

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 99-12483

D. C. Docket No. 98-00169-CR-T-24C

**FILED**  
U.S. COURT OF APPEALS  
ELEVENTH CIRCUIT  
AUG 15, 2001  
THOMAS K. KAHN  
CLERK

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DOUGLAS J. BURNS,  
DAVID JOSEPH MILLER,

Defendants-Appellants.

01-10927

D. C. Docket No. 98-00169-CR-T-24

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DOUGLAS JOSEPH BURNS,

Defendant-Appellant.

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Appeals from the United States District Court  
for the Middle District of Florida

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(August 15, 2001)

Before BLACK and BARKETT, Circuit Judges, and TIDWELL,\* District Judge.

PER CURIAM:

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\*Honorable G. Ernest Tidwell, U.S. District Judge for the Northern District of Georgia, sitting by designation.

Appellants Douglas Burns and David Joseph Miller appeal their convictions and sentences for activities relating to a fraudulent investment scheme. Burns and Miller were convicted of conspiracy to violate the RICO statute, 18 U.S.C. § 1962(d), conspiracy to commit wire fraud, 18 U.S.C. § 1343, and conspiracy to commit money laundering with the intent to promote mail and wire fraud, 18 U.S.C. § 1956(a)(1)(A)(i). Burns was also convicted of conspiracy to commit mail fraud, 18 U.S.C. § 1341, and of two substantive mail and wire fraud counts involving investor Anwar Heidary. Burns and Miller raise several issues on appeal. We will address only their argument regarding the restrictions the district court imposed on the scope of their cross-examination of government witness Heidary. Since we reverse Appellants' convictions based on this issue, we find it unnecessary to address their remaining arguments.

Appellants argue that the district court erred in restricting their cross-examination of government witness Anwar Heidary. Heidary was a securities broker who invested client funds in the First Equity/Dromoland program. The district court refused to allow cross-examination of Heidary regarding the fact that he was a named defendant in a class action lawsuit brought by investors who lost money in several high interest bank trading programs, including the one involved in this case. According to Appellants, cross-examination of Heidary on this topic

would have shown the jury that Heidary had a motive to blame Appellants for Heidary's clients' losses in the investment program. Heidary's defense in the civil action would have been that he was a victim of this criminal enterprise; he believed the program was legitimate, so he was not at fault for his clients' losses. Indeed, Heidary had every incentive to establish that Burns, an attorney, had lied to him and assured him of the program's legitimacy. Deflecting the blame for his investors' losses would have greatly assisted his defense in the class action suit.

The Government claims the district court permitted sufficient cross-examination for the jury to assess Heidary's credibility. According to the Government, allowing Appellants' requested cross-examination would have been confusing to the jury. In addition, the Government claims Appellants would have been required to establish a complex evidentiary foundation in order to reach any relevant testimony on this topic.

“The right of cross-examination is the primary interest secured by the Sixth Amendment's guarantee that the accused in a criminal prosecution ‘shall enjoy the right . . . to be confronted with the witnesses against him.’ ” *United States v. Summers*, 598 F.2d 450, 460 (5th Cir. 1979)<sup>1</sup> (quoting *Davis v. Alaska*, 94 S. Ct.

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<sup>1</sup>In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), this Court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to close of business on September 30, 1981.

1105, 1110 (1974)). “The importance of full cross-examination is necessarily increased ‘[w]hen the witness the accused seeks to examine is the ‘star’ government witness, providing an essential link in the prosecution’s case.’” *United States v. Calle*, 822 F.2d 1016, 1020 (11th Cir. 1987) (quoting *Summers*, 598 F.2d at 460). While it is in the district court’s sound discretion to impose restrictions on the scope of cross-examination, “this discretionary authority comes into play only after there has been permitted as a matter of right sufficient cross-examination to satisfy the Sixth Amendment.” *Summers*, 598 F.2d at 460 (quoting *United States v. Elliott*, 571 F.2d 880, 908 (5th Cir. 1978)). A restriction on cross-examination does not violate a defendant’s Sixth Amendment rights as long as the following two conditions are satisfied:

(1) the jury, through the cross-examination permitted, was exposed to facts sufficient for it to draw inferences relating to the reliability of the witness; and (2) the cross-examination conducted by defense counsel enabled him to make a record from which he could argue why the witness might have been biased.

