"THE FEDERAL CORNER"

Beware of Your Friends in the Courthouse
Who Can Help Jurors Convict Your Client

Buck Files

On May 1, 2020, a panel of the United States Court of Appeals for the Fifth Circuit held that District Judge Amos L. Mazzant of the Eastern District of Texas, did not abuse his discretion in failing to hold an evidentiary hearing before granting the defendant's motion for new trial; and, that the new trial was warranted. *United States v. Jordan*, 958 F.3d 331 (5th Cir. 2020) [Panel: Circuit Judges Elrod, Southwick and Haynes. (Opinion by Elrod)] This case was concerned with whether the comments of a Court Security Officer (CSO) had influenced a juror in arriving at her verdict. What makes the case unique is that Judge Mazzant's three law clerks became, in essence, witnesses for the defendant.

Judge Elrod's opinion reads, in part, as follows:

[The Background of the Case]

> The Government charged Laura and Mark Jordan with conspiracy, honest services wire fraud, and bribery involving a federal program. The charges concerned Laura Jordan's 2013–2015 tenure as mayor of Richardson, Texas. During that time, according to the Government, she accepted gifts and favors from real estate developer Mark Jordan in exchange for favorable votes on city rezoning measures. The two eventually married.
>
> The charges were filed in 2018, and trial began in February 2019. Soon after deliberations started, the jury sent the district court the following note: '[Juror] No. 11 is very upset and feels they can't continue. What can we do? She's asking to be excused and can't vote.' The district court suggested that it conduct an *ex parte* interview with Juror #11 to discover what the issue was, and the parties agreed. In the interview, Juror #11 stated that she wanted to be excused because '[i]t [wa]s making [her] sick to [her] stomach to convict them and [she] just can't.' She also stated that sticking to her guns would produce 'a hung jury.' The district court responded with the following:
>
> > That's a vote, so that—so what I'm saying is I'm not encouraging you one way or another, because what would happen is—well, you can't worry about the consequences. Every juror should re-examine their own views is what I say in the charge, and if you have a firmly held conviction, whatever that conviction is, that's up to you to decide. You have to make your own decision.
>
> After the meeting was over, the district court relayed its essence to the parties in general terms. The Government asked that Juror #11 be excused, but the district

court—in a second *ex parte* meeting—informed Juror #11 that it had decided not to excuse her. It reiterated to Juror #11 that 'whatever your convictions are, those are your convictions, and each juror makes their own decision about what the evidence is and what the verdict should be, and so that's up to you. Every juror is entitled to their opinion about the evidence and the result.' A few hours later, the jury reached a verdict of guilty on almost every count.

The next day, at a detention hearing, the district judge had some troubling news for the parties. He told them that he had learned about a conversation that had taken place the previous afternoon—shortly after the verdict was rendered—between his law clerks and a Court Security Officer (CSO). According to the law clerks, the CSO had stated that he had spoken to a juror regarding the case about '30 to 45 minutes' before the verdict was rendered. During a teleconference held the following week, the district judge also relayed that he had learned from his law clerks that the juror the CSO had spoken to was Juror #11. The Government asked whether the district court was intending to 'hold any kind of hearing or get testimony from the juror,' to which the district court responded that 'that is fine in terms of the [CSO]' but that it was 'not going to subject [jurors] to examination on the witness stand.' The district judge also noted that his law clerks had prepared a written memo detailing their recollections of the conversation.

