No. 84-5511

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, - Plaintiff-Appellee,

versus

MOSE MEADE, - - - Defendant-Appellant.

APPEAL FROM UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY,
PIKEVILLE CRIMINAL, No. 83-8
HONORABLE G. WIX UNTHANK, JUDGE

BRIEF FOR APPELLANT, MOSE MEADE

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STATEMENT OF ISSUES

This appeal presents five (5) issues for determination by this Court. Additionally, the Appellant, Mose Meade, pursuant to Rule 28(i), Federal Rules of Appellate Procedure, adopts those issues presented in Cases 84-5523, 5524, 5525, and 84-5474. The precise issues presented in this Brief are:

(1) Whether there was a fatal variance between the proof and the allegations in Count V of the Indictment which was prejudicial to the Appellant Meade;

(2) Whether the refusal of the trial court to give Meade's "theory of the case" instruction was error;

(3) Whether the Court erred in admitting "prior consistent statements" of witnesses which were prejudicial to Meade;

(4) Whether the trial court's refusal to permit the Defendants to introduce testimony concerning the ability of a local union to engage in organizing activities deprived Meade of a fair trial; and

(5) Whether the admission into evidence of a prejudicial and inflammatory summary exhibit without the proper foundation, a determination of the admissibility of the underlying documents or a cautionary instruction to the jury on the summary's proper use violated Rule 1006 of the Federal Rules of Evidence and deprived the Appellants of a fair trial.

STATEMENT OF THE CASE

On June 6, 1983, a federal grand jury for the United States District Court for the Eastern District of Kentucky at Pikeville returned a ten (10) count Indictment charging the Appellant, Mose Meade, (incorrectly spelled and hereinafter referred to as "Meade") and nineteen (19) others with various violations of the Hobbs Act, 18 U.S.C. § 1951, and various violations of the firearms and explosives laws. Specifically, Meade was charged in Counts I, IV, V, VIII, IX, and X of the Indictment. Count I of the Indictment charged Meade with conspiring with his co-Defendants and certain unindicted co-conspirators to delay and disrupt interstate commerce through the use of actual and threatened force, violence and fear, by forcing Ray-Mac Coal Company to cease the mining of coal in Floyd County, Kentucky. Count IV of the Indictment charged Meade and others with violating the Hobbs Act by damaging a coal auger belonging to Ray-Mac. Count V of the Indictment

charged a similar violation and alleged that the act had been committed by destroying a coal tipple located in Floyd County, Kentucky, which had been leased by Ray-Mac. Count VIII of the Indictment charged Meade with the malicious destruction of property in violation of 18 U.S.C. § 844(i). Count IX alleged that Meade knowingly made a firearm without having paid the making tax as required by federal law in violation of Section 5861(f) and 5871, Title 26, United States Code. The final Count of the Indictment, Count X, charged Meade and others with knowingly possessing a firearm which had not been registered to any of them in violation of Sections 5861(d) and 5871, Title 26, United States Code. (R. 2).

By Order of the Court dated June 15, 1983, the case was declared to be unusual and complex due to the number of Defendants, Exhibits, and the time necessary for pre-trial hearings and trial. Following extensive and lengthy pre-trial hearings, trial began on January 9, 1984. Trial began with eighteen (18) of the twenty (20) named Defendants on trial.[1] Trial was concluded as to Meade on April 10, 1984, with the jury returning verdicts of guilty to Counts I, IV, and V and not guilty on Counts VIII, IX, and X. Of the eighteen (18) Defendants standing trial, thirteen (13) were acquitted of all charges against them. The remaining five (5) Defendants were convicted of some, but not all, of the charges against them.

Sentencing was held on May 25, 1984. Meade was sentenced to the custody of the Attorney General for a period of three (3) years on Count I, three (3) years on Count IV, and three (3) years on Count V. The sentence

[1]Prior to trial, co-Defendant, Van B. Patton, entered a plea of guilty. On Motion of the United States, all charges against Defendant, Morris Ray Hall, were dismissed prior to the presentation of evidence.

imposed on Count IV was ordered to run consecutively to the sentence imposed on Count I. The sentence imposed on Count V was ordered to run consecutive to the sentence imposed on Count I but concurrent to the sentence imposed on Count IV. The concurrent sentences imposed on Counts IV and V were suspended and Meade was placed on probation for a period of two (2) years with the probation to begin running upon his release from the confinement portion of Count I. The Judgment and Commitment Order was not filed until May 29, 1984. (R. 3).

On June 7, 1984, Meade filed his Notice of Appeal with the District Court. (R. 4). On June 14, 1984, Meade executed an appeal bond in the amount of Twenty-Five Thousand ($25,000.00) Dollars own recognizance and is currently free on that bond pending the disposition of this appeal.

In essence, the thrust of the Indictment and of the proof of the United States during the trial was that Meade and the other named Defendants and unindicted co-conspirators attempted to drive Ray-Mac Coal Company out of business. The government alleged that this was done at the direction and insistence of Edgar Jones, a co-Defendant, and a part owner of JRM Coal Company, an alleged competitor of Ray-Mac. The thrust of Meade's defense, as well as that of all the other Defendants, was that a prosecution under the Hobbs Act was not maintainable against him because of the exemption from a Hobbs Act prosecution under the case of *United States* v. *Enmons,* 410 U. S. 396 (1973). (Tr. 44, 28).

The proof adduced at trial by both the United States and the Defendants showed that Floyd County, Kentucky, had long been predominantly union territory. Local 5967

of the United Mine Workers of America was located in East McDowell, a small town in Floyd County. During the weeks of February 15, 1982, and February 22, 1982, violence erupted between the miners with strong union affiliations and backgrounds and employees of Ray-Mac Coal Company, a Pike County coal company which operated with non-union employees. The violence preceded a strike vote taken by Local 5967 of East McDowell and two (2) days of picketing. Counts II and III of the Indictment charged that several of the Defendants, but not Meade, fired upon the equipment and personnel of Ray-May in an effort to close the coal company down. Failing in this, according to the prosecution, the Defendants, including Meade, destroyed equipment belonging to Ray-Mac.

Meade never seriously contended that he was not involved in the activities alleged in the Indictment. His defense to the non-Hobbs Act violations was that he never knowingly possessed or made a destructive device. The jury apparently accepted this argument since they returned verdicts of not guilty to all of the non-Hobbs Act allegations. (Tr. 47, 24). To the Hobbs Act violation charges, however, the jury returned verdicts of guilty. Because of numerous errors and particularly an extremely erroneous and prejudicial instruction given regarding the *Enmons'* defense, Meade has filed this appeal.[2]

At the trial, the Court, over the objection of the Defendants, permitted the prosecution to introduce proof that

[2]While Meade respectfully submits that the Court committed numerous errors which precluded Meade from receiving a fair trial, Meade and his counsel must acknowledge that at all times throughout the trial the trial judge maintained a firm but friendly disposition. The trial judge's handling of this case turned what could have been an unbearable three-month trial into as bearable as any three-month trial can be. The trial judge is to be commended for his handling of the case and any allegations of error by Meade or his counsel are certainly intended not as a personal affront to the ability or integrity of the trial court.

the coal tipple which had been destroyed and which was the subject matter of Count V of the Indictment, had been leased by Coal Mac Sales and not Ray-Mac Coal Company. (Tr. 5, 31-32). Meade's counsel argued that to permit this variance in proof would be permitting the Court to constructively amend the Indictment. This, absent grand jury action, was not proper. Particularly in view of the fact that the whole thrust of the Indictment had been against Ray-Mac and not against Coal-Mac, a totally distinct entity, it would be impossible to state whether or not a grand jury would have chosen to indict the Defendants on this charge had they known the true lessee of the coal tipple. (Tr. XIII, 45-49).

The trial court, also over the objection of the Defendants, permitted the United States, under the guise of rehabilitating a witness under the use of "prior consistent statements", to have read to the jury lengthy statements of key government witnesses. (Tr. 23, 183-187; XXI, 160-164). This procedure was particularly prejudicial to Meade as well as the other Defendants.

As previously noted, the thrust of the Defendants' defense regarding the Hobbs Act violations were they were exempted from prosecution under the Hobbs Act by virtue of the Supreme Court case of *United States* v. *Enmons*. While many of the acts alleged to have been committed in the Indictment were not denied by the Defendants, it was their position that at all times relevant the individuals under Indictment engaged in legitimate labor activities with the legitimate labor goal of organizing Ray-Mac employees. In an attempt to show that the local union was not authorized to conduct organizing drives on behalf of the international union, the United States was permitted to elicit responses from several lay witnesses concerning the

legality or illegality of the local union conducting such activities. It was apparently the position of the prosecution that if the local union could not engage in organizational activities, the acts of any individuals were obviously a sham. To counter the prosecution's contention that the local union could not engage in organizational activities, a law professor from the University of Tennessee College of Law was called as a defense witness to give testimony regarding the authority of a local union. (Tr. 32, 77-78). The trial court refused to permit the law professor to testify regarding the authority of a local union and this operated to the extreme prejudice of all Defendants. In view of the *Enmons'* instruction which would ultimately be given in which the trial court directed the jurors to examine the authority of a local union to engage in certain activities, the denial of this evidence was particularly devastating.

The prosecution's last witness in its case in chief was Gene McAdams, who introduced Government Exhibit #148. Exhibit #148 was a summary chart detailing losses allegedly sustained by Coal-Mac, Inc., Mac Mining Company and Ray-Mac as a result of the events of February, 1982. The Court overruled numerous defense objections to the exhibit and allowed it to go to the jury. Objections included that the summary was inflammatory, speculative, inaccurate, misleading and based almost wholly on inadmissible documents and hearsay information. (Tr. 29, 61-89; 30, 139). The Court failed to admonish the jury that the summary was not to be treated as evidence, but merely as a guide to evaluating evidence. The trial judge at no time made any independent inspection of the documents underlying the exhibit to determine their admissibility. (Tr. 29, 88-89; 30, 139). At a later point, the Judge himself indicated that he believed the summary was misleading and

inaccurate. (Sentencing Hearing Transcript, pp. 13-14, 53, 75).

By Order of this Court dated June 21, 1984, the appeals of three (3) of the Appellants, Kenneth Rowland, Teddy Kinney, and German Stumbo, were ordered consolidated and the Court further directed that one consolidated brief be filed on behalf of those three (3) individuals. Meade was directed to file a brief and the Appellee was then to file one (1) consolidated brief responding to the two (2) briefs of the four (4) Appellants. Because of the identity of issues and parties in these appeals, Meade joins in, incorporates and adopts by reference all issues raised and arguments made on behalf of the Appellants, Kenneth Rowland, Teddy Kinney, and German Stumbo, Court of Appeals, Nos. 84-5523, 5524 and 5525. Additionally, Meade joins in, incorporates and adopts by reference all issues and arguments made on behalf of co-Defendant, Edgar Jones, 84-5474. In view of the adoption of these arguments, the following statements are necessary to supplement the statement of facts offered by the other four (4) named Appellants.

Meade filed a proposed jury instruction regarding the *Enmons*' defense. (Record entry 352, the full text of which is set out in the Appendix). During the Rule 30 conference, Meade specifically objected to the Court's instruction on the *Enmons*' defense and adopted the arguments and instructions of the other Defendants. (Tr. 41, 39-44). During the Court's charge to the jury, the Court instructed on Count V of the Indictment regarding the *Enmons*' exception the same as he had instructed the jury on Count IV. (Tr. 44, 162-163).

Meade elected not to testify in his own behalf. Indeed, all the Defendants that were convicted so elected not to

testify. In view of that fact, the prejudicial and improper comments of the prosecutor during his rebuttal portion of the closing argument concerning the failure of Defendant, German Stumbo, to testify are particularly significant.

ARGUMENT I

There was a Fatal Variance Between the Proof and the Allegations in Count V of the Indictment Which was Prejudicial to the Appellant Meade.

Count V of the Indictment charged that Meade, together with three (3) unindicted co-conspirators, aided and abetted by two (2) named Defendants, violated the Hobbs Act, Section 1951, Title 18, United States Code, by destroying a coal tipple located in Floyd County, Kentucky, which had been leased by Ray-Mac Coal Company, in an attempt to stop Ray-Mac Coal Company from engaging in the business of mining and shipping coal. This allegation conformed to the overall thrust of the Indictment which alleged that an attempt had been made by the named Defendants and unindicted co-conspirators to drive Ray-Mac out of the business of mining and selling coal. As paragraph eight (8) of the descriptive paragraphs preceding Count I of the Indictment stated:

> "Ray-Mac Coal Company (hereinafter Ray-Mac) was a Kentucky partnership engaged in the mining of coal on John Hall and Hamilton Branch near McDowell in Floyd County, Kentucky for shipment in interstate and foreign commerce, and purchased, transported and caused to be moved goods, materials, supplies and commodities in interstate commerce." (R. 2).

The investigation conducted by federal agents had been a lengthy one, having begun in February of 1982 and continuing during the trial. (Tr. 33, 150). Additionally, while

it is not known how many times the Grand Jury which ultimately returned this Indictment did meet, it is known that they did meet as early as October 4, 1982, the time when Agent McAllister was sworn in as "Agent of the Grand Jury". Stumbo Exhibit "3". The Indictment was ultimately returned on June 6, 1983. (R. 2). While the Appellant Meade is certainly not privy to all matters which took place before the Grand Jury and what might have influenced any particular grand juror to vote as he may have, the end result of the Grand Jury sessions was the return of the multi-count indictment alleging the running battle between JRM Coal Company and Ray-Mac Coal Company.

Jury selection began on January 9, 1984. Due to inclement weather and the extraordinary number of jurors needed, the jury was not selected and sworn until January 25, 1984. On January 23, 1984, some two (2) days prior to the swearing of the jury and after the conclusion of extensive pre-trial hearings and two (2) weeks of jury selection, one of the counsel for the United States advised the Court and the parties that at the end of the government's proof, the United States would ask the Court to constructively amend the Indictment to reflect that the coal tipple in question in Count V had in fact been leased by "Coal-Mac", and not "Ray-Mac". Counsel for the Defendants immediately objected and gave notice to the Court that at the appropriate time they would give authority as to why the United States could not, in such a cavalier fashion, amend the Indictment.[3] (Tr. 5, 31-32).

[3]It was agreed and understood between all the parties and the Court that the objection and request of one defense counsel would likewise be treated as an objection and request of all other defense counsel unless some particular counsel wished to be excluded from the ruling. In view of the exceedingly large number of attorneys present, this rule was needed and did simplify procedures significantly.

By January 30, 1984, it became apparent that the proof being offered at trial varied materially from the allegations in the Indictment. Lynn Parrish, the President of Coal-Mac Sales, Inc., testified that in February of 1982 (the dates alleged in the Indictment to have been when the acts of violence occurred) Coal-Mac Sales, Inc. was a corporation duly organized under the laws of the State of Kentucky. Coal-Mac Sales, Inc. (hereinafter "Coal-Mac") at that time was mainly a sales company which operated tipples and purchased coal from various truck mines. The shareholders of Coal-Mac were Frank Justice, Jim McGhee and Lynn Parrish. (Tr. XIII, 8-9). Mac Mining Company (hereinafter "Mac Mining"), on the other hand, was a partnership owned by Frank Justice and Jim McGhee which had as an operating division a company known as Ray-Mac Coal Company (hereinafter "Ray-Mac"). (Tr. XIII, 24). All the coal that was mined by Mac Mining and its divisions was sold by Coal-Mac. (Tr. XIII, 46). Thus, all sales by Ray-Mac were intrastate in nature. Mr. Parrish further testified and was permitted to refer to a sublease agreement between Coal-Mac and several individuals wherein Coal-Mac leased a tipple known as the Liberty Five Tipple on Simpson's Branch in Floyd County, Kentucky. (Tr. XIII, 56).

To all references to Coal-Mac and any documents relating to that corporation, counsel had a continuing objection on the grounds of relevancy, variance, and an attempted amendment of the Indictment. (Tr. XIII, 26, 29, 57, 67).

On February 1, 1984, the matter was again raised in an extensive hearing before the Court. The Appellant Meade submits that any question as to whether prejudice or confusion was created by the constructive amendment of the Indictment and the injection of the testimony concerning

Coal-Mac is answered by simply viewing the problems the trial judge was having keeping straight the corporation, from the partnership, and from the operating division of the partnership. As noted above, Coal-Mac was a Kentucky corporation. Mac Mining was a Kentucky partnership having no legal relationship to Coal-Mac. Ray-Mac was an operating division of Mac Mining. However, as the questions of the trial judge showed, there was great confusion concerning these separate entities. At pages 42 through 43 of Volume XIII of the Transcript, the trial judge has the following mistaken impressions: The stock in Ray-Mac was owned by Coal-Mac; Ray-Mac was a corporation; Mac Mining owned the stock in Ray-Mac.

At that same hearing, the trial court inquired of various counsel how they would be prejudiced by permitting a change in both overt act No. 40 of Count I and substantive Count V. Counsel for the Appellant Meade specifically claimed prejudice to any change in the wording in substantive Count V and specifically argued that allegations in the Indictment could not be changed without the benefit of a grand jury's reconsidering the matter. Counsel further stated that since the Grand Jury had returned a comprehensive indictment listing Ray-Mac as the alleged victim, it would be impossible to know whether the Grand Jury would still have chosen to return an indictment regarding the destruction of the coal tipple had the grand jurors known that the tipple which had been destroyed belonged to Coal-Mac and not to Ray-Mac, a separate entity. (Tr. XIII, 45-49). Counsel for Appellant Meade specifically joined the Memorandum regarding the amendment of the Indictment filed by counsel for the Defendant, Edgar Jones. (R. 384; Tr. XIII, 45).

At that point in the proceedings, counsel for the United States changed their argument to one that the language identifying the tipple as belonging to Coal-Mac was more surplusage. Again, counsel for the Defendants asserted that the language was not mere surplusage, but rather constituted an essential element of the offense, and thus could not be changed without the benefit of the Grand Jury's considering the matter. (Tr. XIII, 50-53).

On March 13, 1984, the last day of the government's case in chief, the issue of variance once again reared its ugly head as the United States was attempting, over the objection of the Defendants, to introduce a summary purportedly showing the losses suffered by Coal-Mac, Mac Mining, and Ray-Mac. Counsel for the Appellant Meade once again objected to any introduction of materials or testimony regarding any entity other than Ray-Mac. In fact, the Court acknowledged that counsel for the Appellant Meade had been consistent in objecting to anything not involving Ray-Mac. Counsel specifically called the Court's attention to the Sixth Circuit cases of *United States* v. *Beeler,* 587 F. 2d 340 (6th Cir. 1978) and *United States* v. *Cusmano,* 659 F. 2d 714 (6th Cir. 1981). At that point, the United States advised the Court that they would not seek to amend the Indictment, a position exactly contrary to that enunciated before the trial. (Tr. 29, 48-49, 54). The Court ruled that there had been neither an amendment nor a material variance. (Tr. 29, 54, 91).

In moving for a judgment of acquittal on Count V as to the Appellant Meade, both at the close of the government's case in chief and at the close of all the evidence, counsel for Meade submitted that there had been a material variance between the allegations and the proof. Counsel once again

cited the Court to the authority of *United States* v. *Beeler* and *United States* v. *Cusmano*. (Tr. 30, 61; 40, 161).

During final instructions to the jury, the Court simply eliminated from the consideration of the jury the issue of whether or not the tipple which had been destroyed by fire had been leased by Ray-Mac. (Tr. 44, 162). This instruction was given over the objection of counsel for the Appellant Meade. (Tr. 41, 39, 43).

It is the position of this Appellant that there was a fatal variance between the proof adduced at trial and the allegations presented in the Indictment which operated to the extreme prejudice of the Appellant and which requires a reversal of his conviction on this Count. This Court has been quick to reverse convictions in cases in which there were fatal variances between the proof and the allegations.

The Fifth Amendment of the Constitution of the United States provides in pertinent part:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . ."

In construing this provision, the United States Supreme Court has held that a trial court may not strike words from an indictment which may have formed the basis for one or more of the grand jurors to vote to indict. *See generally, Ex Parte Bain,* 121 U. S. 1 (1887); *Stirone* v. *United States,* 361 U. S. 212 (1960). In this case, the trial court struck from the Indictment the essential factual allegation that the coal tipple in question had been leased by Ray-Mac. Since it is clear that the entire thrust of the Indictment was to allege violations occurring against Ray-Mac, it is inconceivable that grand jurors were not impressed and influenced by the fact that the tipple named in their Indictment

purportedly belonged to Ray-Mac. Indeed, had the Grand Jury known that the tipple belonged to Coal-Mac, there is no indication that an indictment would have been returned regarding that activity.

In *United States* v. *Beeler, supra,* and *United States* v. *Cusmano, supra,* this Court adopted the District of Columbia Circuit's test for distinguishing between an amendment and a variance as announced in *Gaither* v. *United States,* 413 F. 2d 1061, (D.C. Cir. 1969). In *Gaither,* the Court stated as follows:

> "An amendment of the indictment occurs when the charging terms of the indictment are altered, either literally or in effect, by prosecutor or court after the grand jury has last passed upon them. 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." *Id.* at 1071.

A variance may, however, be substantial enough to amount to a constructive amendment of the indictment. As the Court in *Gaither* further stated, when such event occurs, the Defendants' rights are infringed upon because the Grand Jury has no longer made the charge on its own judgment. *Id.* at 1072.

In the case at bar, the trial court did not permit a formal amendment of the Indictment. However, the effect of what it did was the same. By omitting words from the Indictment, as was done during the Court's instructions to the jury, and by permitting a variance in the proof as to the true lessee of the coal tipple, the Court struck out words as surplusage which may well have formed the basis of the decision by one or more of the grand jurors to vote to indict. Such practice is not permitted and entitles the

Appellant Meade to a reversal of his conviction. *United States* v. *Cusmano, supra; United States* v. *Jones,* 647 F. 2d 696 (6th Cir. 1981); *United States* v. *Beeler, supra.*

The United States is not saved by the fact that they gave notice to the Appellant prior to the attachment of jeopardy (Notice given on January 23, 1984, and jeopardy attached on January 25, 1984) nor by the fact that discovery made available to defense counsel included documents relating to the sublease of the tipple in question. In *Watson* v. *Jago,* 558 F. 2d 330 (6th Cir. 1977), this Court held that an amendment could not be justified on the grounds that defense counsel could have sought information through a bill of particulars. Such reasoning was also, at least by implication, rejected by this Court in *United States* v. *Cusmano, supra.* A material variance deprives the Defendant of his right to be tried upon the charges brought by the Grand Jury. As such, as soon as a showing of material variance has been made, the affected Defendant is entitled to have his conviction reversed.

In the instant case, the Indictment returned by the Grand Jury alleged that the Appellant Meade had interfered with interstate commerce by destroying a tipple which had been leased to Ray-Mac. However, the tipple had not, in fact, been leased to Ray-Mac, but since the entire Indictment centered around activities involving Ray-Mac, it is implausible to believe that the allegation that the tipple had been leased by Ray-Mac did not play a significant role in the decision of the Grand Jury to indict on this particular charge.

ARGUMENT II

The Trial Court Erred in Refusing to Give the Appellant Meade's "Theory of the Case" Instruction.

Prior to the Rule 30 conference concerning jury instructions, counsel for the Appellant Meade submitted a "theory of the defense" instruction. (R. 464). The instruction was short in length and presented, in capsulized form, the theory of defense of Mose Meade as well as his three (3) co-Defendants who were all represented by the same trial counsel. Relating to the Appellant Meade, that instruction provided:

> "All the above-named Defendants have pleaded 'not guilty' to the charges contained in the indictment. It is the theory of these Defendants that the events during the week of February 17 and February 22, 1982, at the Ray-Mac mining site, and the events related to the coal auger and coal tipple, occurred in the course of legitimate organizing efforts by Local 5967 of the United Mine Workers of America, but the purpose of these organizing efforts were to achieve a legitimate labor objective. It is also these Defendants' theory that they never unlawfully and knowingly combined, confederated or agreed with each other or any of the other Defendants or unindicted co-conspirators to obstruct, delay or affect commerce by extortion in violation of the Hobbs Act. . . .
>
> "It is Mose Mead's theory of defense that he never voluntarily and willfully joined in an effort to delay or affect commerce by extortion. Mose Mead had no reasonable means of escaping the threats, both actual and implied, of Ed 'Panhandle' Moore. It is further Mose Mead's theory of defense that he never possessed nor constructed an explosive or destructive device as that term is defined by federal law . . ."

Near the conclusion of the Rule 30 conference, counsel for Edgar Jones questioned the Court regarding charging on the theory of the defense. The Court indicated that no such instruction would be given. At that point, counsel for the Appellant Meade confirmed that his instruction had found its way into the record. (Tr. 41, 124-125).

The law is clear in this Circuit that in a criminal case it is reversible error for a trial judge to refuse to adequately present a defendant's theory of defense. *United States* v. *Garner,* 529 F. 2d 962 (6th Cir. 1976); *United States* v. *Blaine,* 375 F. 2d 249 (6th Cir. 1967).

The District Court erred in this case in two (2) regards: (1) the instruction given regarding *United States* v. *Enmons,* 410 U. S. 396 (1973) was incorrect and prejudicial; and (2) the jury was not advised that it was Meade who was entitled to the coercion instruction ultimately given by the Court.

Meade must concede that the trial court did give an instruction regarding coercion and compulsion. Indeed, such instruction was required and justified under the evidence presented on behalf of Meade. No issue is raised with the correctness of the instruction given. However, that instruction came towards the end of the Court's very lengthy charge and did not specify which Defendant could rely upon that defense. (Tr. 44, 174-175).

When instructing the jury on the applicability of the *Enmons'* defense, the Court did advise the jury that the Defendants had asserted an *Enmons'* defense. This language clearly applied to all Defendants. (Tr. 44, 134). However, when instructing on coercion, the Court referred to only a single Defendant who was not identified by name. Such failure to specify which Defendant was entitled to the instruction constitutes error since it deprived the Defendant Meade of his opportunity to have the jury understand his theory of defense. Certainly a defense based on coercion and on an *Enmons'* defense is not inconsistent.

ARGUMENT III

The Court Erred in Admitting "Prior Consistent Statements" of Witnesses to the Extreme Prejudice of the Appellant Meade.

On three (3) separate occasions, the trial judge, over the strenuous objections of defense counsel, permitted to be read to the jury statements of witnesses which had previously been taken by law enforcement officers. The United States had moved the introduction of the statements on the grounds that they constituted "prior consistent statements" under Rule 801(d)(1)(B), Federal Rules of Evidence. The trial judge, ruling that the credibility of the witnesses had been attacked by defense counsel, permitted the statements to be read to the jury. The statements did not go to the jury room. In two (2) cases, the Clerk of the Court had to read the statements because the witnessees who had given the statements, and purportedly sworn that they had read the statements and that the statements were true, were illiterate and could not, in fact, read.

Danny Blanton was a government witness who had been driving the lead coal truck in a procession off the Ray-Mac hill when a disturbance occurred on the picket line. It was hotly contested at trial as to whether the local union and some of the Defendants or employees of the Ray-Mac Coal Company had been the aggressors in some violence which took place on a picket line on February 16, 1982. Blanton was the lead driver in a procession of coal trucks coming off the hill and there were questions

as to whether or not his truck had actually been damaged by gunfire, whether he was armed, and at whose direction he had come off the hill.

Shortly after the violent activities which took place on the picket line on February 16, Mr. Blanton was interviewed by Officer Forsythe of the Kentucky State Police. That statement read in its entirety:

> "I was driving the first truck off the hill. When I got to the John Hall Branch I saw about 40 pickets. I saw Drexil Hall with the pickets. I went to school with him and I know him very well. He had his right hand in his jacket pocket. When I pulled beside him I saw him pull a bright pistol out and shoot at me. I thought he shot me. Several shots were fired from the pickets. Pete Raymond Barker was in front of me in a regular truck or a Blazer-type truck. He started shooting towards the pickets. The pickets then left." (Government Exhibit No. 52).

Counsel for acquitted Defendant Linville Mosley very briefly cross-examined Blanton regarding whether or not Blanton had seen Mr. Mosley on the picket line. Mosley's counsel questioned Blanton regarding the number of pickets at the Ray-Mac entrance. Blanton gave very equivocal answers and in an attempt to establish the number, Mosley's counsel referred Blanton to his statement of February 16, 1982, and asked him if it were a fact that there were forty (40) pickets. Blanton referred to the statement and even after reading the statement still said that there could have been more than forty (40) or less than forty (40) pickets at the Ray-Mac entrance. (Tr. XVII, 197-202). Thus, Blanton's prior statement was not consistent with his in-court testimony since he never gave the same number of pickets as being present at the Ray-

Mac entrance. That reference to the statement was the only one made either by counsel for the United States or the remaining defense counsel.

During the re-direct examination of Mr. Blanton, the United States attempted to introduce the statement as a prior consistent statement under Rule 801(d)(1)(B), Federal Rules of Evidence. The trial judge rejected the offer and correctly observed that the only question had related to the number of pickets and that rather ambiguous answers had been given. The Court then observed:

> "Now you are seeking to get in the entire statement which are other matters other than that. It has nothing to do with that numbers. The statement which you are trying to get in has nothing to do with the number there." (Tr. XVII, 280).

Unfortunately, the trial court then got sidetracked on the issue of whether or not the prior consistent statement could be introduced because the credibility of the witness had been attacked. The Court then reserved ruling on the question and held that the proper witness for the introduction of statement would be the law enforcement officer who took the statement. (Tr. XVII, 283-284).

Two (2) days later, the United States renewed their efforts to introduce the statement through Officer Forsythe. The United States maintained that the statement was admissible under Rule 801(d)(1)(B) since the Defendants had tried to "impune Mr. Blanton's credibility". (Tr. 15, 26). Over the strenuous objection of defense counsel, the trial court overruled the Defendants' objections and permitted the statement to be read into evidence. The arguments raised by defense counsel included this Circuit's recent holdings in *United States* v. *Hamilton,* 689 F. 2d

1262 (6th Cir. 1982); the fact that no question of recent fabrication had been raised; and a confrontation clause argument. (Tr. 15, 27-30).

The Court's ruling on this rather minor statement was significant since it opened the door and permitted the United States to subsequently offer two (2) extensive statements given by unindicted co-conspirators which were introduced against all Defendants despite the facts that counsel for only one Defendant had made single, isolated references to the statements.

Philman Caudill, an unindicted co-conspirator who had struck a plea bargain agreement with the United States, testified on behalf of the United States. Mr. Caudill, as the testimony developed, was functionally illiterate but had nevertheless given an extensive statement and sworn under oath that he had read the statement. As the facts showed, Mr. Caudill was unable to read some of the words and didn't understand a lot of the other ones. (Tr. 23, 141-142).

On cross-examination, counsel for acquitted co-Defendant, Ranny Blankenship, questioned Caudill about Caudill's in-court testimony implicating Mr. Blankenship in some of the violent activities. Blankenship's counsel questioned Caudill about the prior statement and asked him if he had not, in fact, failed to implicate Mr. Blankenship in the prior statement. The statement was ultimately given to Mr. Caudill so that he could refresh his recollection. (Tr. 23, 136-137). Mr. Caudill was unable to read the statement and a recess was taken so that the statement could be read to him. After court reconvened, Mr. Caudill acknowledged that he had not made any mention whatsoever of Mr. Blankenship being involved in the trouble at Ray-Mac. Furthermore, Mr. Caudill stated that there

was supposed to be more of that statement than what had been shown to him. (Tr. 23, 140).

As might have been expected, on re-direct examination the United States immediately went to the statement. Counsel for the United States first established that the Bureau of Alcohol, Tobacco & Firearms agents had, in fact, not taken down the complete statement from Mr. Caudill. Notwithstanding that, the United States then moved to introduce the statement as a prior consistent statement of the witness under Rule 801(d)(1)(B). (Tr. 23, 160-161).

Over defense objection, the Court permitted the introduction of the statement as a prior consistent statement. What is significant, however, is the Court's basis for admitting the statement which was:

> "Ok. Ok, gentlemen, the witness was questioned about the plea bargaining, the witness was questioned about the much better deal which he got, that he was presently pending sentencing, and the implication is that he is testifying here in order to appeal to the Court to not give him the maximum sentence. It appears that the — that a question is raised as to the credibility of this witness. I will permit the prior consistent statement to be introduced into evidence. I will admonish the jury pursuant to this in-trial admonition, but I will not permit the prior consistent statement to go to the jury room as an exhibit." (Tr. 23, 164).

The Court also, over defense objection, permitted the Clerk to read the statement to the jury notwithstanding the fact that the witness had signed the statement and certified that he had read it. The trial court further prohibited defense counsel from asking the witness to read the statement on re-cross examination. (Tr. 23, 166). The

trial court likewise would not excise from the statement any incompetent matters in the statement, such as the witness's stating that he later had heard from some other person certain matters. (Tr. 23, 176-177; 180).

