

No. 07-50247

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RONALD LEON RAKOW,

Defendant-Appellant.

**GOVERNMENT'S OPPOSITION TO DEFENDANT'S PETITION FOR
REHEARING AND SUGGESTION FOR REHEARING EN BANC**

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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**GOVERNMENT'S OPPOSITION TO DEFENDANT'S PETITION FOR
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I

INTRODUCTION

This Court affirmed defendant-appellant Ronald Leon Rakow's ("defendant") conviction for tax evasion, in violation of 26 U.S.C § 7201, in an unpublished memorandum. In his petition for rehearing, defendant argues that although the indictment charged defendant with evasion based in part on concealment of recently transferred assets, at trial the government claimed evasion based on an uncharged theory of non-disclosure of loans. Defendant argues that this alleged shift constituted a constructive amendment of the indictment, or at least a prejudicial variance, under the caselaw of this Court and the Supreme Court.

The panel found no plain error, concluding that the government presented ample evidence of the charged evasion, and that uncharged evidence of the non-disclosure of loans was admissible to undercut defendant's claim that he acted in good faith and was forthcoming. (Mem. at 2). Accordingly, the panel found neither a constructive amendment nor a material variance.

There is no issue warranting rehearing. Defendant's petition merely repeats his selective summary of the evidence and closing arguments. As the panel correctly concluded, when the trial record is viewed in its entirety, the proof and argument at trial conformed to the indictment. Thus, none of the cases defendant cites conflict with the result here.

Defendant also claims that his privilege against self-incrimination was violated when testimony he gave at a bankruptcy examination was admitted against him. Defendant's petition does not challenge the district court's finding, with which the panel concurred, that defendant (who was represented by counsel at the bankruptcy examination) was well aware of his Fifth Amendment privilege and chose not to assert it, thereby waiving it. Defendant contends only that he was not explicitly advised at the time of his bankruptcy deposition that he was being investigated by the IRS and a federal grand jury, as allegedly required by United States v. Kordel, 397 U.S. 1 (1970), and United States v. Stringer, 535 F.3d 929 (9th Cir. 2008). However, those cases contain no such requirement; to the contrary, Stringer held that the defendants validly waived their privilege although they were not told that the United States Attorney's Office had opened a criminal investigation. The panel's opinion in this case is fully consistent with Stringer and Kordel, and rehearing is not warranted.

II

FACTS

Defendant was charged and convicted of engaging in a four-year scheme to evade paying an approximately \$2.2 million tax debt he owed. As charged in the indictment and proven at trial, from January 1998 to October 2002, defendant was aware of the

IRS's efforts to collect this debt, but nonetheless concealed approximately \$5 million earned during that time by hiding his income and assets in his girlfriend Denise Del Bianco's ("Del Bianco") name. (ER 1-5).¹

The indictment alleged twenty-two overt acts in furtherance of defendant's evasion scheme, including receipt of and failure to report his consulting income from an art gallery (acts 1, 6, 8, and 13), a company called Century Direct Marketing ("CDM") (acts 14, 17, 19, 20, and 21), and purported investment advisor Reed Slatkin (acts 10, 12, 13, 15, 18, 19, and 21).² (ER 10-17). Additional acts related to defendant's receipt of and failure to report his income from sales of his stock in American Interactive Media ("AIME") (acts 2, 5, 8, 9, 13, and 15), Tradesafe (acts 16 and 20) and Earthlink (acts 3, 4, 8, and 9). (Id.) Act 7 related to defendant's submission of "Collection Information" forms to the Internal Revenue Service ("IRS"). (ER 12, 104).

Testimony of IRS revenue agents and defendant's tax attorney established that defendant was aware of his tax debt from meetings, notices and other IRS contacts. (RT 7/5/06: 212-38, 7/6/06: 414-20; GER 576-83, 611-15). Defendant made essentially

¹ Abbreviations are the same as those used in the government's answering brief.