A few days after the teleconference, the Government emailed the district court to 'propose[that] the Court instruct the CSO to answer targeted interrogatories about what precisely ... the CSO said to any juror.' The same day, the district court filed the law clerk memo under seal. Law Clerk #1 reported that

> *[The CSO] indicated that while the jurors were on a break from deliberations, he observed [Juror #11] was particularly upset and even crying. He relayed to me and my fellow law clerks that he told her to put her emotions aside and to determine the outcome of the case without regard to emotions or the possible sentence in the case reminding her that her job was to determine whether the defendants were guilty or not guilty. He then indicated that the jury reached a verdict in this case within about 30-45 minutes of this conversation.* (emphasis added)

Law Clerk #2 reported that the CSO 'stated that he told this juror that she should vote based on her conscience without regard to the punishment that may be imposed on the Defendants.' Law Clerk #2 added that

> *The next morning, Officer Collins told me that, when asked to confirm her decision before the Court, a juror had intended to state that her decision was made 'with reservation.' Officer Collins stated that the juror could not say that her decision was made 'with reservation' because her response would not be believed. I do not know if this was Officer Collins' commentary to me on the*

> *matter or whether he told the juror this. He did tell the juror, however, that she should vote her conscience and that if she did not believe the defendants were guilty, she should vote not guilty. He also told her that she should not be concerned about any punishment the defendants may receive.*
>
> *The identity of this latter juror is unknown.* (emphasis added)

Law clerk #3 reported that

> *Officer Collins stated ... that he told the juror(s) they needed to set their emotion aside and determine whether the Defendants committed the crimes or not. Officer Collins continued, stating he told the juror(s) that if they thought the Defendants committed the crimes, they should find the Defendants guilty, and if they thought the Defendants did not commit the crimes, they should find the Defendants not guilty.* (emphasis added)

The next day, the Jordans filed a motion for new trial under Federal Rule of Criminal Procedure 33. They argued that a new trial was warranted because (1) the CSO's comments improperly influenced the jury, (2) the district court gave an improper *ex parte* instruction to Juror #11, and (3) Juror #11's decision-making was influenced by poor physical and emotional health. The Government argued that '[alt]hough the Court can *deny* the motion for new trial at this stage based on the lack of competent evidence, it cannot *grant* the motion, at least without holding an evidentiary hearing.'

About six weeks after the motion for new trial was filed, the district court granted it without holding an evidentiary hearing. The district court rejected the Jordans' arguments relating to its *ex parte* meetings and Juror #11's health, but accepted their argument that the CSO improperly influenced the jury. Relying on the law clerk memo for the substance of the CSO's comments, the district court ruled that those comments contaminated jury deliberations to the point that the Jordans were denied their Sixth Amendment right to a fair trial.

The Government appeals.

* * *

[The Court's Standard of Review]

'We review only for abuse of discretion a court's handling of complaints of outside influence on the jury.' *United States v. Mix*, 791 F.3d 603, 608 (5th Cir. 2015) (quoting *United States v. Smith*, 354 F.3d 390, 394 (5th Cir. 2003)). 'We review a district court's grant of a new trial under Federal Rule of Criminal Procedure 33 using the same abuse-of-discretion standard.' *Id.*

[The Defendant's and the Government's Burdens of Proof]

'To be entitled to a new trial based on an extrinsic influence on the jury, a defendant must first show that the extrinsic influence likely caused prejudice.' *Id.* 'The government then bears the burden of proving the lack of prejudice.' *Id.* 'The government can do so by showing there is "no reasonable possibility that the jury's verdict was influenced by the extrinsic evidence."' *Id.* (quoting *United States v. Davis*, 393 F.3d 540, 549 (5th Cir. 2004)).

* * *

[The Government's Argument Concerning the District Court's Failure to Hold an Evidentiary Hearing and the Court's Response]

The Government argues that the district court abused its discretion by granting the motion for new trial without holding an evidentiary hearing. We conclude that the district court's decision falls within its broad discretion in these matters.

* * *

The Government's first argument is that our precedent creates a 'bright-line rule' that, when a district court is confronted with credible allegations of outside influence on a jury, it must hold an evidentiary hearing.

* * *

The Government cannot cite a single case in which we vacated a district court's *grant* of new trial for failure to hold a hearing. The quartet of cases it does cite for its alleged 'bright-line rule'—in only one of which we actually remanded for a hearing at all—were cases in which the district court *declined* to grant a new trial.

* * *

Thus, to the extent there is any 'bright-line rule' applicable to allegations of outside influence on the jury, it is not one applicable to this case.

