FILED
March 4, 2016
Board of Disciplinary Appeals

BEFORE THE BOARD OF DISCIPLINARY APPEALS
APPOINTED BY
THE SUPREME COURT OF TEXAS

IN THE MATTER OF	§	
MARC G. ROSENTHAL	§	**CAUSE NO. 53873**
STATE BAR CARD NO. 17281450	§	

MOTION FOR ENTRY OF JUDGMENT OF DISBARMENT

TO THE HONORABLE BOARD:

COMES NOW, Petitioner, the Commission for Lawyer Discipline (hereinafter called "Petitioner"), and files this its Motion for Entry of Judgment of Disbarment, showing as follows:

1. On or about March 11, 2014, Petitioner filed its Petition for Compulsory Discipline against Respondent, Marc G. Rosenthal, (hereinafter called "Respondent") seeking compulsory discipline based upon Respondent's conviction in Case No. 1:11CR00743-001, styled *United States of America v. Marc Garrett Rosenthal*, in the United States District Court for the Southern District of Texas, Holding Session in Brownsville, wherein Respondent was found guilty of Count 1 - Conspiracy to Participate in Conduct and Affairs of a Criminal Enterprise, the Activities which Affected Interstate and Foreign Commerce, through a Pattern of Racketeering Activity, Count 2 - Mail Fraud and Aiding and Abetting, Count 3 - Mail Fraud and Aiding and Abetting, Count 4 - Mail Fraud and Aiding and Abetting, Count 5 - Mail Fraud and Aiding and Abetting, Count 7 - Tampering with Witness and Aiding and Abetting, Count 8 - Tampering with Official Proceeding by False Affidavit, Count 9 - Tampering with Official Proceeding by Perjured Testimony, Count 10 - Extortion (Under Color of Official Right) and Aiding and Abetting, Count 11 - Honest Services Mail Fraud and Aiding and Abetting, and Count 12 - Honest Services Mail Fraud and

Aiding and Abetting, and was committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of two hundred forty (240) months on each count, to be served concurrently. Respondent was ordered upon release from imprisonment to be on supervised release for three (3) years on each count, to be served concurrently, ordered to perform 200 hours of community service, ordered to pay an assessment of $1,100.00 and restitution of $13,288,984.50.

2. On April 11, 2014, an Agreed Interlocutory Order of Suspension was entered by the Board of Disciplinary Appeals which provides in pertinent part, as follows:

> It is further ORDERED that this Order is interlocutory and that the Board retains jurisdiction to enter a final judgment when the appeal of the criminal conviction is final. In the Matter of Mercier, 242 SW 3d 46 (Tex. 2007).

3. Following the appeal by Respondent of his criminal conviction in Case No. 1:11CR00743-001, on the charges of of Count 1 - Conspiracy to Participate in Conduct and Affairs of a Criminal Enterprise, the Activities which Affected Interstate and Foreign Commerce, through a Pattern of Racketeering Activity, Count 2 - Mail Fraud and Aiding and Abetting, Count 3 - Mail Fraud and Aiding and Abetting, Count 4 - Mail Fraud and Aiding and Abetting, Count 5 - Mail Fraud and Aiding and Abetting, Count 7 - Tampering with Witness and Aiding and Abetting, Count 8 - Tampering with Official Proceeding by False Affidavit, Count 9 - Tampering with Official Proceeding by Perjured Testimony, Count 10 - Extortion (Under Color of Official Right) and Aiding and Abetting, Count 11 - Honest Services Mail Fraud and Aiding and Abetting, and Count 12 - Honest Services Mail Fraud and Aiding and Abetting, an Opinion (Exhibit A) was issued by the United States Court of Appeals for the Fifth Circuit on or about October 14, 2015, in Cause No. No. 13-41329, *United States of America, Plaintiff – Appellee v. Marc Garrett Rosenthal, Defendant – Appellant,* which affirmed the judgment issued by the District Court.

4. On or about November 5, 2015, a Judgment was issued as Mandate (Exhibit B) by the United States Court of Appeals for the Fifth Circuit, in Cause No. No. 13-41329, *United States of America, Plaintiff – Appellee v. Marc Garrett Rosenthal, Defendant – Appellant,* which affirmed the judgment issued by the District Court. True and correct copies of the Opinion and Judgment Issued as Mandate issued by the United States Court of Appeals for the Fifth Circuit, are attached hereto as Exhibits A and B, and made a part hereof for all intents and purposes as if the same were copied verbatim herein. Petitioner expects to introduce certified copies of Exhibits A and B at the time of hearing of this cause.

5. Petitioner represents to the Board that the Judgment entered against Respondent, Marc G. Rosenthal, has now become final. Petitioner seeks the entry of a judgment of disbarment. Attached hereto as Exhibit C is a true and correct copy of the form of judgment of which Petitioner seeks the entry herein.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Petitioner prays, upon notice to Respondent, that the Board enter its order disbarring Respondent and for such other and further relief to which Petitioner may be entitled.

Respectfully submitted,

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Rebecca (Beth) Stevens
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ATTORNEYS FOR PETITIONER

NOTICE OF HEARING

NOTICE IS HEREBY GIVEN that a trial on the merits of the Motion for Entry of Judgment of Disbarment heretofore sent to be filed with the Board of Disciplinary Appeals on this day, will be held in the courtroom of the Supreme Court of Texas, Tom C. Clark Building, 14th and Colorado Streets, Austin, Texas, at **9:00 a.m. on the 29th day of April 2016.**

Rebecca (Beth) Stevens

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been sent to Steven L. Lee, Attorney for Respondent, 1411 West Ave., Suite 100, Austin, Texas 78701, on this 4th day of March 2016.

