

Nos. 14-4192 & 14-4249

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

BENJAMIN SUAREZ,

Defendant-Appellant

On Appeal from the U.S. District Court for the
Northern District of Ohio, Case No. 5:13-CR-00420

PETITION FOR PANEL OR *EN BANC* REHEARING
BY DEFENDANT-APPELLANT BENJAMIN SUAREZ

Mark E. Schamel
Joshua D. Greenberg
Womble Carlyle Sandridge & Rice, LLP
1200 19th St., NW, Suite 500
Washington, DC 20036
Tel.: (202) 857-4481
mschamel@wcsr.com
jgreenberg@wcsr.com

Brian M. Pierce (0063736)
The Gothic Building
54 East Mill St., Suite 400
Akron, OH 44308
Tel.: (330) 253-0785
brian@gmpvl.com

Nicole D. Milos
Cremer, Spina, Shaughnessy,
Jansen & Siegert
One N. Franklin St., 10th Flr.
Chicago, IL 60606
Tel.: (312) 980-3024
nmilos@cremerspina.com

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Counsel for Benjamin Suarez

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INTRODUCTION

Judge White's opinion for the panel upholding Benjamin Suarez's conviction for attempted witness tampering (the "Panel Opinion," attached as Exhibit A) overlooks and directly conflicts with *United States v. Bailey*, 444 U.S. 394 (1980), and *United States v. Calloway*, 116 F.3d 1129 (6th Cir. 1997). *Bailey* and *Calloway* each recognize that an attempt requires intent to commit the crime and that knowledge is insufficient. The Panel Opinion, however, holds that an instruction that Mr. Suarez must have acted *knowingly* was sufficient to inform the jury that he must have *intended* to commit the crime. This holding violates *Bailey* and *Calloway*. Panel or *en banc* rehearing is necessary to correct this clear error, see Fed. R. App. P. 40(a)(2); 6th Cir. I.O.P. 40(a)(1), and to secure and maintain uniformity of this Court's decisions, see Fed. R. App. P. 35(b)(1)(A); 6th Cir. I.O.P. 35(a).

The Panel Opinion's holding that the knowingly instruction was sufficient also conflicts with the authoritative decisions of at least two other courts of appeals. By creating such a conflict, the Panel Opinion presents a question of exceptional importance that provides a separate, independently sufficient basis for *en banc* rehearing. See Fed. R. App. P. 35(b)(1)(B).

ARGUMENT

I. THE PANEL OPINION OVERLOOKS AND DIRECTLY CONFLICTS WITH SUPREME COURT AND SIXTH CIRCUIT PRECEDENTS.

A. Under *Bailey And Calloway*, An Attempt Requires Intent To Commit The Crime And Knowledge Is Insufficient.

In *Bailey*, the Supreme Court made clear that knowledge does not support a conviction for an attempt offense and that the government bears the burden of proving intent to commit the crime. 444 U.S. at 404-05, 408. The Court explained the “significant” difference between intent to commit the crime (to which it referred as “specific intent” or “purpose”) and knowledge that the crime will occur (to which it referred as “general intent”). *Id.* at 404. A person who intends to commit the crime (*i.e.*, a person who “act[s] purposefully”) “‘consciously desires that result, whatever the likelihood of that result happening from his conduct.’” *Id.* (quoting *United States v. United States Gypsum Co.*, 438 U.S. 422, 445 (1978)). In contrast, a person “is said to act knowingly if he is aware ‘that that result is practically certain to follow from his conduct, whatever his desire may be as to that result.’” *Id.* (quoting *United States Gypsum Co.*, 438 U.S. at 445). The “heightened culpability” of an intent to commit the crime vis-à-vis knowledge that the crime will occur “merit[s] special attention” for “narrow classes of crimes,” including “inchoate offenses such as attempt.” *Id.* at 405. Indeed, for attempt offenses and other crimes in the “narrow classes” the Supreme Court identified,

“proof that the defendant acted knowingly is [in]sufficient to support a conviction” and “a heightened mental state” – specifically, intent to commit the crime – “separates criminality itself from otherwise innocuous behavior.” *Id.* at 405, 408.

