94-1450

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 94-1492, 94-1493

UNITED OF AMERICA,
Appellee, Cross-Appellant,

v.

DANIEL MILIKOWSKY,
Defendant-Appellant,
Cross-Appellee,

MACC HOLDING CORP.,
Defendant-Appellant

ANNE K. BINGAMAN
Assistant Attorney General

DIANE P. WOOD
Deputy Assistant Attorney General

JOHN J. POWERS, III
MARION L. JETTON
Attorneys

Department of Justice
Antitrust Division - Rm. 3224
10th & Pennsylvania Avenue, N.W.
Washington, D.C. 20530
(202) 514-3680

OF COUNSEL:

PETER J. LEVITAS

Attorney
Department of Justice
Antitrust Division
Washington, D.C. 20001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 94-1450, 94-1492, 94-1493

UNITED OF AMERICA,
Appellee, Cross-Appellant,

v.

DANIEL MILIKOWSKY,
Defendant-Appellant,
Cross-Appellee,

MACC HOLDING CORP.,
Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE UNITED STATES AS APPELLEE AND CROSS-APPELLANT

PRELIMINARY STATEMENT

Judge Ellen Bree Burns of the United States District Court for the District of Connecticut entered judgment and sentence in this case. No ruling or decision in the case has been reported.

JURISDICTION

The appeal and cross-appeal are from a final judgment entered in a criminal case. The district court had jurisdiction pursuant to 18 U.S.C. §3231 and 15 U.S.C. §1. This Court has jurisdiction pursuant to 28 U.S.C. §1291 and 18 U.S.C. §3742(b). The judgment as to Daniel Milikowsky was entered August 10, 1994 (JA 30),[1] and he filed a notice of appeal on August 19, 1994 (ibid.). A timely notice of cross-appeal

---

[1] "JA" refers to the joint appendix filed in this Court. "D.Ex." and "G.Ex." refer to defendants' and government exhibits. "Tr." refers to the trial transcript. "Ruling" refers to the district court's August 25, 1994, ruling on appellant's new trial motion.

was filed by the United States on September 7, 1994 (JA 31). See Fed. R. App. P. 4(b).

STATEMENT OF ISSUES

Appellant Milikowsky raises the following issues:

1. Whether government witness Benjamin DeBerry's trial testimony about his pretrial statements to government attorneys was false and, if so, whether appellant was prejudiced by the allegedly false testimony.

2. Whether appellant's ability to cross-examine DeBerry was unconstitutionally restricted.

3. Whether the government's closing statement constituted reversible error.

The United States raises this issue on cross-appeal:

1. Whether the district court's decision to depart downward from the applicable Sentencing Guidelines range, to avoid harm to defendant's two unrelated businesses that might occur if defendant were incarcerated, was an incorrect application of the Sentencing Guideline and unreasonable.

STATEMENT OF THE CASE

I. NATURE OF THE CASE, COURSE OF PROCEEDINGS, DISPOSITION

A one-count indictment filed July 15, 1993, charged appellant Daniel Milikowsky (Milikowsky) and MACC Holding Corp. (MACC)[2] with conspiring to fix prices of new steel drums offered for sale in the eastern region of the United States, in violation of Section 1 of the Sherman Act, 15 U.S.C. §1. JA 32-37. After a three-week jury trial,

---

[2] MACC was known during the period of the conspiracy as Mid Atlantic Container Corporation ("Mid Atlantic"). Mid Atlantic was sold to a competitor, Russell-Stanley Corporation, in April 1990, and its name was officially changed to MACC on April 4, 1990. JA 167; Tr. 1315.

Milikowsky and MACC were convicted. On August 8, 1994, Judge Burns sentenced MACC to pay a fine within the Guidelines range,[3] but departed as to Milikowsky. Ibid. Milikowsky was placed on probation for two years, and sentenced to six months' home confinement and 150 hours of community service. Milikowsky was also fined $250,000. JA 1804.[4]

II. STATEMENT OF THE FACTS

A. The Conspiracy.[5]

During the period of the conspiracy, appellant Milikowsky was part-owner of Mid Atlantic Container Corporation ("Mid Atlantic"). JA 182. Mid Atlantic, a New Jersey company, manufactured new steel drums of various gauges (thicknesses) at its plant in Linden, New Jersey. JA 163-164, 170. The company sold its drums in the eastern region of the United States[6] to customers such as chemical, oil, food stuffs, and

---

[3] MACC was placed on probation for one year and fined $1 million, as well as a special assessment of $200. JA 1806.