Rebecca (Beth) Stevens

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 13-41329

United States Court of Appeals
Fifth Circuit
FILED
October 14, 2015
Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

MARC GARRETT ROSENTHAL,

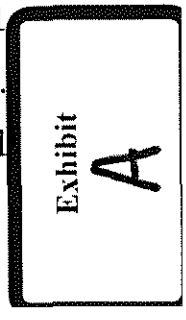
Defendant - Appellant

Appeal from the United States District Court
for the Southern District of Texas

Before STEWART, Chief Judge, and BARKSDALE and PRADO, Circuit Judges.

RHESA HAWKINS BARKSDALE, Circuit Judge:

This appeal does not challenge the sufficiency of the evidence for charged widespread corruption involving a lawyer, a state judge, and a former state legislator. Instead, the lawyer, Marc Garrett Rosenthal, claims he is entitled to a new trial due to procedural errors, such as in obtaining wiretap evidence. He was found guilty by a jury of: racketeering conspiracy, in violation of 18 U.S.C. § 1962(d), the Racketeer Influenced and Corrupt Organizations Act (RICO) (count one); five counts of mail fraud, in violation of 18 U.S.C. §§ 1341 and 2 (counts two–six); witness tampering, in violation of 18 U.S.C. §§ 1512(b)(1) and 2 (count seven); two counts of obstruction of an official



proceeding, in violation of 18 U.S.C. §§ 1512(c)(2) and 2 (counts eight and nine); aiding-and-abetting extortion, in violation of the Hobbs Act, 18 U.S.C. §§ 1951 and 2 (count ten); and three counts of honest-services mail fraud, in violation of 18 U.S.C. §§ 1341, 1346 and 2 (counts 11–13). At sentencing, the district court dismissed counts six and 13 due to insufficient evidence. Rosenthal was sentenced to 240 months' imprisonment.

At issue are the extensions of authorizations to intercept telephone communications admitted as evidence at trial; three jury instructions; and a statement made by the Government during rebuttal closing argument. Each issue is reviewed only for plain error. AFFIRMED.

I.

Rosenthal was a shareholder in Rosenthal & Watson (R&W), a personal-injury law firm with offices in Austin and Brownsville, Texas. In a criminal scheme spanning approximately four years, Rosenthal, among other crimes: bribed a state judge for favorable rulings, orders, and treatment; conspired with others to manipulate personal-injury actions by paying witnesses for false statements and testimony; fabricated evidence; fixed the random case-assignment system in order to ensure cases were filed before judges he preferred; and committed several acts of fraud.

Although several people associated with R&W participated in Rosenthal's offenses, most of the evidence at trial focused on the following individuals: Abel Limas, a state-court judge who became affiliated with R&W; Jim Solis, a former Texas state representative, and of-counsel to R&W; and Gilbert Benavides, an unlicensed lawyer employed by the firm. All three testified against Rosenthal at trial. The Government presented detailed evidence regarding Rosenthal's illegal scheme, grouped below as the Union Pacific Railroad cases, and involvement with then-state-judge Limas.

Rosenthal represented the estate of a man killed when a train struck his vehicle at a railroad crossing. According to Benavides' testimony, in an attempt to force a settlement with Union Pacific, he and Rosenthal enlisted Benavides' cousin to make false statements. The cousin stated falsely he was present at the accident scene, and witnessed the train hit the stopped vehicle without sounding its horn or otherwise warning of its approach. Rosenthal used the false statement to induce Union Pacific to settle in 2006 for more than $1 million. At Rosenthal's behest, Benavides paid his cousin $5,000, and another family member $4,000, for their assistance.

In another matter, Rosenthal represented a woman who was severely injured when she fell from a Union Pacific train after attempting to board illegally. Benavides testified Rosenthal directed him to contact a deputy sheriff present at the accident scene and offer to pay him to state falsely the train's engineer invited the woman to board the train. The deputy was also instructed to say he overheard the engineer say Union Pacific "[did] not care if its trains run over wetbacks". The deputy agreed and made these false statements in an affidavit and deposition, which Rosenthal sent to Union Pacific in an attempt to induce settlement. Rosenthal additionally threatened to erect billboards featuring the comment falsely attributed to the engineer. Union Pacific eventually settled in 2007 for $575,000. The deputy received $4,000 for his cooperation.

In a third matter, Rosenthal represented a passenger in an automobile hit by a Union Pacific train. In another attempt to force settlement, Rosenthal contacted Union Pacific and repeated the earlier statements of the deputy. Rosenthal also enlisted a friend to pose as a Union Pacific attorney, telephone the train conductor, and persuade the conductor to state the train's horn had not been blowing at the time of the accident. The effort was unsuccessful; the

conductor, suspicious of the call, reported it to Union Pacific, which traced it to Rosenthal's associate in 2007.

In 2008, Rosenthal expanded his scheme and began working with Solis, a former state legislator who had represented the city of Harlingen, Cameron County, Texas, from 1993–2006, to bribe Limas, an elected state-court judge in Cameron County, for favorable rulings and treatment. Solis worked primarily in R&W's Brownsville office in Cameron County. Solis testified Rosenthal viewed Limas as a judge who was friendly to plaintiffs. To ensure two high-profile actions would be heard in Limas' court, Rosenthal and Solis worked with an employee in the clerk's office to circumvent the regular assignment process and have the matters assigned to Limas.