* * *

We analyze the district court's exercise of its broad discretion not to hold a hearing in an outside-influence case only to ensure that the district court permissibly balanced the costs, benefits, and interests at stake.

* * *

In the unique circumstances of this case, the district court did not abuse its discretion by determining that the additional benefits of a hearing were too slim to overcome the 'unnecessary attention' and disruption a hearing would inject into this 'high-profile case,' given that it already had 'sufficient' documentation of outside influence to warrant a new trial. As the district court noted, the law clerks 'have no personal interest in this case' and 'prepared the [memo] shortly after the events in question,' adding to its reliability. Moreover, the district court made the

memo available on the docket for the parties' reference in briefing the motion for new trial.

* * *

In sum, the district court did not abuse its discretion in exercising its prerogative, 'within broadly defined parameters, to handle [the allegation of outside influence] in the least disruptive manner possible' in this unusual case.

* * *

[The Government's Argument Concerning the District Court's Granting a New Trial and the Court's Response]

The Government's final argument is that, even fully crediting the law clerk memo, the CSO's statements did not merit a new trial because they were 'innocuous, defense-friendly, and duplicative of the district court's own instructions.'

We conclude that the district court did not abuse its discretion in granting a new trial in this case. In urging Juror #11—whose comments to the district court evinced her great distress at the prospect of conviction—to vote 'without regard to the punishment that may be imposed,' the CSO arguably conveyed a preference for a guilty verdict. The same goes for the CSO's similar comment to the unidentified juror when that juror voiced an intention to vote 'with reservation.' Worse, the CSO's statement that the jury should return a guilty verdict 'if they thought the Defendants committed the crimes' can be reasonably understood as urging a standard for conviction that is lower than the correct one, which 'requires proof beyond a reasonable doubt.' *United States v. Fields*, 932 F.3d 316, 321 (5th Cir. 2019). Finally, the CSO's 'official character ... as an officer of the court' gave his comments a veneer of authority that could have 'carrie[d] great weight with a jury.' *Parker v. Gladden*, 385 U.S. 363, 365, 87 S.Ct. 468, 17 L.Ed.2d 420 (1966).

'District judges have considerable discretion with respect to Rule 33 motions.' *United States v. Simmons*, 714 F.2d 29, 31 (5th Cir. 1983). The district court permissibly concluded that this evidence showed a sufficient likelihood of prejudice to shift the burden to the Government, and further that the Government did not (and could not) show 'no reasonable possibility that the jury's verdict was influenced by' the CSO's comments. *Mix*, 791 F.3d at 608 (quoting *Davis*, 393 F.3d at 549).

* * *

For the reasons stated, the district court's order granting a new trial is affirmed.

My Thoughts

- Anyone who has spent any time in a federal courthouse *knows* that there is a closeness between a judge and the members of the judge's staff. There was simply no possibility

that Judge Mazzant was going to ignore or give little weight to the statements of his law clerks.

- We have all been concerned about how the verbal *or* non-verbal communications of court personnel could influence a jury – to our client's detriment. Judge Glenn Phillips of the 241st District Court in Tyler had a court coordinator who was never without one item of jewelry: A gold necklace with a small hangman's noose on it that had been a present from her husband, a Tyler Police lieutenant. When it was necessary for her to be in the courtroom during a trial or to accompany jurors to a meal outside of the courthouse, I had a standard oral motion that I would present to the court requesting that Judge Phillips direct her to turn the necklace around in order that the jurors could not see the noose. The motion was always granted.

Buck Files is a member of TDCLA's Hall of Fame and a former President of the State Bar of Texas. In May, 2016, TDCLA's Board of Directors named Buck as the *author transcendent* of the Texas Criminal Defense Lawyers Association. This is his 243rd column or article. He practices in Tyler with the law firm of Bain, Files, Jarrett and Harrison, P.C., and can be reached at bfiles@bainfiles.com or (903) 595-3573.