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Before the
Federal Communications Commission
Washington, D.C. 20554

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In the matter of)
)
HERBERT L. SCHOENBOHM)
Kingshill, Virgin Islands)
)
For Amateur Station and)
Operator Licenses)
)
TO: The Commission)

WT Docket No. 95-11

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STATEMENT REQUIRED BY SECTION 1.65 OF THE RULES

Pursuant to Section 1.65 of the Commission's Rules,
Herbert L. Schoenbohm ("Schoenbohm"), by his attorney, hereby
respectfully submits the attached Memorandum Opinion of the Third
Circuit Court of Appeals, denying the appeal from his conviction.

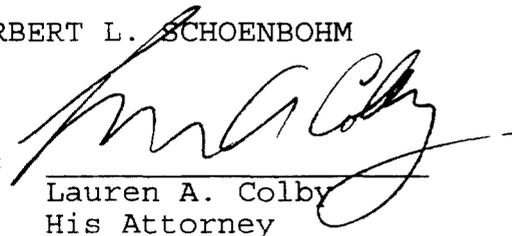
Respectfully submitted,

May 15, 1996

HERBERT L. SCHOENBOHM

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By:


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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-7241

UNITED STATES OF AMERICA

vs.

HERBERT L. SCHOENBOHM,
Appellant

Appeal from the District Court
of the Virgin Islands
(D.C. Crim No. 91-cr-00108)
District Judge: Honorable John P. Fullam

Argued
April 16, 1996
Before: MANSMANN, SAROKIN and GARTH, Circuit Judges.

(Filed MAY 09 1996 , 1996)

MEMORANDUM OPINION OF THE COURT

MANSMANN, Circuit Judge.

We review the district court's denial of Herbert L. Schoenbohm's petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2255. Because the petition was properly denied, we will affirm the order of the district court.

I.

This petition has its origin in Schoenbohm's April 24, 1992 conviction in the District Court of the Virgin Islands on

all counts of a three-count indictment involving theft of long distance telephone service in violation of 18 U.S.C. § 1029.

Specifically, Schoenbohm was convicted of using a counterfeit access device in violation of section 1029(a)(1). He was also convicted of obtaining, with unauthorized access devices, long distance telephone services valued at more than \$1,000 in violation of section 1029(a)(2), and with possessing 15 or more counterfeit and unauthorized access devices in violation of section 1029(a)(3).

Following the conviction, Schoenbohm filed a motion, pursuant to Fed. R. Crim. P. 29, for acquittal. This motion was granted with respect to Counts II and III based on the district court's conclusion that the Secret Service was aware at trial that certain inferences drawn from the evidence and presented to the jury by the United States Attorney were false. Furthermore, the court concluded that the government had failed to disclose to the defendant exculpatory evidence relevant to Counts II and III in violation of the requirements set forth in Brady v. Maryland, 373 U.S. 83 (1963). The Count I conviction was allowed to stand, however, based upon the court's determination that this conviction was supported by adequate untainted evidence.

On July 24, 1994, we considered Schoenbohm's direct appeal from the judgment of conviction and sentence and affirmed that judgment.¹

1. In the direct appeal, Schoenbohm contended that the government knowingly used false evidence to convict him on all
(continued...)

While the direct appeal was pending, Schoenbohm, acting pro se, filed a motion in the district court seeking "relief from judgment" pursuant to Fed. R. Civ. P. 60(b)(3). Schoenbohm claimed to have secured new evidence through his own post-trial investigation, establishing that prosecutors had knowingly presented false evidence relevant to his conviction under Count I.

The district court, noting that such a motion was procedurally improper in a criminal matter, elected to treat the motion as an application for habeas relief under 28 U.S.C. § 2255. The court then denied the petition. Although the district court recognized that Schoenbohm, "via an arduous and time-consuming application under the Freedom of Information Act, [had] a great deal of additional information which, he reasonably argue[d], prove[d] that counsel at trial and on appeal had misrepresented their knowledge of the existence of the exculpatory information," it denied Schoenbohm's petition on the ground that "the Court of Appeals' judgment [in the direct appeal] . . . disposed of all issues raised by Mr. Schoenbohm."