[4] Appellants' coconspirators have received the following sentences. Louis Gaev was convicted after a jury trial and sentenced to 15 months in prison, 3 months' home confinement, three years probation, and a $50,000 fine. William McEntee pleaded guilty and, consistent with the government's U.S.S.G. §5K1.1 motion, was sentenced to probation and fined $100,00. Victor Bergwall pleaded guilty and was sentenced to 7 months in prison and paid a $20,000 fine. See JA 1784-1786. Van Leer pleaded guilty to, inter alia, fixing prices in the eastern region, and paid a fine of $1 million. Russell-Stanley pleaded guilty to price fixing, mail fraud, and obstruction of justice and was sentenced to pay a fine of $1.85 million.

[5] For the trial court's summary of the evidence adduced at trial see JA 1816-1824.

[6] The eastern region is described by the indictment as New Jersey, eastern Pennsylvania, eastern New York, Delaware, Maryland, Virginia, Maine, New Hampshire, Vermont, Massachusetts, Connecticut, Rhode Island, and the District of Columbia. JA 32.

New steel drums range in size (13 to 57 gallons), and in gauge (16 (thickest) to 26 (thinnest) gauge). JA 35, 174. The drums are of two basic designs: either tight (or closed) head or open (removable) head. JA 175-176. Mid Atlantic's most common steel drum was a 55-gallon container with a closed head. JA 163-164, 170, 291.

paint manufacturers, producing up to a million drums per year. JA 181. While Milikowsky owned several other businesses,[7] he received regular reports on Mid Atlantic and visited its factory once or twice a month. JA 183-184, 190, 282, 365-366, 557-565.

From 1987 to 1990, Mid Atlantic and two other companies -- Russell-Stanley Corporation ("Russell-Stanley") and Van Leer Containers, Inc. ("Van Leer") -- dominated the market for heavy gauge new steel drums in the eastern region. JA 193.[8] Eastern Steel Barrel Corporation ("Eastern") also sold some heavy gauge drums. JA 193, 196-197.

Steel drum prices went up about twice a year in response to steel price increases. JA 205, 215-217. All drum customers not covered by long-term contracts would receive 30 days' notice of the amount and effective date of the increase in drum prices. JA 218-221; see, e.g., G.Ex. 4. The amounts paid by individual customers varied depending on how their drums were customized,[9] and reflected volume purchased. JA 176-179, 202. The announced increase would be added to the buyer's current price for their particular specifications. JA 221.[10]

---

[7] Milikowsky was also president and part-owner of Jordan International Company, a steel trading company headquartered in Connecticut, and he was part-owner of Prospect Industries, a steel pail manufacturer. JA 683, 691-692, 720, 724.

[8] Companies in other regions of the United States did not offer significant competition, because of transportation costs, as well as the practical difficulties of shipping these large drums long distances, in good condition and on schedule. JA 180, 198, 293, 580, 643.

[9] Steel drums may be lined or unlined, painted, or decorated in various ways, and may contain fittings to provide for filling and dispensing their contents. JA 176-178, 291-292.

[10] The companies also prepared price lists for their own use that gave the total price for the various gauges and types of drums. JA 221-222; see, e.g., G.Ex. 78.

Witnesses at trial described a price-fixing conspiracy among Mid Atlantic, Russell-Stanley, Van Leer, and Eastern that began in 1987 and continued at least until the conspirators became aware of a grand jury investigation in 1990. The conspiracy covered six successive price increases during this period. Top executives of the companies, including Milikowsky, talked and agreed each time on three points: the amount of the price increase; the effective dates of the price increase; and the order in which the conspirators would announce the increases to their customers. See, e.g., JA 227-234, 974-975.[11]

The dates that increases were publicly announced were staggered so that it would appear that the competitors learned of the price increase through legitimate channels, and then raised their prices independently in response. JA 978, 1016. The order in which the companies announced the increase was varied each time, so that no single company would repeatedly bear the brunt of customer dissatisfaction with the company that led the price increase. JA 233-234, 487-488, 979. But an effort was made to keep the effective dates of the increases close together, so that the first companies to announce would not lose business, and the price increase would stick. JA 976-978, 1000, 1016.