Limas was running for re-election during this time period and received thousands of dollars in campaign donations from Rosenthal and others at R&W. Shortly after Limas lost the primary election in March 2008, he spoke with Rosenthal and Solis about a possible "of counsel" position at R&W at the end of his term. According to Limas and Solis, for the remainder of his term as a judge, Limas agreed to enter orders favorable to Rosenthal in each of his pending actions in exchange for a position with R&W, and a share of the recovery in one of those matters. Over several months, Rosenthal, Solis, and Limas had repeated *ex parte* meetings and communications, some of which were intercepted by a Title III wiretap and played for the jury during trial. The conversations included: motions or orders Rosenthal and Solis wanted ruled upon in their favor; instructions to Limas regarding those orders; and confirmation of Limas' financial incentive. Solis testified that, after one such meeting, and pursuant to Rosenthal's instruction, he gave Limas a box containing $8,000.

As the end of Limas' term approached in December 2008, Rosenthal's two above-referenced actions had not been resolved. Solis testified that

Rosenthal wanted the matters transferred to another plaintiff-friendly judge, rather than Limas' successor. According to Limas' testimony, he transferred the actions, at Rosenthal's request, to another state judge. One day after the transfer, Rosenthal sent Limas a letter offering him a position with R&W. After leaving office, Limas accepted an of-counsel position, and received $100,000 in payments from R&W and Solis' separate business account.

When the defendants in one of Rosenthal's two actions learned Limas was affiliated with R&W, they moved to rescind the transfer order. Limas submitted an affidavit denying any impropriety, and the transferee judge denied the motion. The defendants agreed in 2009 to settle for more than $14 million, and R&W paid Limas $85,000 as his share.

In 2011, a 13-count indictment charged Rosenthal conspired to violate federal statutes in connection with his law practice. His motion, pursuant to 18 U.S.C. § 2515, to suppress evidence procured through Title III intercepts was denied.

In a jury trial that began in early 2013, the Government presented its case over 12 days, with its evidence including, *inter alia,* recordings of the Title III intercepts, and the testimony of 18 witnesses, including Solis, Limas, and Benavides. Rosenthal presented his defense over three days, including his testifying. The jury returned a guilty verdict on all counts.

Following trial, Rosenthal moved for judgment of acquittal for counts six and 13; the motions were granted at sentencing. Rosenthal was sentenced to 240 months' imprisonment, and assessed restitution, jointly and severally with Limas and Solis, in the approximate amount of $13.3 million.

II.

In not challenging the sufficiency of the evidence, Rosenthal concedes "a rational juror could have found the essential elements of the crimes [of which he was not acquitted] beyond a reasonable doubt". He instead challenges the

denial of his motion to suppress wire communications, intercepted pursuant to 18 U.S.C. §§ 2510–2520, and all evidence derived from those communications; three jury instructions; and a statement made by the Government during rebuttal closing argument.

In its response brief and at oral argument, the Government maintained plain-error review applies to all of the issues at hand, urging they were not preserved in district court. Rosenthal, who did not file a reply brief, and therefore did not brief the plain-error position pressed by the Government, agreed at oral argument with the Government's plain-error position, except perhaps for the denial of his suppression motion. No authority need be cited for the long-established rule that we, not the parties, determine our standard of review; nevertheless, Rosenthal's concession is revealing.

To preserve in district court a claim for appellate review, a party "must raise objections that are specific enough to put the district court on notice of potential issues for appeal and allow the . . . court to correct itself". *United States v. Sanchez-Espinal*, 762 F.3d 425, 429 (5th Cir. 2014). As discussed *infra*, Rosenthal did not meet this standard. Accordingly, each issue will be reviewed only for plain error. *Puckett v. United States*, 556 U.S. 129, 135 (2009).

To demonstrate plain error, Rosenthal must show a forfeited error that is plain (clear or obvious) and affected his substantial rights. *Id.* If the prerequisites have been established, our court has discretion to remedy the error, but will do so only if it "seriously affect[s] the fairness, integrity, or public reputation of the judicial proceedings". *Id.* As demonstrated *infra*, each claim fails to satisfy the demanding clear-or-obvious-error requirement.

A.

Rosenthal claims the district court erred by overruling his motions to suppress intercepted wire communications and the evidence obtained from

them, in violation of 18 U.S.C. §§ 2516, 2518, and 2515. In district court, however, Rosenthal did not identify the wiretap applications or orders he now claims to be in error. A similar failing was noted by the district court in its 23 January 2013 order denying suppression. (In any event, even if Rosenthal could demonstrate clear-or-obvious error, he has not shown his substantial rights were affected, especially given the testimony of Limas and Solis, which paralleled the wiretap evidence Rosenthal seeks to suppress.)

As part of its investigation, the Government obtained court orders pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510 *et seq.*, permitting interception of calls to and from five telephones. Two of the telephones, numbers 2 and 4, belonged to Limas; number 5, to Solis; and numbers 1 and 3, to an individual who conspired separately with Limas to influence criminal matters. Calls involving Rosenthal were intercepted only on telephones 2 and 5; he concedes he lacks standing to challenge evidence obtained from the other three.

Rosenthal claims: the application, supporting affidavit, and order relating to authorization of the third wiretap extension for telephone 2 violated Title III; and, therefore, intercepted communications pursuant to that, and subsequent orders, including for telephone 5, should have been suppressed. (The Government also understands Rosenthal's challenge starts with this authorization. His failure to file a reply brief compounds any uncertainty about the precise nature of this issue.)

1.