The statement, as read by the Clerk as she stood before the jury on an elevated platform, was particularly prejudicial to the Appellant Meade. Counsel for Meade had not questioned the witness at all concerning his statement and the thrust of the questioning was directed at matters left out of the statement. Nevertheless, the Clerk was permitted to read to the jury a long statement which takes four (4) pages in the transcript to fully report and implicates Meade. (Tr. 23, 183-187).

Jake Moore, another unindicted co-conspirator, testified on behalf of the prosecutor. Mr. Moore had been interviewed by law enforcement officers after he had been arrested, consulted with a lawyer, and had decided to cooperate with the government. (Tr. XXI, 171-174). In that seven (7) page statement dated October 6, 1982, Mr. Moore swore that he had read the statement though the proof showed that Mr. Moore was illiterate. (Tr. XXI, 167)

During cross-examination, counsel for acquitted co-Defendant Eugene Tackett asked Mr. Moore if, in fact, in a statement given to an ATF agent in October of 1982, he had failed to identify Mr. Tackett as being present at a coal tipple on one particular occasion. Mr. Moore did not remember whether or not be had mentioned the name of Eugene Tackett and further indicated that he could not read the statement so as to refresh his recollection, as counsel for Mr. Tackett had suggested. At that point, at the Court's suggestion, the United States stipulated that the statement given to the ATF agent by Mr. Moore

on October 6, 1982, did not specifically mention Mr. Tackett as being present at the tipple. No further questions were asked by either Mr. Tackett's counsel or any other defense counsel concerning that statement and the statement was never given to the witness for refreshing his recollection. (Tr. XXI, 100-102).

On re-direct examination, the United States immediately went to the October 6, 1982, statement of Mr. Moore. The United States advised the Court that they were going to offer the statement under 801(d)(1)(B) as a "prior consistent statement, your honor, with credibility of the witness has been severely attacked." (Tr. XXI, 138). Defense counsel objected on the grounds that the statement contained totally incompetent matters, that the only paragraph that was ever discussed was that brought out by counsel for Mr. Tackett and the United States had stipulated to that error, and that the statement was not properly a prior consistent statement. (Tr. XXI, 138-141). However, the trial court decided to excise from this statement certain portions which were deemed to be incompetent. Again, the trial court, over defense objections, permitted to be read by the Clerk of the Court the statement rather than by the witness who had previously sworn he had read the statement at the time it was given. (Tr. XXI, 148).

The trial court's basis for admitting the statement was that defense counsel had pointed up some ten (10) to twelve (12) inconsistencies between this witness's testimony at trial and his previous testimony before the Grand Jury and at a mini-hearing held to determine the existence of a conspiracy. (Tr. XXI, 154). The statement as read to the jury, however, was not consistent with the witness' trial testimony. (Tr. XXI, 155).

Counsel for Meade had asked no questions of Moore concerning the statement and the thrust of counsel's questions regarding Meade to Mr. Moore had been to elicit responses that Meade had not constructed a destructive device. (Tr. 23, 111-115). The statement read to the jury by the Clerk, however, contained extensive references to Meade and took the Clerk five (5) pages in the Transcript to read the redacted version. (Tr. XXI, 160-164). The prejudice to Meade was overwhelming in that a Clerk, standing on an elevated platform, read the statement implicating Meade to the jury although the person making the statement had sworn that he had made the statement yet was incapable of reading the statement.

In all three (3) situations involving the use of the "prior consistent statement", the Court did offer admonitions. However, no two (2) of the admonitions were the same and objections were made to all such admonitions. In the situation involving the statement made by Mr. Blanton, the Court indicated that the prior consistent statement was not being used for the purpose of bolstering the testimony of Mr. Blanton. (Tr. 15, 35-36). The trial court admonished the jury, however, that the statement was being admitted as bearing upon the credibility of the witness. In discussing the purpose for admitting the prior consistent statement, the Court advised the jury:

> "This is what is called a prior consistent statement. Now, the consistency of this matter is admitted—the consistency, if any, in this matter is permitted as bearing upon credibility of the witness. In other words, it may be asserted, well, if the witness said something at one time and it's consistent with what he stated after you may consider that as credibility.
>
> "Of course, on the other hand, this court has heard arguments sometimes where consistency might have an unfavorable impression upon credibility. You are the ones who have to decide what the credibility of the witness is going to be. This is merely admitted for the purposes of assisting you in making a determination as to the credibility of what you want to give to Danny Blanton. Do you understand that?
>
> "Now, the consistency that is contained in this statement is not for the purpose of re-emphasizing evidence which you have already heard nor is it to detract or take away from that which you have already heard. This is merely as bearing upon the credibility of the witness Danny Blanton, if in your opinion it has such affect on you. You understand?" (Tr. 15, 31).

Counsel for the United States objected strenuously to the Court's admonition and argued that the statement could be considered as substantive evidence. This argument is probably well-taken if indeed the statement qualified as a prior consistent statement. Following a lengthy conference, the Court further admonished the jury as follows:

> "Now let me state this in addition so there will be no misinterpretation. I am not saying when I instructed you this is bearing on credibility. I am not saying that. The effect of this isn't to say that what Mr. Blanton has said before is in evidence. What Mr. Blanton said before is evidence. This is bearing upon consistency of what Mr. Blanton has said.
>
> "The purpose of this, admitting this is not to re-emphasize that which Mr. Blanton has already testified but is to—its bearing upon the credibility of Mr. Blanton. Do you understand? I take from the nods of your heads you do.
>
> "All right, proceed." (Tr. 15, 37).

Prior to the Clerk's reading of the statement given by Philman Caudill, the Court admonished the jury as follows:

"All right. Now before she commences let me state this to the jury. Mr. Caudill here has testified in the government's case during this trial. You recall it's been brought out that before this trial he made statements which were the same as or were similar to what he has said here in the courtroom. These earlier statements which is the exhibit which is going to be read is brought to your attention to help you decide whether you believe Mr. Caudill's testimony. If Mr. Caudill said essentially the same thing on more than one occasion in your discretion it may or may not be reasonable for you to believe Mr. Caudill's testimony. It is within your discretion.

"Madam Clerk, please read the prior—the statement there first." (Tr. 23, 182-183).

Defense counsel objected to the Court's admonition.

Subsequent to the Clerk's reading of the statement given by Jake Moore, the Court admonished the jury as follows:

"Now, ladies and gentlemen of the jury, this statement was read to you and you may consider it for two purposes. One is what is called as affecting credibility. The other is what is called substantive evidence. The law permits statements of witnesses which were made. What was the date which this statement was made, Madam Clerk?

"The Clerk: October 6, 1982.

"The Court: October 6, 1982, and when was it that the plea agreement was entered into?

"Mr. Self: Please the Court, the 16th of February, 1983.

"The Court: All right. Now, this is—these statements are admissible under the Rules of Evidence to rebut a charge of recent fabrication or improper influence or motive.

"Now, as to credibility where the statement which is read is consistent with his present testimony, this is

permitted to be read to you bringing out that he has made statements which were the same as or similar to what was said in the courtroom.

"Now, these early consistent—this early consistent statement is brought to your attention to help you decide whether or not—whether or not you believe Mr. Moore's testimony. In other words, if Mr. Moore said essentially the same thing on more than one occasion, in your discretion it may or may not be reason for you to believe his testimony. If Mr. Moore has said something different one time to the other, then it is in your discretion to believe what he said at one time or the other. Do you understand?

"Jurors: (nodded their heads).

"The Court: All right. I assume, gentlemen, there is an objection to the admonition, to the form of the admonition. And let that be noted and be overruled." (Tr. XXI, 164-165).

Rule 801(d)(1)(B) provides as follows:

"A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive, . . ."

In order to satisfy admissibility requirements under Rule 801(d)(1)(B), the proponent must establish three (3) criteria: (1) the declarant testifies at trial and is subjected to cross-examination concerning the statement; (2) the statement is consistent with his in-court testimony; and (3) the statement is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive. *United States* v. *Hamilton, supra.* In *United States* v. *Quinto,* 582 F. 2d 224 (2d Cir. 1978), the

Court added as a fourth criterion for admissibility that the proponent must establish that the prior consistent statement was made prior to the time that the supposed motive to falsify arose. In *Hamilton,* this Court raised the question addressed in *Quinto* but declined to answer that question. The Court indicated a desire for a more relaxed standard of admissibility than was required under *Quinto,* but specifically failed to affirmatively answer the question. One of the factors considered by this Court in deciding whether a statement was made prior to a motive to falsify arose was whether there were admissions or adoptive admissions of the other Defendants made after the prior consistent statement was made which would corroborate that statement. 689 F. 2d at 1274.

In the present case, the statement of Jake Moore was made in excess of seven (7) months after the cessation of any violent activities. None of the Defendants gave any statements which were consistent with and corroborated Moore's statement. Further, Moore's statement was made at a point in time after he had been arrested, had consulted with his lawyers on several occasions, and had agreed to cooperate with the United States. Thus, any statements were clearly made after the motive to falsify had arisen since Moore was seeking the best possible deal for himself.

In each of the three (3) situations only a fleeting isolated reference was made to the prior statement of the witness. In none of the cases, were extensive questions asked by all defense counsel and in each case only one defense counsel raised some minor point concerning the statement. In the case of the Blanton statement, a question was asked concerning the number of pickets at the mine site since the witness' testimony had been equivocal and even after reading the statement, the witness would not acknowledge the number of pickets which were present at the mine site. As to the Caudill statement, the only reference to the prior statement was that the witness had failed to identify one of the Defendants in that statement. No other questions were asked. As to the Moore statement, the United States stipulated that the prior statement contained an omission which was different from the witness's in-court testimony. Additionally, in the situation involving the Moore statement, the witness had been asked to refer to the statement to refresh his recollection but was incapable of reading the statement because of his illiteracy.

In the *Hamilton* case, this Court cited *United States* v. *Lombardi,* 550 F. 2d 827 (2d Cir. 1977), as authority for the proposition that where credibility has been challenged on the basis of facts absent from the prior statement, the statement may be admitted where it is consistent with the remaining testimony. *United States* v. *Hamilton,* 689 F. 2d at 1273. In the case at bar, this factor is not present. None of the statements in question were consistent with the in-court testimony of the witnesses from whom the statements had been taken. Further, each of these statements had been offered to the witness to refresh his recollection as to a prior statement and not been used to impeach the witness or attack his credibility. It was error to let in the whole statement against all Defendants when that statement was inconsistent with the in-court testimony of the witness and the witness had not been cross-examined concerning that statement. This case is clearly distinguishable from the facts in *Hamilton* wherein, as a basis of the Court's ruling, it was stated: "Reid testified at trial, counsel for acquitted defendant Turner cross-examined him as to the statement which as signed was consistent with his testimony, and it was offered to rebut at least

implied charges of recent fabrication or improper influence or motive." 689 F. 2d at 1273. In the present case, in regard to each of the three (3) prior statements, the witness was not extensively cross-examined about the statement and the statement was not consistent with his testimony. In each such instance, the statement was simply offered by the United States as a boot-strap attempt to bolster the credibility of the witness and not as a prior consistent statement. The trial court's admonitions varied greatly and implicitly directed the jury to find that if the witness had made similar statements on prior occasions, they should believe the witness.

In summation, it is respectfully submitted that the statements did not qualify as "prior consistent statements". The witness was only very briefly questioned concerning the statement, but most importantly the statement was not consistent with the witness' in-court testimony. As the trial judge acknowledged, the statements were being admitted because defense counsel had pointed out inconsistencies between the trial testimony of the witnesses and testimony given either before the grand jury or at the mini-hearing. The prejudicial effect against Meade is overwhelming. Counsel for Meade specifically avoided the statements and concentrated on other matters. Because of the inability of the witnesses to recall or read, the statements had necessarily been shown to the witnesses or read to them. That limited contact with the statements certainly did not justify the admission into evidence of the statements.

ARGUMENT IV

The Court's Refusal to Permit the Defendants to Introduce Testimony Concerning the Ability of a Local Union to Engage in Organizing Activities Deprived the Appellant Meade of a Fair Trial and Operated to His Extreme Prejudice.

It was the position of the United States throughout this trial that United Mine Workers of America Local 5967 of East McDowell, Kentucky, could not engage in organizing activities. It was the position of the United States that an organizing drive could be performed only by the international union who was solely responsible for, and in charge of, organizing non-union companies. (Tr. XVI, 8, 13). This position had been set out to the jury in the opening statement of the United States in which, on at least two (2) occasions, counsel for the United States discussed with the jury that the international union had not sanctioned an organizing drive. (Tr. 7, 86, 92). As counsel for acquitted co-Defendants Drexil Hall and Austin Moore so succinctly put, "This is the crux of the case, your honor. This is the most important part of the case." (Tr. XIV, 12).

The information put forward by the United States was obtained from Mr. Ernie Justice, the President of District 30 of the United Mine Workers of America. Defense counsel was able to establish on cross-examination that individual miners could ask non-union employees to join the United Mine Workers of America but that the "International will not approve a local union doing an actual organizing drive, no." (Tr. XIV, 93-94).

In view of the ultimate erroneous *Enmons'* instruction which was given by the trial court, this line of inquiry was particularly pertinent. The United States was attempting to establish that the local union had absolutely no authority

to engage in organizing activities. Accordingly, while the trial court's ultimate *Enmons'* instruction directed that an individual could have the protection of *Enmons,* the jury was entitled to consider the activities of the local in determining whether or not that individual was engaged in a bona fide organizing attempt. The United States kept pressing the matter of the legality of the local union's setting up organizing drives or a picket line. In questioning the Recording Secretary of Local 5967, the Assistant United States Attorney asked the following question and got the following response:

> "Question: Can a local union set up a picket line without approval from the International?
>
> "Answer: Well, according to a picket line, the picket line has to be authorized by the International Union or the district to be legal." (Tr. XVI, 36).

The United States solicited through Franklin D. Scott, one of the Field Representatives for District 30, that the activities of the miners were illegal and that they were engaged in an illegal work stoppage. (Tr. XX, 24-25). On cross-examination of Mr. Scott, defense counsel attempted to ask questions regarding area standards picketing, the ability of an individual to go to a non-union company and ask the men to join the union, and the ability of a local union to engage in organizing activities. To all these inquiries, the witness either did not know the answer or the Court cut counsel off from asking the questions. The following question and answer perhaps best capsulizes the thrust of the witness' testimony:

> "Question by Mr. Pafunda: All right. And if on February 13 the local union had taken a vote to go out and picket or assemble outside of Ray-Mac to ask the employees to join the union, all right, are you telling this jury that it is an illegal work stoppage?
>
> "Answer: Well, our contract calls for a 6-day work week and I don't know what the courts of the land has ruled, I mean United States courts or Supreme Court has ruled, but our people is supposed to work when there is work at the mines available for them." (Tr. XX, 46-47).

With this background in mind, defense counsel called as a witness Patrick Hardin, a law professor at the University of Tennessee who taught classes in labor relations law, arbitration, and employment discrimination. Professor Hardin listed an impressive list of credentials including a law degree from the University of Chicago Law School, an association with a Chicago law firm engaged primarily in representing management in labor relations, three (3) years of experience as trial counsel for the United States Department of Justice, and five (5) years of experience at the National Labor Relations Board in Washington, D.C. in the capacities as Chief Legal Counsel to the Chairman of the agency and ultimately as Associate General Counsel for Litigation. Further, Professor Hardin had published several articles regarding labor law, was a member of the American Bar Association Labor Law Section, and had been elected to membership in the National Academy of Arbitrators. Defense counsel moved that the witness be permitted to testify as an expert witness and over the objection of the United States, the Court held the witness to be an expert. Defense counsel stated the reason for calling Professor Hardin as a witness:

> "Mr. Pafunda: No. 1, there has been considerable testimony and by implication that the only common practice for an election or organizational activity is

through an NLRB election. This man will testify that based on his experience that is not so.

"I will go briefly through the United Mine Workers, what are the purposes or goals of the union, how many achieved those particular goals and is the local union itself an entity within the United Mine Workers of America and to be sued and to sue and may it act, how it may act, and then can a local union take a vote without authorization from the international and the district to engage in organizational activities.

"And that, your honor, is the thrust of it. I am not going into any factual situations as concern the violence up at Ray-Mac because I do agree with Mr. Kehrli that would if we opened that can of worms would tend to usurp.

"I am not going to have him express an opinion if there is a violation of the Hobbs Act or any of that garbage." (Tr. 32, 77-78).

Professor Hardin was permitted to answer certain questions regarding the way that the NLRB conducted elections, but when asked whether or not Local 5967 of the United Mine Workers of America was a distinct and separate labor entity, the United States objected and the Court refused to permit the witness to answer the question. It was the position of the Defendants that that particular question was not a jury question whereas the United States argued that it was a question of fact for the jury since the jury had to ultimately decide "whether or not the activities of the Defendant were authorized labor activities on behalf of this local or any other entity of the United Mine Workers of America and this jury must decide this question, not this witness." When ultimately allowed to respond to the question outside the presence of the jury, the witness advised the Court that the local is a separate entity within the organization of the United Mine Workers of America and

was also a labor organization within the meaning of Section 7 of the National Labor Relations Act. (Tr. 32, 91).

During an avowal in which all counsel joined, Professor Hardin testified that a local union could conduct a petition and certification drive without authorization from the international union or the district. (Tr. 32, 102-103, 125). However, the Court ruled that the witness would not be allowed to testify that the local could engage in these organizational activities. (Tr. 32, 125).

Defense counsel submitted that Professor Hardin should be permitted to testify on two (2) grounds: (1) that the witness was an expert within the meaning of Rule 702, 703, and 704 of the Federal Rules of Evidence and if not an expert, then he should be permitted to testify under Rule 701, Federal Rules of Evidence; and (2) that the Court was permitting the jury to only see one side of the issue. During voir dire examination, the Court had showed the jury a hand trick wherein he held up one side of his hand and told the jury that a case was much like the showing of the hand and that the trial would not be complete until the jury had been shown both sides of the hand. In picking up on that theme, defense counsel stated:

"Mr. Walbourn: I think I brought that to the court's attention and Mr. Self even picked it up in his opening. But this ruling is letting the jury see one side of the hand the government has shown us but will not let them see the other side of the hand.

"We have heard from the government witnesses and elicited on government questioning this wasn't sanctioned by the international or the district, therefore it was per se illegal and unauthorized contrary to law. And that is not in fact the true case. And I believe the defendants are entitled to show the other side of the hand." (Tr. 32, 125-126).

During closing arguments, the prosecution once again started pounding the theme that the local union could not take part in organizing activities. On at least six (6) separate occasions, the prosecutor delivering the initial closing argument referred to the illegal activities of the local union and the purported fact that the international union was the only entity which could engage in organizing practices. (Tr. 42, 10, 16, 36, 43, 69, 71).

Rule 702 of the Federal Rules of Evidence provides:

> "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

In the case at bar, the importance of the expert witness is immediately seen. The United States had been permitted through the use of witnesses to establish that only the international union could conduct and supervise organizational activities. With only this information before the jury, the jury was left with the unshakable conclusion that any activities by Local 5967 of the United Mine Workers of America would have had to have been illegal since such activities had not been sanctioned by the International. Indeed, the Defendants conceded that the International had not sanctioned any organizing drives. However, to say that the local union could not conduct an organizational drive was not true. Defendants tried to establish this line of testimony through lay witnesses called by the United States but when asked the questions, the lay witnesses did not know the answers. Instead, they responded with statements such as they knew not what position the United States Supreme Court would take. To counter this clear

inference of illegal activity, the Defendants chose an expert who was certainly qualified by knowledge, experience, training, and education to testify simply to the fact that a local union could engage in organizational activities without being in violation of federal law. More specifically, that witness was prepared to testify, and did testify during his avowal testimony, that a local union was specifically authorized under Section 7 of the National Labor Relations Act to do just that type of activity.

Professor Hardin was not being called to render an expert opinion regarding the legality or illegality of violence connected with organizing activities or whether the acts of the Defendants constituted a violation of the Hobbs Act. Instead, the witness was merely called to establish that a local union was not, in contradiction to the stand taken by the United States, precluded from engaging in organizational activities.

Meade concedes that the decision whether or not to admit expert testimony lies within the sound discretion of the trial judge and will not be reversed unless there is an abuse of discretion; *Hamling* v. *U. S.*, 418 U. S. 87 (1974); *U. S.* v. *Stifel,* 433 F. 2d 431 (6th Cir. 1970), cert. denied 401 U. S. 994 (1971); or there is a showing that the trial court's decision is clearly erroneous. *U. S.* v. *Brown,* 557 F. 2d 541 (6th Cir. 1977).

Factors often considered by the Court in deciding whether or not to admit expert testimony are: (1) whether the expert testimony will assist the trier of fact; (2) whether the witness is qualified as an expert; and (3) whether the expert has sufficient knowledge with the basic facts on which he is rendering an opinion to express an opinion. *Accord: United States* v. *Scavo,* 593 F. 2d 837

(8th Cir. 1979); *United States* v. *Watson*, 587 F. 2d 365 (7th Cir. 1978), cert. denied 439 U. S. 1132 (1979).

In the present case, it is clear that the trial judge abused his discretion in refusing to permit Professor Hardin to testify concerning the ability of a local union to engage in organizational activities. The trial judge had permitted the United States to ask substantially similar questions to lay witnesses called by the United States who were certainly not qualified to give a basis for that opinion. Further, the Court refused to sustain motions by the Defendants to strike the testimony of those lay witnesses concerning conduct which was purportedly illegal or unlawful. (Tr. 32, 127).

By permitting only one side of the hand to be shown, the Court significantly prejudiced the right of Meade to receive a fair trial. Through the only means available, defense counsel had attempted to show that a labor organization was not precluded by federal law from engaging in organizational activities. The trial judge's rulings totally stripped the Appellant of this right. When coupled with the erroneous instruction given regarding the *Enmons'* defense, the gravity of this error is clearly shown.

ARGUMENT V

The Admission Into Evidence of a Prejudicial and Inflammatory Summary Exhibit Without the Proper Foundation, a Determination of the Admissibility of the Underlying Documents or a Cautionary Instruction to the Jury on the Summary's Proper Use Violated Rule 1006 of the Federal Rules of Evidence and Deprived the Appellants of a Fair Trial, Requiring Reversal of their Convictions.

The prosecution closed its case in chief with the introduction, through Gene McAdams, of Exhibit #148. Exhibit

#148 was a summary chart purporting to detail losses sustained by Coal-Mac, Inc., Mac Mining Company and Ray-Mac Coal Company as a result of the February, 1982 violence which gave rise to this case. Defense counsel vigorously objected to the introduction of the summary on numerous grounds, including that:

1. The summary was based almost completely on inadmissible hearsay information given to McAdams as to the amount, cause and nature of the losses described. (Tr. 29, 42-45, 61).

2. The proof summarized resulted in a variance from the indictment in that it included losses to Coal-Mac, Inc. and Mac Mining Company, although the indictment only referred to Ray-Mac. (Tr. 29, 48-57).

3. The trial judge did not examine the underlying documents to determine if the summary was based upon inadmissible material. (Tr. 29, 88-89; 30, 139).

4. McAdams was not an expert in valuation and was thus incompetent to make an assessment of the loss. (Tr. 29, 72-83).

5. The Summary was not an objective summarization of evidence, but rather was based almost entirely on subjective speculation, determinations and assumptions. (Tr. 29, 76-82).

6. The summary was introduced by the prosecution primarily to inflame the jury, its relevance, if any, being far outweighed by its prejudicial character. (Tr. 29, 62).

7. McAdams was not the custodian of the underlying records and was incompetent to give testimony based on them. (Tr. 29, 52).

8. The summary was factually misleading and unfair in a number of ways. *See, e.g.,* Tr. 29, 45, 47, 51.

The trial judge initially stated that the summary would not go to the jury (Tr. 29, 128, 234), but later reversed himself and allowed the jury to see it despite defense objections. (Tr. 30, 4, 137). The judge did not give a cautionary instruction to the jury that the summary was not evidence and had no significance if the underlying evidence was not believed. Instead, the judge simply cautioned the jury that it was not being called upon to make an award for monetary damages. (Tr. 29, 47). The judge seemed to believe that it was for the jury to determine whether the summary was misleading, fallacious or based upon inadmissible documents and information. (Tr. 29, 90; 30, 139).

Rule 1006 of the Federal Rules of Evidence, enacted in 1975, reads:

> "The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court."

The use of summaries can, in some cases, be helpful to aid the jury in understanding a mass of documents. Such summaries can also be extremely dangerous and prejudicial if courts do not ensure that certain safeguards are used to prevent summaries which present a misleading or inaccurate picture. These dangers were articulated in *United States* v. *Scales,* 594 F. 2d 558 (6th Cir.), *cert. denied,* 440 U. S. 946 (1979).

> "The danger of permitting presentation of a summary of some of the evidence in a criminal case is plain. The jury might rely upon the alleged facts in the summary as if these facts had already been proved, or as a substitute for assessing the credibility of witnesses. This danger has led to the requirement of 'guarding instructions' to the effect that the chart is not itself evidence but is only an aid in evaluating the evidence. Even with such instructions, a summary may still be considered as too conclusory or as emphasizing too much certain portions of the Government's case, or as presenting incompetent facts. Trial courts may take care that such unfair summaries are not presented to juries." *Id.* at 564 (citations omitted).

Or, as the Supreme Court stated in *Holland* v. *United States,* 348 U. S. 121, 128, 75 S. Ct. 127, 99 L. Ed. 150, 160 (1954):

> "There is great danger that the jury may assume that once the Government has established the figures in its net worth computations, the crime of tax evasion automatically follows. The possibility of this increases where the jury, without guarding instructions, is allowed to take into the jury room the various charts summarizing the computations; bare figures have a way of acquiring an existence of their own, independent of the evidence which gave rise to them." *See also, United States* v. *Lemire,* 720 F. 2d 1327, 1348-50 (D.C. Cir. 1983); *United States* v. *Abbas,* 504 F. 2d 123 (9th Cir. 1974), *cert. denied,* 421 U. S. 988 (1975); *Lloyd* v. *United States,* 228 F. 2d 9 (5th Cir. 1955).

To counterbalance the dangers posed by summary charts, courts have required various safeguards to make sure that the introduction of the summary will not unfairly prejudice the opposing party. First, "[b]efore a summary is admitted the proponent must lay a proper foundation as to the admissibility of the material summarized . . ." *Needham* v. *White Laboratories, Inc.,* 639

F. 2d 394, 403 (7th Cir. 1981). While some courts have expressed uncertainty concerning whether the documents underlying the summary must actually be in evidence, see *United States* v, *Smyth,* 556 F. 2d 1179 (5th Cir.), *cert. denied,* 434 U. S. 862 (1977), those underlying documents, at a bare minimum, must be shown to be admissible "to protect the integrity of the Federal Rules [of Evidence]." *United States* v. *Lemire,* 720 F. 2d at 1349.

In this case, almost everything McAdams relied upon in preparing and presenting his summary was inadmissible hearsay. McAdams candidly admitted that he was relying on information supplied by others, of which he was not the custodian and of which he had no personal knowledge.

> "Q. And, Mr. McAdams, what did you rely on in preparing this summary?
>
> "A. Well, we started from the general books and records of Ray-Mac, Mac Mining and Coal-Mac. Equipment records, accounts payable records, cash receipts, sales records. We relied on statements and projections that were furnished to me by the officers of Coal-Mac, by certain field people as far as the production capabilities or expectations." (Tr. 29, 69, see also Tr. 29, 73, 75, 197).

McAdams had also no personal knowledge concerning anything his chart reflected. Because the information upon which McAdams based his summary was inadmissible hearsay, the entire chart should have been excluded. At the very least, the Court should have excised those portions of the chart which were shown to be based on hearsay before letting it go to the jury. The defense requested that the objectionable portions be removed, but the Court refused to do so. (Tr. 30, 137-141).

A second, related requirement for the admission of a summary is that the Court carefully examine the underlying documents to determine if they are admissible. *United States* v. *Bartone,* 400 F. 2d 459, 461 (6th Cir. 1968), *cert. denied,* 393 U. S. 1027 (1969). The record reflects that the lower court below made no examination of the underlying documents whatsoever to satisfy itself that the summary was based on competent admissible evidence. This requirement was repeatedly pointed out to the Court. (See Tr. 29, 88; 30, 137-141).

As the Court stated in *United States* v. *Conlin,* 551 F. 2d 534 (2d Cir.), *cert. denied,* 434 U. S. 831 (1977), *quoting United States* v. *Gordon,* 438 F. 2d 858, 876 (5th Cir.), *cert. denied,* 404 U. S. 828 (1971):

> ". . . When summaries are used . . . the court must ascertain with certainty that they are based upon and fairly represent competent evidence already before the jury. . . .
>
> "This, unfortunately, was not done, either upon the offer of the exhibit, or upon thereafter learning that portions were not supported by the record. In fact, the court left it up to the jury to determine what parts of the exhibit were supported and what were not." *United States* v. *Conlin,* 551 F. 2d at 538.

The lower court's determination here was identical to that criticized in *Conlin.* The Court dismissed defense objections stating:

> "All right, Sir. Well, the Court is quite sure that any fallacies of this gentleman's report and opinion will be brought out on cross-examination of the jury (sic) and the jury will be given an instruction upon the conclusion of all the evidence as to consideration they would give to the testimony of an expert witness." (Tr. 29, 90).

Later, immediately before the Court's ruling that the summary would go to the jury, the following exchange took place:

> "Mr. Kirkland: That is not my point. The point is, Your Honor, the law is clear you may not put subjective proof in a summary sheet that is not based on an underlying document that is admissible in and of itself that the Court has reviewed.
>
> The Court has not reviewed any of those documents which in our contention would be inadmissible anyway since they are speculative and subjective.
>
> Most of this information, Your Honor, is highly speculative, highly subjective and has not been reviewed by the Court.
>
> "The Court: But this has been pointed out to the jury, hasn't it?
>
> "Mr. Kirkland: That is not a jury issue. It is a legal issue that has to be decided by the Court and it would be error to allow the jury to speculate on this information that is subjective." (Tr. 30, 139).

Thus, as in *Conlin,* the lower court left it up to the jury to decide whether the summary was supported by competent evidence. The trial court's neglect in failing to examine the underlying documents substantially contributed to the admission of a misleading, incompetent and prejudicial summary exhibit.

The lower court's attitude toward admission of the summary exhibit is even more incomprehensible when one considers that the Court itself thought the figures were inflated and misleading. The summary exhibit, after it had been admitted at trial, was also presented as a possible basis for the victim impact statement at sentencing. At the sentencing hearing, on May 25, 1984, the trial judge offered the

following opinion as to the accuracy of the summary exhibit:

> "So the Court agrees, we agree in part with what Mr. Moore is stating. I feel perhaps the statement of the accountant with regard to the damages recognizes a high. I think perhaps the evidence on the other side would reflect minimal. I guess perhaps when the truth comes out about it, it is going to be somewhere between minimal and somewhere between the substantial." (Sentencing Hearing Transcript, pp. 13-14).

At a later point in the sentencing hearing, the Court added:

> "Well, I think the Court has previously stated that he feels that objection to the high figure if a good objection and that the actual damages is (sic) somewhere between minimal and substantial." *Id.* at pp. 52-53.

"A chart which for any reason presents an unfair picture can be a potent weapon for harm, and permitting the jury to consider it is error." *United States* v. *Conlin,* 551 F. 2d at 539. If the lower court itself thought that the summary was misleading, inaccurate or inflated, there is no justification whatsoever for allowing its admission into evidence.

A third requirement for admission of a summary is that the exhibit must not go beyond an objective summarization of the evidence upon which it is based. See *United States* v. *Kiamie,* 258 F. 2d 924 (2d Cir.), *cert. denied,* 358 U. S. 909 (1958); *Elder* v. *United States,* 213 F. 2d 876 (5th Cir.), *cert. denied,* 348 U. S. 901 (1954). Here McAdams freely admitted that his summary was no more than a subjective determination based upon the subjective conclusions he was given by his employers. (Tr. 29, 76-82). The summary here was by no means similar to that approved in *United*

States v. *Scales,* 594 F. 2d at 564, where the summary was "entirely objective, and, for all that appears from this appeal, uncontested." Rather, the "facts" and conclusions stated in the summary were hotly disputed and certainly not objective, as highlighted by the following exchange during defense counsel's voir dire of McAdams:

> "Q. All right. In your testimony would you say you were given certain figures by your clients who made subjective determinations as to what those figures should be and that you also applied your own subjective skills to put together this summary sheet?
>
> "A. Coal-Mac is not my client. They are my employer. But that is in essence, yes, sir, what I have done." (Tr. 29, 82).