In *Calloway*, this Court likewise stressed that an attempt offense requires the heightened mental state of intent to commit the crime and that knowledge is not enough:

In the context of an “attempt” crime, specific intent means that the defendant consciously intends the completion of acts comprising the choate offense. In other words, the completion of such acts is the defendant’s purpose. Where nothing more than general criminal intent is required, in contrast, the requirement may typically be satisfied by a showing that the defendant knew his actions would produce the prohibited result

116 F.3d at 1135. To further emphasize that knowledge is insufficient, the Court described “intent to finish the crime” as “a *sine qua non* of a punishable attempt.”¹ *Id.* at 1136. The Court recognized that an attempt requires intent to commit the crime even where the completed offense requires a lower level of culpability, such as knowledge: “[M]any attempt crimes require a specific intent even though the completed offense does not.” *Id.*

¹ Accord, e.g., *United States v. Wesley*, 417 F.3d 612, 618 (6th Cir. 2005) (reaffirming that “[t]o convict a defendant of attempt, the government must prove (1) the defendant’s intent to commit the criminal activity”); *United States v. Bilderbeck*, 163 F.3d 971, 975 (6th Cir. 1999) (reaffirming that “[f]or an individual to be convicted of an attempt crime, the government must demonstrate [his] intent to commit the proscribed criminal conduct”).

B. The Panel Opinion Overlooks And Directly Conflicts With *Bailey* And *Calloway* By Holding That Knowledge Establishes Intent.

The Panel Opinion holds that an instruction that Mr. Suarez must have acted “knowingly” as to an element of the substantive offense was sufficient to require the jury to find that he intended that element to occur. This holding overlooks and directly conflicts with *Bailey* and *Calloway*.

Mr. Suarez was found guilty of attempted witness tampering in violation of 18 U.S.C. § 1512(b)(1).² Under this statute, the crime of witness tampering (*i.e.*, the substantive offense) has two elements. In relevant part, the first element is “knowingly uses intimidation, threatens, or corruptly persuades another person.”³ 18 U.S.C. § 1512(b). The second element is “with intent to influence, delay, or prevent the testimony of any person in an official proceeding.” *Id.* § 1512(b)(1). Attempted witness tampering requires intent to commit the crime of witness tampering. See 6th Cir. Pattern Jury Instruction 5.01 (“Attempt – Basic Elements”) (providing that an “element[]” of “attempting to commit [a] crime” is that “the defendant intended to commit the crime”). Under the Due Process Clause, Mr. Suarez could not constitutionally be convicted unless the government proved

² Mr. Suarez was acquitted of all nine of the other counts against him and his company was acquitted of all nine of the counts against it. (Panel Op. at 4-5.)

³ Immediately after the word “person,” § 1512(b) includes the phrase “or attempts to do so” *followed by* the phrase “or engages in misleading conduct toward another person.” The placement of the former phrase shows that the statute does not prohibit an attempt to engage in misleading conduct toward a witness.

beyond a reasonable doubt that he intended *both* (i) to intimidate, threaten, or corruptly persuade the witness in question *and* (ii) to influence, delay, or prevent her testimony in an official proceeding. *See In re Winship*, 397 U.S. 358, 364 (1970) (“[W]e explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”).

The instructions that the district court gave the jury eliminated the intent requirement as to (i) and, in its place, substituted knowledge – a lower level of culpability. The district court instructed the jury that the first element of the offense is that Mr. Suarez “‘*knowingly* intimidated, threatened, corruptly persuaded, or engaged in misleading conduct toward [the witness in question] *or attempted* to do so.’” (Panel Op. at 6, 8 (quoting district court) (emphases added).) The district court defined “knowingly” as follows: “‘An *act* is *done knowingly* if it is done voluntarily and purposely, and not by accident or mistake.’” (*Id.* at 7-8 (quoting district court) (emphases added).) The district court defined “attempted” as to (i) as follows: “‘A defendant may be found to have attempted to intimidate, threaten, corruptly persuade, or engage in misleading conduct if his conduct constituted a substantial step towards committing the crime. The act which constitutes a substantial step must corroborate the defendant’s criminal purpose.’” (*Id.* at 7-8 (quoting district court).) None of the district court’s instructions

informed the jury that it had to find that Mr. Suarez *intended* to intimidate, threaten, or corruptly persuade the witness.

Nevertheless, relying on the district court's uses of the word "knowingly" and its instructions on the intent requirement *as to (ii)*, the Panel Opinion holds that "the instruction[s] read as a whole do[] contain an intent requirement." (*Id.* at 8.) More specifically, the Panel Opinion holds that "taken in their entirety, the instructions told the jury both that [Mr.] Suarez had to have *acted knowingly* and that he had to have had *the intent to affect the testimony*." (*Id.* at 9 (emphases added).)