Lower-level executives implemented the agreed-on price increases.[12] Some customers, because of their bargaining power, were

---

[11] Other top-level executives involved in agreeing on these points were Stanley Bey and William Lima of Russell-Stanley; Willem DeVlugt and Benjamin DeBerry of Van Leer; and Andrew Campbell of Eastern.

[12] William McEntee, Mid Atlantic's president, testified that he never talked to top-level executives Lima or DeBerry about a price increase notice. JA 234-235. Instead, he talked to lower-level counterparts at competing companies: McEntee and Herbert Stickles at Mid Atlantic; Victor Bergwall at Van Leer; Robert Okrasinski (known as (continued...)

able to extract smaller price increases from individual conspirators, or to obtain a delayed effective date. If an executive of a conspiring company received information that a customer was receiving a lower price from a coconspirator than from the executive's company, the executive would call his contact at the conspiring company to check on the claim. The conspirators would inform each other what price was being offered to that customer, and, if necessary, the inquiring company would meet the confirmed lower price.[13] However, the conspirator did not undercut that price, since to do so "would have destroyed our credibility with the competitors," and destabilized drum prices. JA 547-548; see also JA 253.

At trial, three witnesses testified at length about their personal involvement in the conspiracy, and implicated Milikowsky as a coconspirator. Their testimony was corroborated by extensive documentary evidence.

1. William McEntee ("McEntee"), who was president of Mid Atlantic from 1982 to 1990 (JA 163-164), worked with Milikowsky to implement the conspiracy. After a steel price increase was announced, McEntee and Herbert Stickles ("Stickles"), Mid Atlantic's executive vice-president (JA 165, 346), would agree on an increase for Mid Atlantic's drum prices. JA 225, 565-566. They would give this proposed increase to Milikowsky for approval. Ibid. Milikowsky had final authority on timing and amount of price increases. JA 226-227. Subsequently, Milikowsky would tell them whether the price increase

---

[12](...continued)
"Okra") at Eastern; and Louis Gaev at Russell Stanley. See, e.g., JA 246-248.

[13] Several conspirators often sold simultaneously to a particular customer; customers bought from several suppliers to assure themselves of reliable supplies. JA 535.

"was acceptable to the competition as stated" (JA 234), and in what order, relative to Mid Atlantic's two primary competitors (Van Leer and Russell Stanley), the price increase would be announced. JA 227-228. Sometimes, Milikowsky made a small change in the amount of the increase (JA 227). Milikowsky indicated to McEntee that he had spoken with William (Bill) Lima ("Lima"), president of Russell-Stanley, and Benjamin (Ben) DeBerry ("DeBerry"), vice president of sales at Van Leer, and that the price increase, timing, and sequence were "the net result of that discussion." JA 229-230; see also JA 503, 566, 569.

McEntee recalled that, from 1987 to 1990, price increases by Mid Atlantic, Russell-Stanley, and Van Leer were the same, with one exception involving Van Leer (JA 240-241), which caused "quite a disturbance among the competition" because Van Leer's price was 10 cents less per drum, a significant difference. JA 241. McEntee discussed the matter with Milikowsky, who said that Mid Atlantic was advised by Van Leer that "it was an honest mistake." JA 241-242. Van Leer promised to announce first at the next price increase, and did so in January 1989. JA 1002-1003, 1013; G.Ex. 7, 181; D.Ex. 548.[14]

McEntee testified that there was a "standing instruction[]" that, if there were reports that a coconspirator was not conforming to the agreed-on increase and time period, then Stickles or McEntee would contact the company to find out the time period and the amount of their increase. JA 245-252.[15] McEntee said that Mid Atlantic would either meet any lowered price or stay with its higher price, but Mid

---

[14] Van Leer executive DeBerry testified later at trial that he had made a 10 cent error on the 1988 increase, and that he apologized to Lima and Milikowsky and promised to announce first at the next price increase. JA 1002-1004.

[15] When McEntee called Gaev at Russell-Stanley, he used a fictitious name that Stickles had devised. JA 248.