The summary made conclusions, of which McAdams had no personal knowledge, that each item of "loss" was brought about by the violence in which the Defendants below had participated. (See, *e.g.,* Tr. 29, 75). Concerning lost profits, the summary made the subjective assumption that the business of Ray-Mac would be profitable, despite the testimony of one Ray-Mac principal that the company was a losing proposition. (Tr. 29, 51, 81). The summary reflected the subjective determination that additional security was needed as a result of the February, 1982 violence. (Tr. 29, 78). This subjective determination went so far as to extend the perceived necessity of security to all Coal-Mac tipples, not just those owned or operated by Ray-Mac. (Tr. 29, 85). This security was subjectively determined necessary not just for the period immediately following the brief episodes of February, 1982 but all the way up to October 31, 1983, nearly four months after the Appellants were indicted. See Plaintiff's Exhibit #148, III (A-C).

In short, the summary went far beyond a simple calculation of undisputed losses. Instead, it simply presented to the jury Ray-Mac's subjective and speculative estimate of business expenses it incurred following the events of February, 1982, with little or no regard as to whether those events, in fact, caused the expenses. The subjective nature of the summary is highlighted by McAdams' admission that the total loss he testified to at trial differed from his testimony before the grand jury by nearly 2.5 million dollars. (Tr. 29, 173). The summary exhibit, admitted by the Government's witness to be based almost entirely upon speculative assumptions, hearsay information, and subjective evaluations, was patently inadmissible and should have been summarily rejected by the trial court. *United States* v. *Seelig,* 622 F. 2d 207, 215 (6th Cir. 1980).

Assuming that the documents underlying a summary exhibit are examined by a trial court and properly determined to be neither inadmissible nor subjective, the trial judge must still caution the jury "that the chart is not itself evidence, but is only an aid in evaluating the evidence." *Holland* v. *United States,* 348 U. S. at 128; *United States* v. *Foshee,* 606 F. 2d 111 (5th Cir. 1979), *cert. denied,* 444 U. S. 1082 (1980); *United States* v. *Scales,* 594 F. 2d at 564; *United States* v. *Diez,* 515 F. 2d 892, 905 (5th Cir. 1975), *cert. denied,* 423 U. S. 1052 (1976); *United States* v. *Bartone,* 400 F. 2d at 461. The trial judge below completely ignored the requirement that a cautionary jury instruction be given, leaving it entirely up to the jury to decide for itself whether the summary was based on competent and reliable information. (Tr. 29, 90).

The prejudice caused to the Appellants by the admission of the summary was compounded by its inflammatory purpose. The amount of damage sustained by Coal-

Mac, Inc., Mac Mining Company and Ray-Mac had no bearing whatsoever on the Appellants' guilt or innocence. The natural and intended effect of the summary was to create prejudice against the Appellants and sympathy for Ray-Mac. By attempting to impress upon the jurors the seriousness of the case, the prosecution was conveying the unmistakable message that the Appellants should be convicted because of the great amount of damage sustained by Ray-Mac. The prejudicial and inflammatory nature of the summary far outweighed whatever relevance it may have had, if any.

The summary never should have been admitted into evidence or submitted to the jury. Rule 1006 does not contemplate admission of summaries which are no more than subjective speculations based almost entirely upon hearsay. However, once the trial judge made the mistake of letting the summary in, he certainly should not have compounded the error by failing to take any steps to alleviate the summary's prejudicial effect. At the very least, the Court below should have clearly instructed the jury as to the proper use of the summary, examined the underlying documents himself and excised those portions of the exhibit which were shown to have been based on hearsay or which were unsupported by the facts. Because none of these safeguards were applied to Exhibit #148, all of the dangers pointed out in *United States* v. *Scales*, 594 F. 2d at 564, manifested themselves in this case. For these reasons, the prejudice caused to the Appellants by admission of the summary requires reversal of their convictions.

CONCLUSION

In view of any or all of the Arguments made on behalf of Meade, it is respectfully submitted that this Court must reverse the convictions of Meade on Counts I, IV and V of the Indictment and remand this case to the District Court for a new trial. Meade is certainly cognizant that the initial trial took in excess of three (3) months and necessitated the expenditure of hundreds of thousands of dollars. However, his Constitutional right to a fair trial is paramount to any other considerations. None of the errors can be considered harmless beyond a reasonable doubt.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that this Brief for Appellant, Mose Meade has been served on the Appellee by mailing two (2) copies of the same, postage prepaid, to the Hon. Thomas L. Self, Assistant United States Attorney for the Eastern District of Kentucky, Post Office Box 1490, Lexington, Kentucky, 40591, this the_____ day of October, 1984.

_____

Counsel for Appellant

Dist Ct. No. 83-8
Hon G. Wix Unthank

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

Nos. 84-5474, 84-5511, 84-5523,
84-5524, 84-5525

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

EDGAR JONES, MOSE MEADE, GERMAN STUMBO, KENNETH ROWLAND and TEDDY KINNEY,
Defendants-Appellants.

ON APPEAL from the United States District Court for the Eastern District of Kentucky, Pikeville Division.

Decided and Filed July 11, 1985

Before: ENGEL and MARTIN, Circuit Judges; and TIMBERS, Senior Circuit Judge.*

TIMBERS, Senior Circuit Judge. Edgar Jones, Mose Meade, German Stumbo, Kenneth Rowland and Teddy Kinney appeal from judgments of conviction entered May 29, 1984 in the Eastern District of Kentucky, G. Wix Unthank, District Judge.

All appellants were convicted after a jury trial of one count of conspiracy to obstruct interstate commerce by force and

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* Honorable William H. Timbers, United States Court of Appeals, Second Circuit, sitting by designation.

violence and of one count of extortion resulting in such obstruction, in violation of the Hobbs Act, 18 U.S.C. § 1951 (1982) (the Act). The extortion conviction arose from the bombing of mining equipment belonging to the Ray-Mac Coal Co. (Ray-Mac), a competitor of Jones. Stumbo also was convicted of destruction of property by use of explosives, in violation of 18 U.S.C. § 844(i) (1982). Meade also was convicted of a second count of extortion, in violation of 18 U.S.C. § 1951, arising from the destruction of a coal tipple by arson.

All appellants were sentenced to consecutive terms of three years imprisonment on the conspiracy and the first extortion count; the court ordered, as to all appellants, that the sentences on the extortion count be suspended and appellants be placed on probation for two years. In addition, Meade and Stumbo were sentenced to consecutive terms of imprisonment of three years and eighteen months, respectively, on their additional convictions of destruction of property and extortion, respectively; the court ordered that the additional sentences imposed on Meade and Stumbo be suspended and that they be placed on probation for a period of two years. In short, the net sentence of imprisonment imposed on each appellant was three years. All appellants are free on bond pending appeal.

I.

We summarize only those facts believed necessary to an understanding of our rulings on the legal issues raised on this appeal.

Jones was the part owner and president of the JRM Coal Co. (JRM), a company that marketed coal that was mined by a group of contract mine operators. Stumbo was one of these operators, as were accomplices Phillip and Pearl Booth, who entered into plea agreements in return for their testimony at trial. All of the operators in JRM's network had labor contracts with the United Mine Workers of America (UMWA).

In early 1982, JRM had a long-term contract to sell coal to South Carolina Electric and Gas Co. (South Carolina Electric). A force majeure clause in the contract relieved JRM of its obligation, in the event of a labor dispute or strike, to provide 7500 tons of coal per week. In mid- February 1982, JRM faced a depletion of coal available for shipment. Jones became concerned that Ray-Mac, a non-union operator, would take advantage of JRM's shortage and attempt to sell to South Carolina Electric at reduced prices. Jones enlisted UMWA local officials, including appellant Kinney, to stage a strike that would shut down Ray-Mac by preventing access to Ray-Mac's mine. The strike at JRM's affiliated mines also would allow JRM to invoke the force majeure clause and prevent non-compliance with the terms of its contract with South Carolina Electric.

JRM agreed during the strike to pay the wages of the miners employed by the contract mine operators. Booth and the other JRM affiliates told their miners to go on strike, explaining that it was necessary to protect the contract and preserve their jobs. The miners went on strike. A representative of the district office of the UMWA arrived and told the miners to return to work because the strike was illegal, but the miners remained off the job.

JRM financed the purchase of a large number of weapons by the Booths, who then provided the weapons to the strikers. Jones provided a case of whiskey to keep the strikers "fired up". The strikers set up picket lines in front of Ray-Mac's mine to prevent the non-union workers from reporting to work. Ray-Mac then organized an armed convoy to transport its workers safely past the picket line. On February 16, 1982, as the convoy attempted to enter the mine, one of the strikers produced a pistol and fired at the driver of the first truck. The driver was not injured. Other strikers began firing at the convoy and fire was returned from armed escorts of the convoy. Phillip Booth and another striker were injured.

During the next two days, Stumbo, Rowland and Kinney went into the hills overlooking the Ray-Mac site. From this vantage point, they were able to shoot at Ray-Mac equipment with the intent of disabling it. This tactic proved ineffectual. It was decided that, to put Ray-Mac out of business, they would have to blow up Ray-Mac's equipment. Jones enlisted Stumbo and another, Panhandle Moore, also known as the "timber rats", to destroy equipment with the use of explosives. The two men filled an inner tube and a basketball with dynamite and attached fuses. The basketball was attached to a bulldozer. The inner tube was placed on a mining auger. The basketball failed to explode, but the auger was heavily damaged by the dynamite in the inner tube.

In mid-February 1982, Ray-Mac's affiliated company, Coal-Mac Sales, Inc., leased a tipple for use at the Ray-Mac site. Jones was concerned that the tipple would allow Ray-Mac to save two dollars a ton on trucking costs. Panhandle Moore was enlisted, along with Meade and another, to burn the tipple. This operation was carried out successfully.

II.

On appeal, appellants urge what we believe to be two principal claims of error.

First, they argue that the district court erred in denying their motion, made while the trial was in progress, for an evidentiary hearing to determine whether there was prejudicial impropriety in the swearing, by the grand jury foreman, of a federal investigative agent as an "agent of the grand jury". With respect to this claim, appellants also argue that the court erred in denying their motion to dismiss the indictment.

Second, appellants challenge the court's jury charge on their *Enmons* defense. *United States* v. *Enmons*, 410 U.S. 396 (1973).

While other subordinate claims of error are raised, we shall devote this opinion, as counsel did at oral argument before us, chiefly to the two principal claims of error stated above.

(A) *Swearing of Agent McAllister as an "Agent of the Grand Jury".*

Dennis McAllister, an agent of the United States Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, was the "case agent" who supervised the investigation of the events that led to the indictment and conviction of appellants. McAllister first became involved in the investigation on February 21, 1982 in response to a report on the bombing of the coal auger at the Ray-Mac site. It was he who discovered the unexploded bomb that had been attached to the bulldozer at the site. From that day forward, McAllister led the investigation and coordinated the use of undercover agents who infiltrated the group of striking miners believed responsible for the violence.

On October 4, 1982, McAllister appeared before the grand jury that had been convened in the case. McAllister testified as to his involvement in the investigation and presented the grand jury with an overview of the case. At the conclusion of McAllister's testimony, the government's attorney stated:

> "Mr. Foreman, one further thing, because of the records of this Grand Jury, a lot of records have been obtained; I'd ask you, if you would, to make Mr. McAllister an agent of this Grand Jury for the purpose of retention of the physical documents in the course of this investigation, and for the purpose of obtaining voluntary compliance with subpoenas."

The record reflects that McAllister then was sworn as an "Agent of the Grand Jury to assist in this Grand Jury's investigation, and retention of records".

Appellants contend that these facts were unknown to them until February 7, 1984, during McAllister's testimony at trial. At that time the prosecutor sought to use McAllister's status as "agent of the grand jury" for the purpose of establishing the chain of custody of, and thereby authenticating, certain exhibits that had been produced before the grand jury. On Feb-

ruary 20, 1984, some two weeks later but before the close of the government's case, Jones moved to dismiss the indictment for prosecutorial misconduct, alleging several grounds for such dismissal.[1] Among them was the allegation that "the defendant believes that the Government has violated the grand jury secrecy requirements of Rule 6(e) of the Federal Rules of Criminal Procedure by having Special Agent Dennis McCallister [sic] appointed as an 'agent' of the grand jury." In his supporting memorandum of law in the district court, counsel for Jones asserted his belief that the secrecy requirements of Rule 6(e) had been violated and urged that "an inquiry must be conducted by the Court to determine whether a violation of Rule 6(e) has occurred." In oral argument before the district court on the motion, counsel for Jones urged that "the grand jury secrecy requirements of Rule 6(e)" had been violated. The motion to dismiss was denied summarily by the district court from the bench.

As opposed to the emphasis on grand jury *secrecy* in the district court, on appeal, Jones, joined by the other appellants,[2] urged that the practice of swearing an investigative officer as

[1] In support of this motion, appellants argued in the district court, and again before us, that the government failed to release at the proper time certain tape recordings that contained prior statements of two witnesses and constituted possible *Brady* material. *Brady* v. *Maryland*, 373 U.S. 83 (1963). They argued that the prosecutor failed to inform the grand jury that certain witnesses were not credible. These contentions need not detain us. First, the tapes in question were produced in time to be used on cross-examination and, moreover, the court permitted appellants to recall any witnesses for further examination if necessary. In the absence of prejudice, even assuming a violation of *Brady*, reversal is not required. *United States* v. *Campagnuolo*, 592 F.2d 852, 861 & n.9 (5th Cir. 1979). Second, there is no requirement that the prosecution present impeachment evidence before the grand jury with respect to witnesses called before that body. *United States* v. *Adamo*, 742 F.2d 927, 936-38 (6th Cir.), *cert. denied*, —— U.S. ——, 105 S.Ct. 971 (1985). Failure to do so does not constitute prosecutorial misconduct. *Id.* at 938.

[2] It is unnecessary for us to decide, in light of our ruling on the issue, whether the other appellants properly preserved their objection for appeal. We assume, for purposes of this appeal, that Jones's motion was sufficient to preserve the issue as to all appellants.

an "agent" of the grand jury impinged upon the *independence and integrity* of the grand jury.

Before reaching the merits of appellants' argument, two procedural hurdles must be considered. Fed. R. Crim. P. 47 provides that a motion made in the trial court "shall state the grounds upon which it is made and shall set forth the relief or order sought." Moreover, pursuant to Fed. R. Crim. P. 12(b)(2), "[d]efenses and objections based on defects in the indictment" must be raised before trial. Failure to do so, in the absence of an extension granted by the court, results in waiver of the defense or objection. Fed. R. Crim. P. 12(f).

Appellants here failed to raise this claim before trial or to move for an extension of time to file a motion raising the claim. They also seek to advance arguments on appeal that were not presented to the district court. It has been held, under Rule 12(f), that "where a party has shifted his position on appeal and advances arguments available but not pressed below, and where that party has had ample opportunity to make the point in the trial court in a timely manner, waiver will bar raising the issue on appeal." *United States* v. *Braunig*, 553 F.2d 777, 780 (2d Cir.), *cert. denied*, 431 U.S. 959 (1977) (citations omitted); *see also United States* v. *Sachs*, 679 F.2d 1015, 1018 (1st Cir. 1982); *United States* v. *Seidlitz*, 589 F.2d 152, 160 (4th Cir. 1978).

Appellants argue that their failure to challenge the indictment prior to trial should not result in a waiver because they were unaware of the grounds for this motion until McAllister was called as a witness at trial. Whatever the merits of this argument, we shall treat the district court's ruling on the motion, made without reference to its tardiness, as implicitly granting relief from the waiver as permitted by Rule 12(f). Moreover, because of the importance and novelty of the claim presented, and because Rule 47 does not specify that the grounds for the motion be presented "with particularity", we shall treat appellants' argument regarding the alleged viola-

tion of the independence and integrity of the grand jury as adequately preserved for appeal.

The importance of the role of the grand jury as an independent decision making body within the federal criminal justice system cannot be overstated. The grand jury represents a constitutionally-mandated barrier between the accused and the investigative and prosecutorial agencies of government, thus "'protecting citizens against unfounded criminal prosecutions.'" *United States* v. *Sells Engineering, Inc.*, —— U.S. ——, ——, 103 S.Ct. 3133, 3137 (1983), *quoting Branzburg* v. *Hayes*, 408 U.S. 665, 686-87 (1972).

The grand jury also serves in a separate but equally important role, as an investigative body empowered to call witnesses and to require the production of documents and other tangible evidence. *Sells, supra*, —— U.S. at ——, 103 S.Ct. at 3137-38. The cloak of grand jury secrecy, rigidly enforced, furthers the investigative function. By assuring all witnesses of anonymity, those who otherwise would be reluctant or unwilling to testify will be more forthcoming. Secrecy also helps ensure the preservation of evidence and protects the reputations of those who ultimately are exonerated. *Id.* at 3138.

By its nature this independent investigative body of lay citizens has limited means by which it can garner facts and evidence on its own. It must depend on the prosecutor "to secure the evidence or witnesses it requires." *Sells, supra*, —— U.S. at ——, 103 S.Ct. at 3141. Once that evidence is obtained, moreover, the grand jury often requires the assistance of technical experts to assist in deciphering and analyzing the evidence that has been compiled, such as financial statements or ballistics reports. The temporary and ad hoc nature of the grand jury complicates the safe preservation and storage of the evidence, often including, as in this case, firearms, ammunition and explosives. In these and other aspects of its investigative function, the grand jury cannot be totally independent of the law enforcement agents and prosecutors on whom it necessarily must depend.

There is an inherent tension in the grand jury system that is caused by the need to maintain independence in decision-making both in fact and in the public perception, on the one hand, and the necessary reliance on government personnel to assist in the fulfillment of the grand jury's investigative function on the other. It is this tension that appellants seek to exploit.

Appellants on appeal have backed off from their contention, urged in the district court, that the disclosure of grand jury materials to McAllister violated the secrecy requirements of Rule 6(e)(2).[3] In any event, it is clear that such disclosure was permissible under the exception created by Rule 6(e)(3)(A)(ii).[4] *United States* v. *Lartey*, 716 F.2d 955, 964 (2d Cir. 1983). Appellants, moreover, concede that McAllister properly could investigate and report back to the grand jury, as well as summarize and retain custody of the evidence, all in his capacity as case agent. They challenge, however, the ceremony of swearing him as an "agent of the grand jury" because, in their view, this ritual endowed McAllister with more credibility than he otherwise would have had in the eyes of the grand jurors.

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[3] Fed. R. Crim. P. 6(e)(2) provides:

> "(2) **General Rule of Secrecy.** A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court."

[4] Fed. R. Crim. P. 6(e)(3)(A)(ii) provides that disclosure may be made to:

> "(ii) such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law."

Two recent district court opinions outside of this Circuit have criticized the practice of swearing an agent of the grand jury. In *United States* v. *Kilpatrick*, 575 F. Supp. 325 (D. Col. 1983), the court pointed out the absence of any express authorization for the practice in Rule 6, *id.* at 329, and attacked the "blurring of the 'investigative agency', 'prosecuting attorney' and 'grand juror' functions." *Id.* at 327. In *United States* v. *Anderson*, 577 F. Supp. 223 (D. Wyo. 1983), the court focused on what it perceived as the potential for the practice to "undermine public confidence that the grand jury is performing its constitutional function to check the power of the government", *id.* at 232, and held that "It is well within a district court's supervisory powers to insure that the grand jury's integrity as an independent body is not destroyed in the public eye." *Id.* at 232-33. We shall address each of the assertions made in these cases.

First, it is difficult to see how the asserted enhancement of McAllister's credibility could have prejudiced these appellants. Appellants do not contend, nor could they in view of the weight of the evidence against them, that, but for McAllister's being sworn as an "agent of the grand jury", appellants would not have been indicted. Absent a showing of actual prejudice, or a substantial threat thereof, the district court correctly denied appellants' motion to dismiss the indictment. *Cf. United States* v. *Morrison*, 449 U.S. 361, 365-66 (1981) (even deliberate violation of Fourth, Fifth or Sixth Amendments does not require dismissal of indictment absent showing of prejudice).

Second, with respect to the authority to swear such "agents", we find at least tacit acceptance of the practice by the Supreme Court, *United States* v. *Mara*, 410 U.S. 19, 20 (1973); *id.* at 24 (Douglas, J., dissenting), and by other courts of appeals. *E.g.*, *In re Grand Jury Proceeding* (*Mills*), 686 F.2d 135, 140 n.4 (3d Cir.), *cert. denied*, 459 U.S. 1020 (1982); *United States* v. *Cosby*, 601 F.2d 754, 757-58 & n.6 (5th Cir. 1979); *United States* v. *Stanford*, 589 F.2d 285, 292 (7th Cir. 1978), *cert. denied*, 440 U.S. 983 (1979). In *Stanford*, the court viewed the practice as a laudable effort to help preserve the secrecy of the grand jury. *Id.*

Third, in the instant case McAllister was sworn by the foreman of the grand jury, not by the prosecutor as in *Kilpatrick*, *supra*, 575 F. Supp. at 328-29. Appellants do not argue that the grand jury foreman lacked the authority to swear government personnel who assist the grand jury. In our view, appellants place undue emphasis on the word "agent". McAllister was authorized under Rule 6(e)(3)(A)(ii) to perform the functions attributed to him by appellants. The foreman had the authority to swear him to secrecy. There is sufficient authority to permit the practice.

Fourth, we turn to the concern of the court in *Anderson*, *supra*, 577 F. Supp. at 232-33, that the public's perception of the integrity of the grand jury may suffer if this practice is permitted. The public's perception indeed is crucial to the effectiveness of the grand jury system. It provides moral suasion where legal authority to compel might be unavailable or impracticable. As with any government institution, whether legislative, executive or judicial, it provides legitimacy and authority for its decisions. We simply are not persuaded, however, that use of the word "agent" in connection with government personnel assisting a grand jury will undermine the foundation of public trust and confidence in the system. As long as the grand jury remains independent *in fact* of the prosecutor and does not become a mere tool to enhance the prosecutor's power, *Sells*, *supra*, —— U.S. at ——, 103 S.Ct. at 3143, that confidence will continue and will be well-founded.

There is a strong presumption of regularity that attaches to grand jury proceedings. *Hamling* v. *United States*, 418 U.S. 87, 139 n.23 (1974); *In re Grand Jury Proceedings* (*Johanson*), 632 F.2d 1033, 1041 (3d Cir. 1980). Appellants have failed utterly to sustain their burden of overcoming that presumption.

We hold that the swearing of Agent McAllister as an "agent of the grand jury" was not prosecutorial misconduct and did not warrant dismissal of the indictment. We further hold that, absent an initial showing of prejudice, the court did not abuse its discretion in denying appellants' request for an evidentiary hearing.

(B) *Enmons Instruction*

All appellants were convicted of one count of extortion to obstruct interstate commerce by force and violence in violation of the Hobbs Act, 18 U.S.C. § 1951 (1982)[5] and of one count of conspiracy to so obstruct commerce in violation of the Act. In *United States* v. *Enmons*, 410 U.S. 396 (1973), the Supreme Court held that the Act was not intended to reach acts of violence in furtherance of "legitimate union objectives". *Id.* at 400, 411.

Appellants' primary defense at trial was that the admitted acts of violence were intended solely to organize the non-union workers at Ray-Mac. This they contend was a "legitimate union objective" within the meaning of *Enmons*. They assert that they should not have been prosecuted under the Act. In accordance with appellants' theory of the case, the court instructed the jury on the *Enmons* defense.[6] It is that instruction which appellants claim was error.

[5] Section 1951(a) provides:

"§ 1951. Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both."

[6] We assume, for purposes of this appeal, but without deciding, that appellants Jones and Stumbo were entitled to an *Enmons* instruction in the first instance. We seriously doubt, however, that employers whose conduct arguably constitutes an unfair labor practice in violation of the National Labor Relations Act, 29 U.S.C. § 158(a)(1), (2) and (3) (1982), can claim the *Enmons* defense. *United States* v. *Wilford*, 710 F.2d 439, 444 & n.10 (8th Cir. 1982); *United States* v. *Quinn*, 514 F.2d 1250, 1259 (5th Cir. 1975), *cert. denied*, 424 U.S. 955 (1976). Moreover, the evidence adduced at trial does not support Jones's contention on appeal that he was a "supporter" of the union in its pursuit of legitimate labor objectives. *United States* v. *Cusmano*, 729 F.2d 380, 383 (6th Cir. 1983), *cert. denied*, —— U.S. ——, 104 S.Ct. 3536 (1984). The government, however, conceded in the district court that these appellants were entitled to the instruction and does not press the issue on this appeal. We, therefore, rule only on the issue of whether the instruction as given was a correct statement of the law.

In *Enmons*, striking workers committed acts of sabotage against their employer's property in their pursuit of higher wages and other benefits. 410 U.S. at 398. The district court dismissed the indictment for failure to state an offense under the Act. *Id.* On direct appeal, the Supreme Court affirmed. *Id.* at 412.

The Court reasoned that the use of the word "wrongful" in the Act, as in "wrongful force" or "wrongful violence", would be superfluous if it described only the *means* employed to obtain property. *Id.* at 399. The Court concluded that the obtaining of property itself must be wrongful in the sense that "the alleged extortionist has no lawful claim to that property." *Id.* at 400. Thus, the Act does not "sweep within its reach violence during a strike to achieve legitimate collective-bargaining objectives." *Id.* at 404.

The Court, however, distinguished cases in which union officials or members use force or threats to extract payments to which they do not have a legitimate claim in the collective bargaining context, such as using threats to obtain personal payments or "wages" in return for "'imposed, unwanted, superfluous and ficticious services' of workers." *Id.* at 400, *quoting United States* v. *Green*, 350 U.S. 415, 417 (1956). Subsequent decisions of various courts of appeals have refrained from extending the rationale of *Enmons* beyond the facts of that case. *E.g.*, *United States* v. *Cerilli*, 603 F.2d 415, 419 (3d Cir. 1979), *cert. denied*, 444 U.S. 1043 (1980);

United States v. *Duhon*, 565 F.2d 345, 351-52 (5th Cir.), *cert. denied*, 435 U.S. 952 (1978); *Quinn, supra*, 514 F.2d at 1257. In *United States* v. *Russo*, 708 F.2d 209 (6th Cir. 1983), we held that *Enmons* does not apply to the extraction of payments in *violation* of the collective bargaining agreement because there could be no " 'lawful claim to that property.' " *Id.* at 215, *quoting Enmons, supra*, 410 U.S. at 400.

In the instant case, appellants do not contend that they used violence to secure higher wages and benefits from *their* employer. Indeed, Jones and Stumbo seek to portray themselves as supporters of the strike by their own employees. Appellants argue that their defense at trial hinged on what they describe as their attempt "to persuade" the employees of a non-union company to join the UMWA and to enforce area wage standards being undermined by the non-union wage scale, despite the union's instruction not to strike.

We need not decide, however, whether *Enmons* applies, as a matter of law, to the use of violence outside of the collective bargaining context and in pursuit of goals other than higher wages and against individuals other than the strikers' employer. Although such goals, if accepted as genuine, fit loosely within the phrase "legitimate union objectives", it is doubtful whether the *Enmons* narrow limitation on the term "wrongful" encompasses such conduct. *Russo*, *supra*, 708 F.2d at 215. We believe, however, that the court's instructions were a correct statement of the law and we decide this issue on that ground.

The court instructed the jury, in part, as follows:

> "The *Enmons* exception is that legitimate activities by a labor organization or its representatives, honestly acting and representing its members, are not restrained by Title 18, United States Code, Section 1951 and that a legitimate labor objective cannot constitute extortion as defined by [that section], notwithstanding violence and threats may have occurred in support of such proper union objective."

Appellants do not challenge this instruction. Rather, they select various other statements from the charge, taken out of context, and argue that the entire charge was erroneous. We disagree.

The court carefully structured the charge so that it had two parts. The first assumes that appellants acted in pursuit of legitimate union objectives. The jury thus was instructed that

> "[I]n the matter in which it has heard evidence there is a labor dispute within the *Enmons* exception. That organizing the employees of a business so that they may have a union representative is a proper union objective within the *Enmons* exception. That picketing as herein defined is a legitimate labor activity in support of such goal within the *Enmons* exception . . . . If violence and threats honestly occur as a by-product of a legitimate labor activity, in support of a proper union objective, such acts cannot constitute the extortion defined by [the Hobbs Act]."

Appellants isolate certain statements in the second part of the charge, which assumed a finding of improper purpose behind the acts of violence, and contend that those statements were erroneous. For example, appellants quote the following statement:

> "The use of firearms, firing pistols or rifles, in direction [sic] of employees of other employers, not in necessary defense of self or associate fellow pickets to coerce and prevent such employees from working is not a legitimate labor activity within the *Enmons* exception."

Appellants fail, however, to quote the statement that immediately precedes the above statement, which clearly sets the use of firearms in the context of an attempt "to wrongfully deprive or deny the right to do business and legitimately

compete with another . . . ." All of appellants' other claims of error on this issue are similarly flawed.

We do agree, however, that the statement "a legitimate act wrongfully performed may become unlawful and outside the protection of the *Enmons* exception" is somewhat confusing. A "single instruction to a jury may not be judged in artificial isolation," however, "but must be viewed in the context of the overall charge." *United States* v. *Parks*, 421 U.S. 658, 674 (1975).

We hold that, viewed as a whole, the court's *Enmons* instruction more than adequately focused the jury's collective mind on the distinction in *Enmons* between wrongful ends and wrongful means.

III.

We have carefully considered all of appellants' other claims of error. We find all of them to be without merit and do not warrant extended discussion. We shall mention briefly, by way of example, a few such additional claims of error.

Appellants claim that an ambiguous statement by the prosecutor in his closing argument[7] improperly called attention to the fact that appellant Stumbo did not testify. Assuming arguendo that the statement may be so read, we believe it is clear beyond a reasonable doubt that the jury still would have returned a verdict of guilty absent the statement. *United States* v. *Hasting*, 461 U.S. 509, 511 (1982). We hold that any error was harmless.

Appellants contend that the courtroom seating arrangements deprived them of their Sixth Amendment right to consult with counsel. Since the trial involved 18 defendants, they were seated in two rows immediately behind the counsel table. Appellants were permitted to pass notes to their attorneys. The attorneys were permitted to get up and hold conversations with their clients. No restriction was placed on communications during recesses. Under these circumstances, we hold that there was no Sixth Amendment violation. *United States* v. *Hart*, 551 F.2d 738, 739, 741 (6th Cir.), *cert. denied*, 434 U.S. 920 (1977).

Appellants argue that limitations placed on their cross-examination of three government witnesses deprived them of their Sixth Amendment right of confrontation by curtailing their ability to impeach the credibility of those witnesses. All three witnesses, however, were extensively impeached. Pearl Booth said that she was testifying pursuant to a plea agreement and that she had pending a motion for reduction of sentence. She testified that appellant Jones had broken promises to her and financially "broke" her and her husband. She also invoked the Fifth Amendment in the presence of the jury when asked about a bribe to a state official. Phillip Booth testified as to his plea agreement and that he was awaiting sentencing. He testified that he often lied when he had been drinking. He admitted three specific lies in pre-trial proceedings in this case. Phillip Moore was impeached with prior convictions. He also testified that he lied to an undercover agent and that he committed perjury in previous judicial proceedings. Clearly, the jury was "in possession of sufficient information concerning formative events to make a 'discriminating appraisal' of a witness' motives and bias." *United States* v. *Touchstone*, 726 F.2d 1116, 1123 (6th Cir. 1984), *quoting United States* v. *Campbell*, 426 F.2d 547, 550 (2d Cir. 1970); *see also United States* v. *Smith*, 748 F.2d 1091, 1096 (6th Cir. 1984). We hold that the court did not abuse its discretion in limiting cumulative cross-examination.

We also hold that the limitation placed on appellants' expert witnesses was not an abuse of discretion, *United States* v. *Kennedy*, 714 F.2d 968, 974 (9th Cir. 1983), nor was the decision by the court to permit the government to introduce

[7] The prosecutor stated:

> "Who were the timber rats? Ed R. [Panhandle] Moore. He is not here to tell us about it. But German [Stumbo] is."

Moore was deceased at the time of trial.

prior consistent statements to rehabilitate certain prosecution witnesses. *United States* v. *Hamilton*, 689 F.2d 1262, 1273 (6th Cir. 1982), *cert. denied*, 459 U.S. 1117 (1983).

All of appellants' other claims of error similarly are without merit.[8]

IV.

Despite the numerous claims of error urged by appellants in this Court, even appellants' counsel, in oral argument before us, commended the laudable efforts of the able district judge in the long and difficult trial of this case. We agree. As we have stated under similar circumstances, "[e]xperience teaches that while every additional day of trial increases the possibility of error, it correspondingly reduces the risk that any single error may have prejudicial effect upon the ultimate result." *In re Beverly Hills Fire Litigation*, 695 F.2d 207, 227 (6th Cir. 1982).

Appellants were convicted after a fair trial on the basis of overwhelming evidence of serious crimes committed more than three years ago. We affirm the convictions of all appellants on all counts upon which they were convicted, and we order that the mandate issue forthwith.

Affirmed.

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[8] For example, appellants claim that a summary of financial reports was improperly admitted. Appellant Meade argues that his "theory of the case" instruction was not given and that he should have been identified to the jury as the defendant to whom the coercion instruction was relevant. None of these contentions has merit.