² Reed Slatkin filed a petition for bankruptcy in May 2001. (ER 64). He pleaded guilty to various fraud charges in March 2002. (ER 76).

no payments on his tax debt. (RT 7/6/06: 253-260; GER 585-87). In February 1997, the IRS began collection efforts, including a summons to provide financial information. (RT 7/6/06: 330-35, 347; GER 591-92, 595). In May 1999, in response to the summons, defendant completed IRS "Collection Information" statements for himself individually and for two of his purported businesses. (RT 7/6/06: 351; GER 596; ER 104-07). In each statement, defendant denied having any assets of significant value and denied any "recent sale or other transfer of assets for less than full value." (RT 7/6/06: 355, 357; GER 597-98; ER 105-106). He also stated on the forms that he had not received any loans except for a \$70,000 loan from his father. (Id.).

Defendant's ownership and transfers of Earthlink, AIME and Tradesafe stock were established through testimony and documentary evidence. A stockbroker testified that he privately purchased \$144,000 worth of Earthlink shares from defendant in 1997. (RT 7/7/06: 507-10; GER 622-23). Defendant discussed his ownership and transfer of Earthlink and AIME stock to Del Bianco in 1997 with his tax attorney. (RT 7/6/06: 436-37; GER 616). A letter to defendant from a business partner documented the June 1998 sale of a percentage of "your" (i.e., defendant's) Earthlink stock. (RT 7/7/06: 595-96; TEX 111; GER 631, 801). Brokerage records for an account in Del Bianco's name showed ownership and sales of Earthlink and other stock from June 1998 through

December 2000. The stockbroker testified that he spoke with defendant about these trades. (RT 7/7/06: 513-18; GER 623-25). Defendant's cousin Robert Rakow ("Robert") testified that defendant owned one third of the AIME stock collectively purchased by Robert, defendant, and Slatkin; 25,000 of those shares were transferred to Del Bianco in January 1996. (RT 7/7/06: 528-29, 531-32, 534-36; TEX 65; GER 626, 627, 628, 802-18). Robert also testified that he and defendant had an interest in Tradesafe; that stock was sold and distributed to Denise Del Bianco Business Services. (RT 7/7/06: 535-38; GER 628-29).

Numerous witnesses and records also established that defendant worked for Slatkin, CDM and the art gallery, but Del Bianco was paid the majority of defendant's earnings and claimed them as her own income. While defendant found investors, investigated companies and traveled overseas for Slatkin between 1999 and 2001, Del Bianco performed part-time secretarial services for a few months in 2000. (RT 7/5/06: 316-17, 319-20; GER 588-89). Yet, Slatkin paid Del Bianco approximately \$1,375,000 in 2000 and 2001, which she reported as income. (RT 7/6/06: 427-31, RT 7/12/06: 972-79; TEX 328, 329; GER 614-15, 688-89, 715-16). Similarly, Del Bianco did "nothing material" for CDM, while defendant did fund raising and devised business strategy pursuant to contracts which defendant himself negotiated and entered into with CDM. (RT 7/11/06: 835-41; GER 664-66). Del

Bianco reported \$211,960 in income from CDM on her 2000 and 2001 tax returns, but defendant reported only \$15,185. (RT 7/6/06: 430-31; TEX 328-29; GER 615, 715-16). Finally, Del Bianco had no role in consignment sales of art which earned defendant \$434,423 between 1998 and 2000. (RT 7/11/06: 720-48, 870-80, 7/12/06: 901-31; TEX 172-90, 192-95; GER 636-43, 671-74, 676-83, 717-800). Yet, defendant requested that some of his earnings checks be made payable to Del Bianco. (RT 7/11/06: 874-75; GER 672). Neither defendant nor Del Bianco reported this income.³

Records of large purported "loans" from Del Bianco and her businesses to defendant between 1998 and 2001 were found in a search of defendant's residence. (RT 7/7/06: 590-91, 598-601; GER 630, 632). Money earned by defendant and placed in Del Bianco's or her businesses' bank accounts was used to pay defendant's expenses, such as his car lease and credit card bill. (RT 7/12/06: 1006-20; TEX 288-90; GER 691-95; 819-21).

