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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In The Matter of the Application of	)	WT Docket No. 95-11
HERBERT L. SCHOENBOHM Kingshill, Virgin Islands	)	
For Amateur Station and Operator Licenses	)	

DOCKET FILE COPY ORIGINAL

To: Administrative Law Judge Edward Luton

MOTION FOR SUMMARY DECISION

The Chief, Wireless Telecommunications Bureau, by her attorney, moves, pursuant to Section 1.251(a) of the Commission's Rules, 47 C.F.R. § 1.251(a), for a summary decision denying the captioned application for the renewal of Herbert L. Schoenbohm's amateur service station and operator licenses. Copies of the pertinent public records are attached.

1. On February 2, 1994, Mr. Schoenbohm applied for renewal of his amateur station and operator licenses. Those licenses were originally scheduled to expire on March 2, 1994, but their term has been extended pursuant to Section 1.62(a) of the Commission's Rules, 47 C.F.R. § 1.62(a), until the disposition of Mr. Schoenbohm's application.

2. In Government v. Schoenbohm, No. Crim: 1991/0108 (D.V.I. Dec. 30, 1992), Mr. Schoenbohm was convicted in the U.S. District Court for the District of the Virgin Islands (District

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Court) of violating 18 U.S.C. § 1029(a(1) (fraudulent use of counterfeit access device)[1]. The District Court sentenced Mr. Schoenbohm to imprisonment for a term of two months. The District Court suspended execution of this sentence and placed Mr. Schoenbohm under house arrest for two months with two years probation. The District Court also required Mr. Schoenbohm to pay a fine of $5,000 during the probation period. Mr. Schoenbohm started serving his sentence on January 11, 1993.

3. On appeal, the U.S. Court of Appeals for the Third Circuit affirmed Mr. Schoenbohm's conviction. United States V. Schoenbohm, No. 93-7516 (Third Circuit July 22, 1994). On November 2, 1994, the U.S. Court of Appeals for the Third Circuit denied Mr. Schoenbohm's petition for a rehearing. United States V. Schoenbohm, No. 93-7516 (Third Circuit November 2, 1994).

4. This case is ripe for summary decision because there is no genuine issue of material fact for determination at the hearing. The collateral estoppel aspect of the doctrine of res judicata to the determinations made in United States V. Schoenbohm. Those determinations cannot be challenged in this proceeding.

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[1]Section 1029 provides, in pertinent part, that whoever "knowingly and with intent to defraud uses one or more counterfeit access devices . . . shall, if the offense affects interstate or foreign commerce, be punished as provided . . . ." It defines an "access device" as "any plate, card, code, account number, or other means of access that can be used . . . to obtain money, goods, services or any other thing of value . . . ."

5. It is evident that Mr. Schoenbohm does not possess the requisite qualifications for a renewal of his amateur station and operator licenses. He was found guilty of a felony involving fraudulent conduct in a communications service regulated by the Commission. His conviction, therefore, evinces a likelihood that, if his application is granted, he will not comply with the Commission's Rules or the Communications Act. See Policy Regarding Character Qualifications in Broadcast Licensing, 102 FCC 2d 1179, 1183 (1986), recon., 1 FCC Rcd 421,424 (1986), appeal dismissed sub nom. National Association for Better Broadcasting v. FCC, No. 86-1179 (D.C. Cir. June 11, 1987), as modified, 5 FCC Rcd 3252, 3253 (1990) [to cover nonbroadcast licensees], recon., 6 FCC Rcd 3448 (1991).

6. Accordingly, the Bureau requests that a summary decision be issued, pursuant to Section 1.251(a) of the Commission's Rules, denying the captioned application for the renewal of Herbert L. Schoenbohm's amateur service station and operator licenses.

