

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2011

(Argued: May 31, 2012 Decided: July 9, 2012)

Docket No. 11-2142-cr

UNITED STATES OF AMERICA,
Appellant,

v.

MICHAEL JACQUES,
Defendant-Appellee.

B e f o r e: WINTER, CHIN, and DRONEY, Circuit Judges.

Interlocutory appeal from pre-trial orders of the United States District Court for the District of Vermont (William K. Sessions, III, Judge) excluding evidence that the government sought to offer in the punishment phase of a capital case. We affirm in part and vacate in part.

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2 Ruhnke & Barrett, Montclair, New
3 Jersey, and Michael L. Desautels and
4 Barclay T. Johnson, Office of the
5 Federal Public Defender, Burlington,
6 Vermont, on the brief), Ruhnke &
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8 Defendant-Appellee.
9

10 WINTER, Circuit Judge:

11 The government appeals from Judge Sessions's in limine
12 ruling excluding certain evidence from the penalty phase of a
13 death penalty case. After obtaining an indictment against
14 Michael Jacques for the kidnapping, rape, and murder of a
15 12-year-old girl, the government filed a Notice of Intent to Seek
16 the Death Penalty ("Notice"). Included in the Notice, as
17 required by the Federal Death Penalty Act, 18 U.S.C. § 3591, et
18 seq., were allegations of aggravating factors the government
19 proposed to put before the jury in the penalty phase that would
20 follow a conviction. These factors included allegations of six
21 prior rapes and an attempt to obstruct justice by influencing
22 the testimony of a juvenile witness/victim.

23 In pre-trial orders, Judge Sessions struck allegations of
24 three of the prior rapes from the Notice under 18 U.S.C. §
25 3593(c) and suppressed evidence of the attempt to obstruct
26 justice as having been obtained in violation of the Sixth
27 Amendment. The government appealed.

28 We affirm the exclusion of evidence of two of the alleged
29 prior rapes, remand the third for reconsideration but leave the

outcome to the district court's discretion, and vacate the exclusion of evidence of the attempted obstruction of justice. We address each issue in turn.

a) Prior Rapes

1) Relevant Facts

In the Notice, the government alleged several prior rapes by Jacques. The alleged victims included four juveniles and two adults, whom we refer to as J1-J4 and A1-A2, respectively. The district court ruled that evidence of the rape of J1 was admissible during the penalty phase. Briefly stated here, and more fully discussed infra, defendant's sexual contacts with J1 occurred over several years and were in part contemporaneous with the kidnapping/rape/murder in the present matter which is alleged to have occurred in 2008. Moreover, defendant is alleged to have used J1 to lure the murdered 12-year old to her encounter with Jacques.

The court also allowed the admission of evidence of the rape of A2 in the penalty phase. This crime occurred in 1992 and resulted in a kidnapping and rape conviction. A1 has died, and the government no longer seeks to introduce evidence with regard to her.

The court excluded evidence concerning J2, J3, and J4, and the government has appealed. We turn now to these rulings.

In January 1985, J2, a younger relative of Jacques, sought an abortion, which came to the attention of law enforcement

1 authorities. J2 told the Vermont State Police that she was
2 pregnant as a result of being raped by Jacques, who was then 18.
3 Jacques admitted that he had "experimented" with J2 and was
4 arraigned on various charges; however, the case was dismissed
5 after the family decided not to pursue the case.

6 Jacques is accused of raping J3 around the same time. She
7 was a young girl who spent the night at Jacques's residence with
8 a younger sibling. J3 never reported this incident to the police
9 because she feared that they would not believe her.

10 Finally, Jacques is alleged in 1987 to have raped J4,
11 another young girl, who was a friend of one of Jacques's younger
12 siblings. The rape is alleged to have occurred after Jacques
13 provided alcohol to her at his apartment. J4's school nurse
14 learned of the rape and called the police. Following an
15 investigation, Jacques was arrested and charged. After pleading
16 guilty to lewd and lascivious conduct, he was given a three-year
17 deferred sentence.