In excerpts of defendant's videotaped testimony in the Slatkin bankruptcy investigation, defendant admitted working for Slatkin (RT 7/12/06: 997-98; TEX 301; GER 690, 822); working for the art gallery, but having the gallery pay Del Bianco (TEX 302; GER 823); and acquiring the right to buy shares of AIME, which

³ Defendant did declare separate commission income, which the gallery had reported to the IRS in 1099 forms. (RT 7/11/06: 712-22; TEX 326-28; GER 634-36, 713-16).

were then obtained and held in his cousin Robert Rakow's name.
(TEX 308; GER 827-29).

Defendant was convicted on the count of tax evasion, but was acquitted on four counts of signing false tax returns (26 U.S.C. § 7206) which had charged failure to report the hidden income on his returns. (ER 18-22).

III

ARGUMENT

A. THE PANEL CORRECTLY FOUND THAT THERE WAS NO CONSTRUCTIVE AMENDMENT OF OR MATERIAL VARIANCE FROM THE INDICTMENT

The indictment alleged 22 acts committed in furtherance of the tax evasion scheme. Act 7 alleged that defendant submitted false "collection information" statements (Form 433) to the IRS:

[D]efendant RAKOW falsely stated that he owned no securities or other assets with any significant value, and falsely stated that he had not recently transferred any assets for less than full value. In truth and in fact, as defendant RAKOW knew at the time, defendant RAKOW owned considerable amounts of securities, and had recently transferred shares of stock to defendant DEL BIANCO for less than full value.

(ER 12).

Defendant claims that the government constructively amended or materially varied from the indictment when it changed its theory from one based on failure to disclose asset transfers (as charged in Act 7) to an uncharged theory based on defendant's failure to disclose the loans he received from Del Bianco on Form 433. (Petition at 10). A constructive amendment occurs "when

the charging terms of the indictment are altered, either literally or in effect, by the prosecutor or the court after the grand jury has last passed on them." United States v. Von Stoll, 726 F.2d 584, 586 (9th Cir. 1984); see also United States v. Pisello, 877 F.2d 762, 765 (9th Cir. 1989) (a constructive amendment occurs when "the evidence supports a crime other than that charged"). A variance "occurs when the charging terms of the indictment are left unaltered, but the evidence offered at trial proves facts materially different from those alleged in the indictment." Von Stoll, 726 F.2d at 586; see also Pisello, 877 F.2d at 765 (a variance occurs when "different evidence supports the charged crime"). Here, as the panel correctly concluded, there was neither a constructive amendment nor a variance because the evidence at trial conformed to the charges.

Initially, defendant's argument rests on a faulty premise. Defendant's argument focuses solely on Act 7. He contends that the jury could not have convicted based on any of the other charged acts of evasion because it acquitted him of the substantive false subscription counts associated with those acts. As the panel correctly concluded, however, defendant's premise is incorrect because "[a]t most, that would indicate a non-cognizable inconsistency." (Mem. at 2). See United States v. Powell, 469 U.S. 57, 62-65 (1984); United States v. Franco, 136 F.3d 622, 630 (9th Cir. 1998) ("a defendant cannot successfully challenge his conviction on one count on the ground that it is inconsistent with his acquittal on another count"). With respect

to Acts 1-6 and 8-22, defendant does not and cannot dispute that both the indictment and the proof at trial focused on defendant's efforts from January 1998 through October 2002 to evade paying his tax debt by hiding his income and assets in Del Bianco's name, as alleged in those acts of evasion. Accordingly, defendant's claim of a constructive amendment or material variance necessarily fails.⁴

Even with respect to the allegations of Act 7, the proof at trial matched the facts charged. The government presented extensive evidence regarding defendant's transfers of stocks to Del Bianco and others, as well as the numerous sales of stock from Del Bianco's account. The government also discussed defendant's numerous asset transfers during its closing argument, and specifically mentioned in its rebuttal argument defendant's failure to disclose these transfers to the IRS. (RT 7/13/06: 1191-92, 1270; GER 701-702, 707). Furthermore, in addition to the failure to disclose stock transfers, Act 7 also specifically