Respectfully Submitted,

Regina M. Keeney
Chief, Wireless Telecommunications Bureau

By:

Thomas D. Fitz-Gibbon
Attorney

Attachments

Dated: March 29, 1995

Certificate of Service

I, Christina Gavin, certify that, on March 29, 1995, a copy of the foregoing Motion for Summary Decision, filed on behalf of the Chief, Wireless Telcommunications Bureau, was sent by First Class Mail to:

Mr. Herbert L. Schoenbohm
P. O. Box 4419
Kingshill, Virgin Islands 00851

and

Administrative Law Judge
Edward Luton (Hand delivered)

Christina Gavin

Christina Gavin

United States District Court

District of VIRGIN ISLANDS
DISTRICT OF SAINT CROIX

UNITED STATES OF AMERICA
V.

HERBERT L.SCHOENBOEM
(Name of Defendant)

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

Case Number: 91/108

Julio A.Brady, Esquire
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____.
☒ was found guilty on count(s) One, Two & Three after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 USC 1029(a)(1)	FRAUDULENT USE OF COUNTERFEIT ACCESS DEVICE	12/31/87	One

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The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984..

☐ The defendant has been found not guilty on count(s) _____, and is discharged as to such count(s).
☒ Count(s) Two & Three (is)(are) dismissed on the motion of the ~~United States~~ defendant.
☒ It is ordered that the defendant shall pay a special assessment of $ 50.00, for count(s) _____, which shall be due ☒ immediately ☐ as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 484-36-4340

Defendant's Date of Birth: 11-10-39

Defendant's Mailing Address:
No. 15c Consitution Hill
Christiansted,St. Croix, V.I. 00820

Defendant's Residence Address:

August 21, 1992
Date of Imposition of Sentence

Anne E. Thomp
Signature of Judicial Officer

ANNE E. THOMPSON, U.S.D.J.
Name & Title of Judicial Officer

Sept 2, 1992
~~August~~ , 1992
Date

25

Defendant: HERBERT L.SCHOENBOEM
Case Number: 91/108

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of one (1) month ; one (1) month of house confinement to commence upon his release from prison.

☐ The court makes the following recommendations to the Bureau of Prisons:

☐ The defendant is remanded to the custody of the United States marshal.
☐ The defendant shall surrender to the United States marshal for this district,
  ☐ at _____ a.m. / p.m. on _____.
  ☐ as notified by the United States marshal.
☒ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons,
  ☐ before 2 p.m. on _____.
  ☒ as notified by the United States marshal.
  ☐ as notified by the probation office. Ten (10) days after he is notified of the facility in which his sentence is to be served, defendant to surrender to U.S. Marshal.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

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

_____
United States Marshal

By _____
Deputy Marshal

★U.S.GPO:1990-722-448/10286

Defendant: HERBERT L. SCHOEBOEM
Case Number: 91/108

PROBATION

The defendant is hereby placed on probation for a term of three (3) years.

While on probation, the defendant shall not commit another Federal, state, or local crime, shall not illegally possess a controlled substance, and shall not possess a firearm or destructive device. The defendant also shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a fine or a restitution obligation, it shall be a condition of probation that the defendant pay any such fine or restitution. The defendant shall comply with the following additional conditions:

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on probation pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

*U.S.GPO:1990-722-448/10266

Defendant: HERBERT L. SCHOEBOEM
Case Number: 91/108

FINE

The defendant shall pay a fine of $ 5,000.00. The fine includes any costs of incarceration and/or supervision.

☐ This amount is the total of the fines imposed on individual counts, as follows:

☐ The court has determined that the defendant does not have the ability to pay interest. It is ordered that:

☐ The interest requirement is waived.
☐ The interest requirement is modified as follows:

This fine plus any interest required shall be paid:
☐ in full immediately.
☐ in full not later than _____.
☐ in equal monthly installments over a period of _____ months. The first payment is due on the date of this judgment. Subsequent payments are due monthly thereafter.
☐ in installments according to the following schedule of payments:

The fine shall be paid during the three year period of his probation.

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. § 3614.

* U.S. GPO 1992 722-416/40745

Defendant: HERBERT L. SCHOEBOEM
Case Number: 91/108

STATEMENT OF REASONS

☒ The court adopts the factual findings and guideline application in the presentence report.

