

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.<sup>1</sup>

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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.

2. That without it a jury might have reached a different conclusion; [and]

3. That the party seeking the new trial was taken by surprise when the false testimony was given and was unable to meet it or did not know of its falsity until after the trial.

United States v. Meyers, 484 F.2d 113, 116 (3d Cir. 1973).

Instead of using this so-called Larrison test, Schoenbohm says, the district court applied a sufficiency of the evidence standard. On denying Schoenbohm's first motion for a new trial, the district judge stated: "I am denying the motion because looking at the evidence as I must in the light most favorable to the Government, I find that there was sufficient evidence for the jury to have returned a verdict of guilty." On denying Schoenbohm's second motion for a new trial, the district judge noted: "[T]he use of [Exhibit] 5B, while giving the court some thought overall, I cannot say that given all the other evidence in the case that it would have denied the defendant a fair trial."

Application of the Larrison test does not help Schoenbohm. Even if Exhibit 5B had not been introduced, there is still no possibility that "the jury might have reached a different conclusion" on Count I because Exhibit 5B was not relevant to Count I.

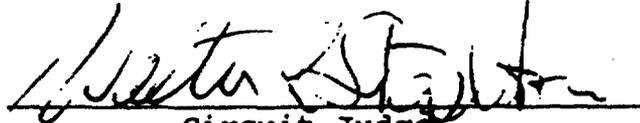
VI.

The judgment of the district court will be affirmed.

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TO THE CLERK:

Please file the foregoing Memorandum Opinion.

  
Circuit Judge

**EXHIBIT B**

P.O.Box 1347  
Clifton, NJ 07015  
7/22/97

Thomas D. Fitz-Gibbon, Esq.  
Federal Communications Commission  
Washington, DC 20554

Dear Mr. Fitz-Gibbon:

In all candor, a quality that you and attorney Reideler are emphasizing Herbert Schoenbohm lacks, I'd be tempted to send the enclosed photo to ALJ Edward Luton to show him there's more to Schoenbohm than lying, stealing and felonious conduct. The man sponsors, encourages and delights in white supremacy and anti-Semitism on amateur(ham) radio.

Is there anything more offensive generally to Americans and specifically to American minorities than seeing a Nazi swastika flag flaunted? And being that Schoenbohm's fate as a ham radio operator is now in the hands of a man of color and that KV4FZ is the head of the BARRF which in itself, as I've said for years, is nothing more than a Hitlerite clique of sociopaths, well.... Judge Luton may become quite aggravated. However, as malicious as he is, Schoenbohm does deserve to have a fair appraisal as to whether or not his amateur radio ticket renewal will be for the good of the public, and my tampering would be as illegal as his ex parte violation. I therefore will have no part of it.

Our First Amendment guarantees us even the right to hate, be it on ham radio or otherwise. That same right enables anyone to hoist a Nazi flag even though it contradicts everything American since it denotes racism, hate and even genocide. And that's exactly what Schoenbohm's BARRF is all about. Things equal to the same thing are equal to each other. In fact, Schoenbohm IS the BARRF. As proof let's keep in mind the opening on-the-air statements in the January 1993 Westlink report.

"A ham generally credited with starting the BETTER AMATEUR RADIO FEDERATION as a way of stopping alleged misuse of telephone patching privileges by members of service nets, has himself been sentenced for a telephone related offense. On December 30th, federal district court judge Anne E. Thompson told Herbert Schoenbohm, KV4FZ, that he must spend two months under house arrest...etc." See the BARRF logo on the cap of the swastika-bearing "gentleman?" Does it not tell you of the link between Schoenbohm, white supremacy and anti-Semitism?

Why does Schoenbohm continue, along with a few of his loyalists, harassing and intentionally interfering with Intercon, a vital ham radio public service net? Anti-Semitism is the reason. Schoenbohm said it himself, "...it will in a negative way call attention to the fact that the Intercontinental Net is predominantly run by Jewish elders that have set up their little thing here to avoid paying for telephone calls. That's the purpose of the organization; it's basically run by Jewish people..." And so Schoenbohm has a rallying cry to disrupt and destroy, along with henchmen, a fine useful net. Isn't it reminiscent of a madman with oratorical skills in the '20s and '30s Germany who, by lies and deceit, galvanized a nation to hate and then murder?

I've been on top of the Schoenbohm sponsored mayhem on ham radio for years and have stressed to the FCC that the basis for it was blatant anti-Semitism. That explains why I came to the defense of Richard Whiten, WB20TK, after he received a \$10,500 fine for interfering with Michael Galego, KA4MUJ, a foul-mouthed bigoted oaf who was Schoenbohm's right hand man. Perhaps if the FCC had known the WHOLE story back in 1992, Whiten would have never been fined? The man was a prime target of the BARRF because of his religion and because he was the first to defend his principles against ham radio tyrants. Perhaps he was over zealous but yet undeserving of such harsh punishment. I certainly hope that the FCC will reconsider and forgive the monetary forfeiture.