18 The district court struck the allegations concerning J2, J3,
19 and J4 from the Notice, concluding that, because the conduct
20 alleged was unadjudicated and over twenty years old, their
21 probative value was outweighed by their potential prejudice.

22 2) Discussion

23 Evidentiary rulings under 18 U.S.C. § 3593© are reviewed
24 only for abuse of discretion. See United States v. Fell, 531
25 F.3d 197, 209 (2d Cir. 2008).

1 The government argues that the exclusion of these
2 allegations will deprive the jury of a full picture of Jacques's
3 personal characteristics and his past conduct as a serial rapist.
4 The government also argues that the district court based its
5 ruling with regard to the allegations concerning J4 on an
6 erroneous finding of fact because those allegations were in fact
7 adjudicated. Section 3593© provides that in the penalty phase of
8 a capital case, "[i]nformation is admissible regardless of its
9 admissibility under the rules governing admission of evidence at
10 criminal trials except that information may be excluded if its
11 probative value is outweighed by the danger of . . . creating
12 unfair prejudice, confusing the issues, [or] misleading the
13 jury." The standard for exclusion of evidence under this Section
14 is broader than under Fed. R. Evid. 403, which allows the
15 exclusion of relevant evidence "if its probative value is
16 substantially outweighed by a danger of . . . unfair prejudice,
17 confusing the issues, [or] misleading the jury." (emphasis
18 added).

19 Generally, "*more* evidence, not less, should be admitted on
20 the presence or absence of aggravating and mitigating factors" in
21 the penalty phase of a capital case. Fell, 531 F.3d at 219 n.12
22 (emphasis in original) (quoting United States v. Fell, 360 F.3d
23 135, 143 (2d Cir. 2004)). Nevertheless, district courts "retain
24 the discretion to exclude any type of unreliable or prejudicial
25 evidence." United States v. Pepin, 514 F.3d 193, 204 (2d Cir.
26 2008)(quoting Fell 360 F.3d at 145).

1 Defendant's alleged conduct toward J2, J3, and J4 is alleged
2 to have occurred almost, or over, twenty-five years ago. Such
3 remoteness reduces the reliability of testimony as to the events'
4 occurrences. In the case of J2 and J3, the danger of
5 unreliability is somewhat enhanced by the lack of a relatively
6 contemporaneous adjudication. In the case of J4, there was an
7 adjudication, but the resultant judgment was not for rape. There
8 is, moreover, murkiness as to each with regard to whether, or how
9 much, coercion was involved. Finally, the remoteness of the
10 allegations also reduces their probative value with regard to
11 Jacques's character because he was a youth himself at the time.
12 Cf. Fed. R. Evid. 609(b) (suggesting that the probative weight of
13 prior crimes used to impeach character is less reliable once
14 significant time has passed); United States v. Figueroa, 618 F.2d
15 934, 942 (2d Cir. 1980) ("[B]oth Rule 609 and Rule 403, which is
16 pertinent here, oblige the trial court to assess the probative
17 value of every prior conviction offered in evidence and the
18 remoteness of a conviction, whatever its age, is always pertinent
19 to this assessment.").

20 Therefore, although we might well have ruled otherwise were
21 we in the district court's position, we conclude that the court
22 acted within its considerable discretion to rule that the lack of
23 reliability of the allegations with regard to J2, J3, and J4

1 outweighed their probative values.¹ However, the district court
2 based its order concerning J4 in part on the assumption that
3 those allegations were unadjudicated. In fact, Jacques pleaded
4 guilty to lewd and lascivious conduct in connection with his
5 conduct with J4. We vacate the order with regard to the
6 allegations regarding her and remand for the district court to
7 reconsider its ruling in light of that adjudication. We add,
8 however, that the district court would still be within its
9 discretion to conclude that the age of these allegations and the
10 ambiguity of the plea as to rape is sufficient to warrant their
11 exclusion under § 3593©.