OR

☐ The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

Guideline Range Determined by the Court:

Total Offense Level: 8

Criminal History Category: I

Imprisonment Range: 2 to 8 months

Supervised Release Range: 2 to 3 years

Fine Range: $ 1,000.00 to $ 10,000.00

☐ Fine is waived or is below the guideline range, because of the defendant's inability to pay.

Restitution: $ 0

☐ Full restitution is not ordered for the following reason(s):

☒ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

☐ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

The sentence departs from the guideline range

☐ upon motion of the government, as a result of defendant's substantial assistance.

☐ for the following reason(s):

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF SAINT CROIX

GOVERNMENT OF THE VIRGIN ISLANDS, PLAINTIFF V HERBERT L. SCHOENBOHM - DEFENDANT	Crim: 1991/0108

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JUDGMENT AND COMMITMENT

On the 20th day of November 1992, United States Attorney for the Government of the Virgin Islands, and the defendant appeared in person and with counsel, Edward H. Jacobs, Esquire.

The defendant Was charged with :

Count I - Fraudulent Use of Counterfeit Access Device
Count II - Fraudulent Use of Unauthorized Access Devices
Count III - Possession of Counterfeit or Unauthorized Access Devices

At arraignment, the defendant pleaded Not Guilty. A jury trial was demanded by the defendant on April 21, 1992, the trial commenced and concluded on April 24, 1992. The jury returned a verdict as follows:

Count I - Guilty
Count II - Guilty
Count III - Guilty

After Oral argument by counsel, held on August 20, 1992, the court dismissed Count II and COUNT III, and denied the motion to dismiss Count I.

This matter having been referred to the Probation Office for a pre-sentence investigation and report, which has been filed with the court, the Defendant was given an opportunity to make a statement in his own behalf, and there being no legal cause why sentence should not be pronounced and no sufficient cause to the contrary being shown or appearing to the count,

It is ADJUDGED that the defendant be and is hereby committed to the director of the Bureau of Corrections for imprisonment for a term of two (2) months on Count I. Execution of this sentence is suspended and defendant is placed on house arrest for 2 months with two (2) years probation. Defendant is

also required to pay a fine of Five Thousand ($5,000.00), during the probation period. Sentence of defendant is to begin on January 11, 1993.

It is further ordered that defendant's bond is discharged and canceled, and all sureties are hereby released.

It is Ordered that the clerk deliver a copy of this Judgment and Commitment to the United States Marshal or other qualified officer and that such copy serve as the commitment of the defendant.

Dated this 30th day of December 1992,

ENTER:

Anne E. Thompson

Anne E. Thompson
United States District Judge
Sitting by Designation

ATTEST:

ORINN ARNOLD, CLERK

By: _____
Deputy Clerk

DISTRICT COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

UNITED STATES OF AMERICA, Plaintiff, v. HERBERT SCHOENBOEM, Defendant	)	CRIM. NO. 1991/108

TO: Alphonso Andrew, AUSA
Edward H. Jacobs, Esq.

ORDER

THIS MATTER came for consideration upon defendant's motion for temporary modification of judgment to delay commencement of house arrest pending resolution of motions and during pendency of appeal.

Upon consideration, it is hereby;

ORDERED that the motion is hereby DENIED and defendant shall commence house arrest as ordered.

ENTER:

DATED: January 12, 1993

ANNE E. THOMPSON
U.S. DISTRICT JUDGE

ATTEST:
ORINN ARNOLD
Clerk of Court

By: _____
Deputy Clerk

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 93-7516

UNITED STATES OF AMERICA

v.