Rosenthal claims the Government's application and affidavit violated § 2516(1)(a–t), by failing to identify the specific offenses under investigation. Along that line, and subject to satisfying statutory requirements, § 2516 authorizes the Government to intercept wire or oral communications in the course of investigating various offenses listed in subsections (a–t). Subsection

(1)(b), at issue here, includes "any offense which involves . . . extortion". 18 U.S.C. § 2516(1)(b).

The Government's application and supporting affidavit for a third extension of authority to intercept telephone 2 complied with § 2516. The application alleged extortion, in violation of 18 U.S.C. § 1951, and aiding-and-abetting extortion, in violation of 18 U.S.C. § 2, with regard to telephones 1, 2, and 3. Additionally, the underlying affidavit explained the extortion investigation in great detail, and identified: specific instances where Limas accepted money in exchange for favorable outcomes for individuals appearing in his court, and several calls made to and from telephone 2 in furtherance of the extortion scheme.

2.

In challenging the order granting authorization for the third extension, Rosenthal claims it violated § 2518(4)(c), by failing to provide "discrete, identified and specifically enumerated Title 18 offense violations". But, the order stated probable cause existed to support the belief that telephones 1, 2, and 3 were being used in connection with "offenses enumerated in Section 2516 of Title 18, United States Code . . . involving: (a) extortion . . . and (b) aiding and abetting [extortion] . . . ", and authorization was granted on that basis.

Therefore, concerning the contested wiretap evidence, we need not address Rosenthal's other claims, including: application of the "fruit of the poisonous tree" doctrine; the Government's "good faith" not being applicable; his defensive position on all counts being undermined, resulting in prejudice; and a new trial's being required.

B.

Rosenthal presents three challenges to the jury instructions. He maintains he preserved these issues by proffering jury instructions that were refused. This was insufficient: "proposed instructions do not preserve error on

appeal, absent an objection specific to the counts at issue". *United States v. Dupre*, 117 F.3d 810, 816 (5th Cir. 1997).

1.

Count one of the indictment charged Rosenthal with RICO conspiracy under 18 U.S.C. § 1962(d). Rosenthal contests the instructions for that count in three ways.

a.

He maintains (in part perhaps based on a claimed insufficient indictment which he unsuccessfully challenged pretrial), that the court failed to identify and instruct on which predicate offenses constitute "a pattern of racketeering activity".

Under 18 U.S.C. § 1962(c), it is a crime for "any person employed by or associated with any enterprise engaged in, [or affecting] interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of [the] enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt". 18 U.S.C. § 1962(c). Section 1962(d), at issue here, prohibits conspiracy to violate any part of § 1962. "The elements of a conspiracy under § 1962(d) are simply (1) that two or more people agreed to commit a substantive RICO offense and (2) that the defendant knew of and agreed to the *overall objective* of the RICO offense." *United States v. Pratt*, 728 F.3d 463, 477 (5th Cir. 2013) (emphasis added) (internal quotation marks omitted).

Regarding Rosenthal's possible reliance on his unsuccessful pretrial challenge to the indictment, RICO "indictment[s] need not contain formal charges of the underlying racketeering activities or articulate the evidence that will be used to prove the allegations", so long as they identify the individuals or entities who perpetrated specific acts, and allege with specificity that they agreed to the objective of the activity. *Id.* at 478. Further, "a failure to set forth more specifically the allegations in the indictment is not reversible error"

where the defendants "have not alleged that they were actually disadvantaged by the indictment's purportedly inadequate charge". *United States v. Sutherland*, 656 F.2d 1181, 1197 (5th Cir. 1981).

As he did pretrial, Rosenthal asserts, in part, that the indictment contained insufficient information to put him on notice of the predicate offenses incorporated in count one. That count identified R&W as the responsible "enterprise" engaged in, or affecting, interstate commerce and acting in violation of the RICO statute. It alleged Rosenthal, and others associated with R&W, conspired "to conduct and participate, directly and indirectly, in the conduct of the affairs of that enterprise through a pattern of racketeering activity". It states the predicate statutes in Title 18 Rosenthal violated, with an explanation of each: §§ 1951 (extortion); 1341 (property mail fraud); 1341 and 1346 (honest-services mail fraud); 1343 (property wire fraud); 1343 and 1346 (honest-services wire fraud); 201(b)(3) (witness bribery); 1512 (witness tampering); and "multiple acts involving bribery, chargeable under Texas Penal Code, Section 36.02(a)".

Additionally, the indictment provided the facts on which it relied in alleging violations of these provisions, including: "Rosenthal pa[id] witnesses . . . for false testimony and statements in potential lawsuits and actual lawsuits filed in Cameron County and surrounding counties, and in the Southern District of Texas"; "ma[d]e arrangements to manipulate the random case assignment system . . . "; and "directly and indirectly pa[id] Limas or instruct[ed] Solis to pay Limas, and . . . otherwise compensate[d] Limas in return for acts of judicial discretion . . . including favorable orders, rulings, and treatment". Therefore, the indictment sufficiently detailed Rosenthal's conduct and his agreement to the objective of the conspiracy. The district court instructed the jury accordingly.

b.

Rosenthal also claims the instructions given for the predicate offenses under count one (§§ 1343 (property wire fraud); 1343 and 1346 (honest-services wire fraud); and 201(b)(3) (witness bribery)) were insufficient because they merely listed the offense elements, and contained no information about how the conspiracy to commit the offense occurred. He also maintains: the instructions "failed entirely" to instruct on state bribery under § 36.02(a) of the Texas Penal Code; and as a result, the jury was unable to determine whether Rosenthal conspired to commit any of those offenses.