1. (...continued)

three counts. In an opinion critical of the government, we held that while evidence had been mishandled and misrepresented by the government, that evidence was fatal to Counts II and III only. United States v. Schoenbohm, No. 93-7516 (3d Cir. July 22, 1994). Schoenbohm filed a petition for panel rehearing which was denied.

United States v. Schoenbohm, No. 91-108 (D.V.I. Dec. 15, 1994) (typescript at 4).²

In his appeal to us from the denial of his habeas petition, Schoenbohm advances three arguments. First, he contends that because he is able to show, through evidence obtained after his conviction, that the prosecutor knowingly used false evidence to convict him of the offense described in Count I, he should have been granted an evidentiary hearing to develop this evidence and establish his entitlement to a new trial. Schoenbohm also alleges ineffective assistance of counsel and argues that the language of the indictment and the jury charge did not conform to the language of the statute under which he was charged. We reject each of these arguments.

II.

Schoenbohm's argument with respect to newly discovered evidence of prosecutorial misconduct is based upon the requirements of Brady v. Maryland, 373 U.S. 83 (1963). Under the ruling in Brady, a defendant may be entitled to have his conviction set aside where the prosecution relied upon trial testimony which was known or should have been known to be perjured. A conviction will be set aside "if there is any reasonable likelihood that the false testimony could have

2. A motion for clarification of the December 15 order was granted in part in a Memorandum and Order dated April 19, 1995. In this Order, the district court again denied Schoenbohm's motion for relief pursuant to 28 U.S.C. § 2255. This appeal followed.

affected the judgment of the jury." Kyles v. Whitley, ___ U.S. ___ (1995), 115 S. Ct. 1555, at 1565 n.7.

Schoenbohm argues that at the time of his direct appeal, he was unable to show that the prosecution had knowingly presented false evidence. It now appears that Schoenbohm may be able to show that false evidence relevant to all counts of the indictment was presented to the jury. He claims that the district court considering his habeas petition should have granted him an evidentiary hearing because "his claim that the prosecution knowingly used false evidence is not fully developed" and there are factual issues to be explored.

In evaluating this argument, we begin with the proposition that "a petitioner on writ of habeas corpus will not succeed merely because the prosecutors' actions were undesirable or even universally condemned." Todaro v. Fulcomer, 944 F.2d 1079, 1083 (3d Cir. 1991). Were this the standard, on the record as it presently stands, Schoenbohm would likely prevail. The test we apply in determining the need for an evidentiary hearing is, however, more restrictive. First, we must determine whether the petitioner asserts facts entitling him to relief. If the petitioner crosses this threshold, we must next determine whether an evidentiary hearing is needed to prove these assertions. Todaro v. Fulcomer, 944 F.2d 1079, 1082 (3d Cir. 1991).

We have carefully reviewed Schoenbohm's disturbing description of the evidence of prosecutorial misconduct detailed in Schoenbohm's brief and in his reply brief. While we agree

that there may be legitimate concerns with the way the case was handled, we must conclude that Schoenbohm has failed to make the threshold showing that an evidentiary hearing is required.

As we noted when we considered this matter on the direct appeal, section 1029(a)(1) was violated if Schoenbohm made a single call using a counterfeit access device. Even accepting as true the "new" evidence of prosecutorial misconduct detailed in Schoenbohm's brief, there remains ample reliable evidence that at least one illicit call was made. Indeed, the record reveals a total of 41 such calls. As we stated before,

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. . . . Another witness testified that he heard Schoenbohm broadcast on a ham radio about how to obtain illegal access codes.

(Mem. Op. at 6-7). In view of this evidence, we do not believe that "there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." Kyles v. Whitley, 115 S. Ct. at 1565 n.7. We find, therefore, that the district court properly denied Schoenbohm's request for an evidentiary hearing.

III.

We next turn to Schoenbohm's claim with respect to ineffective assistance of counsel. This claim grows out of a

procedural morass surrounding the district court's disposition of motions for judgment of acquittal filed pursuant to Fed. R. Crim. P. 29. Rule 29(c) provides that

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 some further time as the court may fix during the 7-day period.