HERBERT L. SCHOENBOHM,

Appellant

Appeal from the United States District Court
For the District of the Virgin Islands
(D.C. Crim. No. 91-00108)
District Judge: Honorable Anne E. Thompson

Argued April 18, 1994

BEFORE: STAPLETON, ALITO and WEIS, Circuit Judges

(Opinion filed 22 1994)

MEMORANDUM OPINION OF THE COURT

STAPLETON, Circuit Judge:

The appellant was prosecuted under 18 U.S.C. § 1029(a) for fraudulently obtaining long-distance telephone service. The statute provides:

Whoever --

(1) knowingly and with intent to defraud produces, uses, or

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P. DOUGLAS SISK,

> traffics in one or more counterfeit access devices;
>
> (2) knowingly and with intent to defraud traffics in or uses one or more unauthorized access devices during any one-year period, and by such conduct obtains anything of value aggregating $1,000 or more during that period;
>
> (3) knowingly and with intent to defraud possesses fifteen or more devices which are counterfeit or unauthorized access devices; . . .
>
> shall, if the offense affects interstate or foreign commerce, be punished . . . .

Elsewhere, the statute defines the relevant terms:

> (1) the term "access device" means any card, plate, code, account number or other means of account access that can be used, alone or in conjunction with another access device, to obtain money, goods, services, or any other thing of value, or that can be used to initiate a transfer of funds (other than a transfer originated solely by paper instrument);
>
> (2) the term "counterfeit access device" means any access device that is counterfeit, fictitious, altered, or forged, or an identifiable component of an access device or a counterfeit access device;
>
> (3) the term "unauthorized access device" means any access device that is lost, stolen, expired, revoked, canceled, or obtained with intent to defraud;
>
> (4) the term "produce" includes design, alter, authenticate, duplicate, or assemble;
>
> (5) the term "traffic" means transfer, or otherwise dispose of, to another, or obtain control with intent to transfer or dispose of; . . . .

18 U.S.C. § 1029(e). We will affirm the appellant's conviction under 18 U.S.C. § 1029(a)(1) -- use of a counterfeit access device.

I.

Between 1982 and 1989, Caribbean Automated Long Line Services ("CALLS") provided long-distance telephone service to customers in the Virgin Islands. Fraud was a major problem for CALLS -- illicitly-obtained access codes were used to procure telephone service. To combat losses, CALLS began an investigation which identified Herbert L. Schoenbohm as a possible user of illicitly-obtained access codes. The United States Secret Service later joined the investigation of Schoenbohm.

On December 17, 1991, Schoenbohm was charged in a three-count indictment with violation of 18 U.S.C. § 1029(a). Specifically, Count I charged that Schoenbohm used a counterfeit access device in violation of § 1029(a)(1), Count II charged that he obtained long distance telephone services valued at more than $1,000 with unauthorized access devices in violation of § 1029(a)(2), and Count III charged that he possessed 15 or more counterfeit and unauthorized access devices in violation of § 1029(a)(3).

At trial, the government introduced Exhibits 5A and 5B. Exhibit 5A, entitled "ALL CALLS PLACED TO NUMBERS KNOWN TO BE CALLED BY SUSPECT," was a list of Schoenbohm's relatives and

business associates who had received calls from the Virgin Islands placed with illicitly-obtained access codes. Exhibit 5B, entitled "ALL CALLS BY ACCESS CODES USED TO CALL THE NUMBERS ABOVE," was a list of 606 calls made from the Virgin Islands with the illicit access codes found in Exhibit 5A.

Damaging inferences can be drawn from these exhibits. For example, Exhibit 5A shows that a call was made on May 13, 1987, from the Virgin Islands to one of Schoenbohm's relatives in Burton, Ohio, with illicit access code 149907. Exhibit 5B shows that 167 telephone calls valued at $263 were made with illicit access code 149907. One therefore might conclude, as the government urged, that Schoenbohm made 167 calls valued at $263 using illicit access code 149907.

A jury convicted Schoenbohm on all three counts. Schoenbohm filed a motion for acquittal under Fed. R. Crim. P. 29 and a motion for a new trial under Fed. R. Crim. P. 33. Both motions were denied with respect to Count I, but acquittals were granted with respect to Counts II and III. Schoenbohm was sentenced to one month incarceration and one month house confinement.

