IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 99-3097, 99-3107, 99-3279

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MICHAEL D. ANDREAS,
Defendant-Appellant,

Nos. 99-3098, 99-3106, 99-3363

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

TERRANCE S. WILSON
Defendant-Appellant,

No. 99-3078

UNITED STATES OF AMERICA,
Plaintiff-Cross-Appellant,

v.

MICHAEL D. ANDREAS and
TERRANCE S. WILSON,
Defendants-Cross-Appellees,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

(Hon. BLANCHE M. MANNING)

REPLY BRIEF FOR CROSS-APPELLANT UNITED STATES OF AMERICA

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The Sentences of Andreas and Wilson Should Have Been Enhanced Due to Their Roles in the Conspiracy

1. This Court Can Review the District Court's Decision for Legal as Well as Factual Errors.

In their briefs as cross-appellees, defendants implicitly deny this Court's power to review the district court's legal errors by insisting that its application of the Sentencing Guidelines was a purely factual determination that can be reviewed only for clear error. Andreas Reply Brief and Cross-Appellee Br. 18 ("Andreas Reply"); Wilson Combined Responsive/Reply Br. 20 ("Wilson Resp. Br."). That is, of course, a significant misstatement of the law. By statute this Court, in an appeal by the defendant or the government, is to determine whether a sentence was imposed "in violation of law" or "as a result of an incorrect application of the sentencing guidelines," and if it finds such an error it is to remand the case for the imposition of a correct sentence. 18 U.S.C. 3742(e)(1)-(2) and (f)(1). Moreover, the very purpose of allowing appeals of Guidelines violations is to further the legislative purpose of "avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct," 28 U.S.C. 991(b)(1)(B), a goal that can be achieved only if district courts apply the Guidelines in accordance with their policy and with settled legal standards. As this Court has routinely held, therefore, it can review sentencing decisions for errors of law as well as errors of fact, and review of legal errors is *de novo*. See *United States v. Emerson*, 128 F.3d 557, 562 (7th Cir. 1997); *United States v. Damico*, 99 F.3d 1431, 1436 (7th Cir. 1996), *cert. denied*, 519 U.S. 1151 (1997); *United States v. Tai*, 41 F.3d 1170, 1174 (7th Cir. 1994).

In any event, the district court's conclusions regarding defendants' roles in the conspiracy cannot be reconciled with indisputable facts. The record establishes the leadership and managerial

roles of Andreas and Wilson by demonstrating that their co-conspirators followed them and adopted Andreas's and Wilson's proposals. As discussed in the Government's earlier brief (U.S. Br. 3-10, 66-73), the other companies did not merely continue to agree on prices among themselves, as they had been doing prior to Archer Daniels Midland Co.'s ("ADM") entry into the market. They ceded a large fixed market share to ADM, as Andreas had insisted both personally and through Wilson and Whitacre. Moreover, before ADM's entry, price fixing arrangements were "very loose." Tr. 1683.[1] After its entry the other conspirators adopted the organizational framework Wilson advocated: they established a legitimate-looking "cover" organization to disguise their unlawful meetings, and a system of sales volume allocations, with reports to a central auditor to ensure prices remained stable. This record of accomplishment is the ultimate proof of the leadership and managerial roles of Andreas and Wilson. Finally, as set out in the earlier brief (U.S. Br. 66-73), the district court's decision denying sentencing enhancements is built on a number of subsidiary factual and legal errors that require setting it aside.

[1] "Tr." refers to the trial transcript. In addition, "SA" refers to the joint appendix of Andreas and Wilson; "RSA" refers to their joint supplemental appendix; "GA" refers to the government's supplemental appendix; "G.Ex." refers to a government exhibit; and "Dkt.No." refers to the district court docket number.

2. The District Court Committed Reversible Factual and Legal Errors.

a. Andreas.

(i) Andreas's primary response to the government's brief is a variation on his earlier theme that he is not guilty of conspiring at all (Andreas Reply 19-21), a contention rejected by the jury and the district court, which warrants no further rebuttal here.[2] See U.S. Br. 14-17.

(ii) As we noted in our opening brief, Section 3B1.1 provides that a defendant's offense level should be increased if the defendant was an organizer, leader, manager, or supervisor of criminal activity "that involved five or more participants or was otherwise extensive." U.S.S.G. §3B1.1 (a), (b). In this case, Andreas apparently does not deny that the lysine conspiracy "involved five or more participants or was otherwise extensive" within the meaning of U.S.S.G. §3B1.1(a), as found by the district court. SA 225. Rather, Andreas argues (Andreas Reply 21-23) that there is no reliable evidence that ADM sales executives participated in the conspiracy and that the government should be estopped from arguing otherwise. Both arguments are wrong.