Atlantic would not further undercut the competitor's price. JA 252-253, 270-271.[16] Mid Atlantic would give Russell-Stanley and Van Leer the same type of information if they requested it. JA 253, 547. McEntee did not remember Van Leer or Russell-Stanley ever using that information to beat Mid Atlantic's price. JA 272, 547-548.[17] McEntee said that Milikowsky was aware of these phone calls between McEntee and Stickles and their competitors (JA 280-282, 451), and that McEntee would tell Milikowsky that he had spoken to Russell-Stanley and Van Leer and resolved "problems relating to the proposed price increase differential, if any, and the date of effectiveness" (JA 281).[18]

2. Robert Okrasinski ("Okra"), vice president of sales for Eastern (JA 579), also described the operation of the conspiracy, including its early stages. His boss, Andrew Campbell ("Campbell"), attended a meeting of steel drum chief executives in May 1987 at the airport Marriott Hotel in Newark, New Jersey. JA 581. Campbell was asked to attend the meeting by Stanley Bey, then chief executive officer and owner of Russell-Stanley (JA 784). JA 581-583. The purpose of the meeting was "[t]o set another forward plan to sanitize

---

[16] To illustrate how the conspiracy worked, the government introduced McEntee's handwritten notes of two conversations on price verification with Gaev and Bergwall in January 1989. G.Ex. 48; JA 254-268.

[17] Mark Inman, who worked on commission as a sales representative for Mid Atlantic (JA 836-837), testified that, if a customer complained to him about a price, he would tell McEntee or Stickles; they in turn would check on "what the prices were" with Okra at Eastern and Bergwall at Van Leer. JA 838-841.

[18] The government's evidence included several monthly reports prepared for Milikowsky that appeared to refer to the price-fixing conspiracy. See e.g., Gov.Ex. 25 and JA 284-285 ("Competition - not so competitive - price shaving [i.e., deviation from announced increases] very thin and selected"); G.Ex. 29 ("Price increase set for 7/1/ 88. Should stick for the most part with cooperative effort.") and JA 286.

the selling prices of steel drums. * * * To set a level and to stay at that level, not to go beneath it but to go above it, when needed." JA 598. Okra asked Campbell, if he attended the meeting, to obtain "threshold prices" -- that is, floor prices below which all would agree not to sell. JA 584, 602-603.

After attending the meeting, Campbell told Okra that, inter alia, Russell-Stanley, Mid Atlantic, and Van Leer had been represented and that Stickles would be calling shortly. JA 599-603.[19] When Stickles did call Okra, he said he had threshold prices and gave Okra numbers for 55 gallon drums, by gauge. JA 603. The general manager of sales of Van Leer, Victor Bergwall, also called and gave Okra threshold

---

[19] While Okra testified that he did not know if Milikowsky attended (JA 602), Milikowsky's 1987 calendar contains an entry for May 22, 1987, which had been completely erased and over-written. An FBI expert testified that the calendar appeared originally to have said "Marriott, drum meeting, _ewa_k airport." Gov. Ex. 68; JA 665-678. In addition, a Jordan (see n.7) telephone bill for June 1987 shows a number of calls placed on May 22, 1987, from a pay phone in the lobby of the Newark Marriott Hotel at the Newark airport, all before 11:00 a.m. Gov. Ex. 212; JA 701-707. The first of these was placed to Russell-Stanley headquarters in Red Bank, New Jersey. G.Ex. 212; JA 706-707. A fax was found in a Jordan file entitled "MACC General" that was received at Jordan on May 19, 1987 -- three days before the meeting. The fax was a copy of a Mid Atlantic internal price list and it listed the same prices that Okra later received from Stickles (and recorded in red on Gov.Ex. 90, see, infra, n.20) as threshold prices agreed on at the meeting. Gov.Ex. 224; JA 694-700. Milikowsky had written on the fax "July 1 prices" and "Today these are the prices," and an arrow was drawn to a column marked "Threshold Prices." G.Ex. 224; JA 694-695.

A 1987 appointment book belonging to Russell-Stanley's Bey indicates that he also attended the meeting. The May 22, 1987 entry says "11 a.m. Meeting at Airport Marriott hotel - Parlor Conf. # 82-WX 35 XQ, $145 late checkout." Gov.Ex. 194; JA 785-787. Bey signed a credit card receipt on the Russell-Stanley account on May 22, 1987 at the Newark Airport Marriott, for $157.79. G. Ex. 195; JA 789-791.