After trial, Schoenbohm began to investigate the 606 calls that Exhibit 5B suggested he had made. (Pre-trial investigation was impossible because Exhibit 5B was not furnished to Schoenbohm until trial). Schoenbohm called some of the numbers listed in Exhibit 5B and learned that he had never had any communication with those who answered. More importantly,

Schoenbohm learned that the Secret Service also had called some of the numbers listed in Exhibit 5B and had been told that Schoenbohm had never called. The Secret Service thus knew that the inference the United States Attorney had asked the jury to draw from Exhibit 5B was false -- Schoenbohm had not made all 606 calls listed in Exhibit 5B. In addition, the government had failed to disclose this exculpatory evidence, even though Schoenbohm had requested all Brady material.

Schoenbohm made motions for a new trial under Fed. R. Crim. P. 33 and for acquittal under Fed. R. Crim. P. 29, but both were denied because, in the trial court's view, other evidence could sustain the conviction on Count I. Schoenbohm also made a motion for correction of sentence under Fed. R. Crim. P. 35, which was granted. At resentencing, he received two months of incarceration, which was suspended, and two months of house arrest. Schoenbohm then filed motions for dismissal under Fed. R. Crim. P. 16, a new trial under Fed. R. Crim. P. 33, and correction of sentence under Fed. R. Crim. P. 35. All motions were denied and this appeal followed. We have jurisdiction under 28 U.S.C. § 1291.

II.

Schoenbohm contends that the government used false evidence to convict him -- Exhibit 5B listed phone calls Schoenbohm did not make, but a government witness and a prosecutor said that Schoenbohm made all phone calls listed in

Exhibit 5B. Schoenbohm further contends that the government's use of the false evidence was knowing -- before trial, the Secret Service learned that Schoenbohm had not made some of the phone calls listed in Exhibit 5B and a Secret Service agent sat beside the prosecutor at trial. Accordingly, Schoenbohm argues, his conviction must be reversed because the government's knowing use of false evidence could have affected the judgment of the jury.

We conclude that there is no reasonable likelihood that Exhibit 5B could have affected the judgment of the jury on Count I -- use of a counterfeit access device. Exhibit 5B was introduced to prove Count II -- obtaining long distance telephone services valued at more than $1,000 with unauthorized access devices -- on which the district court already has granted a judgment of acquittal. Exhibit 5B was intended to supply a monetary figure for Schoenbohm's fraud which would have permitted a jury to convict on Count II. Count I, on the other hand, did not require the government to prove that the fraudulently obtained services had a particular value; § 1029(a)(1) was violated if Schoenbohm made a single call using a counterfeit access device.

Evidence other than Exhibit 5B shows that Schoenbohm made at least one long-distance phone call using an illicitly-obtained access code, as charged in Count I. Two witnesses testified that Schoenbohm telephoned them at about the same time that records show calls being placed to their numbers with illicit codes. Five other witnesses to whom calls were placed

with illicit codes testified that Schoenbohm was the only person in the Virgin Islands who ever telephoned them. Schoenbohm possessed an automatic dialing device that could have been used to break into the CALLS telephone line. A Secret Service agent testified that Schoenbohm admitted possessing access codes and asked "to cut a deal" to avoid losing his job with the Virgin Islands Police Department. Another witness testified that he heard Schoenbohm broadcast on a ham radio about how to obtain illicit access codes.

Because of this other evidence, we will not overturn Schoenbohm's conviction. We wish to make clear, however, that we are disturbed both by the government's use of Exhibit 5B and by some of the arguments the government makes in urging affirmance. The government insists that it introduced no false evidence: "Exhibit 5B was a neutral exhibit" which "contained a computerized summary of all the phone calls made with the access codes for which there was proof that Schoenbohm had previously used." Appellee's Brief 18. The government admits only to asking the jury and the judge to draw a misleading inference from the evidence. See id. ("Concededly, the inference which the prosecutor asked the jury to make was incorrect with respect to some of the phone numbers."). The government further claims that its conduct was not knowing: the Secret Service never told the United States Attorney that Schoenbohm had not made some of the phone calls listed in Exhibit 5B and thus the United States Attorney did not knowingly mislead the court. See id. at 19

("[t]his information was unknown to the prosecutor at trial" because "the U.S. Attorney's office was only provided with reports which showed a connection between Schoenbohm and the illegal phone call").