The instructions, in a section titled "Specific Instructions Regarding Count One", described in detail the elements the jury would be required to find to determine whether the charged conduct had been proven beyond a reasonable doubt. Further, the instructions stated, *inter alia*: "The alleged means and methods of the alleged conspiracy were to[:] . . . locate and pay false witnesses"; "allegedly use communication facilities, including cellular telephone companies with interstate operations, and the United States mail and private interstate commercial carriers, to allegedly advance the purposes of the racketeering activity"; and "affect[ ] [cases] by the illegal payments to witnesses".

The instructions, contrary to Rosenthal's claim, additionally stated the Texas state crime of bribery was among the activities alleged to form the basis of the conspiracy. They also explained the elements the Government was required to prove to establish that offense.

Finally, the instructions explained the Government was not required to prove Rosenthal committed, or agreed to commit, any racketeering acts in order to convict him of conspiracy, only that: two or more conspirators agreed; and Rosenthal knew of, and agreed to, the overall objective.

c.

Rosenthal next maintains: because, after the jury found him guilty, the court entered judgment of acquittal for counts six (property mail fraud) and 13 (honest-services mail fraud), those counts may not be relied upon as predicate acts of conspiracy to commit racketeering activity (count one). Therefore, Rosenthal claims it is impossible to predict how a "properly instructed jury" would rule.

"One can be a conspirator by agreeing to facilitate only some of the acts leading to the substantive offense. . . . [A] conspiracy may exist and be punished whether or not the substantive crime ensues, for the conspiracy is a distinct evil, dangerous to the public, and so punishable in itself." *Salinas v. United States*, 522 U.S. 52, 65 (1997). That the district court found insufficient evidence for counts six and 13 does not preclude the jury's finding a conspiracy to commit them.

2.

In his next challenge to the jury charge, Rosenthal asserts the court should have instructed that a defendant must participate in the "operation or management" of a racketeering enterprise in order to be convicted of a RICO conspiracy under 18 U.S.C. § 1962(d).

It is true that, to be guilty of a substantive RICO offense under 18 U.S.C. § 1962(c) (prohibiting conducting the affairs of an enterprise through "a pattern of racketeering activity"), a defendant must have "participated in the operation or management of the enterprise itself". *Reves v. Ernst & Young*, 507 U.S. 170, 183 (1993). In other words, "some part in directing the enterprise's affairs is required". *Id.* at 179 (alteration omitted). But, our court held in *United States v. Posada-Rios* that the *Reves* "operation or management" test does not apply to *conspiracy* to commit a RICO offense under § 1962(d). 158 F.3d 832, 857–58 (5th Cir. 1998). Instead, § 1962(d) applies to "any person"

who conspires to violate RICO. *Id.* at 857. It suffices that a defendant "adopt[s] the goal of furthering or facilitating the criminal endeavor". *Salinas*, 522 U.S. at 65.

Along that line, Rosenthal acknowledges this, and other, courts of appeals have uniformly held the *Reves* test does not apply to conspiracy under § 1962(d). Nevertheless, without citing relevant authority, he maintains the test should have been included as an element in the indictment and in the final jury instruction.

3.

In Rosenthal's final challenge to the instructions, he contends the court improperly instructed the jury it could convict him of aiding-and-abetting extortion under the Hobbs Act (count ten); he asserts that, as the payor of the extorted money, he was "the victim of the crime". He also maintains the instruction for count ten was not supported by allegations in the indictment.

a.

The Hobbs Act, 18 U.S.C. § 1951(b)(2), defines extortion as: "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". 18 U.S.C. § 1951(b)(2). This section applies both to the extortionate acts of public officials, and to private individuals who aid and abet those acts. *United States v. Rashad*, 687 F.3d 637, 643 (5th Cir. 2012).

The indictment charged Rosenthal with aiding-and-abetting Limas in committing extortion under color of official right, by "paying . . . money and other compensation in return for favorable judicial acts of discretion . . . that benefitted [Rosenthal]". This court has rejected a defendant's contention he was the victim of a public official's extortionate contact where the evidence demonstrated the defendant and his law firm paid the public official. *United States v. Wright*, 797 F.2d 245, 252–53 (5th Cir. 1986). Further, the Supreme

Court has held the term "induced" in § 1951(b)(2), does not require "the transaction . . . be *initiated* by the [public-official] recipient of the bribe". *Evans v. United States*, 504 U.S. 255, 266 (1992) (emphasis in original). In the light of Rosenthal's actions, discussed *supra*, far from being a passive victim, he initiated the plans to secure Limas' cooperation, instructed Limas to take judicial action at his direction, and directed Solis to pay Limas.

The precedent cited in support of Rosenthal's contention, *United States v. Brock*, 501 F.3d 762 (6th Cir. 2007), is inapposite. The offense at issue in *Brock* was conspiracy to commit extortion, and the decision narrowly construed § 1951 accordingly, without discussing aiding-and-abetting extortion, which is at issue here. *Id.* at 767.

b.

Rosenthal's assertion that the jury instruction for count ten was unsupported by the allegations in the indictment is equally unavailing. The instruction required the jury to find Rosenthal was an "active participant in the extortion scheme". The jury was instructed that, to be an "active participant", he must have: "served as a conduit or funneled the extorted property from one individual to the public official; or . . . initiated, requested, induced, convinced or actively solicited . . . Limas's participation in the alleged extortion scheme". Rosenthal claims the indictment fails to allege he engaged in any of these activities.