12 b) Obstruction of Justice

13 1) Relevant Facts

14 Because the obstruction of justice relates to evidence of
15 the underlying offense, we briefly set out pertinent allegations
16 with regard to those charges.

17 The government alleges that in 2003 Jacques concocted a
18 scheme to sexually abuse the then nine-year-old J1. This scheme
19 involved making J1 believe that a fictitious organization named
20 "Breckenridge" would kill her and her family if she did not

¹ We note that the district court is free to alter these rulings, if appropriate, as the case progresses. See Palmieri v. Defaria, 88 F.3d 136, 139 (2d Cir. 1996) (A ruling in limine "is subject to change when the case unfolds." (quoting Luce v. United States, 469 U.S. 38, 41-42 (1984))). Such a change may be in the court's discretion if these allegations become necessary to rebut evidence offered by the defense concerning Jacques's past. See, e.g., Luce, 469 U.S. at 41-42 (change of in limine ruling may be appropriate where defendant introduces testimony contrary to statements given in a proffer).

1 follow the group's instructions. Jacques allegedly sent e-mail
2 messages from two accounts seemingly owned by members of
3 Breckenridge named "Charles" and "Eric." The e-mails told J1
4 that Jacques was to act as her "sexual trainer" and advised her
5 to engage in various sex acts with Jacques. When J1 protested,
6 she received e-mail threats that included the killing of family
7 pets. Jacques's exploitation of J1 through "Breckenridge"
8 continued until 2008, when J1 was 14 years old.

9 In May 2008, J1 received messages from Breckenridge that a
10 12-year-old named Brooke needed to be terminated and that J1 was
11 to help in the termination by inviting Brooke to a party. On the
12 morning of the party in late June 2008, Jacques and J1 picked
13 Brooke up and drove to a convenience store about ten minutes from
14 Jacques's home. Once there, Jacques dropped Brooke off in front
15 of the store's surveillance camera but told her to walk to a
16 nearby spot where they would pick her up. Jacques and J1 then
17 allegedly left but circled back to pick Brooke up. The
18 government alleges that Jacques then drugged, raped, and murdered
19 Brooke.

20 Four days later on June 29, 2008, police discovered the e-
21 mails from Eric and Charles to J1 and traced them to Jacques's
22 computer. Jacques was then arrested and detained on a state
23 charge of sexually assaulting J1. On July 1, 2008, a federal
24 criminal complaint was filed charging Jacques with the kidnapping
25 of Brooke, and, on July 2, her body was discovered. At his
26 initial appearance on July 7, the court appointed the Office of

1 the Federal Public Defender to represent Jacques on the federal
2 kidnaping charge.

3 On July 4 and 8, while in custody, Jacques sent letters to
4 his friend Michael Garcia. These letters asserted Jacques's
5 innocence and asked Garcia for help. On July 10, Jacques called
6 Garcia and asked him to come from Arizona to Vermont, stating
7 that he could not talk to Garcia on the monitored prison phone.
8 He also suggested that Garcia pose as Jacques's attorney in a
9 civil matter and call on the attorney line, which was not
10 monitored. The next day, Garcia contacted the authorities. The
11 government obtained a recording of the phone conversation between
12 Jacques and Garcia. A "taint team" consisting solely of
13 government agents and attorneys not working on the case pending
14 against Jacques was assigned to investigate.

15 On July 13, Jacques called Garcia again and asked him to
16 call on the prison's attorney line, stressing that time was of
17 the essence and that Garcia was Jacques's last hope. Jacques
18 followed up with another letter, dated July 14, requesting
19 Garcia's help and assuring him that it would require only a few
20 e-mails and text messages.

21 On July 16, FBI agents met with Garcia and helped him place
22 a recorded telephone call to Jacques on the attorney line.
23 Prior to the call, the agents instructed Garcia not to ask
24 Jacques anything about the crimes charged. During the call,
25 Jacques told Garcia that he was being framed by some "bad guys"
26 who were involved with J1. Jacques said that he needed Garcia to

1 send messages to J1 telling her that the bad guys were still out
2 there. To accomplish this, Jacques gave Garcia J1's cell phone
3 number and suggested what he should say in messages to her.
4 After this conversation, Jacques again sent Garcia letters
5 begging for his help and expressing dismay that Garcia had not
6 contacted him again.