Nos. 84-5474, 84-5[illegible]1, 84-5523, 84-5524, 84-5525

IN THE UNITED [illegible]TATES COURT OF APPEALS

FOR T[illegible] SIXTH CIRCUIT

UNITED [illegible]TATES OF AMERICA,

Appellee

v.

EDGAR JONES, MOSE MEADE, GERMAN STUMBO, KENNETH ROWLAND, and TEDDY KINNEY,

Appellants

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ON APPEAL FROM THE [illegible]NITED STATES DISTRICT COURT FOR THE EASTE[illegible]N DISTRICT OF KENTUCKY

BRIEF FO[illegible]HE UNITED STATES

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IN THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Nos. 84-5475, 84-5511, 84-5523,
84-5524, and 84-5525

UNITED STATES OF AMERICA,

Appellee

v.

EDGAR JONES, MOSE MEADE, GERMAN STUMBO,
KENNETH ROWLAND, and TEDDY KINNEY,

Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY

BRIEF FOR THE UNITED STATES

STATEMENT OF ISSUES

1. Whether the district court's jury instructions deprived appellants of the defense that their activities were in pursuant of legitimate labor goals within the meaning of United States v. Enmons, 410 U.S. 396 (1973).

2. Whether the indictment was subject to dismissal because ATF Agent McAllister was sworn as an "agent of the grand jury."

3. Whether the prosecutor's failure to present exculpatory information to the grand jury or his delay in producing Brady

materials amounted to misconduct requiring the dismissal of the indictment as a supervisory matter.

4. Whether there was a fatal variance between the allegations in the indictment and the trial proofs relating to Count V.

5. Whether the prosecutor impermissibly commented on appellant Stumbo's failure to testify during rebuttal argument, and, if so, whether the comment was harmless beyond a reasonable doubt.

6. Whether appellants were deprived of their right to confer with counsel when, because of crowded courtroom conditions, they were not allowed to sit at counsel table.

7. Whether the district court abused its discretion in its various rulings admitting or excluding evidence.

8. Whether the district court adequately instructed the jury on appellants Meade's and Jones' theories of defense.

STATEMENT OF THE CASE

On June 6, 1983, a ten-count indictment was returned in the United States District Court for the Eastern District of Kentucky variously charging appellants and 15 co-defendants with conspiracy to obstruct interstate commerce by force and violence, in violation of 18 U.S.C. 1951 (Count I); obstruction of interstate commerce by force and violence, in violation of 18 U.S.C. 1951 and 18 U.S.C. 2 (Counts II-V); carrying firearms during the commission of a felony, in violation of 18 U.S.C. 924(c) (Counts VI and VII); destruction of property by use of explosives, in violation of 18 U.S.C. 844(i) (Count VIII);

manufacture of a destructive device without payment of the requisite tax, in violation of 26 U.S.C. 5861(f) and 5871 (Count IX); and possession of an unregistered destructive device, in violation of 26 U.S.C. 5861(d) and 5871 (Count X). 1/

After a jury trial, appellants were all convicted on the conspiracy count (Count I) and on one extortion count relating to the dynamite-bombing of mining equipment belonging to the Ray-Mac Coal Company (Count IV). In addition, appellant Stumbo was convicted of using explosives to destroy property (Count VIII), and appellant Meade was convicted on a second extortion count relating to the destruction of a coal tipple by arson (Count V). 2/ Appellants were sentenced to consecutive terms of three years' imprisonment on Counts I and IV, with the sentence on Count IV suspended in favor of two years' probation; appellants Meade and Stumbo were further sentenced to consecutive terms of three years' and 18 months' imprisonment for their respective convictions on Counts V and VII, both of which sentences were

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1/ In addition to appellants and their co-defendants, the indictment also named as unindicted co-conspirators Ed "Panhandle" Moore, Phillip Booth, Pearl Booth, Van Patton, Phillip Dale Moore, Jake Moore, Philman Caudill, and Basil Ray Moore. All of the unindicted co-conspirators, with the exception of Ed "Panhandle" Moore, who was deceased, testified for the government at appellants' trial.

2/ Counts VI and VII, charging appellants Stumbo, Rowland, and Kinney with carrying firearms during the commission of a felony, were dismissed on motion of the government (40 Tr. 124), and appellants were found not guilty on the other counts in which they were variously charged (46 Tr. 11-12; 47 Tr. 24, 26-27).

The charges against appellants' codefendants were either dismissed (6 Tr. 23-24; 30 Tr. 114-116; 40 Tr. 124, 174), or the jury acquitted the codefendants on all remaining charges (45 Tr. 11, 20; 46 Tr. 11; 48 Tr. 4-6).

also suspended in favor of probation (XXIII Tr. 43-44, 65-66, 69, 80-81).

STATEMENT OF FACTS

A. Introduction

Appellant Jones was part-owner and president of JRM Coal Company (hereafter "JRM"), an enterprise that marketed coal mined by a network of contract mine operators -- including appellant Stumbo and accomplices Phillip and Pearl Booth -- who were signatories to the Bituminous Coal Operators Agreement with the United Mine Workers of America (hereafter "UMWA"). In early 1982, JRM was providing coal to South Carolina Electric and Gas Co. under a long-term contract that had been negotiated through John McCall Coal Company, a coal brokerage (23 Tr. 231-233; 28 Tr. 159-160; Gov. Ex. 138). The contract obligated JRM to ship 7500 tons per week by filling a 42-car "unit train" twice a week (23 Tr. 233-234; 28 Tr. 169-170). A force majeure provision in the contract relieved JRM of non-compliance with its production quotas caused by, inter alia, "labor disputes [and] strikes" (29 Tr. 16, 29).

In mid-February 1982, at a time when JRM's stock of coal available for shipment was depleted, appellant Jones became concerned that Ray-Mac Coal Co., [3/] a non-union strip and auger

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3/ Ray-Mac, which began mining operations in late 1981 on property owned by Elkhorn Mining Co. and leased from Joseph Mining Co., was the wholly owned production subsidiary of Mac Mining (XIII Tr. 23, 46-47; 27 Tr. 73-81; Gov. Ex. 16). Mac Mining additionally operated Coal-Mac Sales, Inc., a subsidiary that handled mineral leasing, processing, tipple operations, and marketing for Ray-Mac (ibid.).

Arnold Turner was part-owner of Joseph Mining Co. (27 Tr. (Continued)

mining enterprise operating near McDowell, Kentucky, was attempting to jeopardize his contract with South Carolina Electric by offering to supply coal at a reduced rate. To protect his contract, appellant Jones made arrangements with officers of UMWA Local 5967 -- including appellant Kinney, the president of Local 5967 -- to stage a strike that would both shut down Ray-Mac's mining operations and allow JRM to invoke the force majeure provision of its contract with South Carolina Electric. During the following two-week period, appellant Jones, acting through his contract operators, provided manpower, financing, and firearms to facilitate the bogus strike and to shut down Ray-Mac's operations. In the violence that ensued, appellants first tried to shut down Ray-Mac by shooting at its employees and equipment; when this proved ineffectual, various appellants subsequently bombed Ray-Mac mining equipment and burned a tipple that was leased for Ray-Mac's use.

B. Appellant Jones Initiates a Strike

On January 4, 1982, representatives of UMWA District 30 met with appellant Jones as a result of complaints that non-union truckers were on his coal production sites (XIV Tr. 14-15, 28). Appellant Jones agreed to cooperate with union officials in enrolling independent truckers hauling coal for JRM (XIV Tr. 16-17). At the same time, however, appellant Jones was "very

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72), and Nick Cooley received royalties as a surface owner of the tract of land that Ray-Mac mined (XIII Tr. 34). As will be seen (see pp. 6, 15, infra), because of Joseph Mining's ownership of Ray-Mac's leased mineral rights and Cooley's receipt of surface royalties, appellant Jones regarded Turner and Cooley as synonymous with Ray-Mac.

concerned" about Ray-Mac and was "upset" and "angry" because the union was making no effort to organize Ray-Mac (XIV Tr. 15-16, 21; XX Tr. 6-7; 33 Tr. 79). [4/] The District 30 representatives replied that all organizational decisions belonged to the international union (ibid.). [5/]

Six weeks later, on the morning of February 15, 1982, Phillip Booth went to appellant Jones' office. Jones, who had just concluded a telephone conversation, was "real mad" and said that he had learned from his coal buyer that Ray-Mac was trying to underbid JRM on its contract orders and "[t]hat Nick Cooley and Arnold Turner w[ere] behind it" (23 Tr. 251-253). [6/]

4/ In January or early February 1982, appellant Jones similarly told contract operator Pearl Booth that he was "nervous" about the potential expansion of Ray-Mac's mining activities (17 Tr. 121-122). As Jones stated, Ray-Mac's officers were "trying to get at" and "hurt" JRM (17 Tr. 123).

5/ Under the rules and regulations governing the UMWA, the international union was ceded sole responsibility for organizational efforts (XIV Tr. 8, 13, 92-93; XVI Tr. 36-38). Thus, the UMWA Constitution (Gov. Ex. 12), the District 30 Constitution (Gov. Ex. 13), and the UMWA Model By-Laws (Gov. Ex. 14) enjoined all local unions from authorizing strikes without the international union's approval and further enjoined all officers and members from participating in unauthorized strikes (XIV Tr. 42-43, 45-46, 51-52, 79-81).

6/ Appellant Jones stated that the warning had come from a contact at John McCall Coal Co. whom Phillip Booth had met (23 Tr. 252-253; 28 Tr. 160-161), and telephone toll records showed a call from John McCall's regional office to JRM's offices on the morning of February 15 (28 Tr. 184-186; Gov. Ex. 140).

In fact, Nick Cooley's Unit Coal Corp., and not Ray-Mac, submitted a spot market bid on February 12, 1982, to provide coal to South Carolina Electric at $29 per ton (27 Tr. 93-95, 98-101), i.e., approximately $3 less than the $32.29 that appellant Jones was receiving on his long-term contract (28 Tr. 206; Gov. Ex. 143). And, although Unit Coal Co.'s bid was made on the spot market, it was the practice in the coal industry that successfully-met spot contracts were often precursors of long-term contracts (27 Tr. 93-95, 98-101; 28 Tr. 165-166). Indeed,

(Continued)

Accordingly, Jones told Booth to contact two union officers and have them report to his office (23 Tr. 253, 257). Booth did so, and appellant Kinney and co-defendant Jason Moore, both officers of Local 5967, subsequently reported to Jones' office (23 Tr. 258). At the conclusion of their meeting with Jones, Kinney and Jason Moore told Booth that Jones had said that "everybody had to come out in order to protect his contract, there had to be a legal strike" (23 Tr. 260; 24 Tr. 4; XVIII Tr. 109-110). 7/

Later that same morning, appellant Jones met with Phillip and Pearl Booth. Jones stated that there was insufficient coal on hand to meet the weekly "unit train" requirement and that Ray-Mac had underbid JRM's contract with South Carolina Electric by $3 per ton; 8/ accordingly, Jones stated that he had instructed appellant Kinney and Jason Moore to pull the workers out of the JRM-affiliated mines in order to protect its contract (17 Tr. 124-126; 18 Tr. 61; 24 Tr. 5-6). As Jones explained, the only way to avoid losing the contract was that there "be a strike and it had to be legal so we had to bring the union men in" (17 Tr.

JRM had first supplied Coal to South Carolina Electric on a spot market basis (28 Tr. 169).

7/ Although the international union had conducted a preliminary survey to determine the feasibility of organizing Mac Mining Co. and its subsidiaries, it had not authorized an organizing drive or picketing at the Ray-Mac site (XIV Tr. 29-31, 82, 111; XVI Tr. 39-40; XX Tr. 28). The UMWA had not contacted Mac Mining Co. and its subsidiaries with respect to organizational demands prior to February 15, 1982 (XI Tr. 21; XII Tr. 13-14, 51; XIII Tr. 79) and did not do so after the outbreak of violence at the Ray-Mac site (XI Tr. 29-30, 90, 107).

8/ The $3 differential corresponded to Unit Coal Corp.'s bid (see n.6, supra). Moreover, there was evidence (24 Tr. 5-6; 40 Tr. 90-95, 112) showing that JRM's stock of coal available for shipment was depleted.

125, 129). Thus, Jones stated that the Booths and the other contract mine operators "had to pull these men out and go on strike or we wouldn't have [] mines or anything. We would lose everything" (17 Tr. 130). Jones added that there were already some men picketing outside the Ray-Mac site (17 Tr. 125). [9/]

Even though they had no present labor disputes with their employees (24 Tr. 9), the Booths returned to the two mines that they operated and told the miners to go out on strike (17 Tr. 130-131). [10/] The Booths explained to the miners that they "had to go on strike to keep our [coal] orders;" that the purpose of the strike was to "shut down Ray-Mac," because it was underbidding Jones by $3 per ton; that the strike "was alright with Edgar Jones;" and that they would be reimbursed for lost wages while they were on strike (17 Tr. 132, 139, 142-143, 151; 22 Tr. 8-10, 70, 96-97; 25 Tr. 7). [11/] Pearl Booth thereafter reported to Jones that all her employees were out of the mines (17 Tr. 132). Jones replied that she should make sure that the men joined the picket line and that Phillip Booth also be on the

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9/ Codefendant Drexil Hall met briefly and unsuccessfully with Ray-Mac employees on the morning of February 15 in an effort to seek their support for organizing the company. However the Ray-Mac workers were not asked to sign "recognition cards" or petition for an NLRB election (see IX Tr. 17; X Tr. 21-22; XV Tr. 9-12; 12 Tr. 26, 73; 24 Tr. 20-21), even though such procedures constitute an essential step in an UMWA organizing drive (XIV Tr. 9).

10/ With appellant Kinney's permission, employees at the Booth-operated Bryan Coal Co. were allowed to remain at work until a conveyor belt was installed at the mine (17 Tr. 130-131; 24 Tr. 8-9).

11/ Appellant Jones had previously instructed Pearl Booth to pay her employees while on strike if need be (17 Tr. 133).

picket line since "all the other men would go and follow him" (17 Tr. 132, 134). [12/]

On the evening of February 15, Phillip Booth and other mine operators were invited to attend a "special," unauthorized union meeting (22 Tr. 72-74; 24 Tr. 71-72, 92). [13/] There, a field representative of UMWA District 30 advised the miners that they should immediately return to work since their work stoppage was illegal (XX Tr. 24-25, 29) After the field representative departed, codefendant Drexil Hall, who had been vice-president of Local 5967 (XVI Tr. 34, 100), told the assemblage that "Edgar Jones told him he would help them every way he could" and that "Ray-Mac would take his contract, if they underbid him there wasn't no way he could afford to mine coal and take a cut on the coal" (24 Tr. 88-89). At the conclusion of the meeting co-defendant Jason Moore told the men to meet the following morning and further told Phillip Booth to bring guns and ammunition (24 Tr. 93). Accordingly, Pearl Booth ordered a supply of guns and ammunition, which Phillip Booth took to the picket line the

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12/ And, as appellant Jones told Phillip Booth on the afternoon of February 15, "[h]e was going to shut them down, show who they were fooling with" (24 Tr. 13-14, 22).

13/ The recording secretary of Local 5967, who was obligated to attend all union meetings, testified that he was unaware that any special meeting had been authorized for February 15, 1982 (XVI Tr. 54-56). Moreover, Article 11, § 1 of the UMWA Constitution (Gov. Ex. 12) barred mine owners, operators, and supervisors from union membership (XIV Tr. 46; XX Tr. 29). It was therefore uncustomary and "highly unusual" for operators and foremen to attend union meetings or participate in union activities (XIV Tr. 37; XVI Tr. 41-42; XX Tr. 24). When these circumstances were reported to the president of UMWA District 30, he agreed that the UMWA should "absolutely not" be involved (XIV Tr. 31-33, 122-123; XX Tr. 26).

following morning (17 Tr. 134-137, 151-152).

On the morning of February 16, Phillip Booth met with appellant Jones and received a case of whiskey to keep "the men up there on the picket line * * * all fired up" (24 Tr. 26; see also Tr. 71-72). From there, Booth went first to the JRM tipple where a group of men had met (XVIII Tr. 57-62) and then to the entrance of the Ray-Mac mine site (22 Tr. 14, 17). Because of prior threats of harm to truck drivers hauling Ray-Mac coal (see VIII Tr. 6-8; XVII Tr. 6-13, 52-53, 218-219; XI Tr. 39-43, 64, 68-70; X Tr. 15-21; XV Tr. 9-12;), Ray-Mac organized a convey to haul coal from its mine to its tipple on February 16. As the first coal truck in the convoy passed the picketers outside the Ray-Mac site, codefendant Drexil Hall approached the truck, drew a pistol from his pocket, and fired at the driver (VIII Tr. 17-19; XI Tr. 71; 12 Tr. 8-12, 14; XVII Tr. 68-70, 220; 22 Tr. 20, 111; 24 Tr. 38-40, 43). After other picketers joined in the firing, armed escorts in the other convoy vehicles returned fire, driving the picketers from the Ray-Mac site and wounding Phillip Booth and accomplice Phillip Moore (XI Tr. 72-73, 89; 12 Tr. 15-16; XVII Tr. 71-75, 110, 249-250; Gov. Exs. 23-31). 14/

Following the shooting incident, Phillip Booth and Phillip Moore retreated to JRM's office where appellants Jones, Stumbo and Kinney, codefendant Jason Moore, and Pearl Booth were present (17 Tr. 152-153; 22 Tr. 27-28; 24 Tr. 49). When Phillip Moore

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14/ As a result of the armed attack on the convoy, Ray-Mac suspended coal-hauling operations for the remainder of the week (XI Tr. 89, 100, 104-105, 228-229; XV Tr. 29).

complained that they would need "bigger and better guns" in order to stop Ray-Mac, appellant Jones replied that "if that's what we need we'll get them" (17 Tr. 153-154; 22 Tr. 29-30, 116-117; 24 Tr. 49-51; XXI Tr. 13-15). Appellant Jones instructed that heavier weapons be purchased and said that he would reimburse the purchase price; however, he added that the guns could not be traced back to him (17 Tr. 156; 24 Tr. 51-52). 15/

Appellant Jones promised that if Ray-Mac was stopped, "[h]e had enough work for every man there in McDowell to retire" (22 Tr. 33-34) since he had available for them "thirteen and a half to fourteen years [of] work" (XXI Tr. 15). 16/ On the other hand, Jones warned that no one would have a job if he lost his orders because of underbidding (ibid.). See also 17 Tr. 153-154, 157-158; 20 Tr. 155-156. As Jones declared, he "ha[d] enough money to retire on" and would do so "if they [his employees] d[id]n't take care of their job[s]" (XXI Tr. 15). Ray-Mac, in appellant Jones' view, "had to be got," and "the only way" to do it "was through their equipment" (17 Tr. 156). At the conclusion of the meeting, Jones conferred privately with appellant Stumbo, after which he handed Stumbo a $5000 check "to get his ammunition and stuff" (20 Tr. 142-143; 22 Tr. 30, 24 Tr. 51; 27 Tr. 41-43;

15/ As a result of the meeting, Pearl Booth purchased a supply of guns and ammunition that night, relying on a list furnished by Stumbo and Jason Moore (17 Tr. 158, 162-165; 22 Tr. 36-40).

16/ JRM's production contract with South Carolina Electric (Gov. Ex. 138), which was entered into in September 1980, had a five-year duration and could be extended for two additional five-year South Carolina Electric. Thus, at the time of the Ray-Mac violence, there was 13½-14 years remaining on the contract if it were fully extended.

Gov. Ex. 127). Accordingly, it was agreed that armed men should be sent into the hills overlooking the Ray-Mac site in an effort to shut down Ray-Mac (17 Tr. 154).

Thereafter, on February 17 and 18, armed men -- including appellants Stumbo, Kinney and Rowland [17/] -- went into the hills overlooking the Ray-Mac site (17 Tr. 208-209; 22 Tr. 48, 50, 57; 24 Tr. 98, 111-112, 121, 137; XXI Tr. 19-26, 29-32) and fired at Ray-Mac's miners and equipment as the morning shifts began (XI Tr. 94, 97-104; VIII Tr. 24-33; IX Tr. 27-33; 12 Tr. 22-23; 14 Tr. 37-38, 167-168). During this time, Jones reiterated that "the way to get to Ray-Mac was through their equipment by going up in the hills and shooting at it" (17 Tr. 195; see also 17 Tr.

17/ In addition to participating in the sniper attacks, appellants Stumbo and Kinney scouted the hills overlooking Ray-Mac's facilities for ambush sites (24 Tr. 58-59, 61, 69) and aided in soliciting manpower and providing weapons. Thus, accomplice Philman Caudill was solicited as an armed raider by Panhandle Moore with promises of making "some easy money" that would be provided by Stumbo (23 Tr. 61-69). Accomplice Van Patton was similarly recruited by Panhandle Moore -- in the presence of Stumbo and Kinney -- with the promise of a job if he helped "shoot up" the Ray-Mac site because it was "underbidding other local coal miners" (25 Tr. 22-24). And, shortly after the violence subsided, Van Patton was given a job at the coal mine that Stumbo operated (25 Tr. 41-42). Finally, accomplice Jake Moore was recruited to fire at the Ray-Mac site by Stumbo (XXI Tr. 18). At the time, Stumbo told Jake Moore that appellant Jones had "promised" him a mine if they stopped Ray-Mac (XXI Tr. 28, 60). In fact, Stumbo began operating a new mine for Jones soon after the Ray-Mac violence ceased (23 Tr. 212-213).

In addition, on February 17, appellant Kinney issued and negotiated a $3,000 check drawn on Local 5967's account that was made out to "cash" and for the "strike fund" (Gov. Ex. 44; 14 Tr. 205-206, 208; XVI Tr. 51-52). The check did not bear the union's seal as required (XVI Tr. 48-50) and no such expenditure of funds had been authorized by Local 5967 (XVI Tr. 34-36, 53). Kinney purchased two high-powered rifles and a pistol on February 16, 1982 (16 Tr. 154-157; 28 Tr. 67-68; Gov. Exs. 82-84).

193), and by "hitting [Ray-Mac] where it hurt" (17 Tr. 209). [18]

C. The Bombing at the Ray-Mac Site

After two days of sniping attacks proved ineffectual in closing down the Ray-Mac operation (see XI Tr. 104-105, 111, 117-118), appellant Jones reiterated that "the only way to get to Ray-Mac was to get to their equipment" (24 Tr. 152). Thus, on the afternoon of February 19, appellant Jones told Booth to "take a vacation" and "take a bunch of [alibi] witnesses with [him]" (24 Tr. 150-151) because "there were things [that were] going to happen that he would get blamed for" (17 Tr. 211-212; see also 24 Tr. 207-208). According to appellant Jones, "the old-time timber rats [i.e., Stumbo and Panhandle Jones] [were] going to be working that weekend" and "the shit was going to hit the fan" when Ray-Mac's equipment was destroyed (17 Tr. 211-212; 24 Tr. 152-153). Heeding appellant Jones' advice, Phillip and Pearl Booth left McDowell for the weekend, taking alibi witnesses with them (17 Tr. 213; 22 Tr. 65-66; 24 Tr. 153-154, 156).

On February 20, while the Booths were out of town, Panhandle Moore recruited accomplices Philman Caudill and Jake Moore for a "little job" the next day (23 Tr. 87; XXI Tr. 39-40). Early the next morning, Panhandle Moore, Jake Moore, and Philman Caudill went to appellant Stumbo's barn, where appellants Stumbo, Kinney, Rowland and Meade were also present (23 Tr. 89-94; 25 Tr. 38-39; XXI Tr. 39-43). From there, the men carried an inner tube, an

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[18] Prior to the outbreak of violence, Jones had asked the watchman at the Ray-Mac site what he would do "when the lead starts flying" (11 Tr. 15-16). Asked to explain, Jones stated that "it is coming. They've got it laid up for you" (ibid.).

old basketball, and some dynamite to a site on Ray-Mac's property where its mining equipment was located. While appellants Kinney, Rowland, and Meade fanned out as armed look-outs (23 Tr. 101), appellant Stumbo and Philman Caudill filled the inner tube and basketball with dynamite and attached fuses (23 Tr. 101-102; XXI Tr. 41-42, 46).

Appellant Stumbo then wedged the dynamite-filled basketball beside the engine of a bulldozer, while Panhandle Moore placed the inner tube on a mining auger (XI Tr. 127-129; 16 Tr. 52, 63-64, 67-68; 23 Tr. 102-105; XXI Tr. 47-49; Gov. Exs. 32, 56-58). They then lit the fuses and ran. The auger was heavily damaged in the ensuing explosion; however, the bomb on the bulldozer failed to explode because the fuse was crimped too tight (XI Tr. 113-114; 16 Tr. 76; XXI Tr. 49-50; Gov. Ex. 33). 19/

Upon returning home on the afternoon of February 21, the Booths learned from co-defendant Caudill that appellants Stumbo, Rowland, and others had destroyed Ray-Mac's equipment by use of basketball and inner tube bombs (17 Tr. 214; 24 Tr. 156-158). The next day, appellant Jones told the Booths that "it wasn't over yet," but that "he was just like J.R. Ewing" and "could sit down there on South Fork and get anything he wanted done" (17 Tr. 215; 24 Tr. 159). Appellant Jones added that there "had been

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19/ The basketball bomb consisted of dynamite, black electrician's tape, and a partially burned safety fuse (16 Tr. 52, 63-64, 67-68, 76; Gov. Exs. 32, 56-58). An explosives expert testified that the bomb constituted an "explosive device" (27 Tr. 9-14). Similarly, the expert testified that the auger was destroyed by an explosive device containing 10-15 sticks of dynamite (27 Tr. 14-16).

enough damage done" so that Ray-Mac would "probably be out of business for a while" (24 Tr. 161). Since "there was nothing else we could do right now without getting in trouble," appellant Jones ordered Phillip Booth to "[p]ut [his] men back to work" and "let it die down" (17 Tr. 216-217; 24 Tr. 160). As instructed, Booth ordered his men to report for work the following day (17 Tr. 217-218; 24 Tr. 160).

D. The Arson at the Tipple

In mid-February 1982, Coal-Mac Sales, Inc., leased a tipple at Simpson's Branch, Kentucky, to process coal mined at the Ray-Mac site (XIII Tr. 49, 54-59; Gov. Exs. 21, 21A, and 21B). The lease was to become effective as of March 1, 1982 (ibid.). 20/

On February 24, appellant Jones complained that Ray-Mac had leased a tipple that would allow them to save two dollars per ton on their trucking costs (24 Tr. 179-180). Appellant Jones stated that "the tipple had to be taken care of" (17 Tr. 227) and that "[t]here would never be a lump of coal run across it" (24 Tr. 180). As appellant Jones elaborated, he was not "going to put up with that bigger company running nonunion while he had to run union," nor was he going to acquiesce while "Nick Cooley and Arnold Turner [were] all the time trying to hurt him" (17 Tr. 228).

20/ At the time the lease was signed, coal from the Ray-Mac site was hauled to a tipple at Stone Coal Creek, Kentucky, for rail shipment (XIII Tr. 15-16, 39-40). Since the tipple at Simpson's Creek was closer to the mining site, it would allow Ray-Mac to lower its trucking costs once it became effective (XIII Tr. 49).

A day or two later, co-defendant Caudill told the Booths that they were planning to burn the newly-leased tipple and that the Booths might have to finance the operation that was scheduled for the weekend of February 27-28 (17 Tr. 229; 20 Tr. 245-246; 24 Tr. 181-182, 185). That weekend, Panhandle Moore told appellant Meade and Basil Moore that he had "a little job" for them to do (26 Tr. 56-57). After collecting some old tires and inner tubes, the three men were driven to the Simpson's Branch tipple by Philman Caudill (23 Tr. 109-113; 26 Tr. 56-58). There, the men hung the tires on the tipple by means of nails and wires (26 Tr. 60; see also 16 Tr. 85-88; Gov. Exs. 61 and 62). Panhandle Moore then doused the tires with gasoline that he had brought and ignited the tipple (26 Tr. 60-61). Panhandle Moore thereafter paid Philman Caudill $100 and appellant Meade and Basil Moore $50 each for their help in burning the tipple with money that he received from codefendant Caudill (23 Tr. 115-117; 26 Tr. 62). In turn, codefendant Caudill told Phillip Booth that he no longer needed money from him for the tipple's destruction since the financing had already been taken care of by appellants Kinney and Stumbo (17 Tr. 229-230; 24 Tr. 186-187). 21/

E. The Effect on Interstate Commerce

Coal production at the Ray Mac site was marketed by Coal-Mac Sales, Inc., for sale in interstate commerce and, in particular,

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21/ Appellant Kinney personally gave Philman Caudill $20 and Van Patton $15 in gas money for their assistance in the violence directed at Ray-Mac's facilities (23 Tr. 119-120; 25 Tr. 41). As appellant Kinney told Philman Caudill when he paid him: "It won't be coming off me. It will be coming off them other fellows" (23 Tr. 119-120).

was used to fill a long term contract with the S. D. Warren Co. of Maine that was entered into in December 1981 (XIII Tr. 13-19, 39-40). In addition, Ray-Mac purchased supplies and parts used in January and February 1982 from out-of-state sources (29 Tr. 120-126, 148; Gov. Ex. 147).

As a result of the violence in February 1982, Ray-Mac and its related Mac Mining entities suffered substantial economic losses (XII Tr. 49). Although no coal contracts were lost, the tonnage of coal mined at the Ray-Mac facility fell markedly in the months following the violence (IX Tr. 40; XI Tr. 117-119, 302; XIII Tr. 146-147), and Coal-Mac Sales was forced to buy replacement coal to fulfill its contractual obligations (XIII Tr. 47-48). In total, the owners of Ray-Mac sustained $2,089,030 in losses as a result of the violence, including $151,000 in damaged equipment at the Ray-Mac site; $196,000 in damage to the tipple facilities at Simpson's Branch; $126,000 in added security costs; $40,000 in lost rent from the tipple; $1,420,000 in lost profits; $40,500 in shutdown costs at the Ray Mac site; and $115,000 in development costs for a substitute mine (29 Tr. 133-146; Gov. Ex. 148).

ARGUMENT

I. THE TRIAL COURT DID NOT DEPRIVE APPELLANTS OF THE DEFENSE THAT THEIR ACTIVITIES WERE IN PURSUIT OF A LEGITIMATE LABOR OBJECTIVE; RATHER, THE COURT'S INSTRUCTIONS ALLOWED THE JURY TO CONVICT ONLY THOSE DEFENDANTS WHO WRONGFULLY USED FORCE, VIOLENCE AND FEAR IN AN ATTEMPT TO OBTAIN PROPERTY TO WHICH THEY HAD NO LAWFUL CLAIM

Appellants do not dispute that they induced Ray-Mac Coal Company to part with property or that their activities affected interstate commerce. Instead, relying on United States v. Enmons, 410 U.S. 396 (1973), appellants contend (Stumbo Br. 6-26) that their conduct did not constitute "extortion" within the meaning of the Hobbs Act, since its purpose was not "wrongful". Appellants further argue the jury instructions improperly deprived them of the defense that they could not be prosecuted under the Hobbs Act because their acts were directed toward "organizing employees of Ray-Mac." As we demonstrate below, the trial judge's instructions adequately submitted the Enmons defense to the jury, and the jury obviously rejected it in light of the substantial proofs showing that appellants' "union organizing" was nothing but a ruse for employer-led activities that were designed to drive Ray-Mac out of business. Accordingly, their extortion convictions are not precluded by the holding in Enmons.

A. Pursuant To The Proper Jury Instructions, The Five Appellants Were Convicted For Conduct With Goals And Motives Far Different From Any Union Organizing Activity Arguably Protected By The Narrow Labor Exemption Created By Enmons and Its Progeny.

1. As the Supreme Court noted in Enmons, supra, 410 U.S. at

403, Congress enacted the Hobbs Act "to prevent both union members and nonunion people from making use of robbery and extortion under the guise of obtaining wages in the obstruction of interstate commerce" (quoting 91 Cong. Rec. 11900 (1945) (remarks of Rep. Hancock)). The legislation's primary purpose was to overrule the Supreme Court's interpretation of the predecessor to the Hobbs Act (the Anti-Racketeering Act of 1934) made in United States v. Local 807, 315 U.S. 521 (1942). In Local 807, union members stopped all trucks entering New York City that were driven by over-the-road drivers and imposed a fee (based on the union wage scale) on trucks before the drivers were allowed to deliver their cargo (id. at 526, 539). Relying upon a wage exemption contained in the predecessor statute, the Court held that the union members could not be prosecuted for extortion. Reacting to this ruling, Congress passed the Hobbs Act, which broadly proscribes "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence or fear . . ." (18 U.S.C. 1951(b)(2)).

In subsequently interpreting the Hobbs Act, the Supreme Court has upheld its application to union officials who compelled an employer to pay "wages" to union members, for imposed, unwanted, superfluous, and fictitious services. United States v. Green, 350 U.S. 415 (1956). As the Court there stated (id. at 419):

> The legislative history makes clear that the [Hobbs] Act was meant to eliminate any grounds for future judicial conclusions that Congress did not intend to cover the employer-employee relationship.