Count ten, however, incorporates the factual allegations in the indictment. The incorporated facts include allegations Rosenthal "made arrangements to have Limas paid" and alleged Rosenthal "would and did directly and indirectly pay Limas or instruct Solis to pay Limas".

C.

Prior to Rosenthal's trial, Limas pleaded guilty to racketeering, in violation of 18 U.S.C. § 1962(c). In that regard, Rosenthal claims error because,

during its rebuttal closing argument, the Government referred to Limas' guilty plea. As he concedes, his attorney failed to object; therefore, this issue was not preserved. *E.g., United States v. Meza*, 701 F.3d 411, 429–30 (5th Cir. 2012).

The relevant portion of the Government's argument stated:

> Now, the Limas [guilty] plea. It's not based – as you saw, there's nothing in there that said that Solis told me that this comes from Marc [Rosenthal] or Marc knows. What happens is Limas reviews all the evidence, evidence that you've seen, the toll records and all of the other evidence, matching up perfectly and corroborating . . . Solis' testimony. Listens to all the calls we have, matches up the orders, and comes to a common sense logical inference, the same thing that we're asking you to do.

Rosenthal contends the statement is improper because it asks the jury to consider Limas' guilty plea to a RICO charge as evidence of Rosenthal's guilt. He asserts the statement constitutes reversible plain error because it inferred the jury should do as Limas did: review the evidence and find guilt. The Government counters that the reference in its rebuttal argument to Limas' guilty plea was a permissible response to the comments Rosenthal made in his closing argument.

To demonstrate plain error, as discussed *supra*, Rosenthal must show a forfeited error that is clear or obvious, affecting his substantial rights. *Puckett*, 556 U.S. at 135. Assuming, *arguendo*, clear-or-obvious error, when examining whether the Government's remarks affected his substantial rights, "[t]he determinative question in our inquiry is whether the . . . remarks cast serious doubt on the correctness of the jury's verdict". *United States v. Thompson*, 482 F.3d 781, 785 (5th Cir. 2007) (internal quotation marks omitted). In deciding that question, this court considers: "(1) the magnitude of the prejudicial effect of the [Government's] remarks, (2) the efficacy of any cautionary instruction

by the judge, and (3) the strength of the evidence supporting the conviction". *Id.*

For the first prong of the above three-part test, in considering the magnitude of the prejudicial effect, if any, of the Government's comments, this court examines them "in the context of the trial and attempt[s] to ascertain their intended effect". *United States v. Virgen-Moreno*, 265 F.3d 276, 291 (5th Cir. 2001). Rosenthal, *not* the Government, had Limas' indictment, plea agreement, and plea-packet memorandum admitted in evidence. In examining the impact of the Government's remarks, "the reviewing court . . . must also take into account defense counsel's opening salvo. . . . [I]f the [Government's] remarks were 'invited,' and did no more than respond substantially in order to 'right the scale,' such comments would not warrant reversing a conviction". *United States v. Young*, 470 U.S. 1, 12–13 (1985).

During closing argument, Rosenthal's attorney stated Limas pleaded guilty "[b]ecause the evidence [wa]s overwhelming against him. They had him on more tape recorded conversations than you can possibly imagine. . . . [T]he guy gave up". Rosenthal's contention was: although the Government had overwhelming evidence of Limas' guilt, there was no direct link between Rosenthal and Solis' payments to Limas; and Limas falsely "stretched out to . . . pull [Rosenthal] in", in return for a "break" at sentencing.

Even assuming the Government's statement about Limas' guilty plea was more than an invited response, the comment, in the context of the trial, was an "isolated statement"; thus, the risk of prejudice is less than it would be "in situations where the government repeatedly makes improper arguments". *United States v. Hitt*, 473 F.3d 146, 161 (5th Cir. 2006). The prejudicial effect of the Government's comments, therefore, does not rise to the level necessary to establish reversible plain error.

Moreover, pursuant to the second prong of the above-stated affect-substantial-rights analysis, the court's cautionary instruction counters any potential prejudice. The jury instructions included, in relevant part: "Remember that any statements . . . by the lawyers are not evidence"; and "[t]he fact that an alleged accomplice has entered a plea of guilty to the offense charged is not evidence of the guilt of any other person".

Finally, in assessing the third and final prong of the analysis (examining the strength of the evidence against the defendant), Rosenthal concedes he cannot successfully challenge the sufficiency of the evidence against him. Rosenthal thus agrees that a reasonable trier of fact could have found the evidence established guilt beyond a reasonable doubt. *E.g., United States v. Mergerson*, 4 F.3d 337, 341 (5th Cir. 1993). Instead, Rosenthal asserts: the evidence against him is "not overwhelming"; and, as a result, the Government's guilty-plea comment may have affected the outcome of the proceedings. He cites no authority in support of his contention; nevertheless, when assessing the strength of the evidence for the third prong of the applicable analysis, nothing requires it to be "overwhelming". *See Thompson*, 482 F.3d at 787–88.

III.

For the foregoing reasons, the judgment is AFFIRMED.

A True Copy
Certified Feb 23, 2016

Tyle W. Cayce

Clerk, U.S. Court of Appeals, Fifth Circuit

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE
NEW ORLEANS, LA 70130

November 05, 2015

Mr. David J. Bradley
Southern District of Texas, Brownsville
United States District Court
600 E. Harrison Street
Room 1158
Brownsville, TX 78520

No. 13-41329 USA v. Marc Rosenthal
USDC No. 1:11-CR-743-1

Dear Mr. Bradley,

Enclosed is a copy of the judgment issued as the mandate and a copy of the court's opinion.