To begin with, the exact number of ADM executives who participated in the conspiracy is not important given the district court's undisputed finding that "[t]he sheer girth of the lysine conspiracy" supported a finding that the conspiracy was otherwise extensive. SA 225. In this situation, the district court correctly noted that the issue is whether Andreas had a greater role in the offense than others (*id.* at 225-26), an issue we address *infra* at p. 7. Indeed, even assuming that fewer than five of the

[2] In making this argument Andreas suggests that the factors mentioned in Note 4 to U.S.S.G. §3B1.1 are exclusive (Andreas Reply 19). That is contrary to the law of this Circuit. See U.S. Br. 71 n. 58, citing *United States v. Sierra*, 188 F.3d 798, 803-04 (7th Cir. 1999).

conspiracy participants reported to Andreas, an adjustment for his role in the offense is still warranted if he "organized or supervised a criminal activity involving four other participants." *United States v. Kamoga*, 177 F.3d 617, 621 (7th Cir.), *cert. denied*, 120 S.Ct 355 (1999). Section 3B1.1 "is designed precisely to prevent masterminds of criminal schemes from escaping responsibility for their role simply by delegating some authority to only one or two deputies." *Id.* at 621-22. Rather, an adjustment for role in the offense is warranted when other participants in the conspiracy act "according to the organizer's design and in furtherance of his or her plan." *Id.* at 622. That plainly happened in this case when the non-ADM participants in the conspiracy accepted the allocation plan urged by Andreas at Irvine and acted to implement it.

In any event, the government did present reliable evidence at the sentencing hearing supporting its contention that at least four ADM sales executives (Shuji Tani, Marty Allison, Alfred Jansen, and John Ashley) were told about the conspiracy after the Irvine meeting and subsequently helped implement it. GA 205-06, 208, 213-14.[3] Contrary to Andreas's argument (Reply 22-23), the statements are admissible and credible. Hearsay evidence is admissible for purposes of sentencing, "provided that the information has sufficient indicia of reliability to support its probable accuracy." U.S.S.G. §6A1.3. Accord, 18 U.S.C. 3661; *United States v. Hardamon*, 188 F.3d 843, 849 (7th Cir. 1999). In this case, the accuracy of the statements in issue is buttressed by their detail and their

[3] Tani learned of the conspiracy from one of the Japanese co-conspirators. GA 205-06. Allison learned of it "during the fall of 1993," along with Jansen, from Whitacre. GA 213-14. Allison also said that Ashley was aware of it. GA 214. Andreas's claim that Jansen was not told about the conspiracy (Andreas Reply 21) refers only to the time of the Mexico City meeting in June 1992 (RSA 19).

consistency with the evidence at trial.[4] Moreover, since the statements are facially credible, a decision to reject them on grounds of credibility would have called for an explanation. The district court, however, failed even to acknowledge the existence of the government's evidence, citing instead to a witness who said nothing about whether any ADM sales executives were aware of the lysine conspiracy. SA 225; U.S. Br. 68 & n. 54. A finding that is contrary to the only probative evidence of record on an issue is clearly erroneous. See, *e.g.*, *United States v. Szarwark*, 168 F.3d 993, 996-97 (7th Cir. 1999); *United States v. Bradley*, 165 F.3d 594, 596 (7th Cir. 1999).

Andreas's contention that the doctrine of judicial estoppel bars reliance on this probative evidence (Reply 21-22) is untenable. That doctrine only applies when a party intentionally adopts inconsistent positions to gain unfair advantage in consecutive proceedings, prevailing on one theory in the first case and then adopting its opposite in the second. See, *e.g.*, *Medcom Holding Co. v. Baxter Travenol Laboratories, Inc*., 106 F.3d 1388, 1396-97 (7th Cir. 1997). In this case the doctrine is inapplicable because judicial estoppel applies only when the second position taken is inconsistent "with one underlying a prior judgment," *Astor Chauffeured Limousine Co. v. Runnfeldt Investment Corp.*, 910 F.2d 1540, 1548 (7th Cir. 1990), and here there is no prior judgment. Moreover, the government has been consistent in its position in this case that Tani, Allison, Jansen, and Ashley were

[4] Allison's statement, for example, includes a list of meetings he and a colleague attended with representatives of European competitors to implement the conspiracy. GA 215-16. Tani said that Mimoto told him about meeting in Hawaii with Wilson and Whitacre, GA 205-06; the meeting was proven at trial both by an FBI videotape of it and by Mimoto's testimony. Tr. 1081. The trial evidence shows that it was held on March 10, 1994, while Tani said that Mimoto told him about it in March 1993. Speaking over four years after the event Tani apparently confused the year, but the other details confirm the truthfulness of his statement.

participants in the conspiracy. It stated that position in its Bill of Particulars even before trial, and if Andreas considered that position inconsistent with the government's theory of guilt he could have raised it at trial.[5]