Trial in this matter ended on April 24, 1992 and, on April 29, 1992, the district court granted counsel for Schoenbohm until May 18 to file a Rule 29 Motion. On May 18, 1992, the district court extended the time for filing to May 27. On May 27, the motion was heard and denied on the merits.

When we reviewed the denial of the Rule 29 motion during the course of Schoenbohm's direct appeal, we concluded that the filing of the motion was untimely, contravening the requirements of Fed. R. Crim. P. 44(c) which provides that "the court may not extend the time for taking any action under Rule 29 . . . except to the extent and under the conditions stated [therein]." We concluded that the extension granted by the court on May 18 violated the procedure set forth in Rule 29(c) and as a result, we declined to review the merits of the district court's denial of Schoenbohm's May 27 motion. We applied a similar analysis to a second Rule 29 motion filed on September 27, 1992.

In his habeas petition, Schoenbohm attempted to raise the sufficiency of the evidence claims originally advanced in the untimely Rule 29 motions. Citing our opinion on direct appeal, the district court declined to address these claims.

Schoenbohm now attempts to have us revisit the denial of the Rule 29 motions by couching his request in terms of ineffective assistance of counsel. He argues that "his counsel's failure to timely file a Rule 29 motion was a result of ineffective assistance of counsel." We find nothing in the record to support this claim.

It is by now well established that a conviction will be overturned due to ineffective assistance of counsel only where counsel's conduct so "undermined the proper functioning of the adversarial system that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984). A petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness and a reasonable probability that "but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694.

In the circumstances presented here, we cannot say that counsel's failure to appreciate the ramifications of the May 18 extension amounted to unprofessional error falling below a standard of reasonableness. It is clear that counsel merely complied with the scheduling established by the district court. Moreover, having concluded that Schoenbohm's conviction under Count I must be sustained, the Rule 29 motion could not have been granted in any event, even had it been timely.

IV.

Finally, we turn to Schoenbohm's contention that his conviction must be reversed because the indictment and jury charge do not track the language of the statute: 18 U.S.C. § 1029(a)(1) criminalizes conduct which "affects interstate commerce," but Schoenbohm was convicted under an indictment and pursuant to jury instructions charging him only with conduct involving the "use" of interstate commerce.

This argument is meritless. Where language in an indictment differs from that of the statute defining the crime, the indictment is sufficient provided that it sets forth the elements of the crime charged and apprises the defendant of the charge, enabling him to plead guilty or not guilty. United States v. Johnson, 371 F.2d 800 (3d Cir. 1967).

We agree with the district court that the indictment in this case

was sufficient to charge a violation of the statute. Although not couched in the precise language of the statute . . . the indictment conveys the same message. It seems reasonably clear that to use a counterfeit access device in interstate commerce necessarily affects interstate commerce.

United States v. Schoenbohm, (D.V.I., April 19, 1995) (typescript at 5).

v.

Having rejected each of the arguments advanced in the petition for habeas corpus, we will affirm the order of the district court.

TO THE CLERK:

Please file the foregoing opinion.

Carol Lee Mansmann

Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-7241

UNITED STATES OF AMERICA

vs.

HERBERT L. SCHOENBOHM,

Appellant

Appeal from the District Court
of the Virgin Islands
(D.C. Crim No. 91-cr-00108)
District Judge: Honorable John P. Fullam

Before: MANSMANN, SAROKIN and GARTH, Circuit Judges.

JUDGMENT

This cause came to be considered on the record from the United States District Court of the Virgin Islands and was argued on April 16, 1996.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the district court entered on April 19, 1995, be and the same is hereby affirmed.

ATTEST:

P. Douglas Sisk

Clerk

MAY 09 1996

CERTIFICATE OF SERVICE

I, Barbara Betteker, a secretary in the law office of
Lauren A. Colby, do hereby certify that copies of the foregoing
have been sent via first class, U.S. mail, postage prepaid, this
15th day of May, 1996:

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Barbara Betteker
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