Although subsequently reiterating in Enmons, supra, that the Hobbs Act reached union activities of the type involved in Local 807 and Green, supra (see 410 U.S. at 401-404, 408), the Supreme Court refused to apply the statute to the activities of union members charged with acts of violence committed in support of lawful collective bargaining demands for higher wages. The Court found that the term "wrongful" in the Hobbs Act's definition of extortion "limits the statute's coverage to those instances where the obtaining of property itself would be 'wrongful' because the alleged extortionist has no lawful claim to the property." Id. at 400. Relying primarily on the Act's legislative history, the Court concluded that the statute "did not apply to the use of force to achieve legitimate labor ends" (id. at 401), such as obtaining higher wages or employment benefits for employees represented by the union. In so holding, however, the Court made clear that the decision did not preclude extortion prosecutions in the event of unlawful labor objectives, such as where the accused has no lawful claim to the property obtained (id. at 400). 22/

In construing Enmons' "labor exemption", the courts of appeals have restricted the definition of "legitimate" labor

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22/ As was later noted in United States v. Quinn, 514 F.2d 1250, 1257 (5th Cir. 1975), cert. denied, 424 U.S. 955 (1976):

> [T]he effect of Enmons was to remove from the reach of federal criminal law the use of coercive tactics to obtain increased wages, but with the caveat that the prosecutor's hand would be stayed only when the payment is gained in furtherance of legitimate labor objectives. (emphasis in original)

goals to the context of threats of force applied by unions in pursuit of higher wages during collective bargaining with an employer. See United States v. French, 628 F.2d 1069, 1075 (8th Cir.), cert. denied, 449 U.S. 956 (1980); United States v. Porcaro, 648 F.2d 753, 760 (1st Cir. 1981); United States v. Thordarson, 646 F.2d 1323, 1327-1329 (9th Cir.), cert. denied, 454 U.S. 1055 (1981); United States v. Clemente, 640 F.2d 1069 (2d Cir.), cert. denied, 454 U.S. 820 (1981); United States v. Cerilli, 603 F.2d 415, 419-420 (3d Cir. 1979); United States v. Warledo, 557 F.2d 721 (10th Cir. 1977); United States v. Quinn, 514 F.2d 1250 (5th Cir. 1975), cert. denied, 424 U.S. 955 (1976) Thus, not only have labor officials been convicted of Hobbs Act violations for extorting personal payoffs (see United States v. Duhon, 565 F.2d 345 (5th Cir.), cert. denied, 435 U.S. 952 (1978)), but also where the object of the extortion was declared unlawful or illegitimate under the Taft-Hartley Act, 29 U.S.C. 186(b)(1) (see United States v. Quinn, supra, 514 F.2d at 1256-1259)); where the object of the extortion was contrary to express obligations of a collective bargaining agreement between a union and an employer (see United States v. Russo, 708 F.2d 209 (6th Cir.), cert. denied, 104 S.Ct. 487 (1983); United States v. Cusmano, 729 F.2d 380 (6th Cir.), cert. denied, 104 S.Ct. 3536 (1984)); or where the object of the extortion was made illegal by the National Labor Relations Act, 29 U.S.C. 151 et seq. (United States v. Wilford, 710 F.2d 439, 444 (8th Cir. 1983), cert.

denied, 104 S.Ct. 701 (1984)). [23]

This Court recently considered an Enmons defense in United States v. Cusmano, supra. [24] There, two employers and one union official were charged with Hobbs Act violations because they coerced employees to pay the company's contributions to health, welfare and pension funds. Rejecting an Enmons-type claim that Cusmano had a legitimate right to "negotiate" the employees' assumption of the contribution payments in order to reduce his labor costs, this Court held that Cusmano "had no legitimate claim to the [employee payments]" since "existing contracts expressly required the [c]ompany to make payments to the welfare and pension funds out of the [c]ompany's own funds" (id. at 382-383). As the Court continued (id. at 383):

> We believe Cusmano's attempt to characterize his behavior as protected labor activity stretches Enmons too far. He claims he had a legal right to bargain with his

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[23] Appellants miscite (Stumbo Br. 18-19) Wilford for the proposition that conduct constituting a violation of the unfair labor practice provisions of the National Labor Relations Act (NLRA) may not be prosecuted as a Hobbs Act violation. However, the Hobbs Act convictions in Wilford were based on conduct that the court noted was clearly unlawful under the NLRA. See Wilford, supra, at 443-444. Moreover, the very purpose for which the Hobbs Act was enacted -- to prevent the imposition of unwarranted, unnecessary, and fictitious services -- constitutes an unfair labor practice under 29 U.S.C. 158(b)(6). Finally, the portion of Wilford appellants rely upon involves a discussion whether double jeopardy principles bar convictions for both Hobbs Act and Taft-Hartley violations. Hence, appellants to the contrary (Stumbo Br. 19), Wilford did not determine whether "a Hobbs Act violation and an unfair labor practice were co-extensive". Thus, provided that the other statutory elements of the Hobbs Act are present, conduct that would be prohibited as an unfair labor practice could also be an improper or unlawful extortionate "goal" under the Hobbs Act.

[24] See also, United States v. Russo, supra.

> employees in an attempt to reduce [his] labor costs. Although he might have this right, the facts proven at trial do not establish any legitimate bargaining by Cusmano in an attempt to reduce [his] labor costs. Instead, the evidence discloses that he and his co-defendants coerced [his] drivers into an illegal agreement which required the drivers to pay for pension contributions which Cusmano should have paid. The facts demonstrate Cusmano attempted to obtain by wrongful means, and under the guise of a "service charge", an objective which the party's own contract specifically declares unlawful and illegal. United States v. Russo, 708 F.2d at 216 (concurring opinion). This conduct went beyond legitimate labor tactics and violated the Hobbs Act. [citations omitted]. Applying Cusmano's interpretation of * * * the Hobbs Act would pose no bar against utilization of sham agreements, even though such agreements were obtained outside the traditional labor/management bargaining context. We decline to adopt such a restricted view and believe that Enmons provides no sanction for the activities proven here.

In Hobbs Act cases where defendants claim that they are pursuing a facially legitimate and bona fide labor objective, a jury is entitled to reject that claim where the government proves the actual extortionate purpose was a different, unlawful objective. See United States v. Wilford, supra. There, four Teamster officials were convicted of extorting "union dues and initiation fees" from self-employed, out-of-state truck drivers delivering materials to a construction site. The Wilford defendants argued their objective was legitimate under Enmons because they were both enforcing their work clause under a collective bargaining agreement and soliciting and organizing new Teamster members (710 F.2d at 444). On the other hand, the government asserted that the defendants' true purpose instead "constituted an attempt to bolster [the union's] treasury by

wrongfully taking money from transient truckers under the guise of obtaining union dues." Ibid.

Affirming the extortion convictions, the Wilford court stated that it "need not decide whether the defendants' asserted objectives are legitimate labor objectives" since "[i]n spite of the defendants' assertions as to what the objectives of their conduct were, there is evidence to support the jury's conclusion that these were not the defendants' true objectives." Ibid. Rather, in the court's view, the proofs established three unlawful labor objectives since the defendants' actions violated the unloading fee provisions of the Taft-Hartley Act (29 U.S.C. 186(b)(2)); since the defendants provided no union benefits in return for the "dues" they extorted; and since the forcing of self-employed persons to join a labor union "was statutorily declared not to be a legitimate labor objective" under the unfair labor practice provisions of the NLRA (29 U.S.C. 158(b)(4)-(ii)(A)). Id. at 444-445 and n.10 (citing United States v. Quinn, supra, 514 F.2d at 1259). Just as in Cusmano, supra, the Wilford court held that sufficient evidence existed to support the jury's conclusion that the claimed "labor objectives" were merely sham justifications to disguise otherwise unlawful objectives.

2. There was ample evidence at trial from which the jury could readily conclude that appellants agreed to and conducted activity aimed at obtaining a wrongful extortionate objective within the scope of the Hobbs Act. The record is replete with evidence establishing that the claimed organizational effort in

this case was merely a ruse for an attempt by appellant Jones and his subcontractors to drive Ray-Mac out of business. Thus, the bombing of Ray-Mac equipment (Count IV) and the burning of a coal tipple that was leased for Ray-Mac's benefit (Count V) were planned, financed, and supervised by Jones, his subcontractors and other individuals not affiliated in any manner with the UMWA. 25/ Although Jones and his subcontractor enlisted the aid of appellants Kinney and Rowland and other UMWA members to accomplish their unlawful goal of putting Ray-Mac out of business, the participation of these UMWA members in extortionate activities on Jones' behalf does not invoke the Enmons exemption. See Cusmano, supra; Wilford, supra.

Moreover, the trial judge properly submitted the question of whether appellants' actions were in pursuit of a lawful labor objective to the jury. Read as a whole, the instructions clearly required the jury to make a determination, based upon the evidence, whether the violence was in support of the claimed "union organizing" purpose, or whether the asserted objective was a pretext for violence furthering the scheme of appellant Jones and his subcontractors to eliminate a competing coal-mining concern. By its verdict, the jury clearly found that the bombing of the equipment and the burning of the tipple were not incidental to any legitimate union organizing activity.

25/ In addition to employer Jones, the Ray-Mac violence was directed by subcontractors Phillip and Pearl Booth, and "timber rats" appellant Stumbo (a Jones' subcontractor) and Panhandle Moore (a non-UMWA member).

When viewed in their entirety and in the context of the trial proofs (see, e.g., Cupp v. Naughten, 414 U.S. 141, 146-147 (1973)), the court's instructions adequately presented the Enmons defense to the jury. Thus, the court instructed that "extortion" constituted the "obtaining of property from another * * * induced by wrongful use of actual or threatened violence" (44 Tr. 141), and correctly defined the concept of wrongfulness as "the obtaining of property by one having no lawful claim thereto" (44 Tr. 128). [26/] Noting that the defendants asserted that their conduct was exempted from prosecution under the Enmons exception to the Hobbs Act, the court explained (44 Tr. 134, 150-151, 158):

> The Enmons exception is that legitimate activities by a labor organization or its representatives, honestly acting in representing its members, are not restrained by [the Hobbs Act], [and] labor activity in a labor dispute in support of a proper labor objective cannot constitute extortion * * *, notwithstanding violence and threats may have occurred in support of such proper union objective.

[26/] To support their attack on the Enmons instructions, appellants cite (Stumbo Br. 21-22, 26) suggested changes to the proposed jury instructions made by the prosecution during the Rule 30 conference. These changes were offered at a point where the court's proposed instructions contained an incorrect definition of the term "wrongful" (see 41 Tr. 11, 40-41, 68-69, 106-107). After the Rule 30 conference, the court changed its instruction on wrongfulness to the correct definition under Enmons, i.e., obtaining property without lawful claim (see 41 Tr. 134). Once this change was made, it eliminated the basis for many of the prosecution's suggestions concerning other aspects of the instructions. For example, when "wrongful" is defined as obtaining property without lawful claim, portions of the instructions that were previously objectionable (see, e.g., Stumbo Br. 23) became correct statements of law under Enmons. See, United States v. Billingsly, 474 F.2d 63, 65 (6th Cir.), cert. denied, 414 U.S. 819 (1973).

The court further stated that "organizing the employees of a business" was "a proper union objective within the Enmons exception," and that picketing was "a legitimate labor activity in support of such goal" (44 Tr. 134-135, 151, 158-159). Moreover, the court made clear that "violence and threats" that occurred "as a by-product of a legitimate labor activity, in support of a proper union objective" were beyond the reach of the Hobbs Act (44 Tr. 135, 151, 159). As opposed to such acts that were "honestly and in good faith performed in pursuit of a legitimate objective," however, the court charged that Enmons did not provide a defense to extortionate activities committed during "mere pretext[ual] or feigned" labor disputes (44 Tr. 136, 153, 160). 27/ Thus, Enmons did not apply to extortionate activities undertaken for the purpose of "wrongfully depriv[ing] or deny[ing] the right to do business and legitimately compete with another" (ibid.). And, of course, the court stressed the government's burden of establishing the inapplicability of the Enmons exception beyond a reasonable doubt (44 Tr. 134, 139, 150-155, 158, 161-162). Hence, a fair reading of the Enmons instructions shows that defendants, including appellants, were

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27/ The court explained that "a legitimate act wrongfully performed may become unlawful and outside of the protection of the Enmons exception" (44 Tr. 135, 151, 159). Thus, violence occurring during a labor dispute that was "not associated with nor happening to result from any ongoing legitimate labor activity is not violence in conjunction with a labor dispute within the meaning of the Enmons exception (44 Tr. 138-139, 154-155, 161).

allowed to avail themselves of a claimed "legitimate labor goal" defense. 28/

In applying these comprehensive instructions, there was an ample evidentiary basis for the jury's rejection of appellants' assertions that their activities were in pursuit of the legitimate goals of organizing Ray-Mac's employees or of engaging in "area standards" picketing. 29/ Thus, the record shows that appellant Jones believed that Nick Cooley and Arnold Turner, Jr. and Ray-Mac -- all synonymous in Jones' mind -- were underbidding him on a coal supply contract to South Carolina Electric and that he had "to shut Ray-Mac down" to save his business. To do this, appellant Jones and his subcontractors provided the manpower, financing, weaponry and supervision during the incidents of violence directed at Ray-Mac. See pp. 4-16, supra.

28/ Appellants isolate the jury instruction dealing with "malicious damaging or destruction of equipment" (Stumbo Br. 15-18) and argue that it is inconsistent with Enmons. However, they fail to read that instruction in proper context with the court's preceding instructions. In those, the court specifically compared violence incidental to a bona fide labor dispute and violence which occurs where the labor objective is "a mere pretext or feigned in order to avoid responsibility for an unlawful act." The judge clearly and correctly told the jury that the former is protected by Enmons, but the latter is not. By its verdict, the jury apparently found the shooting from the hills on February 17 and 18 (Counts II and III) was incidental to a legitimate union goal that was honestly being pursued. However, in convicting appellants for the bombing and burning (Counts IV and V), the jury determined that those subsequent acts were actually in support of the separate and unlawful objectives of Jones and the JRM subcontractors.

29/ The so-called "area standards" theory is being offered initially on appeal. The record is absolutely devoid of any evidence even colorably amounting to a claim that defendants established a picket to protest Ray-Mac's failure to meet prevailing wage scales.

Yet other evidence showed that the defendants' "union organizing" claim was a sham or pretext. First, as the recording secretary of Local 5967 testified, no strike vote or organizing campaign was ever approved by the Local. UMWA officials testified that no approval for a strike or recognitional picket was ever requested from or granted by the international union, as mandated by the UMWA's Constitution. See, Cusmano, supra. 30/ In fact, the picketers were instructed to cease and desist by an UMWA official the night before the first shooting incident, and UMWA district officials wholly disassociated themselves from the activities at Ray-Mac when it became apparent that Jones' mine operators and foremen were involved. Conspicuously absent from the record, moreover, was any indicia of normal UMWA organizing procedures such as authorization card signings or the filing of an NLRB election petition with the National Labor Relations Board.

As such, any consequent effort to "organize" Ray-Mac by Local 5967 which was directed by Jones, an employer, would be unlawful employer coercion, domination or assistance in violation of the National Labor Relations Act, 29 U.S.C. 158(a)(1), (2), and (3). See Wilford, supra. Following the judge's instruction, the jury could have examined this overwhelming body of evidence

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30/ In Plumbers and Pipefitters v. Plumbers and Pipefitters Local 134, 452 U.S. 615 (1981), the Supreme Court held that a union's international constitution is an enforceable contract under § 301(a) of the Taft-Hartley Act, 29 U.S.C. 158 (452 U.S. at 619-627). Therefore as with the collective bargaining agreement relied on in Cusmano, the union constitution and by-laws introduced at trial provided further evidence of appellants' unlawful objectives and intent.

and properly rejected defendants' "lawful organizing objective" as a sham or pretext to disguise violence actually mounted against Ray-Mac for the benefit of appellant Jones and his associates. 31/

Moreover, even assuming arguendo that the initial activities at the Ray-Mac site involved organizing efforts protected by Enmons, once those activities became dominated and controlled by Jones and his operators for their own benefit, they became "wrongful" for purposes of Enmons. See United States v. Clemente, supra, 640 F.2d at 1077; United States v. Billingsly, 474 F.2d 63, 65 (6th Cir.), cert. denied, 414 U.S. 819 (1973); see also, Wilford, supra. Thus, whatever the jury's reason for returning not guilty verdicts as to the allegedly extortionate shooting incidents on February 17 and 18, 32/ it could nonetheless properly conclude that the bombing and arson events were wholly removed from, rather than incidental to any lawful organizing efforts. To attempt to shield appellants from

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31/ Appellants' complaints (Stumbo Br. 15-23) regarding instructions concerning "wildcat strikes" and "picketing" are also without merit. To begin with, appellants were neither charged with nor convicted of extortion accomplished by a wildcat strike or picket. Moreover, there was no "wildcat strike" during this violent episode since Ray-Mac's employees did not cease work and since the employers of JRM's subcontractors ceased work only when directed to do so by their employers. Thus, any "strike" against JRM was ordered and facilitated by Jones for his own purposes, and was hardly a "wildcat" called by the local to address a labor dispute with JRM and its subcontractors.

32/ Since the defendants did not dispute that the shootings occurred or deny their participation, the most obvious explanation is that, under Enmons, the jury concluded that the government failed to negate the existence of a legitimate organizing effort at the time of the shooting.

liability on these extortion counts because of Enmons belies the mass of evidence introduced at trial proving the objective and purpose of the extortionate acts charged in these counts was exclusively for the unlawful benefit of Jones and his sub-contractors.

B. Enmons Is Not A Defense Outside The Context Of Lawful Demands Made By A Labor Organization Acting As A Representative Of Employees It Represents For Collective Bargaining Purposes

Although the court's instructions adequately submitted the Enmons defense to the jury for its consideration, it is doubtful that appellants were entitled to rely on any Enmons defense whatsoever in the circumstances of this case. The facts of Enmons included violence in support of wage demands by a labor union on behalf of employees it represented for the purpose of collective bargaining under the National Labor Relations Act, 29 U.S.C. 151, et seq. In recognizing an exception to the Hobbs Act, the Supreme Court grounded its holding on the premise that the union, as designated bargaining representative, had lawful claim to higher wages for employees on whose behalf it was bargaining. 33/ In the case at bar, Local 5967 was not the authorized representative of any of Ray-Mac's employees. As

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33/ See also United States v. Caldes, 457 F.2d 74 (9th Cir. 1972), with facts similar to, and cited as authority by, the Enmons decision. 410 U.S. at 409. Caldes clearly describes the Enmons issue and its boundaries: "whether violence employed during the course of a valid, bona fide collective bargaining negotiation can be viewed as extortion within the meaning of the Hobbs Act . . . [or] did Congress intend to impose a felony conviction with severe penalties upon the union member . . . trying to gain larger wages or better working hours and conditions for wanted employees?" Caldes, supra, 457 F.2d at 77.

United States v. Jacobs, 543 F.2d 18 (7th Cir. 1976), makes clear, this distinction is crucial (id. at 21):

> Presumably, a demand for recognition, on behalf of a union authorized to represent the majority of employees albeit at gunpoint, cannot, under Enmons violate the Hobbs Act. We think the same demand on behalf of a union which does not have authority to represent any of them could violate it.

The Jacobs rationale is consistent with this Court's holding in United States v. Franks, 511 F.2d 25 (6th Cir. 1975). There, defendants (including a union official) were convicted of Hobbs Act extortion for planning the bombing of nonunion businesses. On appeal, defendants challenged their convictions, arguing that no extortion had been proven. After first holding that the Hobbs Act reaches violence in the furtherance of an aborted extortion scheme (id. at 31), the Court continued (id. at 31-32):

> In applying the adopted interpretation, we find sufficient evidence underlying the jury finding that Franks and Britton violated the statute. Particularly in light of the Hobbs Act's legislative history, violence designed to coerce a businessman into changing his establishments from nonunion to union is certainly violence designed to extort . . . . By coercing a businessman into changing his establishments from nonunion to union or risk being bombed, one deprives the businessman of his "property" interest of an economic advantage, of using nonunion labor, or of operating his business.

Jacobs and Franks support a conclusion that none of the defendants below were causing violence in support of lawful labor demands in a manner protected by Enmons. First, unlike Enmons, Local 5967 was not authorized to bargain for Ray-Mac's employees. In fact, before any violence erupted, Local 5967 officers were told by Ray-Mac employees that they were not

interested in union representation (see p. 8, supra). No evidence exists anywhere on this record that Local 5967 had achieved majority status as bargaining representative of Ray-Mac's employees. Under those circumstances, Local 5967 had no lawful claim to demand anything from Ray-Mac or its work-force. 34/ Therefore, even absent the overwhelming proof of the direction and conduct of the violence by Jones and his representatives, appellants were simply not entitled to an Enmons defense. 35/

34/ Unlike the construction industry where "top-down" organizing and pre-hire contracts are permitted by 29 U.S.C. 158(e) and (f), in the coal industry the only lawful avenues to attain designation as bargaining representative of employees would be (1) NLRB election and certification, or (2) voluntary recognition by the employer after proof of majority status by the union. See 29 U.S.C. 159. Nothing remotely resembling either occurred here.

35/ Indeed, the district court "came very close" to omitting a charge on the Enmons defense (41 Tr. 55-56).

II. THE INDICTMENT WAS NOT SUBJECT TO DISMISSAL BECAUSE ATF AGENT McALLISTER WAS SWORN AS AN "AGENT OF THE GRAND JURY"

During the course of the grand jury proceedings, ATF Agent Dennis McAllister was sworn by the foreman as an "agent of the grand jury" to assist in its investigation and to retain its physical exhibits (14 Tr. 228, 257; Stumbo Ex. 3, Oct. 4, 1982 Tr. 23). In that capacity, Agent McAllister served subpoenas (14 Tr. 230-231, 244-252) and thereafter received from the foreman custody of exhibits that had been produced by witnesses subpoenaed before the grand jury (14 Tr. 228-229, 231, 254-255). Agent McAllister also briefly testified before the grand jury on two occasions (see Stumbo Ex. 3). He was not, however, present in the grand jury room during the testimony of any other witnesses (14 Tr. 229-230) or during any of the grand jury's deliberations (14 Tr. 258).

Appellants contend (Stumbo Br. 30-50; Jones Br. 51-56) that Agent McAllister's designation as an "agent of the grand jury" jeopardized the independence of the grand jury and compromised the secrecy of its proceedings; accordingly, they argue that the indictment should have been dismissed. At the outset, we note that Fed. R. Crim. P. 12(b)(1) and 12(b)(2) provide that objections based on defects in the institution of the prosecution or in the indictment "must be raised before trial." Since appellants failed to object to the grand jury proceedings on this basis prior to trial, [36/] they have waived their right to object

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36/ Appellant first objected to the designation of Agent McAllister as an "agent of the grand jury" midtrial and in the (Continued)

now. See, e.g., Shotwell Mfg. Co. v. United States, 371 U.S. 341, 361-362 (1963); United States v. Blitz, 533 F.2d 1329, 1344 (2d Cir.), cert. denied, 429 U.S. 819 (1976) (waiver of objection to allege prosecutorial misconduct before the grand jury); United States v. Coppola, 526 F.2d 764, 772-773 (10th Cir. 1975) (waiver of objection to presence of allegedly unauthorized person in the grand jury room). In any event, the grand jury's designation of Agent McAllister as its "agent" neither implicated its independence nor compromised its secrecy.

It is not uncommon for federal investigative officers to be designated as "agents of the grand jury." Indeed, the term has been used by the Supreme Court (United States v. Mara, 410 U.S. 19, 20, 24 (1973)), by this Circuit (Matter of Atterbury, 323 F.2d 726 (6th Cir. 1963)), and by other courts of appeals. See Hampton v. Hanrahan, 600 F.2d 600, 618-619 (7th Cir. 1979); In re Grand Jury Proceedings (Mills), 686 F.2d 135, 136, 140 n.4 (3d Cir.), cert. denied, 459 U.S. 1020 (1982); United States v. Cosby, 601 F.2d 754, 757-758 n.6 (5th Cir. 1979) ("assum[ing], without deciding, that this is a proper practice"); In re Perlin, 589 F.2d 260, 262 (7th Cir. 1978); United States v. Stanford, 589 F.2d 285, 290, 292 (7th Cir. 1978), cert. denied, 440 U.S. 983 (1979). On the one hand, the practice of the grand jury's "swearing the FBI personnel as agents and cautioning them about the need for secrecy" has expressly been approved as a laudable

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context of a claim that Fed. R. Crim. P. 6(e) was violated by Agent McAllister's retention of financial records that had been subpoenaed from Local 5967 (14 Tr. 214-263; XVI Tr. 5-14). The prosecutor argued that appellants' objection was untimely (16 Tr. 114).

"precaution[] to preserve secrecy." United States v. Stanford, supra, 589 F.2d at 292. On the other hand, the practice is entirely consistent with the independent investigatory role performed by the grand jury.

As the Supreme Court recently noted, "a modern grand jury would be much less effective without the assistance of the prosecutor's office and the investigative resources it commands." United States v. Sells Engineering, Inc., 103 S.Ct. 3133, 3141 (1983). The grand jury "depends largely on the prosecutor's office to secure the evidence on the witnesses it requires." Ibid. And, as practical matter, the prosecutor is, in turn, dependent on federal investigative agents in fulfilling this function. Id. at 3141 n.13. [37/] Without such "thorough and effective investigation, the grand jury would be unable either to ferret out crimes deserving of prosecution, or to screen out charges not warranting prosecution." Id. at 3138.

37/ As the Senate Judiciary Committee pointed out with respect to the 1977 amendment of Fed. R. Crim. P. 6(e) (S. Rep. 95-354):

> Attorneys for the Government in the performance of their duties must possess the authority to utilize the services of other government employees. Federal crimes are "investigated" by the FBI, the IRS, or by Treasury agents and not by government prosecutors or the citizens who sit on grand juries. Federal agents gather and present information relating to criminal behavior to prosecutors who analyze and evaluate it and present it to grand juries. Often the prosecutors need the assistance of the agents in evaluating evidence. Also, if further investigation is required during or after grand jury proceedings, or even during the course of criminal trials, the Federal agents must do it.

Here, Agent McAllister was designated as the grand jury's "agent" primarily to act as custodian of physical exihibits amassed by the grand jury during its investigation. His appointment to this innocuous caretaking function was entirely reasonable in view of the substantial quantity of physical evidence -- including firearms and explosives -- amassed during the instant investigation. Moreover, in additionally assisting in gathering evidence, Agent McAllister merely performed an indispensible service which grand jurors necessarily rely upon investigative agents to perform. In no case did Agent McAllister perform in a manner that undermined the essential independence of the grand jury.

Just as prosecutors may served "both the grand jury's functions and their own prosecutorial duties" without doing violence to the grand jury's independence (see United States v. Sells Engineering, Inc., supra, 103 S.Ct. at 3141), there is nothing untoward about investigative agents similarly serving both interests. Thus, in United States v. Bailey, 332 F. Supp. 1351, 1356-1357 (N.D. Ill. 1971), the court squarely rejected the claim that the grand jury was precluded from appointing "agents" to assist its investigatory function:

> The defendants finally contend that, irrespective of the power of the grand jury to seize exemplars, it was not empowered to appoint agents to receive and examine them. In this case, the grand jury ordered certain of the defendants to provide exemplars to the Federal Bureau of Investigation. We believe the defendants' contention to be meritless. To require the grand jury itself to analyze, without the aid of expert analysis, the handwriting exemplars that have been seized consistent with the Fourth Amendment would

> render meaningless the even limited power to order exemplars. The F.B.I. and their agents were best qualified, upon completion of their analysis of the extracted exemplars, to assist the grand jurors in determining whether certain items were forgeries and whether there was probable cause to believe that a particular person or persons wrote the forgeries. Such analysis is incapable of being performed by lay members of a grand jury.

The same rationale is equally apposite here.

There is equally no merit to appellants' claim that Agent McAllister's appointment compromised grand jury secrecy. In the first place, Agent McAllister's oath specifically called his attention to the non-disclosure requirements of Rule 6(e), and, accordingly, it constituted a salutary "precaution[] to preserve secrecy." United States v. Stanford, supra, 589 F.2d at 292. But beyond this, "matters occurring before the grand jury" were in any event properly disclosed to Agent McAllister as "government personnel * * * deemed necessary by an attorney for the government to assist * * * in the performance of such attorney's duty to enforce federal criminal law." See Fed. R. Crim. P. 6(e)(3)(A)(ii); United States v. Lartey, 716 F.2d 955, 964 (2d Cir. 1983); United States v. Stanford, supra, 589 F.2d at 291-292. 38/ Hence, irrespective of his role as "agent of the grand

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38/ The prosecutor advised the court that Agent McAllister was assisting him as necessary "government personnel" when the agent received grand jury materials (14 Tr. 256-257). The prosecutor further averred that he had filed a sealed listing with the court of all persons to whom disclosure of grand jury materials were made (14 Tr. 253).

jury," Agent McAllister was strictly governed by Rule 6(e)'s secrecy provisions. 39/

39/ As appellants point out (Stumbo Br. 40-44), the practice of swearing federal law enforcement agents as "agents of the grand jury" has recently been criticized by two district judges. See United States v. Kilpatrick, 594 F. Supp. 1324, 1328-1331 (D. Colo. 1984); United States v. Anderson, 577 F. Supp. 223, 232-233 (D. Wyo. 1983); United States v. Kilpatrick, 575 F. Supp. 325, 327-330 (D. Colo. 1983). We believe that these decisions are incorrect in this respect and are based on a misperception of the fundamental role that federal agents must necessarily play if the grand jury is to fulfill its investigatory function.

At all events, the instant circumstances do not lend themselves to an application of the Kilpatrick-Anderson holdings. Unlike here, where Agent McAllister was sworn by the grand jury foreman, the agents in Kilpatrick were sworn by the prosecutor (594 F. Supp. at 1328) and the record in Anderson was silent as to how the agents were sworn (577 F. Supp. at 232). Moreover, the subsequent activities of the newly-sworn "agents" in Kilpatrick and Anderson were much more pervasive than the primary caretaking role performed by Agent McAllister, and, unlike here, the courts in Kilpatrick and Anderson perceived the existence of a wide range of other abusive grand jury procedures.

III. THE DISTRICT COURT PROPERLY REFUSED TO DISMISS THE INDICTMENT BECAUSE OF ALLEGED PROSECUTORIAL MISCONDUCT

Appellants contend (Jones Br. 42-59) that the district court, in the exercise of its supervisory powers, should have dismissed the indictment because the prosecutor "concealed" until mid-trial several Brady items of an impeaching nature and because the prosecutor "misled" the grand jury by failing to inform the grand jury that the testimony of its principal witnesses was not credible. 40/ Even assuming arguendo that there was any prosecutorial misconduct, it is well established that a court may not use its supervisory powers to dismiss an indictment in the absence of discernible prejudice to the accused (United States v. Morrison, 449 U.S. 361, 364-367 (1981); cf. United States v. Hasting, 461 U.S. 499, 505-507 (1983)) and a "showing of demonstrated and longstanding prosecutorial misconduct" (see, e.g., United States v. Adamo, 742 F.2d 927, 942 (6th Cir. 1984). Appellants have not met these requirements here.

1. Appellants were provided with extensive discovery in the district court that included disclosure and inspection of all government exhibits, the production of agents' handwritten notes (V Tr.(4) 45, 71-74; VI Tr. 121), and the early production of Jencks material during a lengthy mini-hearing regarding the admissibility of co-conspirator declarations (V Tr.(1) 111-

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40/ Appellant Jones cites (Br. 51-56) the swearing of ATF Agent McAllister as an "agent of the grand jury" as an additional indication of prosecutorial misconduct. As we have shown elsewhere (pp. 34-39, supra), the swearing of Agent McAllister was proper and in no way implicated the validity of the proceedings.

118). In addition, the prosecutor agreed to produce tape recordings of all consensually monitored conversations between an undercover agent and the various co-conspirators during the agent's investigation of the Ray-Mac violence (XIII Tr. 171-181). [41] The bulk of these tape recordings were produced at trial on February 6, 1984 (XIII Tr. 182-184, 306-310); however, two tape recordings of conversations between the undercover agent and accomplices Phillip Booth and Phillip Moore were not produced until approximately two weeks later. Because these later-produced tapes contained statements inconsistent with Booth's and Moore's trial testimony, appellants charge that the prosecutor purposefully concealed Brady material.

The short answer to appellants' claim is that they suffered absolutely no prejudice. Even though there was an inadvertent delay in production, [42] the tape recordings were nonetheless disclosed in time for their contents to be fully utilized in

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41/ At least 56 tape recordings of consensually monitored conversations involving various defendants were produced well in advance of trial.