This holding cannot be reconciled with *Bailey*, which dictates that, for an attempt offense, the "heightened mental state" of intent to commit the crime "*separates criminality itself from otherwise innocuous behavior*." 444 U.S. at 405 (emphasis added). Indeed, *Bailey* makes clear that "proof that the defendant *acted knowingly*" – the very words that the Panel Opinion uses as to (i) – *cannot* support a conviction for an attempt offense. *Id.* at 405, 408 (emphasis added). The Panel Opinion's holding also cannot be reconciled with *Calloway*, which mandates that "*intent to finish the crime*" is "*a sine qua non* of a punishable attempt" and that "a

showing that the defendant knew his actions would produce the prohibited result” is insufficient.⁴ 116 F.3d at 1135-36 (emphasis added).

That the district court’s “knowingly intimidated” instruction “[t]rack[s] the language of Section 1512(b)” (Panel Opinion at 8) fails to cure the violation of *Bailey* and *Calloway*. The statute uses “knowingly” to identify the substantive offense. An attempt offense requires intent to commit the crime even where (as here) the completed crime requires a lower level of culpability, such as knowledge. *See Calloway*, 116 F.3d at 1136 (“[M]any attempt crimes require a specific intent even though the completed offense does not.”).

Nor does the “done knowingly” instruction (Panel Opinion at 8) cure the violation of *Bailey* and *Calloway*. That instruction required the jury to find only an absence of “accident or mistake” (*id.*), not the presence of intent to commit witness tampering. Similarly, that the act must be “done voluntarily and purposely” (*id.*) required the jury to find only that *the act* was done consciously and intentionally (*e.g.*, that Mr. Suarez did not unconsciously or accidentally write the handwritten letter), *not* that the act was done *with the requisite intent to tamper with the witness’s testimony*. *See Morissette v. United States*, 342 U.S. 246, 275-76 (1952) (holding that the defendant’s admission that he acted “conscious[ly] and

⁴ The Panel Opinion quotes part of the relevant language in *Calloway* (Panel Op. at 8-9), but overlooks the decision’s admonition that knowledge is insufficient to be convicted of an attempt offense.

intentional[ly]” when he took the items at issue was “not an adequate basis” for the jury to find that he acted with “the criminal intent to steal”).

Finally, the violation of *Bailey* and *Calloway* is not cured by the instructions that Mr. Suarez must “have had the intent to affect the [witness’s] testimony,” *i.e.*, “the purpose had to have been to influence, delay, or prevent [her] testimony.” (Panel Op. at 9.) That purpose relates *only* to element (ii) of the substantive offense, and *not* to element (i). Mr. Suarez could have intended to block the witness’s testimony without *also* intending to intimidate, threaten, or corruptly persuade her. Intent to do the former is insufficient to establish that he is guilty of attempted witness tampering, which requires intent as to *both* (i) and (ii).

Indeed, any person who seeks to block a witness from testifying before a grand jury or at a trial has the intent required for element (ii). Such a person might *know* that their efforts will have the effect of intimidating the witness, without *intending* to have such an effect. This situation can occur, for example, when an attorney files a motion to block a witness from testifying. The instructions that the district court gave the jury would allow such an attorney to be found guilty of attempted witness tampering. This absurd result highlights the irreconcilable tension between the Panel Opinion and the decisions in *Bailey* and *Calloway*.

II. THE PANEL OPINION CONFLICTS WITH AT LEAST TWO OTHER COURTS OF APPEALS' AUTHORITATIVE DECISIONS.

A. An Authoritative Decision Of The Ninth Circuit Holds That An Attempt Requires Intent To Commit The Substantive Offense.

In *United States v. Gracidas-Ulibarry*, 231 F.3d 1188 (9th Cir. 2000), the Ninth Circuit – sitting *en banc* – held that the offense of “attempted illegal reentry in violation of 8 U.S.C. § 1326” requires intent to illegally reenter the United States even though the substantive offense does not require such intent. *Id.* at 1190-91, 1193, 1196. The Ninth Circuit explained that an attempt offense demands that the government prove “specific intent” – meaning a “purpose” to cause the result that the substantive offense forbids – “even if the crime attempted does not.” *Id.* at 1192, 1196 (internal quotation marks omitted). The district court thus “committed constitutional error by failing to instruct the jury on the specific intent element of the crime.” *Id.* at 1196.