7 Garcia called Jacques on July 22, a call again recorded by
8 the FBI. Jacques stated that the "plan" to contact J1 needed to
9 be carried out soon because the indictment had not yet issued.
10 He also instructed Garcia to take precautions, such as using a
11 secondary hard drive or sending e-mail messages from internet
12 cafes, to prevent the messages from being tracked back to Garcia.
13 Garcia made yet another recorded call to Jacques on July 24,
14 during which Jacques again asked Garcia to contact J1 and told
15 Garcia that he had mailed a package to him that would explain
16 what steps he should take.

17 The package of instructions told Garcia to send J1 messages
18 in the names of Eric and Charles from Breckenridge. The messages
19 would instruct her to inform the authorities and the media that
20 Jacques had been framed and to tell Jacques's wife that he had
21 been framed. Garcia was instructed, if necessary, to e-mail J1
22 as Eric, telling her to send "editorials" to major newspapers
23 stating that Jacques was innocent. Jacques also gave
24 instructions on the timing of these steps and recommended that
25 Garcia send these e-mails from public computers in other states.
26

1 The next recorded conversation between Jacques and Garcia
2 took place on July 28. Garcia told Jacques that he was flying to
3 Vermont to meet him. Jacques instructed Garcia on how to visit
4 the facility posing as his attorney. The FBI again instructed
5 Garcia not to initiate any inquiries about the charges pending
6 against Jacques or to talk about Jacques's lawyers. On July 30
7 and 31, Garcia visited Jacques in prison, where their
8 conversations were recorded by the FBI. During these
9 conversations, Jacques sought confirmation of Garcia's receipt of
10 the package, reiterated that Garcia should use a second hard
11 drive or public computer to send the messages to J1, and told
12 Garcia to expect to be contacted by the authorities.

13 Throughout these telephone calls and meetings, Jacques
14 frequently asserted that he was innocent; that he was set-up by
15 Breckenridge, who planted evidence in the form of Google
16 searches, e-mails, and orders of items such as handcuffs; and
17 that he had simply dropped Brooke off at the convenience store
18 the morning that she had gone missing. Garcia asked two
19 clarifying questions and told Jacques that he would assist with
20 the plan.² On one occasion, contrary to the FBI's instructions,
21 Garcia actively sought information unrelated to what Jacques was
22 already telling him. The question concerned Jacques's prior
23 criminal conduct allegedly committed during the early 1980's
24 about which Garcia was curious.

² As noted by the district court, when Jacques stated that the actual killers had planted evidence, Garcia asked "[W]hat did they do? What, what kind of evidence?", to which Jacques was largely unresponsive. Garcia also asked whether Jacques's arrest occurred at the time Brooke's body was found.

1 After these meetings, the taint team sent copies of
2 Jacques's packet of instructions and transcripts of the phone
3 calls to Jacques's defense counsel, along with a letter
4 explaining the events and giving counsel ten days to object
5 before the taint team provided the materials to the prosecution.
6 The defense did not object within the ten days.

7 Jacques moved to suppress this evidence as obtained in
8 violation of his Sixth Amendment rights. Noting that kidnapping
9 and obstruction of justice were separate charges, the district
10 court stated that this evidence would "clearly be admissible at a
11 separate trial for obstruction of justice" but nevertheless
12 concluded that the evidence was inadmissible in the present
13 prosecution.