42/ Given the substantial number of monitored conversations and the logistical problems in assembling the tapes and reviewing their contents, it was unfortunate -- but hardly an indication of prosecutorial bad faith -- that all of the tapes were not produced as soon as envisioned.

We further note that not all delays in producing discoverable materials or subpoenaed documents were attributable to the prosecutor. Thus, on at least five occasions -- and four involving appellant Jones' counsel -- defense exhibits were proffered without having previously been disclosed to the government (see 24 Tr. 268; 33 Tr. 51; 36 Tr. 100, 146; 38 Tr. 106-108; XIX Tr. 26). One of these instances of defense non-production caused the court to remark: "[Y]ou are accusing the prosecution of aggressive prosecution and I just want the record to reflect that there are instances of aggressive defense" (XIX Tr. 26).

impeaching Phillip Booth (24 Tr. 196-197, 220-222) and Phillip Moore (22 Tr. 152-155) concerning their inconsistent -- and false (ibid.) -- accounts of their Ray-Mac-related activities to the undercover agent. Not only, as the district court noted (30 Tr. 19), were the Brady materials used in cross-examination, the court additionally allowed defense counsel to recall any witness for further examination that might be necessitated by the delayed production (18 Tr. 3-4). In such circumstances, "it is clear that the appell[ants] were not prejudiced by the tardy disclosure" of the tape recordings. United States v. Campagnuolo, 592 F.2d 852 (5th Cir. 1979). See also, United States v. Xheka, 704 F.2d 974, 979-982 (7th Cir. 1983), cert. denied, 104 S.Ct. 486 (1984); United States v. Nixon, 634 F.2d 301, 312-313 (5th Cir.), cert. denied, 454 U.S. 828 (1981); United States v. Barnes, 604 F.2d 121, 149-150 (2d Cir. 1979), cert. denied, 446 U.S. 907 (1980); United States v. McPartlin, 595 F.2d 1321, 1345-1347 (7th Cir.), cert. denied, 444 U.S. 833 (1979). 43/

2. Equally unavailing is appellants' contention that the prosecutor misled the grand jury by failing to inform the grand jurors that Phillip Booth and Phillip Moore were not credible and had given prior inconsistent statements to an undercover agent concerning their roles in the Ray-Mac violence. As this Court

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43/ Near the end of trial, the ATF agent having custody of all tape recordings pertaining to the case filed an affidavit averring that all tapes listed in the surveillance log (Gov. Ex. 116) had been provided to defense counsel either before or during trial. See R. 463.

has repeatedly held, however, there is no requirement that the prosecutor present to the grand jury evidence that is impeaching or exculpatory in nature. See United States v. Adamo, 742 F.2d 927, 936-938 (6th Cir. 1984); United States v. Blanton, 700 F.2d 298, 311 (6th Cir. 1983), modified, 719 F.2d 815 (6th Cir. 1983), cert. denied, 104 S.Ct. 1592 (1984); United States v. Ruyle, 524 F.2d 1133, 1135 (6th Cir. 1975), cert. denied, 425 U.S. 934 (1976). Thus, it is legally irrelevant the instant grand jury was not informed that, contrary to their grand jury testimony, Booth had told an undercover agent that he destroyed the auger with 47 sticks of dynamite or that Moore had told the same uncover agent that he had been paid $5000 for burning the tipple.

The prosecutor's obligation of presenting to the grand jury testimony that he believes to be true (see United States v. Adamo, supra, 742 F.2d at 940) was met here. As Booth and Moore explained at trial (22 Tr. 152-155; 24 Tr. 196-197, 220-222), their inconsistent statements to the undercover agent -- and not their grand jury and trial testimony -- were false since, believing him to be an underworld "hit" man, they had distorted the extent of their Ray-Mac activities in order to impress him. Moreover, the grand jury and trial testimony of these two witnesses was consistent with the accounts given by accomplices Jake Moore, Philman Caudill, and Van Patton as to the equipment bombing and by accomplices Basil Moore and Philman Caudill as to the tipple arson (see pp. 13-16, supra). [44/] We have no reason

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44/ Thus, none of these accomplices who witnessed these two extortionate acts place either Booth or Moore at the scene of (Continued)

to believe that either Booth or Moore perjured themselves during their grand jury testimony. Nor is there any reason to speculate that the grand jury would have failed to find probable cause to indict had it been aware of the prior inconsistent statements; indeed, the petit jury was able to conclude appellants' guilt beyond a reasonable doubt despite the extensive impeachment of Phillip Booth and Phillip Moore at trial.

Nor does the holding in United States v. Basurto, 497 F.2d 781 (9th Cir. 1974), require the dismissal of the indictment based on appellants' allegation that the indictment was "possibly" based on perjured testimony. Since Basurto was decided, its continuing validity has been questioned by the Ninth Circuit (see United States v. Bracy, 566 F.2d 649, 655 (9th Cir. 1977), cert. denied, 435 U.S. 1301 (1978)) and by other courts (United States v. Bracy, 435 U.S. 1301 (1978) (Rehnquist, J., op. in chambers); Talamante v. Romero, 620 F.2d 784, 790 n.7 (10th Cir.), cert. denied, 449 U.S. 877 (1980); United States v. Cathey, 591 F.2d 268, 271-272 (5th Cir. 1979)). Indeed, in Adamo, supra, this Court recently found "no reason to impose" upon the government the rigid remedy provisions of Basurto when an accused's right to a fair trial is not demonstrably prejudiced (742 F.2d at 940-941). Moreover, the Ninth Circuit has noted that Basurto dealt with a situation of acknowledged and undisputed perjury before the grand jury. See United States v.

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either crime. Moreover, Phillip Booth's statement to the undercover agent that he used 47 sticks of dynamite to destroy the auger is further contrary to the ATF expert's conclusion as to the size of the bomb used (see n. 19, supra).

Bracy, supra, 566 F.2d at 653-654; United States v. Kennedy, 564 F.2d 1329, 1336 (9th Cir. 1977), cert. denied, 435 U.S. 944 (1978). No such threshold showing of clear perjury has been made in the context of this case. Cf. United States v. Cathey, supra, 591 F.2d at 272. 45/

45/ At the least, appellants contend (Jones Br. 57) that the court should have conducted an evidentiary hearing into their allegations. Since there was no obligation on the prosecutor to present exculpatory information to the grand jury, the failure to do so a fortiori did not constitute misconduct. Similarly, the remedy for a Brady violation that prejudices the accused is a new trial at which the previously undisclosed materials may be utilized, not dismissal of the indictment. Finally, the court heard Agent McAllister's account of his activities as an "agent of the grand jury" and received by avowal the transcripts of his grand jury testimony (see p. 34, supra). As such, the district court did not abuse its discretion in failing to hold a hearing. Cf. United States v. Wilson, 715 F.2d 1164, 1170 (7th Cir.), cert. denied, 104 S.Ct. 434 (1983).

IV. THERE WAS NO FATAL VARIANCE BETWEEN THE INDICTMENT AND THE PROOFS AT TRIAL

Count 5 of the indictment alleged in part that the tipple at Simpson's Branch that was destroyed by arson "had been leased by Ray-Mac." Immediately prior to the start of trial, the prosecutor informed the court that "[t]he proof will show that in fact Ray-Mac did use the tipple but the formal lease agreement * * * is made out to Coal-Mac" (5 Tr. 31). 46/ The court thereafter allowed the government to introduce evidence concerning Coal-Mac Sales' lease of the tipple (XIII Tr. 49, 54-59; Gov. Exs. 21, 21A, and 21B) and, in charging the jury on Count 5, omitted reference to the allegation that the tipple had been "leased by Ray-Mac" (44 Tr. 162). Although there was no formal amendment of the instant indictment, appellant Meade contends (Br. 9-16) that there was a fatal variance between the allegations and proofs on Count 5 that amounted to a constructive amendment of the indictment. We disagree. 47/

It is axiomatic that the government's trial proofs need not precisely replicate the allegations in the indictment. See United States v. Lemire, 720 F.2d 1327, 1344 (D.C. Cir. 1983),

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46/ As the prosecutor stated (ibid.) and defense counsel acknowledged (IX Tr. 47-48), the lease identifying Coal-Mac Sales as the lessee was made available to the defense during discovery.

47/ Overt Act 40 of the conspiracy count (Count 1) also alleged that the tipple at Simpson's Branch was "leased to Ray-Mac." Appellants do not argue that the validity of their conspiracy convictions were implicated by the alleged fatal variance between the indictment and the trial proofs. Of course, a claim of fatal variance or constructive amendment does not affect the validity of the convictions of any defendants on other counts. See 1 C. Wright, Federal Practice and Procedure (Criminal 2d), § 127 at 424 (1982).

cert. denied, 104 S.Ct. 2678 (1984); United States v. Norton, 700 F.2d 1072, 1077 (6th Cir.), cert. denied, 103 S.Ct. 1885 (1983). A variance in proof is prejudicial only if it "effectively alter[s] the charging terms of the indictment." United States v. Cusmano, 659 F.2d 714, 719 (6th Cir. 1981). If, however, a modification in proof does not change the "basic theory" of the government's case, unfairly surprise the defendant, or create the risk that the defendant might be prosecuted twice for the same offense, a defendant's substantial rights will not be affected by a variance in proof. See Berger v. United States, 295 U.S. 78, 82 (1935); United States v. Cina, 699 F.2d 853, 858 (7th Cir.), cert. denied, 104 S.Ct. 481 (1983).

This is not a case in which the jury was charged on a new and distinct theory of guilt (compare, Stirone v. United States, 361 U.S. 212 (1960); United States v. Cusmano, supra; United States v, Jones, 647 F.2d 696, 698-700 (6th Cir.), cert. denied, 454 U.S. 898 (1981)) or in which there was an extensive and material variance in proofs as to crucial events not pleaded in the indictment (compare, United States v. Beeler, 587 F.2d 340 (6th Cir. 1978). As this Court stated in Cusmano, supra, 659 F.2d at 719, the two essential elements of a Hobbs Act violation are extortionate activity and interference with interstate commerce. Here, Count V alleged in essential part that appellant Meade and others extortionately "set fire to and destroy[ed] a coal tipple located at Simpson's Branch * * * in an attempt to stop Ray-Mac from engaging in the business of mining and shipping coal" in interstate commerce. That the lease was formally held

by Coal-Mac Sales rather than Ray-Mac is of no import: the evidence clearly showed that the lease was executed to benefit Ray-Mac by allowing it to cut its production costs by providing a railhead closer to its mining site (XIII Tr. 49). [48/] Thus, regardless of the lessee's identity, the trial proofs showed that Meade's extortionate activity affected interstate commerce in exactly the way alleged by the grand jury. [49/]

The misidentification of the lessee in this case is much like the misidentification of the target of the terrorist attack in United States v. Norton, supra. There, the indictment alleged a plan to bomb the Jewish temple in Nashville, Tennessee, and the proofs at trial showed an attempt to bomb the Jewish synagogue in

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48/ Appellant Meade makes much of the fact that Ray-Mac and Coal-Mac were different entities and speculates that the grand jury may not have returned an indictment on Count 5 if it had been aware of the true identity of the lessee. As the district court correctly noted, the two entities were part of "the same family" (IX Tr. 49), and, indeed, their fortunes were inextricably tied. Thus Frank Justice and James McGhee, partners in Mac Mining, wholly owned Ray-Mac as their production subsidiary and, through Mac Mining, further owned a controlling interest in Coal-Mac Sales, which they capitalized and "set up to sell their coal" (XIII Tr. 23-24, 46-47). Moreover, the related entities operated out of the same offices (XIII Tr. 47), and their financial data interlapped (29 Tr. 95-96, 151). In such circumstances, the grand jurors could readily conclude that the destruction of property leased by Coal-Mac Sales had an adverse affect on Ray-Mac's ability to do business. So too, the petit jury, which was properly instructed on the element of interstate commerce (44 Tr. 144-145, 162-163), could also reach the same result.

49/ Since the defense was furnished with copies of the lease well in advance of trial (see n. 46, supra), the government's proofs relating to the lease did not unduly surprise defense counsel. Furthermore, the description of the tipple in the indictment, which was supplemented by both the lease and photographs of the tipple at trial, effectively disspelled any risk of double jeopardy arising from the variance.

the same city. Rejecting a claim that this "mistake in factual detail" required reversal, this Court held (700 F.2d at 1077):

> Even those counts that describe the Temple as the target do not differ materially from the crime proven at trial: the [defendants] were shown to have conspired and to have attempted to destroy a Jewish place of worship in Nashville using stolen explosives transported across state lines.

See also United States v. Von Stoll, 726 F.2d 584, 585-587 (9th Cir. 1984) (no fatal variance since "[t]he only inconsistency is that the indictment specified that Von Stoll took the money from one partner, while the proof showed he got it from the other. The identity of the defrauded person is irrelevant * * *"); United States v. Hansen, 701 F.2d 1215, 1220-1221 (7th Cir. 1983) (no fatal variance where name of victim bank corrected); United States v. McCrary, 699 F.2d 1308, 1310-1311 (11th Cir. 1983) (no fatal variance as to a misidentification of contraband smuggled into a prison); United States v. Spatuzza, 331 F.2d 214, 216 (7th Cir.), cert. denied, 379 U.S. 829 (1964) (no fatal variance where the indictment alleged a theft from the "depot" of the "New York Central System" and the proof showed a theft from the "yard" of its wholly owned subsidiary, the "New York Central Transport Co."). 50/

50/ Indeed, since the precise identification of the lessee did not constitute a matter of substance, we believe that the district court could formally have corrected the allegation or deleted it altogether without running afoul of Meade's right to be tried only on charges returned by the grand jury. See United States v. Doby, 598 F.2d 1137, 1142 (8th Cir. 1979) (amendment to correct name of victim bank); United States v. Powers, 572 F.2d 146, 152 (2d Cir. 1978) (amendment to correct description of weapon in a firearms prosecution); United States v. McGrath, 558 F.2d 1102, 1104-1105 (2d Cir. 1977) (amendment to correct name of (Continued)

Here, as in those cases, appellant Meade's substantial rights were not affected by a variance in proof as to a single factual detail.

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governmental body by which the defendant was employed); United States v. Stith, 479 F.2d 315, 317 (8th Cir.), cert. denied, 414 U.S. 845 (1973) (amendment to correct location of embezzled bank); Dye v. Sacks, 279 F.2d 834, 837 (6th Cir. 1960) (amendment to correct description of robbery victim). See also, 1 C. Wright, Federal Practice and Procedure (Criminal 2d), § 127 at 419-420 (1982) ("Thus amendments have been allowed to correct a misnomer * * *").

V. APPELLANT STUMBO IS NOT ENTITLED TO REVERSAL OF HIS CONVICTIONS BECAUSE OF AN ALLEGED COMMENT ON HIS FAILURE TO TESTIFY

During his rebuttal argument, the prosecutor stated (44 Tr. 107-108):

> Who were the timber rats? Ed R. Moore, Ed Ray Moore. He is not here to tell us about it. But German is. They told you that German and Panhandle were the timber rats. They were the one[s] [who] led the charge on both sides of the hills. That led these other men up in there.

Appellant Stumbo contends (Br. 27-38) that the prosecutor's statement constituted a "direct and deliberate" comment on his failure to testify, in violation of the rule in Griffin v. California, 380 U.S. 609 (1965). Since Stumbo did not register a timely objection to the remark during the prosecutor's summation (see 44 Tr. 107-108), [51] however, his instant complaint is

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[51] Stumbo's counsel did not register an objection when the challenged remark was made (44 Tr. 107-108) nor did he object during the time that the jury was out of the courtroom between the end of the rebuttal argument and the beginning of the jury instructions (44 Tr. 114-116). Instead, counsel delayed until an intermission during the court's jury instructions before raising any objection (44 Tr. 148).

Appellant Stumbo argues (Br. 28) that he did not waive his right to challenge the prosecutor's remarks since, under the rules of the district court, he objected "at the first available opportunity." Nothing in the district court's rules dispensed with the need for a contemporaneous objection, however. Prior to final arguments, the court informed counsel (42 Tr. 29-30):

> If someone has an objection he just stands and doesn't say anything. I will indicate I am aware of it and he can sit back down. Then at the end of the time when it is over, then they can approach the Bench and we will go over the objection.

Acting in accordance with this procedure, counsel for codefendant Tackett objected once to the prosecutor's closing argument (42

(Continued)

reviewable only for plain error. See United States v. Kennedy, 714 F.2d 968, 976-977 (9th Cir. 1983), cert. denied, 104 S.Ct. 1305 (1984); United States v. Caucci, 635 F.2d 441, 448 (5th Cir.), cert. denied, 454 U.S. 831 (1981); United States v. Polytarides, 584 F.2d 1350, 1353-1354 (4th Cir. 1978). At all events, there is no reason to reverse appellant Stumbo's convictions because of the prosecutor's statement.

We do not believe that the comment implicated the rule in Griffin. To begin, the instant remark was in no way akin to the comments in cases in which deliberate Griffin violations have been found since the prosecutor neither referred directly to Stumbo's failure to testify nor invited the jurors to draw an adverse inference from it. Compare, United States v. Robinson, 716 F.2d 1095, 1096 (6th Cir. 1983), cert. denied, 104 S.Ct. 722 (1984) ("He could have taken the stand and explained it for you"); Eberhardt v. Bordenkircher, 605 F.2d 275, 278 (6th Cir. 1979) ("who else could have testified," accompanied by a gesture towards the defendant); Rachel v. Bordenkircher, 590 F.2d 200, 202 (6th Cir. 1978) ("We will never know, these men won't tell us. The only other man would tell us is dead."); Berryman v. Colbert, 538 F.2d 1247, 1249 (6th Cir. 1976) ("Noboby was there * * * that we can bring here to testify. The defendants, yes, but we can't get them to testify"). 52/

Tr. 55) and the prosecutor objected eight times to the arguments of various defense counsel, including four times to that of Stumbo's counsel (42 Tr. 110-111; 43 Tr. 32, 44, 91, 119, 120, 121; 44 Tr. 9). And, where appropriate, the court responded with cautionary instructions (42 Tr. 61-63; 43 Tr. 54; 44 Tr. 9).

52/ Not only does the tenor of the prosecutor's remark show that (Continued)

Moreover, "[i]f two plausible interpretations can be given to a prosecutor's ambiguous final argument, the court should not strive to adopt the one which casts doubt upon the prosecutor's intentions." Angel v. Overberg, 682 F.2d 605, 608 (6th Cir. 1982) (en banc). See also, United States v. Monaghan, 741 F.2d 1434, 1437-1438 (D.C. Cir. 1984). Although, under one interpretation, the comment may be construed as an indirect reference on Stumbo's failure to testify, it is equally subject to a second, benign interpretation. See Steele v. Taylor, 684 F.2d 1193, 1205 (6th Cir. 1982), cert. denied, 103 S.Ct. 1501 (1983).

Thus, during closing arguments, a codefendant's counsel stated that the jury would "never know what Ed Panhandle Moore had to say * * * because he is dead" and argued that the government was "lay[ing] every statement" as to the defendants' participation in the Ray-Mac violence on Panhandle Moore since he was unable to disavow them (43 Tr. 31). Reasonably read, the prosecutor's later remark in rebuttal referred only to the fact that there were two "timber rats" -- one dead and one present in the courtroom -- and that the identification of the "timber rats" depended not on Panhandle's out-of-court declarations, but upon the direct testimony of various government witnesses who were aware that "German and Panhandle * * * led the charge on both

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it was not a direct and deliberate comment on the failure to testify, but the surrounding circumstances similarly indicate a lack of deliberateness. Only four of the 14 codefendants testified at trial. It is illogical to assume that the prosecutor would single out just one of the non-testifying codefendants and intentionally comment on his failure to testify in the brief and ambiguous fashion at issue here.

sides of the hill" (44 Tr. 107-108). See Hall v. Wainwright, 565 F. Supp. 1222, 1237 and n.23 (M.D. Fla. 1983).

In any event, even if the prosecutor's passing comment "was manifestly intended to be or was of such a character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify" (Butler v. Rose, 686 F.2d 1163, 1170 (6th Cir. 1982) (en banc)), any error was harmless beyond a reasonable doubt. The Supreme Court has recently made clear that the constitutional harmless error standard is wholly applicable to asserted Griffin violations (United States v. Hasting, 461 U.S. 599, 507-511 (1983)), and, in turn, this Circuit has held that an error must be weighed in light of the nature and prominence of the prosecutor's remark, the strength of the evidence, the existence of curative instructions, and the presence or absence of other substantial trial errors. See United States v. Robinson, supra, 716 F.2d at 1100; Hearn v. Mintzes, 708 F.2d 1072, 1077 (6th Cir. 1983); Eberhardt v. Bordenkircher, supra, 605 F.2d at 278. "Consider[ation] [of] the trial record as a whole" (United States v. Hasting, supra, 461 U.S. at 509) leaves no doubt the constitutional violation alleged here was harmless. 53/

53/ As we show elsewhere in our brief, there were no other substantial trial errors that exacerbated the impact of the instant remark.

Thus, the challenged remark constituted a single, isolated event during otherwise unexceptional closing and rebuttal arguments that totaled 131 pages in length. Compare, United States v. Soulard, 730 F.2d 1292, 1307 (9th Cir. 1984) (harmless error where isolated remark), with Raper v. Mintzes, 706 F.2d 161, 167 and n.5 (6th Cir. 1983) ("repeated comments" by prosecutor were "the dispositive factor in this case"). The prominence of the remark was further reduced since it was "oblique and somewhat obscure" (United States v. Kennedy, supra, 714 F.2d at 977) and did not stress any inference of guilt to be drawn from Stumbo's failure to testify (see, e.g., United States v. Armstrong, 654 F.2d 1328, 1336 (9th Cir. 1981), cert. denied, 454 U.S. 1157 (1982)). Indeed, defense counsel's failure to object contemporaneously attests to the ambiguous nature of the comment. Cf. Butler v. Rose, supra, 686 F.2d at 1172 (failure to object "notable"); Cook v. Bordenkircher, 602 F.2d 117, 121 (6th Cir.), cert. denied, 444 U.S. 936 (1979) (failure to object a "significant consideration").

Moreover, the district court gave a full set of instructions regarding the presumption of innocence, the lack of any duty on the part of the defendants to testify or present evidence, and the prohibition against drawing adverse inferences from the failure to testify (44 Tr. 119, 124, 133). Such cautionary instructions during the general jury charge are adequate to cure any possible prejudice from an isolated remark (see United States v. Soulard, supra, 730 F.2d at 1307), especially when, as here, defense counsel's timely failure to object prevented the court

from giving an immediate cautionary instruction. That the jury followed the instructions and drew no adverse inference from Stumbo's failure to testify is well illustrated by its acquittal of Stumbo on five of the eight counts against him (47 Tr. 26) (see United States v. Saenz, 747 F.2d 930, 942 (5th Cir. 1984)), including Counts 2 and 3 that related to the events in the hills alluded to in the prosecutor's rebuttal (cf. Berryman v. Colbert, supra, 538 F.2d at 1248, 1250).

Finally, as we have detailed above (see pp. 4-16, supra), there was substantial evidence showing that Stumbo, as one of appellant Jones' contract mine operators, played a pivotal role in fomenting the Ray-Mac violence, and Stumbo does not now challenge the sufficiency of the government's evidence. Indeed, in his brief (Br. 2) and in arguments at trial (31 Tr. 40-42, 51), Stumbo conceded that the events charged in the indictment occurred, arguing only that they were excused by the Enmons defense. Cf. United States v. Hasting, supra, 461 U.S. at 511-512.

Given these circumstances, any allusion by the prosecutor to Stumbo's failure to testify in addressing the question, "who were the timber rats?," was harmless beyond a reasonable doubt. 54/ See, United States v. Soulard, supra, 730 F.2d at 1307; United States v. Armstrong, supra, 654 F.2d at 1336; United States v.

54/ A fortiori, the isolated remark did not affect the validity of the convictions of the remaining appellants. See United States v. Robinson, 716 F.2d at 1100-1101. Although none of the remaining appellants testified, they were not "timber rats," and all were acquitted on at least three counts each. See United States v. Saenz, supra.

Pruitt, 719 F.2d 975, 978 (9th Cir.), cert. denied, 104 S.Ct. 536 (1983); United States v. Runge, 593 F.2d 66, 71 (8th Cir.), cert. denied, 444 U.S. 859 (1979).

VI. APPELLANTS WERE NOT DEPRIVED OF THEIR RIGHT TO CONSULT WITH COUNSEL BECAUSE OF THE COURTROOM SEATING ARRANGEMENT AT TRIAL

Because of the crowded courtroom conditions, the 12 defense counsel were seated at an L-shaped table at trial, while the 18 defendants were seated immediately behind the table in two rows of nine each (see 6 Tr. 55; Court's Ex. 1). 55/ Appellants contend (Stumbo Br. 50-59) that this seating arrangement deprived them of their Sixth Amendment right to consult effectively with their counsel. Their claim is not well taken.

As the Supreme Court has recognized, "[n]ot every restriction on counsel's time or opportunity * * * to consult with his client * * * violates a defendant's Sixth Amendment right to counsel." Morris v. Slappy, 461 U.S. 1, 11 (1983). See also United States v. Vasquez, 732 F.2d 846, 847-848 (11th Cir. 1984) (restriction on consultation until the conclusion of a bench conference); United States v. Hart, 551 F.2d 738, 739, 741 (6th Cir.), cert. denied, 434 U.S. 920 (1977) (order restricting verbal exchanges between defendants and counsel during trial). Moreover, it is equally well recognized that a district court has broad discretion "to arrange the seating for defendants and counsel" depending on "a variety of factors," including "the size

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55/ Originally, during a pre-trial mini-hearing and jury voir dire, the defendants were seated on one side of the spectators' section, with consultation allowed by notes (II Tr. 49) or by counsel entering the spectators' section to confer orally (II Tr. 50-52). At the suggestion of various defense counsel (6 Tr. 32, 34), including appellant Stumbo's counsel (II Tr. 50; 6 Tr. 37), it was suggested that the defendants be seated inside the bar railing in double rows behind counsel. The court adopted defense counsels' suggestion (6 Tr. 55).

of the courtroom, * * * the number of defendants and lawyers, * * * [and] security provisions." United States v. Turkette, 656 F.2d 5, 10 (1st Cir. 1981). See also United States v. Walker, 559 F.2d 365 (5th Cir. 1977); United States v. Shapiro, 565 F.2d 479 (7th Cir. 1977); United States v. Rios Ruiz, 579 F.2d 670, 674-675 (1st Cir. 1978).

Although the defendants were not seated at counsel table, the district court noted that the defendants would be within "five or six feet" from their respective counsel and would be "close enough" so that "they can get word to [counsel]" if they wished to confer (7 Tr. 41). And, although the defendants were not allowed to move around the courtroom because of security considerations (ibid.), the court allowed counsel to move to where their clients were seated and confer freely as the need arose (II Tr. 50-52; 7 Tr. 40-41). Finally, at no time did the court restrict in any fashion the defendants' right to consult freely with counsel during the not-infrequent recesses during trial. Compare, Geders v. United States, 425 U.S. 80 (1976); United States v. Bryant, 545 F.2d 1035 (6th Cir. 1976).

Given the congestion occasioned by this multi-defendant trial and the reasonable steps taken by the court to insure ready access between counsel and client, the courtroom seating arrangment imposed below did not deprive appellants of their Sixth Amendment rights. See United States v. Sorrentino, 726 F.2d 876, 887 (1st Cir. 1984) (where counsel was free to consult at will with defendant seated in the first row of the spectators' section, communication between defendant and counsel was neither

prevented nor unduly hindered); Anderson v. United States, 367 F.2d 553 (10th Cir. 1966) (no Sixth Amendment violation where counsel were allowed to confer with defendants seated separately during pre-trial suppression hearing). 56/

56/ People v. Zammora, 152 P.2d 180, 211-216 (Cal. Dist. Ct. App. 1944), upon which appellants principally rely (Stumbo Br. 53-55), is not to the contrary. There, the defendants were seated together as if in a "prisoner's box" that was "in one part of the courtroom some distance from the counsel table" (id. at 211), and counsel was prevented from conferring with their clients either in the courtroom or during recesses (id. at 211-213). Not only was Zammora based on a construction of a state constitutional provision that varies in language from the Sixth Amendment (see People v. Sharp, 499 P.2d 489, 495 (Cal. Sup. Ct. 1972)), but Zammora expressly has no application to circumstances like those here where the defendants are seated reasonably near counsel and counsel is accorded free access for consultation (152 P.2d at 215).

VII. THE DISTRICT COURT'S EVIDENTIARY RULINGS WERE CORRECT

Appellants contend that the district court erred in its various rulings admitting or excluding evidence at trial. However, such evidentiary determinations are committed to the sound discretion of the district court, and, as we show below, that discretion was not abused in the circumstances of this case.

A. The District Court Did Not Deprive Appellants Of Their Right To Confront Government Witnesses When It Limited The Scope of Cross-Examination.

Appellants contend (Jones Br. 27-39) that their confrontation rights were denied when the district court limited their cross-examination of witnesses Pearl and Phillip Booth and Phillip Moore regarding prior acts of misconduct, drug usage, and inconsistent statements. In imposing these limitations, the district court specifically found that the proffered examination would be cumulative, needlessly time-consuming, unduly prejudicial, and collateral to the issues at trial (see 19 Tr. 73-85, 190; 20 Tr. 220-221 (as per Pearl Booth); XIX Tr. 155; 36 Tr. 114 (as per Phillip Booth); 23 Tr. 26-27 (as per Phillip Moore)). The district court did not err in these determinations.

It is well recognized that a trial court has broad discretion in restricting both the scope and the length of cross-examination. See, e.g., Alford v. United States, 282 U.S. 687 (1931); United States v. LaRiche, 549 F.2d 1088, 1096 (6th Cir.), cert. denied, 430 U.S. 987 (1977). To be sure, as a constitutional matter, a court may not preclude cross-examination as to a witness' credibility and his possible biases and motives for testifying. See Davis v. Alaska, 415 U.S. 308 (1974). There

is, however, no need for a court to permit "unending excursions into each and every matter touching on veracity." United States v. DeLuca, 692 F.2d 1277, 1282-1283 (9th Cir. 1982). See also United States v. Haimowitz, 706 F.2d 1549, 1559 (11th Cir. 1983), cert. denied, 104 S.Ct. 974 (1984) (need not permit "detailed excursions into collateral matters"); United States v. Fortes, 619 F.2d 108, 118 (1st Cir. 1980). Thus, once cross-examination has revealed sufficient information by which the jury may assess the witness' possible motives for testifying falsely in favor of the government, the demands of the Confrontation Clause are fully met. Ibid.

Here, as the district court correctly noted (19 Tr. 230), the cross-examination of these witnesses was "extensive". Thus, Pearl Booth testified that she was testifying pursuant to a favorable plea agreement under which all charges against her were dismissed in return for her guilty plea to a single count of conspiracy to deal in dynamite without a license (17 Tr. 110, 235; 19 Tr. 127-128, 137-138, 144-146; 20 Tr. 126-129). As Pearl Booth explained, the circumstances underlying this felony conviction involved the exchange of a substantial quantity of dynamite to an undercover agent posing as a "hit man" in return for two bales of marijuana (18 Tr. 32-52). At the time of appellants' trial, Pearl Booth stated that she had pending a motion for reduction of her sentence (19 Tr. 146). In addition, Pearl Booth testified that appellant Jones financially "broke" her and her husband by refusing to pay for allegedly "dirty" coal (19 Tr. 194-197; 20 Tr. 148-149); that Jones reneged on a promise

to provide financial help to the Booths (19 Tr. 192-194); that she had used valium in 1982 (20 Tr. 120-124); and that she had lied to the undercover agent (20 Tr. 42-43). Pearl Booth also invoked before the jury her Fifth Amendment privilege regarding her alleged attempt to bribe state officials after her husband's driver's license had been revoked (20 Tr. 199-209).

Phillip Booth was similarly impeached with evidence of his post-arrest cooperation as an informant (XVIII Tr. 242-243) and his bargained plea to a charge of conspiracy to trade dynamite for marijuana (23 Tr. 196-197; XVIII Tr. 225-232; Jones Ex. 11). Phillip Booth stated that he had not been charged in any Ray-Mac related activities (XVIII Tr. 233, 238-239) and that he was awaiting sentencing on his conspiracy conviction (23 Tr. 196-197). Testifying that he would tell any lie when he had been drinking (XIX Tr. 68, 83), Phillip Booth admitted lying to state police officers during the week of February 15, 1982 (XVIII Tr. 192); to the undercover agent concerning his role in the Ray-Mac violence (24 Tr. 196-197; XVIII Tr. 156-157, 220-224); and to defense counsel and their investigator concerning the events at the Ray-Mac site (XVIII Tr. 260-267; XIX Tr. 16-22, 30-33). In addition, Phillip Booth was impeached with evidence of prior inconsistent statements regarding the Ray-Mac violence (XVIII Tr. 71-76, 131-132, 176-178; XIX Tr. 183-184, 203; Jones Ex. 19) and with his admission that Jones had put him out of business (XIX Tr. 24).