Sincerely,

LYLE W. CAYCE, Clerk

Jim deMontluzin

By: _____
James deMontluzin, Deputy Clerk
504-310-7679

cc:
Mr. David L. Botsford
Ms. Renata Ann Gowie
Mr. Robert Alton Parker

A True Copy
Certified Feb 24, 2016

Lyle W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit

Exhibit B

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 13-41329

D.C. Docket No. 1:11-CR-743-1

United States Court of Appeals
Fifth Circuit
FILED
October 14, 2015
Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

MARC GARRETT ROSENTHAL,

Defendant - Appellant

Appeal from the United States District Court for the
Southern District of Texas, Brownsville

Before STEWART, Chief Judge, and BARKSDALE and PRADO, Circuit Judges.

J U D G M E N T

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is affirmed.

A True Copy
Certified Feb 23, 2016
Lyle W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit

Certified as a true copy and issued
as the mandate on Nov 05, 2015
Attest: Lyle W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit

BEFORE THE BOARD OF DISCIPLINARY APPEALS
APPOINTED BY
THE SUPREME COURT OF TEXAS

IN THE MATTER OF	§	
MARC G. ROSENTHAL	§	**CAUSE NO. 53873**
STATE BAR CARD NO. 17281450	§	

JUDGMENT OF DISBARMENT

On the _____ day of _____, 2016, the Board of Disciplinary Appeals considered the Motion for Entry of Judgment of Disbarment filed in the above case by Petitioner, Commission for Lawyer Discipline of the State Bar of Texas, against Respondent, Marc G. Rosenthal. The Board finds that:

(1) It has continuing jurisdiction of this matter pursuant to Texas Rules of Disciplinary Procedure 8.05 ("TRDP");

(2) The United States Court of Appeals for the Fifth Circuit affirmed Respondent, Marc G. Rosenthal's, criminal conviction and entered a Judgment Issued as Mandate indicating that the decision was final on or about November 5, 2015;

(3) Petitioner filed its Motion for Entry of Judgment of Disbarment on or about March 4, 2016, and served same on Respondent in accordance with TRDP 8.05;

(4) Respondent's conviction for the commission of Intentional Crimes as defined by TRDP 1.06(T), for which he was sentenced in the United States District Court for the Southern District of Texas, Holding Session in Brownsville, has become final and is not subject to appeal;

(5) Petitioner's Motion for Entry of Judgment of Disbarment should be granted.

Interlocutory Suspension

On the 11th day of April 2014, the Board of Disciplinary Appeals entered an Agreed Interlocutory Order of Suspension, which included the following findings of fact and conclusions of law:

Exhibit C

(1) Respondent, Marc G. Rosenthal, whose State Bar Card number is 17281450, is licensed but not currently authorized by the Supreme Court of Texas to practice law in the State of Texas.

(2) On or about August 16, 2011, Respondent was charged by Indictment with Count 1 – Conspiracy to Participate in Conduct and Affairs of a Criminal Enterprise, the Activities which Affected Interstate and Foreign Commerce, through a Pattern of Racketeering Activity, in violation of 18 U.S.C. §1962(d), Count 2 – Mail Fraud and Aiding and Abetting, in violation of 18 U.S.C. §§1341 and 2, Count 3 - Mail Fraud and Aiding and Abetting, in violation of 18 U.S.C. §§1341 and 2, Count 4 - Mail Fraud and Aiding and Abetting, in violation of 18 U.S.C. §§1341 and 2, Count 5 - Mail Fraud and Aiding and Abetting, in violation of 18 U.S.C. §§1341 and 2, Count 6 - Mail Fraud and Aiding and Abetting, in violation of 18 U.S.C. §§1341 and 2, Count 7 - Tampering with Witness and Aiding and Abetting, in violation of 18 U.S.C. §§ 1512(b)(1) and 2, Count 8 - Tampering with Official Proceeding by False Affidavit, in violation of 18 U.S.C. §§ 1512(c)(2) and 2, Count 9 - Tampering with Official Proceeding by Perjured Testimony, in violation of 18 U.S.C. §§ 1512(c)(2) and 2, Count 10 - Extortion (Under Color of Official Right) and Aiding and Abetting, in violation of 18 U.S.C. §§ 1951 and 2, Count 11 - Honest Services Mail Fraud and Aiding and Abetting, in violation of 18 U.S.C. §§1341, 1346, and 2, Count 12 - Honest Services Mail Fraud and Aiding and Abetting, in violation of 18 U.S.C. §§ 1341, 1346, and 2, and Count 13 - Honest Services Mail Fraud and Aiding and Abetting, in violation of 18 U.S.C. §§1341, 1346, and 2, in Cause No. B-11-743, styled *United States of America v. Marc Garrett Rosenthal*, in the United States District Court for the Southern District of Texas, Brownsville Division.

(3) On or about February 13, 2014, a Judgment in a Criminal Case was entered in Case No. 1:11CR00743-001, styled *United States of America v. Marc Garrett Rosenthal,* in the United States District Court for the Southern District of Texas, Holding Session in Brownsville, wherein Respondent was found guilty of Count 1 - Conspiracy to Participate in Conduct and Affairs of a Criminal Enterprise, the Activities which Affected Interstate and Foreign Commerce, through a Pattern of Racketeering Activity, Count 2 - Mail Fraud and Aiding and Abetting, Count 3 - Mail Fraud and Aiding and Abetting, Count 4 - Mail Fraud and Aiding and Abetting, Count 5 - Mail Fraud and Aiding and Abetting, Count 7 - Tampering with Witness and Aiding and Abetting, Count 8 - Tampering with Official Proceeding by False Affidavit, Count 9 - Tampering with Official Proceeding by Perjured Testimony, Count 10 - Extortion (Under Color of Official Right) and Aiding and Abetting, Count 11 - Honest Services Mail Fraud and Aiding and Abetting, and Count 12 - Honest Services Mail Fraud and Aiding and Abetting, and was committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of two hundred forty (240) months

on each count, to be served concurrently. Respondent was ordered upon release from imprisonment to be on supervised release for three (3) years on each count, to be served concurrently, ordered to perform 200 hours of community service, ordered to pay an assessment of $1,100.00 and restitution of $13,288,984.50.