14 The district court concluded that the government had
15 knowingly circumvented Jacques's right to counsel on the
16 kidnapping/rape/murder charges under Massiah v. United States,
17 377 U.S. 201 (1964). The court reasoned that it was foreseeable
18 that Jacques would confide in Garcia due to their longstanding
19 friendship and that incriminating evidence about the current
20 charges would be obtained because the obstruction plan was
21 focused on avoiding those charges.³

³ The government also disputes the district court's conclusion that, based on Estelle v. Smith, 451 U.S. 454 (1981), the suppression of evidence obtained in violation of the Sixth Amendment applies to the penalty as well as the guilt phase of a capital case. Given our disposition of this matter, we need not, and do not, address this issue.

1 2) Discussion

2 The facts pertinent to Jacques's Sixth Amendment claim are
3 embodied in correspondence and recorded conversations and are,
4 therefore, undisputed. The question of whether the district
5 court applied the correct legal standard to those facts is a
6 question of law to be resolved de novo. See United States v.
7 Vasquez, 389 F.3d 65, 75 (2d Cir. 2004). We turn, therefore, to
8 that standard.

9 "[A]fter the . . . right to counsel attaches and is invoked,
10 any statements obtained from the accused during subsequent
11 police-initiated custodial questioning regarding the charge at
12 issue . . . are inadmissible." McNeil v. Wisconsin, 501 U.S.
13 171, 179 (1991). This exclusionary rule applies not only to
14 questioning by identified police officers, but also to statements
15 obtained where the government uses "an undercover agent to
16 circumvent the Sixth Amendment right to counsel." Illinois v.
17 Perkins, 496 U.S. 292, 299 (1990).

18 However, "a defendant does not make out a violation of [the
19 Sixth Amendment] simply by showing that an informant, either
20 through prior arrangement or voluntarily, reported his
21 incriminating statements to the police." Kuhlmann v. Wilson, 477
22 U.S. 436, 459 (1986). Rather, a defendant's rights are violated
23 only when the government uses "investigatory techniques that are
24 the equivalent of direct police interrogation." Id. Therefore,
25 the Sixth Amendment does not "forbid[] admission in evidence of

1 an accused's statements to a jailhouse informant who was 'placed
2 in close proximity but [made] no effort to stimulate
3 conversations about the crime charged.'" Id. at 456 (alteration
4 in original)(quoting United States v. Henry, 447 U.S. 264, 271
5 n.9 (1980)). Instead, a "defendant must demonstrate that the
6 police and their informant took some action, beyond merely
7 listening, that was designed deliberately to elicit incriminating
8 remarks." Id. at 459.

9 Moreover, the government does not violate the Sixth
10 Amendment rights of a defendant charged with a crime by
11 investigating or interrogating that defendant with regard to a
12 separate crime that has not been charged. See Maine v. Moulton,
13 474 U.S. 159, 180 (1985). This is true even where the latter
14 crime is "'factually related' to a charged offense," so long as
15 the offense being investigated is not considered the "same
16 offense" for the purposes of determining the applicability of the
17 Fifth Amendment's Double Jeopardy Clause. Texas v. Cobb, 532
18 U.S. 162, 168, 172-73 (2001).⁴

⁴ Prior to the Supreme Court's opinion in Cobb, several circuits had interpreted the opinions in Brewer v. Williams, 430 U.S. 387 (1977), and Moulton to suggest that a defendant's Sixth Amendment right extends to charges under investigation that are "so inextricably intertwined . . . that the right to counsel for the pending charge cannot constitutionally be isolated from the right to counsel for the uncharged offense." United States v. Covarrubias, 179 F.3d 1219, 1223-24 (9th Cir. 1999) (collecting cases). That conclusion was explicitly rejected by the Court. See Cobb, 532 U.S. at 168, 172-73.

However, incriminating statements relating to a charged offense obtained during an investigation of a separate offense are "inadmissible at the trial of [the charged offense], . . . if, in obtaining this evidence, the State violated the Sixth Amendment by knowingly circumventing the accused's right to the assistance of counsel." Moulton, 474 U.S. at 180.