⁴ A variance does not warrant reversal unless the defendant's substantial rights are affected. Pisello, 877 F.3d at 765. To establish prejudice, defendant argues that the jury likely relied on the failure to disclose loans as the affirmative act of tax evasion because they were not clearly instructed that they could only consider the 22 acts charged in the indictment and the undisclosed loans were the only potential evidence of evasion once the jury acquitted on the substantive counts. (Petition at 10-11). In fact, the prosecutor did advise the jury that they must find one of the acts of evasion alleged in the indictment. (RT 7/13/06: 1191; GER 701). Moreover, the panel concluded that there was ample evidence other than the loan evidence to convict defendant of tax evasion. (Mem. at 2). Accordingly, even if there was a variance, defendant cannot demonstrate that it was material, and rehearing should be denied for this reason as well.

alleged defendant's failure to disclose his ownership of securities -- an allegation which defendant overlooks. The government presented extensive evidence -- including testimony from defendant's tax attorney, the stockbroker, and defendant's cousin, as well as numerous exhibits -- establishing that defendant in fact owned and controlled the Earthlink, AIME, and Tradesafe securities held in Del Bianco's name.

Defendant argues that the use of undisclosed loans from Del Bianco to conceal his income was not specifically charged in the indictment, and therefore evidence of such loans amounts to an amendment or a variance. However, the panel correctly concluded that such evidence "was admissible to undercut Rakow's assertion that he had acted in good faith and was forthcoming." (Mem. at 2). United States v. Bhagat, 436 F.3d 1140, 1146 (9th Cir. 2006)("evidence not referenced in the indictment may be admitted for impeachment or other legitimate purposes without effecting any changes to the indictment"). The government's argument concerning the undisclosed loans was made in rebuttal to defendant's claim of good faith:

Now, talking about one last point the defense brought up and emphasized quite a bit is the meticulous records that Ms. Del Bianco kept and how could that be that they were trying to evade the IRS if they kept such meticulous records.

Members of the jury, keep in mind that none of those were given to the IRS. None of them. . .

These loan documents show that [defendant] earned the

money. [Defendant] owned the stock. He held it in Ms. Del Bianco's name, put it on her tax returns, and then lo and behold, it goes right back to [defendant] in the form of these documented loans. Yes, they are documented, fine, but they are not disclosed to the IRS.

Not in this 433 form . . . in which he had the opportunity to disclose these loans from the IRS but did not, did not.

(RT 7/13/06: 1264-66; GER 706). The government also argued, "[Defendants] are talking about how honest they are with the IRS, that they wanted to work it out, compromise, to do all of these things. Why not be honest with them in this 433 form back in May of 1999? Why not tell them about the loans? \$300,000 worth."

(RT 7/13/06: 1269; GER 707). The government did not argue or suggest that defendant's failure to disclose the loans was itself an "act of evasion" upon which a finding of guilt could be based.⁵ Instead, the government argued that defendant's failure to disclose the loans rebutted defendant's claim of good faith and demonstrated willfulness.

Because the evidence at trial proved the same crime and the same set of facts charged in the indictment, there is no conflict

⁵ The government also briefly referenced defendant's failure to disclose the loans in its closing argument concerning Del Bianco's role in aiding and abetting defendant's tax evasion. The prosecutor discussed Del Bianco's preparation of records documenting loans and other payments to defendant, and noted that defendant "did not tell the Internal Revenue Service about [these loans] in May 1999 when he had the opportunity." (RT 7/13/06 1196; GER 703). This brief reference did not urge the jury to convict defendant based solely on the failure to disclose the loans on the 433 forms.

between this case and those upon which defendant relies, which involved jury instructions permitting the jury to convict based on facts not alleged in the indictment. Stirone v. United States, 361 U.S. 212, 214 (1960) (constructive amendment where indictment alleged crime affected shipments of sand, but jury was instructed that they could find guilt based upon finding that crime affected shipments of sand or steel); United States v. Adamson, 291 F.3d 606, 616 (9th Cir. 2002) (fatal variance where wire fraud indictment alleged a particular misrepresentation, but jury instruction and proof at trial focused on a different misrepresentation); United States v. Dipentino, 242 F.3d 1090, 1094-95 (9th Cir. 2001) (constructive amendment where indictment charged defendants with failing to put asbestos-containing materials into containers, but jury instructions specifically permitted jury to convict defendants for failing to deposit asbestos materials in waste disposal site). There is no plain error or conflict which merits rehearing in this case.