(4) Respondent, Marc G. Rosenthal, is the same person as the Marc Garrett Rosenthal who is the subject of the criminal case described above.

(5) Respondent has appealed the criminal conviction.

(6) This Board has jurisdiction to hear and determine this matter. Tex. R. Disciplinary P. 7.08(G).

(7) Respondent, Marc G. Rosenthal, having been convicted of Conspiracy to Participate in Conduct and Affairs of a Criminal Enterprise, the Activities which Affected Interstate and Foreign Commerce, through a Pattern of Racketeering Activity; Mail Fraud and Aiding and Abetting; Mail Fraud and Aiding and Abetting; Mail Fraud and Aiding and Abetting; Mail Fraud and Aiding and Abetting; Tampering with Witness and Aiding and Abetting; Tampering with Official Proceeding by False Affidavit; Tampering with Official Proceeding by Perjured Testimony; Extortion (Under Color of Official Right) and Aiding and Abetting; Honest Services Mail Fraud and Aiding and Abetting; and Honest Services Mail Fraud and Aiding and Abetting, has been convicted of Intentional Crimes as defined by TRDP 1.06(T).

(8) Respondent has also been convicted of Serious Crimes as defined by TRDP 1.06(Z).

(9) Having been found guilty and convicted of Intentional and Serious Crimes and having appealed such conviction, Respondent, Marc G. Rosenthal, should have his license to practice law in Texas suspended during the appeal of his criminal conviction. TRDP 8.04.

(10) The Board retains jurisdiction to enter a final judgment in this matter when the criminal appeal is final.

Disbarment

The Board has determined that disbarment of the Respondent is appropriate. It is, therefore, accordingly, ORDERED, ADJUDGED, AND DECREED that Respondent, Marc G. Rosenthal, State Bar No. 17281450, be and he is hereby DISBARRED from the practice of law in the State

of Texas, and his license to practice law in this state be and is hereby revoked.

It is further ORDERED, ADJUDGED and DECREED that Respondent, Marc G. Rosenthal, is hereafter permanently prohibited, effective immediately, from practicing law in Texas, holding himself out as an attorney at law, performing any legal service for others, accepting any fee directly or indirectly for legal services, appearing as counsel or in any representative capacity in any proceeding in any Texas court or before any Texas administrative body, or holding himself out to others or using his name, in any manner, in conjunction with the words "attorney," "counselor," or "lawyer."

It is further ORDERED that Respondent, Marc G. Rosenthal, not later than thirty (30) days from the date of the entry of this judgment, shall notify in writing each and every justice of the peace, judge, magistrate, and chief justice of each and every court, if any, in which Respondent has any legal matter pending, if any, of his disbarment, of the style and cause number of the pending matter(s), and of the name, address, and telephone number of the client(s) Respondent is representing in that court. Respondent is also ORDERED to mail copies of all such notifications to the Office of the Chief Disciplinary Counsel, Statewide Compliance Monitor, State Bar of Texas, P.O. Box 12487, Austin, Texas 78711.

It is further ORDERED that Respondent, Marc G. Rosenthal, shall immediately notify each of his current clients and opposing counsel, if any, in writing, of his disbarment. In addition to such notification, Respondent is ORDERED to return all files, papers, unearned fees paid in advance, and all other monies and properties which are in his possession but which belong to current or former clients, if any, to those respective clients or former clients within thirty (30) days after the date on which this Judgment is signed by the Board. Respondent is further ORDERED to file with this Board, within the same thirty (30) days, an affidavit stating that all current clients

and opposing counsel have been notified of his disbarment and that all files, papers, unearned fees paid in advance, and all other monies and properties belonging to clients and former clients have been returned as ordered herein. If Respondent should be unable to return any file, papers, money or other property to any client or former client, Respondent's affidavit shall state with particularity the efforts made by Respondent with respect to each particular client and the cause of his inability to return to said client any file, paper, money or other property. Respondent is also ORDERED to mail a copy of said affidavit and copies of all notification letters to clients, to the Office of the Chief Disciplinary Counsel, Statewide Compliance Monitor, State Bar of Texas, P.O. Box 12487, Austin, Texas 78711.

It is further ORDERED that Respondent, Marc G. Rosenthal, if he has not already done so, immediately surrender his Texas law license and permanent State Bar Card to the Office of the Chief Disciplinary Counsel, Statewide Compliance Monitor, State Bar of Texas, P. O. Box 12487, Austin, Texas 78711, for transmittal to the Clerk of the Supreme Court of Texas.

It is further ORDERED that a certified copy of the Petition for Compulsory Discipline on file herein along with a copy of this Final Judgment of Disbarment be sent to the Chief Disciplinary Counsel of the State Bar of Texas, P.O. Box 12487, Austin, Texas 78711.

Signed this _____ day of _____ 2016.

_____
Chair Presiding
BOARD OF DISCIPLINARY APPEALS