The distinction the government makes between "false evidence" and "incorrect inferences" is not valid. This court has repeatedly emphasized the government's duty to present the truth. For example, the government has an obligation to correct false testimony, even when made inadvertently: "[W]hen it should be obvious to the Government that the witness' answer, although made in good faith, is untrue, the Government's obligation to correct that statement is as compelling as it is in a situation where the Government knows that the witness is intentionally committing perjury." United States v. Harris, 498 F.2d 1164, 1169 (3d Cir.), cert. denied sub nom. Young v. Harris, 419 U.S. 1069 (1974). The government's duty to present the truth is no less compelling in this situation. See, e.g., Hamric v. Bailey, 386 F.2d 390, 394, (4th Cir. 1967) ("[e]vidence may be false either because it is perjured, or, though not itself factually inaccurate, because it creates a false impression of facts which are known not to be true").

While the United States Attorney's ignorance of the Secret Service investigation is, of course, relevant with respect to his personal culpability, it provides no excuse for the government's having prosented false evidence to the jury. This court, for Brady purposes, looks to the knowledge of the entire

"prosecutorial team," which includes both investigative and prosecutorial personnel. See United States v. Perdomo, 929 F.2d 967, 970 (3d Cir. 1991). A prosecutor who has an obligation to contact investigators to search for Brady materials likewise has an obligation to contact investigators to ensure the evidence he or she offers is not false. Despite the government's mishandling of Exhibit 5B, however, we must affirm Schoenbohm's conviction on Count I because of the overwhelming evidence that supports it.

III.

Schoenbohm argues that the government's failure to reveal the results of the Secret Service investigation violated his rights under Brady v. Maryland, 373 U.S. 83 (1963). When the government withholds Brady material, "this Court ordinarily grants [the defendant] a new trial," United States v. Starusko, 729 F.2d 256, 265 (3d Cir. 1984), and, Schoenbohm contends, should do so in this case.

We are unpersuaded. "A valid Brady complaint contains three elements: (1) the prosecution must suppress or withhold evidence, (2) which is favorable, and (3) material to the defense." United States v. Perdomo, 929 F.2d 967, 970 (3d Cir. 1991). The results of the Secret Service investigation were material to the defense of Count II -- obtaining telephone service valued at more than $1,000 with unauthorized access devices -- but not to the defense Count I -- use of a counterfeit

access device. A judgment of acquittal, however, already has been granted on Count II.

IV.

Schoenbohm argues that the government failed to meet its burden of proof under 18 U.S.C. § 1029(a)(1). Specifically, Schoenbohm maintains that the government failed to show that the codes were counterfeit as opposed to unauthorized, that he knew the codes were counterfeit, and that CALLS had exclusive rights to the codes.

We cannot review the sufficiency of the evidence unless the defendant makes a motion for judgment of acquittal in the district court under Fed. R. Crim. P. 29. See Charles A. Wright, Federal Practice and Procedure § 469. Schoenbohm made four motions for judgment of acquittal -- at the close of the prosecution's case on the morning of April 23, 1992, at the close of his own case on the afternoon of April 23, 1992, on May 27, 1992, and on September 21, 1992 -- each of which the district court denied on the merits and each of which we will examine individually. "The standard to be used in judging the sufficiency of the evidence after a properly preserved motion for acquittal has been made is whether, viewing all the evidence adduced at trial in the light most favorable to the government, there is substantial evidence from which the jury could find guilt beyond a reasonable doubt." Government of the Virgin

Islands v. Bradshaw, 569 F.2d 777, 779 (3d Cir.), cert. denied, 436 U.S. 956 (1978).