Finally, Phillip Moore was also impeached with evidence of his conviction in the dynamite-for-marijuana conspiracy (22 Tr.

5-6, 168-169; 23 Tr. 21; Jones Ex. 15) as well as with evidence of a 1970 felony conviction (22 Tr. 129-130, 133-137; Jones Ex. 14). Phillip Moore testified that all charges relating to the Ray-Mac violence had been dismissed (22 Tr. 173-175; 23 Tr. 46-46); that he had sold dynamite to the undercover agent on four occasions (22 Tr. 171-173); and that he had discussed potential jobs involving illegal conduct with the undercover agent, believing him to be a "con man" or a "dope runner" (23 Tr. 43-46). Lastly, Phillip Moore conceded that he had repeatedly lied to the undercover agent (22 Tr. 151-155, 161, 163; 23 Tr. 44-45) [57/] and had perjured himself in a recent judicial proceeding (22 Tr. 178-180).

In other cases in which there has been similarly extensive impeachment of the government's witnesses, reviewing courts have consistently rejected claims that the accused's confrontational rights were violated by additional restrictions on cross-examination. See, e.g., United States v. Haimowitz, supra; United States v. Wood, 695 F.2d 459, 464 (10th Cir. 1982); United States v. DeLuca, supra; United States v. Sonntag, 684 F.2d 781, 788 (11th Cir. 1982); United States v. Tracey, 675 F. 2d 433, 436-439 (1st Cir. 1982); United States v. Taylor, 657 F.2d 92, 93 (6th Cir.), cert. denied, 454 U.S. 1086 (1981); United States v. Garcia, 647 F.2d 794 (8th Cir.), cert. denied, 454 U.S. 970 (1981); United States v. Singh, 628 F.2d 758, 763-764 (2d Cir.), cert. denied, 449 U.S. 1034 (1980); United States v. Fortes,

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57/ The trial court specifically noted that Moore "admitted he is a liar" on 15 occasions (23 Tr. 158).

supra; United States v. Hoffa, 349 F.2d 20, 46 (6th Cir. 1965), aff'd., 385 U.S. 293 (1966). There is no reason to reach a different result here.

Appellants to the contrary, they were not entitled as a matter of right to inquire into Pearl Booth's prior specific acts of misconduct relating to her participation in an arson-for-profit scheme. Although Fed. R. Evid. 608(b) permits inquiry into specific acts of misconduct "concerning [a witness'] character for truthfulness," the rule "has been worded specifically to emphasize the discretionary power of the trial judge." United States v. Fortes, supra, 619 F.2d at 118; see also, 3 Weinstein's Evidence, ¶ 608[05] at 608-27 (1982). Accordingly, this Court has sanctioned the exclusion of evidence of acts of misconduct that bore on truthfulness. See Corbett v. Bordenkircher, 615 F.2d 722, 726-727 (6th Cir.), cert. denied, 449 U.S. 853 (1980) ("theft-related" offense); United States v. Vinson, 606 F.2d 149, 155-156 (6th Cir. 1979), cert. denied, 444 U.S. 1074 (1980) (bribery incident "was remote on credibility and unrelated to the merits"). See also, United States v. Haimowitz, supra (execution of fraudulent documents); United States v. Singh, supra, 628 F.2d at 764 (INS fraud); Cloud v. Thomas, 627 F.2d 742, 743-745 (5th Cir. 1980) (false statement). 58/

58/ Pearl Booth's invocation of her Fifth Amendment privilege as to the prior acts of misconduct (20 Tr. 54-60, 65-69, 71-75, 79-80) underscored the propriety of the district court's ruling excluding inquiry into those acts. Fed. R. Evid. 608 expressly provides that its provisions do not take precedence over a witness' Fifth Amendment privilege. And, this Court has held that an accused's confrontational rights are not prejudiced when, as here, a witness invokes the testimonial privilege as to (Continued)

Appellants' remaining challenges to the limitations on cross-examination are equally insubstantial. Thus, although the court precluded inquiry regarding Phillip Moore's drug usage, Moore denied during a proffer [59] that he used amphetamines (23 Tr. 6-7), and inquiry into any misconduct involving drug trafficking -- to which he invoked his Fifth Amendment privilege (23 Tr. 7-10) -- was precluded by Fed. R. Evid. 608(b). So too, any additional inquiry into Pearl Booth's acts of violence and lawlessness (see 20 Tr. 82-84) was at best cumulative in light of her admissions concerning her role in supplying guns and ammunition for the Ray-Mac violence and her subsequent conviction in the dynamite-for-marijuana conspiracy. Moreover, the court allowed adequate inquiry into Pearl Booth's mental status. After Pearl Booth stated during a proffer that she had been treated by a psychologist in 1974 and that she had hallucinated in 1977, five years before the instant events (20 Tr. 84-86, 90-94), the court allowed inquiry into any psychiatric problems at the time of the offense and at the time of trial (20 Tr. 116-117). And,

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collateral criminal activity that is unrelated to the subject of the witness' direct examination. United States v. LaRiche, supra, 549 F.2d at 1095-1097.

59/ Relying on United States v. Bohle, 445 F.2d 54 (7th Cir. 1971), appellants contend (Jones Br. 35-36) that it was error for the district court to use the "avowal" procedure of proffering the witnesses' testimony. Although the court in Bohle was concerned with the unfair advantage given the government if its witnesses are apprised of impeaching information in advance of actual cross-examination, different considerations apply where, as here, the district court has already precluded a specific line of cross-examination and the "avowal" procedure serves the purpose of providing a record for appeal. Indeed, Fed. R. Evid. 103(a)(2) expressly provides that the substance of the excluded testimony should be "made known to the court by offer [of proof]."

of course, her ability to recall events was adequately tested by questioning.

Finally, appellants claim that they should have been able to question Pearl Booth concerning her alleged threat to "get even" with Jones (20 Tr. 83-84) and Phillip Booth concerning his execution of affidavits recounting inconsistent versions of the Ray-Mac events. Although the court precluded cross-examination into both matters, extrinsic evidence was admitted showing that Pearl Booth threatened to "get Edgar Jones one way or the other" (33 Tr. 274) and that Phillip Booth indeed gave sworn affidavits to defense counsel contradicting his testimony (36 Tr. 57-70, 127-133, 147-149, 151-153; Jones Exs. 16 and 18). 60/ Since these items were otherwise admitted into evidence, appellants cannot complain that they were precluded from inquiry during cross-examination. See Batchlor v. Cupp, 693 F.2d 859, 864-865 (9th Cir. 1982), cert. denied, 103 S.Ct. 3547 (1983); United States v. Singh, supra, 628 F.2d at 765. 61/

60/ The jury was also instructed that these sworn inconsistent statements could be considered as substantive evidence (36 Tr. 155-156).

61/ Appellant Jones also contends (Br. 36-37) that the court should have allowed him to cross-examine Ray-Mac officials regarding their procurement of guns during the week of February 15, 1982, and regarding an unrelated shooting incident between Ray-Mac employees and UMWA members in 1981 (see XIII Tr. 116-121, 160-169). There was, however, evidence that Mac Mining purchased semi-automatic weapons during the week of February 15 and supplied them to the Ray-Mac site (XI Tr. 93, 262-263; 31 Tr. 197-198). Moreover, there was abundant evidence adduced that Ray-Mac employees were armed and exchanged gunfire with appellants and their cohorts (see, e.g., VIII Tr. 13, 18-19; XI Tr. 72-73, 89, 94, 97-98, 102-104; 12 Tr. 15-16, 23-26; 13 Tr. 6-8). Since the jury had before it other evidence of gun procurement and usage at the Ray-Mac site, the court's

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At bottom, appellants thoroughly impeached Phillip Moore and Phillip and Pearl Booth, and effectively argued the witnesses' motive, bias, and mendacity [62/] to a properly instructed jury (44 Tr. 122-124, 175-176). Under such circumstances, the district court did not abuse its discretion by imposing modest restrictions on the scope of cross-examination.

B. The District Court Properly Curtailed The Opinion Testimony Of A Defense Labor Law Expert

Appellants contend (Meade Br. 33-40) that the court erred in precluding defense witness Patrick Hardin, an expert on labor law, from offering an opinion concerning the legal ability of a local union to engage in organizing activities (32 Tr. 88, 119, 121, 126, 134). As appellants concede (Br. 39), however, the question whether to admit or exclude expert testimony is committed to the broad discretion of the district court, and its determination will be disturbed only if it is "manifestly erroneous" (United States v. Kennedy, 714 F.2d 968, 974 (9th Cir.

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restriction of cross-examination as to this topic was not error. See Batchlor v. Cupp, supra, 693 F.2d at 864-865.

Similarly, the district court did not abuse its discretion under Fed. R. Crim. P. 403 in excluding as unduly prejudicial inquiry into unrelated violence involving Ray-Mac and UMWA members in 1981 (XIII Tr. 116-121). Inquiry into this unrelated episode could only have tended to "open up a trial within a trial" (United States v. Bowe, 360 F.2d 1, 16 (2d Cir.), cert. denied, 385 U.S. 961 (1966)) by "diverting the jury from the issue of [appellants'] guilt to what, in effect, would have constituted a separate fact-finding venture * * *" (United States v. Pacelli, 521 F.2d 135, 138 (2d Cir. 1975), cert. denied, 424 U.S. 911 (1976)).

62/ Jones' counsel had no difficulty in final argument in asserting that there was ample evidence from which the jurors could conclude that Phillip Moore and the Booths were "monumental liars," "criminals," "vengeful and vindictive," and "bad people" who testified out of self-interest (42 Tr. 98-99, 102-110, 115-140, 161-162).

1983), cert. denied, 104 S.Ct. 1305 (1984). There was no such abuse of discretion here.

Although Fed. R. Evid. 704 permits expert testimony that "embraces an ultimate issue to be decided by the trier of fact," it "does not open the door to all opinions." Owen v. Kerr-McGee Corp., 698 F.2d 236, 240 (5th Cir. 1983). In particular, Rule 704 bars opinion testimony "as to the legal implications of conduct." United States v. Baskes, 649 F.2d 471, 478-479 (7th Cir. 1980), cert. denied, 450 U.S. 1000 (1981); see also McCormick on Evidence, § 12 at 28 (2d ed. 1972). Thus, the courts of appeals have frequently found excludable legal opinions as to causation and culpability (see Owen v. Kerr-McGee Corp., supra; United States v. Pino, 606 F.2d 908, 917-918 and n.11 (10th Cir. 1979); Stoler v. Penn Central Transp. Co., 583 F.2d 896, 898-899 (6th Cir. 1978)) or to the legal obligations of contracting parties and the legal significance of evidence (see Marx & Co. v. Diners' Club, Inc., 550 F.2d 505, 508-512 (2d Cir.), cert. denied, 434 U.S. 861 (1977)).

As the district court correctly held (32 Tr. 119), "95 percent" of Hardin's proffered testimony ran afoul of the prohibition against legal opinion evidence. Hardin -- who had never been affiliated with the UMWA, had no experience in applying its by-laws within the union, and had no knowledge of the facts of the case (32 Tr. 80-81) -- testified outside the presence of the jury that Local 5967 was a separate "labor organization" within the meaning of § 7 of the National Labor Relations Act ("NLRA") (32 Tr. 91); that even if a local violated

the internal rules of the union, its organizing efforts would be legally protected activity under the NLRA (32 Tr. 102); that the organizing activities directed at Ray-Mac were protected within the meaning of the NLRA (32 Tr. 104, 107); that federal law had pre-empted state regulation of labor activities (32 Tr. 109); that it would be a violation of §§ 8(a)(1) and (8)(a)(3) of the NLRA for an employer to order his employees to join a picket line (32 Tr. 111); that the activities at the Ray-Mac site on February 15 and 16 did not violate the Hobbs Act (32 Tr. 113-114); that the strike could be enjoined under § 301 of the NLRA only if the contract contained an arbitration clause (32 Tr. 117); and that a wronged employer could fire striking employees and sue the union for damages (ibid.).

The district court allowed defense counsel to inquire into the methodolgy of union organizing practices (32 Tr. 97), and counsel availed themselves of this proper subject of examination (32 Tr. 130). However, the court did not abuse its discretion in prohibiting additional inquiry into "what amounted to a legal opinion * * * on the ultimate issue of fact in the case." Stoler v. Penn Central Transp. Co., supra, 583 F.2d at 899. 63/

63/ Apart from the merits of the district court's determination, appellants argue (Meade Br. 34-35) that it was unfair since UMWA officials who testified for the government were allowed to testify regarding the legality of the activities directed at Ray-Mac. There is, however, a fundamental difference between an expert's legal opinion testimony and the testimony of a union official who had direct knowledge of the events charged in the indictment and whose characterization of certain conduct as illegal was relevant as state-of-mind evidence with respect to attendees at the February 15 "special" union meeting. But, in any event, the court admonished the jury to disregard the opinions of prior lay witnesses concerning the legality or (Continued)

C. The District Court Properly Admitted A Summary Exhibit Of The Losses Occasioned By The Ray-Mac Violence

At trial, the district court admitted (29 Tr. 87) a summary exhibit (Gov. Ex. 148) prepared by Gene McAdams, a certified public accountant and comptroller for Ray-Mac's successor corporation, that detailed the financial losses that resulted from the Ray-Mac violence (see p. 17, supra). Appellants contend (Meade Br. 40-50) that the summary exhibit was inadmissible since McAdams had "no personal knowledge concerning anything his chart reflected" and since the court did not examine the underlying documents. Questions concerning the adequacy of the foundation and the admissibility of summary evidence are committed to the sound discretion of the trial court. See United States v. Behrens, 689 F.2d 154, 162 (10th Cir. 1982), cert. denied, 459 U.S. 1088 (1983); United States v. Collins, 596 F.2d 166, 169 (6th Cir. 1979). There was no abuse of that discretion here.

By its terms, Fed. R. Evid. 1006 provides that "[t]he contents of voluminous * * * recordings * * *, which cannot conveniently be examined in court may be presented in the form of a * * * summary." Since the adoption of Rule 1006, it is no longer necessary that the underlying materials be introduced; rather, the proponent must merely lay a foundation to show the admissibility of those materials. See United States v. Lemire, 720 F.2d 1327, 1347, 1349 (D.C. Cir. 1983), cert. denied, 104 S.Ct. 2678 (1984); United States v. Smyth, 556 F.2d 1179, 1183-1184 and n.9 (5th Cir.), cert. denied, 434 U.S. 862 (1977);

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illegality of union activities (32 Tr. 129-130).

Advisory Committee Notes, Rule 1006, citing 4 Wigmore on Evidence § 1230 (Chadbourn Rev. 1972).

As an exception to the hearsay rule, Fed. R. Evid. 803(6) provides for the admission of any sort of "memorandum, report, record or data compilation" regarding "acts, events, conditions, opinions, or diagnoses" that are prepared and maintained "in the course of a regularly conducted business activity." Accordingly, the courts have sanctioned the admission of summary exhibits that are based on an analysis of business records. See City of Phoenix v. Com/Systems, Inc., 706 F.2d 1033, 1037-1039 (9th Cir. 1983); Ford Motor Co. v. Auto Supply Co., Inc., 661 F.2d 1171, 1175-1176 (8th Cir. 1981); United States v. Scales, 594 F.2d 558, 562 (6th Cir.), cert. denied 440 U.S. 946 (1979); United States v. Clements, 588 F.2d 1030 (5th Cir. 1979); Peter Kiewit Sons' Co. v. Summit Construction Co., 422 F.2d 242, 266-267 (8th Cir. 1969).

Here, as the government's foundation evidence plainly showed, McAdams was the custodian of Ray-Mac's business records (29 Tr. 96, 227) and prepared the summary exhibit based on an analysis of corporate or partnership books, records, and production projections that were normally kept and relied upon in the coal mining business (29 Tr. 69-71, 81, 127-128, 145-146). In such circumstances, the district court did not abuse its discretion in finding that McAdams was "an expert and the underlying data upon which his report is based is the type which experts in his field reasonably depend upon in forming their

opinions" (29 Tr. 87). 64/

Appellants' remaining challenges to the admission of the summary exhibit are equally unavailing. First, there is no requirement under Rule 1006 that the trial court examine the underlying materials to determine their admissibility. As the Advisory Committee's Notes state, "[t]he admission of summaries of voluminous books, records, or documents offers the only practical means of making their contents available to judge and jury." Thus, the only inspection requirement contained in Rule 1006 is that the underlying materials "be made available for examination * * * by other parties." Since the government made the underlying materials available for inspection by defense counsel on December 16, 1983 -- nearly three months before McAdams' testimony (29 Tr. 39-40, 58), -- the court was required to do no more than assure itself, as it did, that the summary

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64/ Nor did it matter that McAdams had no personal knowledge as to the events or projections memorialized in the underlying business records. Rule 803(6) provides that business records may be admitted based upon "the testimony of the custodian or other qualified witness." Thus, "where circumstances indicate that the records are trustworthy" (United States v. Veytia-Bravo, 603 F.2d 1187, 1191-1192 (5th Cir. 1979), cert. denied, 444 U.S. 1024 (1980)), there is no requirement that the authenticating witness have actually prepared and maintained the record, supervised its preparation, been employed when the record was produced, or even have knowledge of the transaction. Ibid. See also United States v. Young Bros., Inc., 728 F.2d 682, 694 (5th Cir. 1984); United States v. Evans, 572 F.2d 455, 489-490 (5th Cir.), cert. denied, 439 U.S. 870 (1978); United States v. Flom, 588 F.2d 1179, 1182 (5th Cir. 1977); United States v. Jones, 544 F.2d 251, 252 (5th Cir.), cert. denied, 434 U.S. 866 (1977). It is enough that the witness can testify as to how the business system worked and that the record was kept in the regular course of business. See United States v. Colyer, 571 F.2d 941, 947 (5th Cir. 1978); 4 Weinstein's Evidence, ¶ 803(6)[02] at 803-152 (1981). As corporate comptroller and custodian of the underlying records, McAdams met Rule 803(6)'s requirements.

exhibit was based on mass records that were prepared and maintained in the course of a regularly conducted business activity. 65/

There was similarly no requirement that the court instruct the jury that Gov. Ex. 148 "is not itself evidence, but is only an aid in evaluating the evidence" (Meade Br. 49, quoting Holland v. United States, 348 U.S. 121, 128 (1954)). Again, the language in Holland pre-dates the adoption of Rule 1006, and, unlike here, Holland dealt with the situation of a chart that was used to summarize exhibits that had already been admitted. Under Rule 1006, however, "summaries were * * * given an independent evidentiary significance and could be introduced on the strength of the preparer's foundation testimony, thereby avoiding the need to receive voluminous documentary evidence at trial." United States v. Smyth, supra, 556 F.2d at 1183. In view of the "independent evidentiary significance" of the instant summary exhibit, it would hardly have been proper for the district court to instruct that it was "not evidence."

65/ In United States v. Bartone, 400 F.2d 459 (6th Cir. 1968), cert. denied, 393 U.S. 1027 (1969), this Court stated that the trial judge must "carefully examine" summary charts and supporting exhibits "in order to determine that everything contained in the summary is supported by proof" (id. at 461). Bartone was decided prior to the promulgation of Rule 1006, and, as such, we question its current force on this score. Cf. United States v. Smyth, supra, 556 F.2d at 1183-1184 and n.10 (noting the wide divergence in admissibility requirements before the adoption of Rule 1006). While such a "careful[] examin[ation]" makes sense where, as in Bartone, a summary chart is used merely to summarize exhibits that have already been introduced into evidence, it has no application where, as here, a summary exhibit is used in the place of records that are too voluminous to be "conveniently * * * examined in court" (Fed. R. Evid. 1006).

The court below cautioned the jury that the summary exhibit was admitted solely to aid it in determining the effect, if any, of the Ray-Mac violence on interstate commerce (29 Tr. 147) 66/ and further instructed on the weight to be accorded expert testimony. Appellants were entitled to no more.

D. The Prior Consistent Statements Of Various Government Witnesses Were Properly Admitted To Rebut Suggestions Of Recent Fabrication And Improper Motives

Despite the fact that government witnesses Danny Blanton, Philman Caudill, and Jake Moore had been impeached with evidence of prior inconsistent statements and/or bargained plea agreements, appellants contend (Meade Br. 19-32) that the court erred in allowing the government to rehabilitate the credibility of these its witnesses through evidence of their prior consistent statements. As the record shows, "[t]he district court did not abuse its discretion in permitting the jury to hear both the consistent and inconsistent statements in order to facilitate [its] evaluation of the witnesses' credibility." United States v. Rios, 611 F.2d 1335, 1349 (10th Cir. 1979), cert. denied, 452

66/ Citing remarks at the sentencing hearing (XIII Tr. 13-14, 52-53), appellants argue (Meade Br. 46-47) that the summary exhibit was inherently prejudicial since the district court believed McAdams' conclusion as to the total loss to be "high." However, McAdams' conclusions were thoroughly tested by cross-examination (29 Tr. 148-227) and weighed by a properly instructed jury (29 Tr. 147; 44 Tr. 124-125); the court's post-trial assessment of the summary exhibit did not implicate its admissibility. At all events, the court indicated that the damages were significant (see XXIII Tr. 13-14, 52-53), and there was other testimony at trial apart from that of McAdams to demonstrate the significant adverse effect on commerce that the Ray-Mac violence caused. See XIII Tr. 59-60, 147-148, 173-175 (tipple costs); IX Tr. 40; XI Tr. 117; XIII Tr. 47-48 (production losses); 14 Tr. 33-35 (security costs).

U.S. 918 (1981).

1. On cross-examination, truck driver Blanton was impeached by means of a prior inconsistent statement contained in a February 16, 1982, police report (Gov Ex. 38) concerning the number of pickets present outside the Ray-Mac site when shooting erupted that day (XVII Tr. 197-202). Finding that the cross-examination "has been more than a general attack here against Mr. Blanton" (15 Tr. 35), the court permitted Blanton's statement to the police officer to be read in its entirety to the jury as a statement consistent with his trial testimony (15 Tr. 38). 67/ The court admonished the jury that the statement could be considered only "as bearing upon the credibility of the witness" (15 Tr. 30-31, 37).

Accomplice Philman Caudill was impeached with evidence that he had pleaded guilty to a Hobbs Act violation in exchange for a dismissal of all other charges, that he was awaiting sentencing, and that his cooperation was to be made known to the sentencing judge (23 Tr. 123-124, 154-157, 187-190; Gov. Ex. 121). In addition, Caudill was cross-examined concerning his failure in a post-arrest statement to law enforcement officers (Gov. Ex. 120) to identify, as he had done at trial, codefendant Blankenship as a participant in the Ray-Mac violence (23 Tr. 140). Finding that the effect of this impeachment was to imply that Caudill "is testifying here in order to appeal to the Court to not give him the maximum sentence" (23 Tr. 164), the court allowed Caudill's

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67/ We note that the statement referred only to acquitted codefendant Drexil Hall and not to any of appellants (ibid.).

entire post-arrest statement to be read to the jury to rebut this implication (23 Tr. 183-187). The court cautioned the jury that the statement was being read only "to help you decide whether you believe Mr. Caudill's testimony" (23 Tr. 182).

Finally, accomplice Jake Moore acknowledged that he was testifying pursuant to a plea agreement, that he had not yet been sentenced, and that he hoped his cooperation would ameliorate his eventual sentence (XXI Tr. 64-66, 75-78). Moore was additionally confronted with numerous prior inconsistent statements concerning the events at the Ray-Mac site (XXI Tr. 69-72, 89-90, 92-93, 100-106), including his failure to identify codefendant Tackett as a participant in the violence in a post-arrest statement (Gov. Ex. 126A) to law enforcement officers (XXI Tr. 100-102). Taking note of Moore's plea agreement and the "ten or twelve inconsistencies" that had been revealed on cross-examination, the court allowed Moore's post-arrest statement (XXI Tr. 160-164) to be read to rebut "the implication * * * that this witness here is testifying falsely for a favor to the Government and * * * that there is a breach in his memory" (XXI Tr. 154). As before, the court instructed the jury that Moore's prior statement was admitted "to rebut a charge of recent fabrication or improper influence or motive" and to "help you decide * * * whether or not you believe Mr. Moore's testimony" (XXI Tr. 165).

2. Fed. R. Evid. 801(d)(1)(B) provides that "[a] statement is not hearsay" if it "is consistent with [the witness-declarant's] testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper

influence or motive." "Broad discretion is given to the trial court regarding the admission of prior consistent statements" (United States v. Hamilton, 689 F.2d 1262, 1273 (6th Cir. 1982), cert. denied, 459 U.S. 1117 (1983)), and that discretion was not abused since "[t]he statement[s] here comport[ed] precisely with the literal terms of the Rule" (ibid.).

In Hamilton, counsel for an acquitted codefendant "indicated that there was recent fabrication in that [the witness'] testimony at trial included elements not mentioned in the statement" and further "implied that [the witness'] account was influenced by his deal with the government" (ibid.). Similarly, counsel for various codefendants below impeached the witnesses with evidence that their trial testimony included significant elements either not mentioned or misstated in their prior statements. 68/ See also United States v. Brantley, 733 F.2d 1429, 1438 (11th Cir. 1984). And, it was strongly implied that Caudill and Moore were influenced by their favorable plea bargains and the specter of impending sentencing proceedings. In such circumstances, Rule 801(d)(1)(B) clearly authorized the prior consistent statements to be admitted. 69/

68/ Appellants stood to benefit from any attack on the witnesses' credibility and, accordingly, cannot properly complain that the critical impeachment was undertaken by counsel for their acquitted codefendants. See United States v. Hamilton, supra, 689 F.2d at 1274.

69/ Since the prior statements were admitted to assist the jury in its credibility determinations, rather than as substantive evidence of guilt, we believe that the statements could properly be admitted without reference to Rule 801(d)(1)(B)'s requirements. See United States v. Parodi, 703 F.2d 768, 785-786 (4th Cir. 1983); United States v. Rubin, 609 F.2d 51, 66-70 (2d

(Continued)

Relying on United States v. Quinto, 582 F.2d 224 (2d Cir. 1978), appellants argue (Meade Br. 29-30) that, even if the explicit requirements set out in Rule 801(d)(1)(B) were satisfied, the statements were nonetheless inadmissible since they were made after the time that the motive to falsify arose. This Court has, however, declined to adopt Quinto's extra-statutory requirement in favor of a "desire for a more relaxed standard of admissibility" under Rule 801(d)(1)(B). United States v. Hamilton, supra, 689 F.2d at 1273-1274; see also United States v. LeBlanc, 612 F.2d 1012, 1017 (6th Cir.), cert. denied, 449 U.S. 849 (1980). [70/] This case is controlled by Hamilton and LeBlanc, and not Quinto, since the instant statements were merely read to the jury, but did not go the jury room; the defense "elicited the use of the statement" by first referring to it on cross-examination; [71/] and the defense exploited the favorable consideration that Caudill and Moore received under their plea bargains.

In any event, even if there were a requirement that prior consistent statements must pre-date the time at which a

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Cir. 1979) (Friendly, J., concurring), aff'd on other grounds, 449 U.S. 424 (1981).

70/ Accord, United States v. Parry, 649 F.2d 292, 295-296 (5th Cir. 1981); United States v. Rios, supra, 611 F.2d at 1349; United States v. Williams, 573 F.2d 284, 289 and n.3 (5th Cir. 1978); United States v. Scholle, 553 F.2d 1109, 1121-1122 (8th Cir.), cert. denied, 434 U.S. 940 (1977); United States v. Gandy, 469 F.2d 1134 (5th Cir. 1972), cert. denied, 410 U.S. 986 (1973).

71/ Once defense counsel has questioned a government witness as to a portion of a document, Rule 801(d)(1)(B) permits examination with respect to "other statements made by the declarant at the time." United States v. Stuart, 718 F.2d 931, 935 (9th Cir. 1983).

motivation to fabricate arises, the instant statement met that requirement. Blanton plainly had no reason to fabricate when he was questioned as a shooting victim only hours after an assault. Moreover, since Caudill's and Moore's statements were made after their arrests but several months before their plea agreements, a motive to falsify had not yet arisen. See United States v. Henderson, 717 F.2d 135, 138-139 (4th Cir. 1983), cert. denied, 104 S.Ct. 1006 (1984) (setting the motive-for-falsification date at the time of arrest would "effectively swallow[] the rule" since "by definition such statements would never be prior to the event of apprehension or investigation by the government").

Accordingly, the admission of the prior consistent statements provides no basis for reversing appellants' convictions. 72/

72/ Even if the trial court erred in its admissibility determination, any error was harmless since "the statement[s] [themselves] contained nothing substantively new" and since "[b]y not being taken into the jury room during deliberations, the statements asserted no undue influence on the jurors." United States v. Hamilton, supra, 689 F.2d at 1274.

VIII. THE DISTRICT COURT PROPERLY INSTRUCTED THE JURY ON THE ESSENCE OF APPELLANTS' "THEORY OF DEFENSE"

Appellants Meade (Br. 17-19) and Jones (Br. 39-42) contend that the district court erred in refusing to give their proffered "theory of defense" instructions (see 41 Tr. 124-125). When viewed in its entirety, however, the court's charge adequately apprised the jury of the defenses asserted.

To be sure, this Court has held that "it is reversible error for a trial judge to refuse to present adequately a defendant's theory of defense." United States v. Garner, 529 F.2d 962, 970 (6th Cir.), cert. denied, 429 U.S. 850 (1976); United States v. Blane, 375 F.2d 249, 252 (6th Cir.), cert. denied, 389 U.S. 835 (1967). However, denominating a proposed instruction as a "theory of defense" instruction does not automatically require that it be given. See, e.g., United States v. Silverman, 745 F.2d 1386, 1399 (11th Cir. 1984); United States v. Williams, 728 F.2d 1402, 1404 (11th Cir. 1984). Rather, it is enough that the instructions "as a whole adequately cover[] the theory of defense." United States v. Blane, supra, see also United States v. Garner, supra, 529 F.2d at 970 (defendant merely entitled to "some mention" of theory of defense). Thus, the refusal to give a requested "theory of defense" instruction will only require reversal if it (1) was not substantially covered by the other instruction and (2) dealt with a point so important that the accused's defense was seriously impaired by the absence of the requested instruction. See United States v. Williams, supra; United States v. Gibson, 726 F.2d 869, 874 (1st Cir.), cert.

denied, 104 S.Ct. 2174 1984).

Here, appellant Meade contends that the court was derelict in charging on the labor activity exception to the Hobbs Act and on the issue of coercion. The district court, however, instructed the jury at length and repetitively on the Enmons exception to the Hobbs Act (see 44 Tr. 134-139, 150-155, 157-162). As we have demonstrated above (see pp. 26-28, supra), the court's instructions in this regard were adequate to apprise the jurors of the Enmons defense. So too, as appellant Meade concedes (Br. 18), the court included a correct instruction on the defense of coercion. 73/ Appellant Meade's counsel argued this theory to the jury (44 Tr. 26), and the adequacy of the given instruction was not undercut because the court did not expressly identify Meade as the defendant to whom the instruction might apply.

73/ As the court instructed (44 Tr. 174-175):

> Coercion or compulsion may provide a legal excuse for the crime charged in the indictment. However, to provide a legal excuse for any criminal conduct, the compulsion must be present and immediate and of such a nature as to induce a well-founded fear of impending death or serious bodily injury, and there must be no reasonable opportunity to escape the compulsion without committing the crime or participating in the commission of the crime. Acts done under such coercion or compulsion are not done willfully.
>
> If the evidence in the case leaves you with a reasonable doubt that the defendant, at the time and place of the offense alleged in the indictment, as a result of coercion, compulsion or duress as just explained, failed to act willfully and voluntarily, then it is your duty to find the defendant not guilty.

For his part, appellant Jones contends (Br. 41) that the court failed to instruct on his twin theories (1) that the violence at Ray-Mac arose during union organizational activities and (2) that Jones played no part in the violence at Ray-Mac. In addition, Jones argues that the court should have included his detailed factual defenses to each of the alleged overt acts in its instructions.