B. An Authoritative Decision Of The Tenth Circuit Holds That Knowledge Is Insufficient To Establish Intent In A Criminal Case.

In *United States v. Manatau*, 647 F.3d 1048 (10th Cir. 2011), the Tenth Circuit held that an “intended loss” under the sentencing guidelines “means a loss the defendant *purposely* sought to inflict” and “does not mean a loss that the defendant merely *knew* would result from his scheme.” *Id.* at 1050 (emphases in original). The Tenth Circuit explained: “The difference between these two mental states – between intent and knowledge – is, put simply, the difference ‘between a

man who wills that a particular act or result take place [intent] and another who is merely willing that it should take place [knowledge].” *Id.* at 1050-51 (quoting Model Penal Code § 2.02 cmt. 2 at 233 n.6 (1985)) (alterations in original).

The Tenth Circuit emphasized that this point is basic and well-established: “The simple fact is intent and knowledge are different things, different as a matter of their plain meaning, different in their treatment in modern American criminal law,” as evidenced by “the Supreme Court’s many pronouncements . . . recognizing the modern distinction between intent and knowledge.” *Id.* at 1051, 1054 n.3. As an example, the Tenth Circuit quoted Justice Scalia’s opinion for the Supreme Court in *Giles v. California*, 554 U.S. 353 (2008), which rejected a “claim that knowledge is sufficient to show intent [a]s emphatically *not* the modern view.” *Id.* at 368 (emphasis in original), *quoted in Manatau*, 647 F.3d at 1050.

C. The Panel Opinion Conflicts With The Ninth Circuit’s Decision In *Gracidas-Ulibarry* And The Tenth Circuit’s Decision In *Manatau*.

The Panel Opinion conflicts with the Ninth Circuit’s decision in *Gracidas-Ulibarry* and the Tenth Circuit’s decision in *Manatau*.

Gracidas-Ulibarry decides that an attempt offense requires intent even where the statute defining the substantive offense does not. 231 F.3d at 1190. The Panel Opinion conflicts with *Gracidas-Ulibarry* by ruling that the fact that the “knowingly” instruction “[t]rack[s]” the definition of the substantive offense in

§ 1512(b) as to element (i) means that no intent requirement exists as to that element for purposes of an *attempt* to commit that offense. (Panel Op. at 8.)

Manatau decides that knowledge that a result will occur is insufficient to prove intent to cause that result. 647 F.3d at 1050-51. The Panel Opinion conflicts with *Manatau* by holding that knowledge that element (i) will occur is sufficient to prove intent to cause that element.

CONCLUSION

For the foregoing reasons, panel or *en banc* rehearing is necessary because the Panel Opinion both overlooks and directly conflicts with *Bailey* and *Calloway*. *En banc* rehearing is also warranted because the Panel Opinion conflicts with *Gracidas-Ulibarry* and *Manatau*.

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Mark E. Schamel
Joshua D. Greenberg
Womble Carlyle Sandridge & Rice, LLP
1200 19th Street, NW, Suite 500
Washington, DC 20036
Tel.: (202) 857-4481
Fax: (202) 261-0098
E-mail: mschamel@wcsr.com
E-mail: jgreenberg@wcsr.com

Respectfully submitted,

/s/ Brian M. Pierce
Brian M. Pierce (0063736)
The Gothic Building
54 East Mill Street, Suite 400
Akron, OH 44308
Tel.: (330) 253-0785
Fax: (330) 253-7432
E-mail: brian@gmpvl.com

Nicole D. Milos
Cremer, Spina, Shaughnessy, Jansen & Siegert
One North Franklin Street, 10th Floor
Chicago, IL 60606
Tel.: (312) 980-3024
Fax: (312) 726-3818
Email: nmilos@cremerspina.com

Counsel for Benjamin Suarez

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of August 2015, copies of the foregoing document and any exhibits thereto were filed through the Court's ECF system, which will provide notice to the following attorneys for the government at the e-mail addresses alongside their names, as indicated on the electronic filing receipt:

Carole Rendon – Carole.Rendon@usdoj.gov

Rebecca C. Lutzko – Rebecca.Lutzko@usdoj.gov

Matthew J. Cronin – Matthew.Cronin@usdoj.gov

/s/ Brian M. Pierce