B. THERE IS NO CONFLICT WARRANTING REHEARING ON DEFENDANT'S FIFTH AMENDMENT CLAIM

On appeal, defendant claimed that improper collusion between the bankruptcy trustee in the Reed Slatkin bankruptcy proceeding and the prosecutors and agents involved in the criminal investigation of defendant violated defendant's Fifth Amendment rights, requiring suppression of defendant's testimony in the bankruptcy examination. "The Supreme Court has held that the

government may conduct parallel civil and criminal investigations without violating the due process clause, so long as it does not act in bad faith." United States v. Stringer, 535 F.3d 929, 936-37 (9th Cir. 2008) (citing United States v. Kordel, 397 U.S. 1, 11 (1970)). The government may act in bad faith if it "has failed to advise the defendant in its civil proceeding that it contemplates his criminal prosecution." Stringer, 535 F.3d at 937 (quoting Kordel, 397 U.S. at 12). Both the Supreme Court and this Court have held, however, that a defendant who is aware of the possible consequences, yet chooses not to assert his Fifth Amendment privilege in the civil proceeding, waives the privilege. Kordel, 397 U.S. at 9-10; Stringer, 535 F. 3d at 938.

The panel concluded that "[defendant], who was represented by counsel, was well aware of the privilege and chose not to assert it in the bankruptcy proceeding. Thus, he waived it." (Mem. at 3, citing Kordel and Stringer). The panel's conclusion was well supported. The district court found that defendant "knew he was the subject of a criminal investigation at the time of his [bankruptcy] examination." (ER 95). The district court noted that, by the time defendant testified in the bankruptcy proceeding, law enforcement had searched his home and seized approximately \$380,000 in cash, and that defendant's attorney had communicated with prosecutors regarding this search. The district court also noted that defendant retained an experienced

criminal defense attorney to represent him, and that the attorney stated during the first session of defendant's bankruptcy examination that defendant knew he could invoke the Fifth Amendment, but that he had made the "courageous" decision to testify nonetheless. (ER 94).

Defendant does not challenge the district court's factual findings. Instead, he contends that despite his knowledge of the criminal investigation and his awareness that he could invoke his Fifth Amendment privilege, he had a right to explicit notice that he was being investigated by a federal grand jury. (Petition at 14). This Court rejected the very same claim in Stringer, holding that the defendants' waivers of their Fifth Amendment privilege were valid even though they were not explicitly told they were the subjects of an active criminal investigation. Id., 535 F.3d at 938. Likewise, in Kordel, the defendant received notice only that the Food and Drug Administration contemplated a criminal proceeding against him. 397 U.S. at 4-6. The Supreme Court concluded that Kordel had waived his privilege against self-incrimination because he was represented by counsel and appreciated the possible consequences of responding to the interrogatories at issue. Id. at 10-11.

The instant case is fully consistent with Stringer and Kordel. Here, as in Stringer and Kordel, the defendant had sufficient notice of the potential for criminal prosecution and

that his testimony from the bankruptcy proceeding could be used in a subsequent criminal proceeding. Neither of those cases establishes a requirement that the defendant be explicitly notified that a criminal investigation has actually commenced prior to providing evidence in a parallel civil proceeding. Accordingly, there is no basis for rehearing or rehearing en banc.

IV

CONCLUSION

For the foregoing reasons, this Court should deny defendant's petition for rehearing.

DATED: September 29, 2008

Respectfully submitted,

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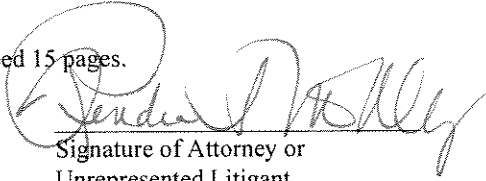
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