As we have noted above, the court stressed at length that an extortion prosecution could not properly be maintained with respect to violence or threats that occurred as a result of legitimate labor activity in support of a proper labor objective, that the organizing of employees constituted a proper labor objective and that the burden was on the government to show the inapplicability of the Enmons defense beyond a reasonable doubt (see, e.g., 44 Tr. 134-135, 139). Moreover, with respect to Jones' claim that he had no involvement with the violence, the court charged that the defendants controverted every element of each defense by pleading not guilty (44 Tr. 128); that the government was obligated to prove each element of each count beyond a reasonable doubt (e.g., 119-120, 128, 133); that the accused must be a knowing and willful participant in the charged offenses to be liable (see 44 Tr. 125, 129-130, 133); that "mere similarity of conduct" or common association and aims was insufficient to establish the existence of a conspiracy (44 Tr. 128); that "mere presence" or "mere knowledge" was insufficient to establish liability (44 Tr. 142-143, 169); and that a defendant could only be convicted of conspiracy if he willfully

and knowingly participated in an unlawful plan with the intent of advancing its purposes (44 Tr. 129-130). And, of course, the court set out the element of each offense (44 Tr. 132-133, 143, 156-157) and defined the concepts of willfulness and knowledge (44 Tr. 125, 130). These comprehensive instructions were more than adequate to impart appellant Jones' theory that he could not be convicted if he did not participate in the Ray-Mac violence. See, e.g., United States v. Gibson, supra, 726 F.2d at 875; United States v. Lewis, 718 F.2d 883, 884-885 (8th Cir. 1983); United States v. Muse, 708 F.2d 513, 515-516 (10th Cir. 1983); United States v. Jenkins, 701 F.2d 850, 858-859 (10th Cir. 1983); United States v. Blane, supra, 375 F.2d at 252-253.

Nor was the court obligated to give a lengthy and detailed factual outline of Jones' theory of defense. See United States v. Garner, supra, 529 F.2d at 969. Courts may properly omit requested "theory of defense" instructions that are argumentative (see, e.g., United States v. Sorrells, 714 F.2d 1522, 1532 (11th Cir. 1983); United States v. Veal, 703 F.2d 1224, 1231 (11th Cir. 1983)), misleading or irrelevant (see, e.g., United States v. Phelps, 733 F.2d 1464, 1473 (11th Cir. 1984); United States v. Williams, supra, 728 F.2d at 1405), or "merely emphasize[] a certain phase of the evidence" favorable to the defendants without presenting a true legal defense (United States v. Silverman, supra, 745 F.2d at 1400). There is similarly no need for the court to give a narrative of the facts favorable to an accused's defense when it has not, as the court avoided here, reviewed the facts relied upon by the government. See United

States v. Conlon, 661 F.2d 235, 237 (D.C. Cir. 1981), cert. denied, 454 U.S. 1149 (1982).

Appellant Jones' profferred instruction (Br. 40) for his "theory or explanation of the January 4, 1982 meeting" that was alleged as Overt Act 1 of the conspiracy count amounts to nothing more than a parsing of the evidence introduced concerning the episode. Whether Jones initiated the meeting or not is legally irrelevant and misleading; the important point is -- as the proffered instruction acknowledges in passing -- that Jones made overtures during the meeting that the UMWA should unionize Ray-Mac. Clearly, this "theory of defense" instruction as to the January 4 meeting was properly rejected by the trial court.

CONCLUSION

For the foregoing reasons, we respectfully submit that appellants' convictions should be affirmed.

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NO. 84-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

UNITED STATES OF AMERICA, - - Respondent

versus

EDGAR JONES,
GERMAN STUMBO,
KENNETH ROWLAND,
TEDDY KINNEY and
MOSE MEADE - - - - - - - - Petitioners

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Does a court-ordered seating arrangement at trial which requires a criminal defendant to sit far away from his attorney, making direct verbal communication impossible, deprive the defendant of effective assistance of counsel?

2. Should this Court allow federal prosecutors to compromise the grand jury's independence by appointing their chief investigative agent, primary witness and assistant to serve as an "agent of the grand jury"?

3. Should this Court reaffirm and clarify its decision in *United States* v. *Enmons*, 410 U. S. 396 (1973) by insisting that trial courts accurately and clearly instruct juries that violence associated with the pursuit of legitimate labor objectives is exempt from Hobbs Act prosecution?

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

No. 84-_____

UNITED STATES OF AMERICA - - *Respondent*

v.

EDGAR JONES,
GERMAN STUMBO,
KENNETH ROWLAND,
TEDDY KINNEY and
MOSE MEADE - - - - - *Petitioners*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioners pray that a writ of certiorari issue to review the Opinion and Order of the United States Court of Appeals for the Sixth Circuit entered on July 11, 1985.

OPINION BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit, review of which is hereby sought, appears as *United States* v. *Edgar Jones, et al.*, in 766 F. 2d 994 and is set forth in its entirety as Appendix A to this Petition.

STATEMENT OF JURISDICTIONAL GROUNDS

The Opinion, Order and Mandate of the United States Court of Appeals for the Sixth Circuit, review of which is hereby sought, were entered on July 11,

1985. 28 U.S.C. §1254(i) is believed to confer jurisdiction of this Court to review the judgment of the United States Court of Appeals for the Sixth Circuit. This Petition is being submitted for filing within sixty (60) days from the date of entry of the Opinion, Order and Mandate in accordance with Rule 20 of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amendment VI to the Constitution of the United States provides:

> 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 defense.* (Emphasis added).

18 U.S.C. §1951 provides:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section

shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

STATEMENT OF THE CASE

This case arises from acts of violence committed against Ray-Mac Coal Company, an Eastern Kentucky mining concern, (hereinafter referred to as "Ray-Mac") during a labor dispute in February, 1982. The Petitioners, Edgar Jones and German Stumbo, are coal operators from Floyd County, Kentucky. The Petitioners, Teddy Kinney, Mose Meade and Kenneth Rowland, are coal miners, also from Floyd County, Kentucky. Teddy Kinney was president of Local 5967 of the United Mine Workers of America (hereinafter referred to as UMWA).

On June 6, 1983, a federal grand jury for the Eastern District of Kentucky at Pikeville returned a ten-count indictment charging the Petitioners and 15 other defendants with various violations of 18 U.S.C. §1951 (hereinafter referred to as the "Hobbs Act") and certain explosives and firearm statutes. All of the Petitioners, save German Stumbo, were acquitted of all non-Hobbs Act counts, but were convicted of conspiring to violate and violating the Hobbs Act. Specifically, Stumbo, Meade, Kinney, Rowland and Jones were convicted of conspiring to violate the Hobbs Act as charged in Count I of the Indictment. Stumbo, Meade, Kinney and Rowland were also convicted of violating the Hobbs Act, which violation Jones was convicted of aiding and abetting. Meade was convicted of an additional Hobbs Act count for burning a coal tipple leased by Coal-Mac, another Floyd County mining company. Stumbo was convicted of a separate count under 18 U.S.C. §844(i), arising out of the de-

struction of Ray-Mac mining equipment by explosives. Each Petitioner is currently serving a three year sentence. Appendix B. Meade and Stumbo will be placed on probation for two years when they are released. Appendix B, pp. 26a, 27a, 30a.

The events which gave rise to this case began on February 13, 1982 at a union meeting of the members of UMWA Local 5967. Testimony, disputed by the Government, established that the members discussed and voted upon a proposal to picket Ray-Mac, which had recently started operating with non-union employees in an area that had long been a union stronghold in Floyd County, Kentucky.

On February 15, 1982, picketing began at the Ray-Mac site, ending in an unsuccessful attempt to persuade Ray-Mac employees and truckers to join the Union. The picketing continued through the next two days, escalating into the shooting of firearms by both picketers and Ray-Mac employees. Although some equipment was damaged, most of the shooting was into the air and nobody was seriously injured.

The other acts of violence alleged against the Petitioners included the destruction and attempted destruction of a Ray-Mac coal auger and bulldozer, respectively, with two homemade bombs constructed of an innertube and a basketball containing dynamite on February 21, 1982. Approximately one week later, the old wooden coal tipple leased by Coal-Mac was burned.

Although details concerning the Petitioners' participation were unclear and disputed, the fact of the events set out above and the general involvement of

Stumbo, Meade, Rowland and Kinney in them was not seriously contested. Any link between these activities and Edgar Jones, however, was vigorously disputed. The Petitioners' chief defense at trial was that the activities of February, 1982 were pursued to achieve the legitimate labor goal of organizing Ray-Mac's employees and were thus exempt from Hobbs Act prosecution under the holding in *United States* v. *Enmons,* 410 U. S. 396. The Government's theory, on the other hand, was that the Petitioners and their co-defendants had conspired to engage in these activities at the direction and for the benefit of Edgar Jones with the purpose of destroying Ray-Mac's ability to compete with Jones' company, JRM Mining. The Government argued that Edgar Jones planned, initiated, financed and directed these activities in an attempt to force Ray-Mac out of business through acts of violence, although Jones was never alleged to have physically participated in those acts.

Throughout the course of the trial, Edgar Jones and the other Defendants asserted that the activities at Ray-Mac in February, 1982 occurred in the course of a legitimate effort by Local 5967 to organize a non-union coal company and merely resulted from efforts to achieve a legitimate union objective. Furthermore, the defense argued that the picketing and other acts at the Ray-Mac site were not part of a conspiracy to assist Edgar Jones in shutting down his alleged competitor, but rather a futile, desperate effort by union members and sympathizers to organize Ray-Mac and

preserve the prominence of the UMWA in the coal fields of Eastern Kentucky.

A. Seating Arrangement.

Trial of the case ultimately involved 18 defendants represented by 12 attorneys. A one-week mini-hearing to determine the existence of a conspiracy for admission of co-conspirators' statements was conducted through the week of November 14, 1983. Trial by jury began on January 9, 1984 and lasted for three months. At the mini-hearing, the Defendants, due to their large numbers were ordered to sit in the back of the courtroom, far away from counsel. During voir dire, the Defendants were required to sit together in one corner of the courtroom, placing the Petitioners between 15 to 30 feet from their attorneys. At trial, the court-ordered seating arrangement placed the Defendants hemmed in against the wall in a "peanut gallery" arrangement. All of the Petitioners were placed a considerable distance from their attorneys. Appendix C, D.

These conditions made direct communication between attorney and client impossible during the mini-hearing, voir dire and trial. The court overruled defense objections to the seating arrangements and dismissed suggestions which would have, with some minor rearrangement of chairs or addition of tables, allowed the Defendants to sit next to or directly behind counsel. The court seemed to believe that any rearrangement would somehow upset the decorum of the courtroom. If the attorneys wished to communicate

with their clients, they were required to stand up, leave their places and walk to their client. If the Defendants wished to communicate with their attorneys, they were required to pass notes, assuming they could read and write. Appendix C, D.

B. Grand Jury Agent.

One of the prosecution's chief witnesses at trial was Dennis L. McAllister, an investigative agent for the Treasury Department, Bureau of Alcohol, Tobacco and Firearms. McAllister was the chief investigative agent responsible for investigating and preparing the case for trial. He was also a chief witness before the grand jury. In addition, he served as the prosecutor's assistant during grand jury proceedings, purportedly under the authority of Rule 6(e) of the Federal Rules of Criminal Procedure.

In addition to all these functions and while continuing his investigation, McAllister was also somehow designated and sworn in as an "agent of the grand jury" at the request of the prosecutor. Appendix E. As "grand jury agent" McAllister was responsible for reporting the results of his investigation to the grand jury, serving and compelling compliance with grand jury subpoenas, keeping and examining grand jury documents and otherwise assisting the grand jury in every way. Neither McAllister nor the prosecution was able to cite any legal authority for the investigator's status as "agent of the grand jury". Appendix E, pp. 59a-60a. The Petitioners strongly objected to the procedure of swearing and designating McAllister as a

"grand jury agent" on the grounds that it completely compromised the grand jury's independence, making it a mere tool of the prosecutor. Defense motions to strike all of McAllister's testimony and to dismiss the indictment on the grounds of prosecutorial misconduct before the grand jury were summarily overruled.

C. Labor Activities Exemption Instruction.

The Petitioners' chief defense at trial was based on the exemption from Hobbs Act prosecution of acts undertaken in pursuit of legitimate labor goals recognized in *United States* v. *Enmons,* 410 U. S. 396. The Petitioners and the Government each submitted different proposed *Enmons* instructions, as did most of the other Defendants. The lower court rejected all proposed instructions and chose instead to formulate its own charge on the labor exemption defense. Appendix F. Defense counsel objected to the court's instruction as a plain misstatement of the holding of *Enmons* which practically directed a verdict against them. Even the Government itself practically implored the court to change its instruction to conform with *Enmons,* no doubt sensing that reversible error was about to be committed. The court refused to make any suggested modification and gave its labor exemption instruction virtually unchanged.

The Petitioners appealed from their convictions to the United States Court of Appeals for the Sixth Circuit on June 18, 1984. In an opinion rendered on July 11, 1985, that court affirmed the convictions. Appendix A. In doing so, the Court of Appeals held that the

integrity of the grand jury process was not compromised by cloaking the chief investigative agent with the mantle of an "agent of the grand jury". Appendix A, p. 14a. The Court of Appeals also held that the Petitioners received effective assistance of counsel despite the fact that they were seated in such a way that they could not directly communicate with their attorneys during trial and pre-trial proceedings. Appendix A, p. 20a. Finally, although acknowledging that part of the trial court's *Enmons* instruction was "somewhat confusing" the court approved the instruction as being a proper statement of the labor activities exemption when "viewed as a whole." Appendix A, p. 19a. The Petitioners seek a writ of certiorari to review these decisions of the Court of Appeals.

ARGUMENT

I. The Decision Below That The Petitioners Have No Sixth Amendment Right to be Seated in Such a Way That They Could Communicate Directly With Their Attorneys During Trial is Contrary to Fundamental Concepts of Effective Representation and in Direct Conflict With Other State and Federal Appellate Decisions.

The right of a criminal defendant to free and unhampered consultation with his attorney during trial has been recognized by this Court as fundamental. *Geders* v. *United States,* 425 U. S. 80 (1976). This Court, however, has never directly addressed the question of whether effective representation includes the simple, basic right of a defendant to sit close enough to his attorney at trial to exercise this right of consultation. The growing prevalence of mass federal con-

spiracy trials involving numerous defendants ensures that this issue will arise again and again. This Court's guidance is urgently needed to ensure that trial courts, in experimenting with the various methods of seating numerous defendants and attorneys, do not ignore, overlook or ride roughshod over the fundamental right to effective consultation. The fact that the decision of the court below directly conflicts with the only state and recent federal decisions discussing the subject further compels a grant of certiorari on this issue. See United States Supreme Court Rule 17.

This case does not involve a situation where practical necessities or security reasons required attorney and client to be separated. *Cf. United States* v. *Turkette,* 656 F. 2d 5, 10 (1st Cir. 1981). There was ample space in the courtroom. Appendix C, p. 42a. No compelling need for isolating the Defendants from their lawyers appears in the record and no justification for this action was given by the court. Nevertheless, the court insisted that the Defendants be seated at trial in a two-row "peanut gallery".

Defense counsel were seated at an "L" shaped table. The court-ordered seating arrangement required that the Appellants be seated at trial in a double row behind a portion of the counsel table so that they were bunched together and always a considerable distance from their attorneys. The situation at trial is approximately represented by the diagram appended hereto as Appendix D.

During voir dire the distance between the Defendants and their attorneys was even greater since the

Defendants were all crowded into one corner, totally away from their counsel. Counsel for Stumbo, Kinney and Rowland estimated that he was 15 to 17 feet from his nearest client during voir dire. Appendix C, p. 34a. The situation was even worse during a week-long pretrial conspiracy mini-hearing, where the Defendants were seated at the back of the courtroom. Even at the best of times, direct verbal communication between the Appellants and defense counsel was precluded by the distance involved. In sum, the seating arrangement made meaningful consultation between client and attorney during the mini-hearing, voir dire and trial impossible.

Defense counsel objected to the court's seating arrangement on the grounds that it deprived their clients of the right to freely communicate with their attorneys during trial and consequently denied them the effective assistance of counsel. Appendix C, pp. 34a-45a. Counsel pointed out that it would be impossible for the Defendants to comment on testimony for cross-examination purposes, propose questions and otherwise participate in their defense if there were no means of direct contact between attorney and client. The trial court's proposed "solution" was to give each Defendant a pad and pen to write notes to their counsel, despite the fact that some Defendants could barely write and one was illiterate. Appendix C, pp. 42a-43a. As counsel pointed out, in the several minutes that could pass before a note reached the respective attorney, crucial testimony could have gone by or important

jury selection facts or criteria could have been overlooked. Appendix C, pp. 43a-44a.

In one instance, a prospective juror made a statement that seemed significant to one of the Petitioner's counsel. When counsel looked back to gesture toward his clients to get their response or impression, he had to struggle to even see them. When counsel did get their attention, he tried unsuccessfully to mouth the problem to them. If counsel had written a note, the Petitioners, when they finally got it, may not have understood the problem, requiring further hand gestures and mouthing. In any event, the delay in communication was tantamount to no communication at all. One Defendant summed up his feelings about the seating arrangement by commenting in a written note "If I can't sit close to my lawyer, why do I need a lawyer?". Appendix C, pp. 44a-45a.

These problems persisted through the three-month trial. The only time the Defendants could effectively consult with their attorneys was during recesses, which were often very short. The court rejected defense proposals which, with some minor rearrangements, would have easily allowed the Defendants to sit either beside or directly behind their attorneys. Appendix C, pp. 49a-50a. The trial judge seemed concerned that any arrangement other than the one he had ordered would somehow upset the decorum and balance of the courtroom. The trial judge also stated that he was concerned that talking between the defendant and his attorney would be distracting to the jury. Appendix C, p. 41a. This unfounded fear of "jury distraction" had the

effect of distracting the Petitioners and their counsel from their essential roles.

The court in *People* v. *Zammora,* 152 P. 2d 180 (Cal. Dist. Ct. App. 1944) was faced with a nearly identical situation in which 22 defendants were tried together. The limited courtroom facilities did not permit the defendants to sit at counsel table with their respective attorneys, although defense counsel vigorously insisted that they had the right to do so. The defendants were not permitted to move about to consult with their attorneys, but could consult during recesses with the court's permission. *Id.* at 214. The trial court overruled all objections to the seating arrangement, stating that everything possible had been done to allow consultation without excessive disruption of courtroom decorum. The California appellate court reversed and remanded for a new trial, holding that at trial:

> In order that he may have absolute freedom to assist by suggestion and information in his own defense, the accused has the right to sit with his counsel, or at least be so situated that he can freely and uninterruptedly communicate and consult with his attorney. It is the court's duty to provide adequate quarters and facilities, which the court has the power to do without limitation.

Zammora appears to be the only state court decision which discusses the issue. The constitutional right of a criminal defendant to sit with his attorney, absent security or practical reasons compelling otherwise, was also recently recognized in *United States* v. *Sorrentino,* 726 F. 2d 876 (1st Cir. 1984). The Opinion of the

Sixth Circuit below is in conflict with these decisions in failing to recognize this right.

In *Geders* v. *United States,* 425 U. S. 80 (1976) this court held that the trial court committed reversible error by ordering that Geders not consult with his attorney during an overnight recess between his direct and cross-examination testimony. The *Geders* holding has been applied to reverse convictions for similar limitations on the right of consultation during a one-hour noon recess, *United States* v. *Bryant,* 545 F. 2d 1035 (6th Cir. 1976) and even a twenty-minute recess. *United States* v. *Allen,* 542 F. 2d 630 (4th Cir. 1976), *cert. denied,* 430 U. S. 908 (1977). The *Allen* court stated that the sixth amendment right to counsel was "so fundamental that there should never occur any interference with it for any length of time, however brief, absent some compelling reason." *Id.* at 633.

The situation below was the converse of that requiring reversal in *Geders* and its progeny and certainly no less violative of the Appellants' sixth amendment rights. The Appellants were free to consult with their attorney during recesses, but were effectively barred by the court-ordered seating arrangement from communicating with counsel during actual voir dire and trial proceedings. The court was unclear as to its reasoning in ordering the seating arrangement, giving no better justification other than its own peculiar notions of courtroom decorum. This rationale is difficult to comprehend in light of the Petitioners' fundamental right to consult with counsel at every stage of the proceedings. This right could have been preserved with

extreme ease by simply switching the chairs around so a client could sit next to or directly behind his counsel or by simply adding more tables. In *Geders, Allen* and *Bryant,* the Courts found the right to consult with counsel to be so fundamental that actual prejudice need not be shown to warrant reversal for an order interfering with that right. Nevertheless, the prejudice is obvious when a criminal defendant's right to communicate with his attorney is interfered with and impeded, not just for twenty minutes or one hour, but for every single day of a three-month trial. The prejudice in this case is well documented in the record. Appendix C.

In holding that no sixth amendment violation had occurred, the Court of Appeals for the Sixth Circuit focused on the fact that the Petitioners "were permitted to pass notes to their attorneys" and that "[t]he attorneys were permitted to get up and hold conversations with their clients." Appendix A, p. 20a. This holding demonstrates an alarming lack of understanding about the respective roles of attorney and client during a trial. Any attorney with a moderate amount of trial experience will acknowledge that instant and unhampered communication between client and attorney is essential to effective representation. For example, if a witness on cross-examination gives an answer that the client immediately sees is erroneous or inconsistent, the client must be able to communicate his observation without delay. Otherwise, the opportunity to formulate an adequate follow-up question will be lost.

Inability of counsel and client to communicate creates similar problems during direct examination,

voir dire and virtually every aspect of the trial. During the course of a long trial, the frustration of delays in and lack of communication will be compounded over and over with each lost opportunity. The delays caused by requiring counsel to interrupt what he is doing, discreetly get up, walk over to his client, discuss the matter causing immediate concern, walk back and resume, assuming that the client could quickly get his attorney's attention in the first place, is tantamount to no communication at all.

The Petitioners did not ask to be indicted and tried along with 15 other defendants. Once the decision to proceed with this mass prosecution was made, and all motions to sever overruled, it was the court's duty to ensure that courtroom facilities were adequate to safeguard the Petitioners' constitutional rights, which could have easily been done here. Certainly, the trial court's peculiar notions concerning courtroom decorum and balance should never override constitutionally guaranteed rights. The court's failure to discharge its duty to provide adequate seating arrangements profoundly interfered with the Petitioners' fundamental right to adequate consultation with their defense counsel. While actual prejudice need not be shown where basic sixth amendments rights are violated, the prejudice is obvious and well documented in the record where, for each day of a major three-month trial, the Petitioners were not able to meaningfully participate in their defense during trial procedures.

This case presents an opportunity for the Court to fashion a rule to prevent similar sixth amendment viola-

tions in the future. A rule should be established recognizing the sixth amendment right of a criminal defendant to be seated close enough to his attorney to ensure that free and unhampered consultation can occur. If security or other compelling practical considerations require that the Defendant be seated in another manner, the trial judge should be required to place those considerations in the record. For these reasons, the Petitioners respectfully request that their Petition for a Writ of Certiorari be granted.

II. The Widespread Practive of Cloaking Government Agents With the Unauthorized Office of "Grand Jury Agent" is So Repugnant to the Integrity of The Grand Jury That its Condemnation by This Court is Needed to Preserve That Body's Independence.

The issue of whether the prosecutor's chief investigator, primary witness and assistant may be made an "agent of the grand jury" is of critical importance, as it goes to the very core of the historical purpose and integrity of the grand jury. Even the court below recognized the "importance and novelty" of the issue in its opinion. Appendix A, p. 10a. The urgent need for review of the Sixth Circuit's stamp of imprimatur upon this prosecutor-created office is highlighted by the fact that such appointments have become "common practice" in federal grand jury proceedings. Appendix E, p. 59a.

The practice of appointing or swearing investigative agents as "agents of the grand jury" has been harshly condemned in recent opinions by federal judges as a flagrant assault upon the independence and

integrity of the grand jury. *United States* v. *Kilpatrick,* 594 F. Supp. 1324 (D. Colo. 1984); *United States* v. *Anderson,* 577 F. Supp. 223 (D. Wyo. 1983); *United States* v. *Kilpatrick,* 575 F. Supp. 325 (D. Colo. 1983). Serious questions concerning the practice were raised in *United States* v. *Cosby,* 601 F. 2d 754, 757-58 and n.6 (5th Cir. 1979). Oddly enough, the Sixth Circuit in its opinion below cited *Cosby* as giving "tacit approval" of the practice, Appendix A, p. 13a, even though the Fifth Circuit merely decided to express no opinion on the issue since it reversed on other grounds. It is extremely likely that other courts will be called upon to grapple with this common practice unless there is a definitive ruling from this Court.

No satisfactory explanation has ever been put forth as to why a grand jury would need an agent to be appointed to "assist" it or how an investigator can purport to be an agent of a supposedly independent, unbiased grand jury when, in fact, he is working for the prosecutor with the single-minded purpose of convincing that same grand jury to indict. From the day of his appointment, Dennis McAllister investigated, served subpoenas, gathered documents and testified not as an agent working for the ATF or an assistant working for the prosecutor, but, in his own eyes, in the eyes of the prosecutor and those of the grand jury, as a "grand jury agent". Obviously, despite his sworn designation as a grand jury agent, McAllister never ceased to view his job as prosecutorial. Once an investigator becomes so identified with the grand jury as its agent, the grand jury ceases its role as an inde-

pendent constitutional body designed to clear the innocent as well to indict the guilty. It becomes instead part of a "team effort" to secure an indictment in language suitable to the prosecution.

While no one doubts that the prosecutor needs assistance from investigators to do his job, there is a world of difference between assisting the prosecutor under Rule 6(e) and purporting to work for the grand jury as its agent. McAllister's only authority for even being in the grand jury room was either as the prosecutor's assistant or as a witness. The prosecutor and the grand jury can easily perform their separate functions without the dubious aid of a grand jury agent.

Despite the lack of a clear appellate case on the subject, the district courts in *Anderson* and *Kilpatrick* had no difficulty in discerning the clear and present danger of making an investigator an agent of the grand jury: by blurring the separate functions of investigator, prosecutor and grand jury, the jurors will be perceived, and perceive themselves, as merely an arm of the prosecution, not an independent body. Making the prosecutor's chief witness, assistant and investigator an agent of the grand jury is perhaps the final insult to the already much-eroded concept of an independent grand jury standing as a bulwark between the Government and private citizens.

The grand jury's historical and constitutional function is that of "an investigative body 'acting independently of either prosecuting attorney or judge', whose mission is to clear the innocent, no less than to bring to trial those who may be guilty." *United States*

v. *Dionisio,* 410 U. S. 1 (1973) (citations and footnotes omitted). This basic and sacrosanct constitutional purpose of the grand jury has, in recent years, been steadily eroded by practices which compromise the grand jury's independence and separate identity.

The grand jury can still perform the independent function it was created for, but only if courts are willing to protect its integrity from the incursions of overreaching prosecutors seeking to misuse it. The use of investigators as grand jury agents, if permitted by this Court, can only serve to hasten the complete disappearance of the last vestiges of grand jury independence. This Court can and should exercise its supervisory powers to put a halt to this widespread, unlawful and invidious practice

III. Review of The Trial Court's Labor Exemption Instruction is Urgently Needed to Halt the Continuing Erosion by Federal Appellate Court Decisions of This Court's Holding in *United States* v. *Enmons.*

The basic question presented by this case is: How must trial courts instruct juries regarding the labor activities defense to Hobbs Act prosecutions. In 1973, this Court held in *United States* v. *Enmons,* 410 U. S. 396 (1973) that the Hobbs Act did not reach the use of violence to achieve legitimate labor goals. This Court recognized that Congress never intended to include violence arising out of a legitimate labor dispute within the Act's definition of extortion, leaving such matters to state court prosecution. The central focus of *Enmons* which must always be kept in mind is that,

in the labor context, the means the defendant uses, no matter how wrongful or violent, are irrelevant as long as the labor goal is legitimate. It is this basic concept which the trial judge below either completely ignored or utterly misunderstood when he instructed the jury.

Since *Enmons* was decided, no federal court of appeals case has been published in which a Hobbs Act defendant has successfully availed himself of the labor activities defense. Instead, *Enmons* has been eroded, limited to its own facts, distinguished and "explained" away. See Appendix A, pp. 15a-16a and cases cited therein. The decision below, for example, came very close to holding that *Enmons* does not apply outside of the "collective bargaining" context or to any labor goal other than "higher wages." Appendix A, p. 17a.

The various limitations placed upon the *Enmons* rationale by federal appellate courts have made it difficult, if not impossible, for anyone to predict with assurance how this Court's holding is to be applied to any particular fact pattern. The result of this confusion was made evident in the trial court here. Trial judges, such as the one below, simply have no idea how to accurately and intelligibly instruct a jury on how the labor activities defense is to be applied. This case presents an ideal opportunity for this Court to clarify and reaffirm *Enmons* by rejecting the erroneous and misleading instructions given by the trial court.

The Opinion of the Sixth Circuit below is the only published decision discussing the correctness of an *Enmons* instruction in detail. This case becomes doubly important then, since the bizarre and incomprehensible

instructions given below, having been stamped with approval by the Sixth Circuit, will undoubtedly be held up as the standard, stock instructions in future Hobbs Act labor exemption cases.

The Government conceded at trial that the Petitioners were entitled to an *Enmons* instruction. The evidence could have justified a jury finding on either side of the labor exemption issue. But the instruction given, which the trial judge drafted himself, was a devastating misstatement of *Enmons,* all but directing a verdict of guilty. The instruction effectively stripped the Petitioners of their primary defense. The Government itself objected to several of the most flagrantly erroneous portions of the charge.

The actual instruction is too lengthy to be repeated here. The entire text is appended hereto as Appendix F. Those portions so clearly erroneous that the Government itself felt compelled to join in the Defendants' objections may be summarized briefly.

First, the court told the jury that use of firearms "to coerce and prevent employees from working is not a legitimate labor activity within the *Enmons* exception." Appendix F, p. 66a. It went on to state that damaging equipment "for the purpose of encouraging employees of such employer to join the union is not a legitimate labor activity within the *Enmons* exception." Appendix F, p. 67a. These instructions are incomprehensible in light of the fact that the *Enmons* defendants themselves were indicted for damaging equipment with firearms. 410 U. S. at 398. As in *Enmons,* the Petitioners' goal of unionizing Ray-Mac

was legitimate and protected, regardless of the violent means used to achieve it.

Next, the trial court charged to the effect that if the picketing and other activities were not authorized by the district and international levels of the UMWA, the picketers would not be protected by *Enmons*. The trial judge seemed to believe that if the picketers were not acting as or under the authority of a labor organization, they were not entitled to an *Enmons* defense. The Government, on the other hand, joined the Defendants in objecting to this charge, correctly pointing out that the United States Government was not in the business of policing wildcat strikes under the guise of a Hobbs Act prosecution. See *WSB Electric* v. *Rank & File Com. to Stop 2-Gate Sys.*, 105 F.R.D. 417, 419 (D. Mass. 1984) (picketing to achieve legitimate labor goal protected by *Enmons* regardless of whether picketers constitute a labor organization).

Finally, the Court gave an instruction that even the Opinion below acknowledged was "somewhat confusing." Appendix A, p. 19a. The trial court stated: "A legitimate act wrongfully performed may become unlawful and outside the protection of the *Enmons* exception." Appendix F, pp. 64a-65a. As with the other portions of the charge mentioned above, even the Government recognized that this instruction improperly focused the jury's attention on the Defendant's admittedly wrongful means, rather than their legitimate stated goals. The trial court rejected the Government's suggestion that the charge be changed to show that the

objective, rather than the means, must be wrongful to support a Hobbs Act conviction.

The Petitioners never seriously contested at trial that the means used (blowing up equipment, burning a tipple, shooting firearms) were wrongful, though each particular person's involvement in those activities was unclear and disputed. They never denied that the activities were not sanctioned by the upper levels of the UMWA. They primarily rested their defense on the seemingly simple proposition that violence undertaken incident to a pursuit of a legitimate labor objective was a matter for state courts, exempt from federal prosecution under the Hobbs Act. Thus, under proper instructions, the jury's task would have been to merely determine what the Defendants' true goals were. The trial court's instructions that wrongful means employed and lack of sanction from the union removed the protection of *Enmons* misdirected the jury's attention, deprived the Petitioners of their primary defense and, in effect, directed a verdict of guilty.

The Opinion below seemed to recognize, at least implicitly, that the trial court's statements cited above were erroneous. In approving the instruction as given, however, the Sixth Circuit made much of the fact that the charge also contained correct statements of law which supposedly put the incorrect statements in a proper context. Appendix A, p. 19a. In so holding, the Court of Appeals ignored its own well-established principle that "First instructing a jury in one way and then in another, as was done here, requires reversal for

a new trial . . . ." *United States* v. *Walker,* 677 F. 2d 1014, 1016 n.3 (6th Cir. 1982).

In all fairness to the trial judge, is it not surprising that his self-drawn instruction was so completely contrary to the true holding of *Enmons.* The pure and clear holding of that case that violence incident to the pursuit of legitimate labor objectives is outside the scope of the Hobbs Act has been diluted, distorted and clouded by the appellate decisions which have sought to limit it to its own specific facts. In trying to explain to the jury the various limitations these appellate courts have placed upon *Enmons,* the trial judge lost sight of the basic principles enunciated in that case. A writ of certiorari should be granted in this case so that this Court may once and for all halt this continuing erosion and distortion of *Enmons* and prevent the trial court's mistakes from being repeated by future judges struggling to instruct juries on the labor activities exemption.

CONCLUSION

The Petitioners therefore pray that a writ of certiorari issue to the United States Court of Appeals for the Sixth Circuit.

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