The photo of the swastika lover in the BARF cap IS Herbert Schoenbohm is philosophy but not in physiognomy. I do not know the identity of the person photographed however it would not be surprising to discover that he is one of the unidentified harassers on either 14.300 or 14.313 who disparage against Jews and call Ashley Reed, 6Y5GR, a Jamaican, a "jungle bunny and nigger" and Phil, N9GOR, an Afro-American, "brillo and nigger." No amount of Schoenbohm-linked bigotry has ever surprised me. KV4FZ is indeed the essence of BARF; BARF is a euphemism for intolerance and both are inseparable.

Good ham radio is hoping Judge Luton makes the right decision. As the matter drags on, mayhem reigns supreme because the BARF Schoenbohm supporters feel confident that KV4FZ's license will be renewed. They view the FCC as no more than a paper tiger which is impotent in amateur radio enforcement thanks to a combination of lack of will, lack of evidence, lack of manpower and budgetary constraint.

The photo says it all. A picture may be worth a thousand words but for the sake of good ham radio, just three are necessary: "Goodbye Mr. Schoenbohm."

Respectfully,

"Doc"

C. Schwartzbard DDS

AF2Y

EXHIBIT C

TERRITORY OF THE U.S. VIRGIN ISLANDS )  
 : ss  
 CITY OF FREDERIKSTED )

DECLARATION

Herbert Schoenbohm hereby declares under penalty of the laws of perjury that the following is true and correct:

1. For some time now, I have been aware that certain members of the amateur radio community were circulating letters, statements to the Internet, and messages sent by ham radio, accusing me of being a Nazi and an anti-Semite. At first I considered these allegations to be too ridiculous to require a reply. After all, I am employed by the Virgin Islands government in a job which requires me to work harmoniously with people who are predominantly of different races from mine. A bigot could not last on my job for ten minutes. Those who know me are aware that I am not a bigot.

2. Recently, however, I have become aware of a letter dated July 22, 1997, written by one C. Schwartzbard, and addressed to Mr. Tom Fitz-Gibbon, a member of the FCC's staff. The letter was accompanied by a fake photograph, purporting to show me holding a Nazi flag. The letter accuses me of being anti-Semitic and making anti-Semitic remarks. The writer of the letter says that he would "not be surprised" if I was one of the unidentified "harassers" who use the ham bands to disparage Jews and refer to Blacks as a "jungle bunny and nigger" or a "brillo and nigger".

3. I do not know who else may have been the subject of letters from Mr. Schwartzbard and/or his friends. Hopefully, no letters were sent to the Administrative Law Judge. I have to consider the possibility, however, that these scurrilous letters may have been circulated amongst the FCC staff, and that some staff members, not knowing me, may actually believe the contents of the letters.

4. For the record, I have never used ham radio to disseminate racial or religious stereotypes or epithets of any sort. I do not use such epithets in my conversations, either on or off the air. I harbor no animosity towards anyone based on that person's race or religion. I have never held a Nazi flag in my hands, nor would I do so. The photograph, purporting to show me holding such a flag, is a crude counterfeit. I do not "hate" anyone because of his race or religion. I rarely even mention race or religion in my conversations; I am not preoccupied with these subjects. My preoccupation, if there is one, is with the observance of the FCC's amateur rules.

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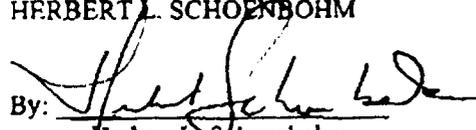
5. I have, in fact, had disagreements with the Intercontinental Net (some of whose leaders are Jewish) over observance of the FCC's Rules. I had a similar disagreement with Mr. Ackley (who is not Jewish), which resulted in the criminal conviction which is the basis for the pending proceeding on the renewal of my ham license.

Further, declarant sayeth not.

HERBERT L. SCHOENBOHM

Dated: 11/18/97

By:

  
Herbert L. Schoenbohm

CERTIFICATE OF SERVICE

I, Traci Maust, 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 20<sup>th</sup> day of November, 1997, to the offices of the following:

ALJ Edward Luton  
F.C.C.  
2000 L Street, N.W.  
Room 225  
Washington, D.C. 20554

Thomas D. Fitz-Gibbon, Atty.  
F.C.C.  
2025 M Street, N.W.  
Room 5328  
Washington, D.C. 20554

  
Traci Maust