In his Rule 29 motion on the morning of April 23, 1992, Schoenbohm made two arguments for acquittal on Count I. First, he claimed that the government had failed to prove the use of the access codes in foreign commerce, as the statute supposedly required. Second, he claimed that the government failed to prove that the access codes belonged to CALLS. The district court rejected the first argument, ruling that the government had to prove use of the access codes in either interstate or foreign commerce, and Schoenbohm does not press the argument before this court. As for Schoenbohm's second argument, we find it unpersuasive. Government Exhibit 15A consisted of Federal Communication Commission documents granting CALLS the right to operate a long-distance service which subscribers could access "by Touch Tone telephone, or a Soft Touch Tone Pad, or an Equal Access Dialer." From this, the jury could conclude that the codes that CALLS would issue to permit access to long-distance service belonged to CALLS.

Schoenbohm's Rule 29 motion on the afternoon of April 23, 1992, concerned only Counts II and III of the indictment, neither of which is now at issue.

Schoenbohm's Rule 29 motion of May 27, 1992, was untimely. Fed. R. Crim. P. 29(c) provides:

> If the jury returns a verdict of guilty . . . a motion for judgment of acquittal may be made or renewed within 7 days after the jury

> is discharged or within such further time as the court may fix during the 7-day period.

Trial ended on April 24, 1992, so Schoenbohm had seven days within which either to make a Rule 29 motion or to get the district court to grant an extension of time in which to file a Rule 29 motion. On April 29, the court granted an extension until May 18. On May 18, the district court granted Schoenbohm an extension to May 27 to file his Rule 29 motion -- an extension which was contrary to Fed. R. Crim. P. 45(b), which provides that "the court may not extend the time for taking any action under Rules 29, 33, 34 and 35, except to the extent and under the conditions stated in them." See also United States v. Piervinanzi, 765 F. Supp. 156, 157 (S.D.N.Y. 1991) ("any extension of time for making of a Rule 29(c) motion must be granted, if at all, within seven days after the jury is discharged . . . Rule 45(b) explicitly forbids a court from granting extensions beyond those permitted in Rule 29(c)"). Accordingly, we decline to review the district court's denial on the merits of Schoenbohm's untimely Rule 29 motion of May 27, 1992.[1]

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1. Despite the motion's untimeliness, the district court could have granted it, and we would not have reversed the district court's decision based solely on the basis of untimeliness. As we noted in United States v. Coleman, 811 F.2d 804, 807 (3d Cir. 1987):

> In United States v. Giampa, 758 F.2d 928, 936 n.1 (3d Cir. 1985), this court specifically held that a district court may enter a judgment of acquittal "sua sponte under its inherent power," without regard to the seven-

(continued...)

A similar analysis applies to Schoenbohm's Rule 29 motion of September 21, 1992, made almost five months after the jury was discharged. It was in this motion that Schoenbohm first asserted that the government had failed to prove use of a "counterfeit" access device, as contrasted with an "unauthorized" one. Because of the motion's untimeliness, we decline to review the district court's disposition of the arguments that Schoenbohm made therein.

V.

Schoenbohm contends that the district court failed to use the appropriate standard in ruling on his motions for a new trial. When a defendant argues that a government witness testified falsely at trial, a new trial must be granted if:

> 1. The court is reasonably well satisfied that the testimony given by a material witness is false;

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1. (...continued)

> day requirement of Rule 29. . . . Here, although the district court entered a judgment of acquittal on [the defendant's] motion for acquittal, and not sua sponte, it would be inconsistent to hold that the court's inherent power to grant an acquittal out of time sua sponte does not extend to those occasions when a motion is made in granted. Accordingly, [the defendant's] acquittal cannot be reversed for such a procedural deficiency, and we must now consider the merits of the appeal.

This case, however, is distinguishable from Coleman in that the district court never granted Schoenbohm's motion for acquittal -- there was no exercise of "the court's inherent power to grant an acquittal out of time" which we can review.