In any event, Andreas's belated contention that the government has contradicted itself is wrong. The evidence at trial showed that at the time of the June 1992 meeting in Mexico City the only ADM personnel who knew of it were Andreas, Wilson, and Whitacre, and that up to the time of Andreas's October 25, 1993, meeting with Kazutoshi Yamada at which a market allocation agreement was finally reached, Andreas had opposed informing other ADM sales executives of the existence of the conspiracy. U.S. Br. 4; SA 676-78. The prosecutor referred to that evidence several times in his closing statement to rebut Andreas's defense at trial that, regardless of what he said on tape, his intentions were innocent; the argument was that keeping the arrangements with ADM's competitors secret even from his own sales staff implied an awareness of guilt. That evidence and line of argument is entirely consistent with the sentencing evidence that Tani and Allison learned of the conspiracy from other persons, or were informed after October 1993.[6]

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[5] While Andreas suggests (Reply 22) that the government is adopting a new position on appeal, it actually identified the four executives as participants in its Bill of Particulars, Nos. 3 and 17, and Exhibit A (filed Apr. 28, 1998) (Dkt.No. 279), as well as in its Sentencing Memorandum at 67 (filed Jan. 28, 1999) (Dkt.No. 480), to which the statements of Allison and Tani were attached (GA 204, 211). Andreas's reference to a colloquy regarding Wilson's sentence (RSA 107-08) is irrelevant because the government never contended that Wilson controlled ADM's lysine sales executives.

[6] The prosecutor went through the various conspiratorial meetings in chronological order, pointing out the defendants' involvement, and commenting on the fact the ADM's salesmen were not to be told about them. Tr. 5620-21 (Mexico City meeting, June 1992), 5652-53 (Decatur, April 1993), 5674 (Vancouver, June 1993), 5692-93 (Irvine, October 1993), 5703 (Hawaii, March 1994). Only the last reference raises any question with respect to the government's position at sentencing, and given

(continued...)

Nor is there any contradiction between the jury verdict and use of the sentencing evidence. The issue at trial was Andreas's subjective state of mind, which is wholly irrelevant to the coverage of U.S.S.G. §3B1.1(a); he can be given the four point enhancement even if he did not know that the salesmen had learned of the conspiracy. *United States v. Kamoga*, 177 F.3d at 621-22. Similarly, it was unnecessary for the jury to believe that he continued to hide the conspiracy from his sales executives after October 1993, let alone that he was successful in doing so, in order to find that he intended to fix prices and allocate market shares. There was ample other evidence to support that element of the offense. Under these circumstances, the government properly relied on the Tani and Allison statements for purposes of sentencing.

(iii) In arguing that the district court had a "solid factual basis" for its conclusion that Andreas was not a leader (Reply 23-25), Andreas ignores the court's underlying errors of law in construing §3B1.1's reference to "organizer or leader." As pointed out in the government's earlier brief, the court erred particularly in assuming that to be a leader a defendant needed power to control the other participants, and in failing to understand the law regarding collective leadership (U.S. Br. 69-71). That is clear from the court's holding that Andreas could not have been a leader because he could not "coerce Ajinomoto and the rest," or just "directly call[] someone at Ajinomoto, Sewon, Eurolysine, and so forth, and simply order[] them to sell a specific volume at the set 'agreement price,'" but instead had to negotiate with Yamada. SA 227. As this Court has repeatedly held, "[c]ontrol *** is not the

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[6] (...continued)
the overall record that inconsequential error hardly warrants the "strong medicine" of judicial estoppel. See *Chaveriat v. Williams Pipe Line Co.*, 11 F.3d 1420, 1428 (7th Cir. 1993).

decisive factor," *Hardamon*, 188 F.3d at 852, quoting *Kamoga*, *supra*, 177 F.3d at 612, and "influence" is enough. See *United States v. Mustread*, 42 F.3d 1097, 1105 (7th Cir. 1994).

Andreas's initial defense of the district court's reasoning rehashes his contention that there was no agreement between ADM and its competitors (Reply 23), ignoring the jury's verdict and the district court's findings. The fact that the other companies had been fixing prices before ADM entered the market (Reply 19, 23) is wholly consistent with Andreas taking a leading role after ADM entered. See *United States v. Evans*, 92 F.3d 540, 545 (7th Cir. 1996).

In fact, while ADM's entry initially destabilized the market, the evidence clearly showed that the conspiracy ultimately followed the course along which Andreas led it, giving ADM the benefit of a large guaranteed market share at fixed high prices. As Mimoto acknowledged at trial (Tr. 1001-02), he and the other lower level participants in the conspiracy were unable to reach an agreement on a sales volume allocation and looked to top management, including Andreas, to resolve the dispute. See also Tr. 1707 (Ikeda). And, indeed, Andreas broke the impasse by meeting personally with Yamada at Irvine and agreeing on a compromise that ultimately was accepted by all of the conspirators. U.S. Br. 7-9. This is exactly the sort of leadership of criminal activity that warrants a four level increase for role in the offense. Cf. *United States v. Dillard*, 43 F.3d 299, 307 (7th Cir. 1994) (defendant's "participation in the operation was most critical to its success").