*Calle*, 822 F.2d at 1020 (quoting *Summers*, 598 F.2d at 461); *see also United States v. Lankford*, 955 F.2d 1545, 1548 (11th Cir. 1992) (“Unless the defendant has been permitted sufficient cross-examination to allow a jury to adequately assess the witness’ credibility, the district court’s limitation of cross-examination will be in error.”).

After reviewing the record and hearing oral argument, we conclude Appellants' Sixth Amendment rights were violated in this case. The district court permitted no cross-examination regarding Heidary's involvement in the civil case. The civil case provided a powerful reason for Heidary to do everything possible to assure that Appellants were convicted in this case, and the jury was not aware of Heidary's possible motivation in testifying. The cross-examination permitted did not expose the jury to facts sufficient for it to draw inferences regarding Heidary's credibility, and defense counsel were not able to create a record from which to argue Heidary might have been biased.

This constitutional error does not, however, require automatic reversal of Appellants' convictions. Instead, this error is subject to harmless error analysis. The Supreme Court has stated that "the denial of the opportunity to cross-examine an adverse witness does not fit within the limited category of constitutional errors that are deemed prejudicial in every case." *Delaware v. Van Arsdall*, 106 S. Ct. 1431, 1437 (1986). "The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt." *Id.* at 1438. We cannot say the error in this case was harmless beyond a reasonable doubt, and we therefore reverse Appellants' convictions.

We agree with Appellants that Heidary was, if not the Government's "star" witness, then at least a very important one. From the record, it appears that his testimony was crucial in securing the convictions. Burns was acquitted of most of the substantive mail and wire fraud counts; he was convicted only on those relating specifically to Heidary. Miller was acquitted on all of the substantive counts; he was convicted only on the conspiracy counts. Since Heidary's testimony was so pivotal, the restriction on cross-examination was especially damaging.

Moreover, the error in restricting cross-examination was compounded by the fact that witness Heidary improperly communicated with several of the jurors. Heidary was testifying on the sixth day of trial. At the close of the day, with Heidary's testimony to resume the next day, he was warned not to speak to anyone about the case. Despite this warning, Heidary boarded the courthouse elevator with several jurors. While in the elevator, Heidary apologized to the jurors for an emotional outburst on the stand. He explained that he ordinarily did not act that way, but he was upset because Appellants "steal your money and then try to be your friend."

The next morning, one of the jurors sent a note to the district court reporting the incident in the elevator. The court conducted an extensive inquiry into the incident, individually questioning all of the jurors. All of the jurors who had heard

the comments stated that they could put the comments aside and not consider them when rendering a verdict. Miller's counsel moved for a mistrial, which the district court denied.

We need not decide whether Heidary's improper contact with the jurors, standing alone, would warrant reversal, because we conclude, at the very least, that his comments to the jurors added to the harmfulness of the restriction on cross-examination. Under these circumstances, we cannot say the restriction on cross-examination was harmless beyond a reasonable doubt. It was extremely difficult for the jurors to evaluate Heidary's credibility; they had been exposed to his comments in the elevator, but they were not exposed to information which could have discredited him on cross-examination. Accordingly, Appellants' convictions are reversed.<sup>2</sup>

REVERSED.

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<sup>2</sup>Since we reverse Appellants' convictions, we need not consider Burns' separate appeal of the denial of his motion for a new trial in Case No. 01-10927, which was consolidated with Case No. 99-12483 on appeal. That appeal is accordingly DISMISSED AS MOOT.