a full confession in her letter and fully absolved Appellant from having any knowledge of, or participating in, McKinnon's fraudulent conduct. Under the

circumstances, the refusal to admit the letter deprived Appellant of the ability to present a viable defense in violation of his right to due process and a fair trial. Therefore, Appellant's conviction should be vacated. Chambers, 410 U.S. at 302.

II. The district court erroneously determined the amount of loss was between $1.5 million and $3.5 million and imposing a 16-level enhancement under U.S.S.G. §2B1.1(b)(1).

The district court incorrectly applied Guidelines' enhancements for the amount of loss based on conduct of others that was not attributable to Appellant as relevant conduct under the Guidelines.

Appellant was found guilty for the offenses charged in the indictment, but the court conflated Pinkerton conspiratorial liability with relevant conduct standards to in determining the amount of loss. See United States v. McReynolds, 964 F.3d 555, 562 (6th Cir. 2020)(Griffin dissenting), and Eighth Circuit precedent in United States v. Spotted Elk, 548 F.3d 641, 674 (8th Cir. 2008). A defendant's offense level calculations can be derived from his or her "relevant conduct," as that term is defined in U.S.S.G. § 1B1.3. McReynolds, 964 F.3d at 562. "[T]he scope of relevant conduct with regard to the drug amounts involved in a conspiracy under § 1B1.3(a)(1)(B) is 'significantly narrower' than the conduct needed to obtain a conspiracy conviction." Id at 563. "[T]he emphasis under § 1B1.3 is the scope of the *individual* defendant's undertaking and foreseeability in light of that undertaking, rather than the scope of

the conspiracy as a whole." Spotted Elk, 548 F.3d 641, 674 (8th Cir. 2008) (emphasis in original); see § 1B1.3, comment. (n.2). Thus, "the guidelines limit a defendant's vicarious liability for the acts of her coconspirators under Pinkerton v. United States, 328 U.S. 640 (1946), by instructing district courts to distinguish between each coconspirator's jointly undertaken activity." McReynolds, 964 F.3d at 563.

In this case, the court erroneously increased the amount of loss to Faybik to $500,000 despite the fact the government agreed the amount of loss attributed to her was just $42,500. RE 210 PSR (Sealed); RE 219 Hearing; PageID#2120-2224. Plus, Faybik consistently maintained throughout this case that she was not a victim and had not suffered a loss as a result of the Appellant. Id. The finding lacks evidentiary support and is based on Agent Hubbuch's testimony that Faybik may have invested $500,000 over the years with the Appellant even though "[government] records only show a tenth" of that amount. RE 219 Sentencing; PageID#2126. In fact no evidence was presented to substantiate the allegation that Faybik invested $500,000 with the Appellant. And Appellant cannot be accountable under relevant conduct standards for McKinnon's conduct or for losses that the alleged victim denies occurred.

Based on the above and on the arguments presented in the opening brief, the correct amount of loss was under $1.5 million and Appellant's offense level was improperly calculated. Therefore, his sentence should be vacated.

III. The district court erroneously found the offense resulted in financial hardship and assessing a two-level enhancement under U.S.S.G. §2B1.1(b)(2)(A)(iii).

At sentencing, the district court applied a two-level financial hardship enhancement under § 2B1.1(b)(2)(A) by finding that Ms. Faybik was a victim and suffered a $500,000 loss. RE 219 Sentencing; PageID#2211-2212. This finding was contrary to all relevant and reliable evidence.

Under U.S.S.G. §2B1.1(b)(2)(A), an enhancement shall apply if the offense "(iii) resulted in substantial financial hardship to one or more victims, increase by 2 levels." The enhancement "focuses on the 'extent of the harm' to a particular victim and requires a showing that the loss was 'more than minimal or trivial' as gauged by the victim's specific financial circumstances." United States v. Skouteris, 51 F.4th 658, 672 (6th Cir. 2022). In determining whether the enhancement applies, the district court "may make reasonable inferences about the victims' financial circumstances and about their level of financial harm, so long as those inferences find some support in the record." United States v. Howder, 748 F. App'x 637, 644 (6th Cir. 2018).

As an initial matter, Ms. Faybick consistently maintained that Appellant had not defrauded her and that she was not a victim. She provided victim impact statements to the court asserting as much. Agent Hubbuch confirmed Ms. Faybik does not consider herself to be a victim. PageID#2167-2168. He also testified that she was

an authorized user on Appellant's bank account and had withdrew funds from the account in December of 2016. Trial Day 5; PageID#1539-40. Therefore, including Faybik as a victim was contrary to the evidence and clearly erroneous.

Perhaps even more egregious, the court determined that Faybik suffered a $500,000 loss and a financial hardship. This was contrary to the information in the PSR, which found that the total loss to Faybik was $42,500. RE 210 PSR ¶ 29 (sealed). It was also contrary to evidence provided by Agent Hubbuch, who testified that no documentation exists showing that Faybik invested $500,000 with the Appellant. Instead, the evidence demonstrated that Faybik invested a total of $42,500 and received a return of $59,600. PageID#2151-52. Further, no evidence was introduced to show that Faybick suffered a financial hardship. Instead the court speculated that she lost $500,000 and that such a loss must have caused a financial hardship. RE 219 Sentencing; PageID#2211-2212.

Because the court's determination that Faybik was a victim who suffered a significant financial hardship is refuted by all relevant evidence and is contrary to Faybik's assertions that she is not a victim, the district court abused its discretion in applying an enhancement under §2B1.1(b)(2)(A)(iii). The decision to pull $500,000 "out of thin air" and punish Appellant based on that amount conflicts with circuit precedent and deserves en banc review.

CONCLUSION

The decision to affirm the district court's decision to exclude McKinnon's letter conflicts Supreme Court and Sixth Circuit precedent in Chambers and Fryman and deprived Appellant of the ability to present a viable defense in violation of his right to due process and a fair trial. The decision to affirm the district court's sentencing decisions with respect to the amount of loss attributed to Appellant, conflicts with this Circuit's precedent in McReynolds, and Eighth Circuit precedent in Spotted Elk. And the decision to affirm the application of a financial hardship enhancement conflicts with United States v. Howder, 748 F. App'x 637, 644 (6th Cir. 2018). Thus, Petition for rehearing en banc should be granted to resolve these conflicts on issues of exceptional importance and to maintain conformity of decisions within this Court.

Respectfully Submitted,

Robinson & Brandt, PSC

/s/ Matthew M. Robinson
Matthew M. Robinson, Esq.
Counsel for the Appellant
629 Main Street, Suite B
Covington, KY 41011
859-581-7777 phone
859-581-5777 fax
administrator@robinsonbrandt.com
mnrobinson@robinsonbrandt.com

CERTIFICATE OF COMPLIANCE

Under Fed. R. App. P. 32(a)(7) and Sixth Circuit Rules 32.3 and 40(d)(3)(A), I certify that the instant petition for rehearing en banc complies with Sixth Circuit limitations with respect to font and type size. The petition was prepared using Times New Roman in type-size 14, and contains a total of 3,485 words.

/s/ Matthew M. Robinson
Matthew M. Robinson, Esq.

CERTIFICATE OF SERVICE

The undersigned certifies that a on December 6, 2024, a true and accurate copy of the foregoing petition and attached order and entry was filed with the Clerk of Court using the CM/ECF system, constituting delivery upon James T. Chapman, Assistant United States Attorney, 260 W. Vine Street, Suite 300, Lexington, Kentucky 40507-1612.

/s/ Matthew M. Robinson
Matthew M. Robinson, Esq.