Contrary to Andreas's contention (Reply 24) the government does not "confuse legitimate business hierarchy with the very different concept of relative responsibility for illegal conduct" in arguing that Andreas was more culpable than Wilson. In *United States v. DeGovanni*, 104 F.3d 43, 46 (3rd Cir. 1997), the case on which Andreas relies, the court held that a police sergeant who engaged in

extracurricular criminal activities with some of his police subordinates was not a leader of the criminal activities in which his police rank played no part. His status in the police department "was not enough to substantiate an enhancement for *active* supervision of *other members* of the conspiracy" where he was a mere "rank and file" participant in the criminal activity. *Ibid*. In this case, by contrast, Andreas engaged in the conspiracy in his capacity as a corporate officer of ADM and on its behalf. He made the decisions for ADM, he actively directed and controlled the roles of his corporate subordinates in the conspiracy, and he personally negotiated the sales volume allocation with Yamada. Andreas had greater relative responsibility for the illegal conduct not because he was higher in the legitimate business hierarchy, but because he actively exercised the power that status gave him to advance the criminal conspiracy.

Andreas further argues (Reply 24) that the collective leadership principle of *Evans*, 92 F.3d at 545 (cited at U.S. Br. 70-71), is "inapposite" merely because the leaders of the conspiracy in this case did not call themselves a "board of directors" or operate by majority vote as they did in *Evans*. Those distinctions, however, are immaterial. The Guidelines themselves plainly say that substance, not nomenclature, is what counts. U.S.S.G. §3B1.1, Commentary, Note 4. The organization in this case may have been somewhat less formal than in *Evans*, and decisions may have been made by consensus rather than majority vote, but the fundamental concept of collective leadership is the same. Andreas and Yamada, whose companies shared 60% of the market allocation (U.S. Br. 71 n. 57), together with the heads of the smaller companies involved, jointly made the important decisions for the conspiracy. The holding of *Evans* thus squarely applies, and the district court erred as a matter of law in not applying it.

b. Wilson.

Wilson, in his laconic response to the government's argument that he should have received an enhanced sentence based on his management role in the conspiracy, basically tracks Andreas's argument. Wilson asserts that the government is only complaining of factual errors, and that he could not be a leader or manager because the other firms had been fixing prices before ADM entered the market, and they sometimes conspired against ADM. Wilson Resp. Br. 20-21. Like Andreas's arguments, Wilson's contentions are wrong because they ignore the finding that Wilson participated in a conspiracy with the other firms,[7] and this Court's holding in *Evans* that latecomers may become leaders.

As with Andreas, Wilson's contention that he was not a manager of the conspiracy is belied by the fact that other members of the conspiracy followed his lead. The other firms adopted all the steps that he advocated, including the establishment of an industry association as a cover for their price fixing activities,[8] filing of reports on sales volumes with Kanji Mimoto as a means to implement their sales volume allocation agreement (GA 4-5), and a compensation arrangement in case a firm exceeded its quota. See GA 135 (Ikeda confirming that everyone accepted "ADM's *** proposal"). The district court decision did not mention these facts, let alone negate them (Wilson Resp. Br. 21 n. 27), but applied the legally erroneous assumption that Wilson had to exercise control over the other participants

[7] The facts underlying the government's argument are set out in its Statement of Facts in its main brief (U.S. Br. 2-10) and in the Presentence Investigation Report.

[8] Such an industry association had been used as a cover in the citric acid price fixing conspiracy (Tr. 2640-41). Although Wilson's proposal for a similar lysine association was initially greeted with some suspicion, it was ultimately adopted (Tr. 4208, 4589-90). See G.Ex. 3/10/94 1B96, 98, 94, 95-T5, at 150 (Wilson describing association as "perfect, perfect cover").

in order to be a manager. As shown in the government's main brief, influence over the others is sufficient to make a defendant a leader or manager (U.S. Br. 69-70). This Court has repeatedly held that "control over others is not the sine qua non of a finding that a person is [a] manager or supervisor." *Dillard*, 43 F.3d at 307, quoting *United States v. Young*, 34 F.3d 500, 507 (7th Cir. 1994). In light of its legal error, the district court's decision must be set aside.

CONCLUSION

For the reasons set forth in the Brief for the United States and in this brief, the judgment of the district court must be set aside to the extent it refused to enhance the sentences for Andreas's and Wilson's leadership and managerial roles, respectively, and the case remanded for resentencing under proper legal standards.

Respectfully submitted.

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DECEMBER 1999

CERTIFICATE OF SERVICE

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