1 Therefore, it is not enough to show a foreseeability that
2 Jacques's friendship with Garcia would lead Jacques to say things
3 he would not say to someone identified as a law enforcement
4 agent. To prove a violation of the Sixth Amendment, Jacques must
5 also show that Garcia took actions amounting to an "indirect and
6 surreptitious [interrogation]" of Jacques with regard to the
7 kidnapping/rape/murder offenses. Kuhlmann, 477 U.S. at 458
8 (internal quotation marks omitted). In our view, Garcia took no
9 such actions.

10 Unlike Henry, where a jailhouse informant who was paid for
11 producing only useful information on pending charges had
12 ingratiated himself with a fellow prisoner through conversations,
13 447 U.S. 264, 270, 274 n.12 (1980), or Moulton, where a
14 cooperating defendant feigned forgetfulness and reminisced with a
15 co-defendant about the charged conduct, 474 U.S. at 165-66,
16 Garcia never took any initiative that elicited information from
17 Jacques concerning the charged offense. To be sure, Jacques
18 invited conversations with Garcia because of their friendship,
19 but these conversations were at Jacques's initiative -- actually,
20 insistence -- not Garcia's. Indeed, Garcia was entirely passive
21 while Jacques was insisting on explaining to Garcia how to help
22 him.

23 Nor were the few questions that Garcia asked during his
24 conversations with Jacques of a probing nature with regard to the
25 kidnapping/rape/murder charges. We have previously declined to

1 decide whether "limited follow-up questions could be found to
2 'stimulate' discussion," United States v. Rommy, 506 F.3d 108,
3 136 (2d Cir. 2007), and need not do so here. Garcia's infrequent
4 questions did "not alter the fundamental nature of the exchange
5 between the two men: namely, [Jacques] enlist[ing] [Garcia's]
6 help." Matteo v. Superintendent, SCI Albion, 171 F.3d 877, 896-
7 97 (3d Cir. 1999). From beginning to end, the conversations
8 focused on Jacques's using Garcia to influence J1's statements
9 and providing Garcia with the information that Jacques believed
10 was necessary to accomplish that goal. Id. (finding no
11 deliberate elicitation when an incarcerated defendant asked a
12 friend to retrieve evidence and the telephone calls concerning
13 that request were recorded by the government with the friend's
14 consent).⁵

15 To be sure, the FBI actively assisted Garcia in making calls
16 on the attorney line and in visiting Jacques in prison. However,
17 those acts are not "the equivalent of direct police
18 interrogation." Kuhlmann, 477 U.S. at 459. When prison
19 authorities place an informant in close proximity to a defendant,
20 even when expecting the defendant to divulge incriminating
21 information, id. at 456, the Sixth Amendment is not violated
22 unless the informant actively elicits statements that are
23 incriminating with regard to charged crimes. Id. at 459.

⁵ Garcia's inquiry concerning the charges against Jacques in the early 1980's clearly elicited information; however, that information concerned a crime other than those charged. See McNeil, 501 U.S. at 175 (the Sixth Amendment is offense specific).

Moreover, neither Garcia nor the FBI selected use of the attorney line or prison visits as the means of communication. Rather, it was Jacques who selected them. Garcia and the FBI simply allowed Jacques to undertake his own chosen course of action.

Finally, the fact that Garcia represented that he was willing to assist in the obstruction scheme did not violate Jacques's rights with regard to the underlying charges. Garcia's assent did not seek to elicit a response, because merely expressing agreement is not comparable to "engaging the defendant 'in active conversation.'" Kuhlmann, 477 U.S. at 459 (quoting Moulton, 474 U.S. at 177, n.13); see also Matteo, 171 F.3d at 895-97.

In sum, Jacques shared information on his own initiative and on his own terms. Therefore, the government did not take any "action, beyond merely listening, that was designed deliberately to elicit incriminating remarks." Kuhlmann, 477 U.S. at 459.

CONCLUSION

For the foregoing reasons, we affirm the exclusion of the allegations with regard to J2 and J3, vacate and remand with regard to the allegations concerning J4, and vacate the order suppressing evidence of the alleged plan to obstruct justice.