Travel records for Van Leer show that Willem DeVlugt, then president of Van Leer (JA 912), was also in Newark that morning. He flew from Chicago, the location of Van Leer's corporate offices, to Newark on May 22, 1987, arriving about 10:15 a.m., and returned to Chicago that afternoon. G.Ex. 140; JA 816-825.

prices identical to Stickles' prices, as well as a target date for the next increase. JA 603-604.[20] Campbell told Okra not to go below the threshold prices without his permission, and Eastern did not. JA 608-609.

Following the 1987 Newark meeting, Okra, with Campbell's approval, had continuing pricing contacts about price increases "above the threshold price" (JA 611-614)[21] with Bergwall, Stickles, and Gaev.[22] JA 628-629, 634-635. Campbell also had contacts with upper level executives from time to time, which he discussed with Okra. JA 629-630. Okra continued to contact competitors on the pricing program until November 1989, when he left Eastern. JA 630. Okra said that, prior to implementation of a price increase, there were numerous calls among the conspirators; the calls were made, inter alia, to verify price increases on individual customers after salesmen made contacts

---

[20] Gov.Ex. 90, at J108466, which is a copy of Eastern's internal price list for heavy gauge drums effective April 20, 1987, contains numbers added by Okra in red that Okra had received from Stickles and Bergwall, as well as Okra's notation in red, "threshold." JA 604-607.

[21] A memorandum that Okra prepared for Campbell, dated July 5, 1987, included a section entitled "Agreed Ground Rules for Pricing" in which Okra reviewed the ground rules that he had agreed on with Bergwall (Van Leer), Lou Gaev (Russell-Stanley), and Stickles (Mid Atlantic), noting that they "appear[ed] to be in place." G.Ex. 90 at J108464-J108465; JA 614-623. The ground rules set out how accounts that involved long-term contracts would be treated by the conspirators; how accounts would be treated that had not received an earlier April increase; whether the conspirators would enter into long-term contracts in connection with the July increase; and how solicited bids would be handled.

[22] Like McEntee, Okra testified that Gaev suggested using aliases, but said that he did not use one, since he had legitimate business reasons for calling Gaev. JA 631-634.

on the announced price increase. JA 253, 630-631.[23] Okra testified that he would not offer a price lower than Mid Atlantic's because "we had agreed" not to cut the price. Tr. 644-645.[24]

3. DeBerry, who took over responsibility for sales at Van Leer in late 1987 (JA 922-923), and to whom Bergwall reported (JA 937), testified at trial about his own pricing contacts with competitors, including Milikowsky. After November 1987, DeBerry began discussions with Milikowsky "on general support for price increases." JA 957-958.[25] Later, his discussions with Milikowsky became very specific. JA 958. DeBerry remembered talking with Milikowsky about the general price increases for July 1988, January 1989, July 1989, and January 1990. JA 971-972, 974, 981-982. DeBerry discussed with Milikowsky and Lima the amount of the increase, the effective date of the increase, and when the announcements would be made and which of the three would make the announcement first. JA 974-975, 996-1028, 1035-1044. The three also discussed the reasons that would be given in their customer letters for the increase, and the letters ultimately gave consistent justifications. JA 1016-1025. DeBerry always spoke to both Lima and Milikowsky, because unless both supported a price

---

[23] The government introduced summaries of telephone contacts between Milikowsky's office in Connecticut at Jordan and designated numbers at Van Leer and Russell-Stanley. These showed peaks of activity around the time of price increases in June and July 1987, November 1987, July 1988, November 1988, and June 1989. G.Ex. 166, 169, 172; JA 855-875. These could not be adequately explained by calls relating to steel purchases; indeed, Russell Stanley bought no steel from Milikowsky in 1988. Tr. 841-850.

[24] Copies of competitors' price increase lists were found in the conspirators files. G.Ex. 92 at J108365-J108366 and JA 639-642 (Eastern's file for July 1989 price increase, containing both Mid Atlantic's public price increase letter and internal price list).

[25] This was after the May 22, 1987, Newark meeting, which DeVlugt apparently attended on behalf of Van Leer. See supra, n. 19.

increase, the increase would not be nearly as effective. JA 981-982. Most contacts with Milikowsky and Lima were by telephone, but DeBerry recalled all three attending two meetings, one at the Marriott Hotel at Newark Airport, and the other at the Hilton Hotel at O'Hare Airport, Chicago. JA 979-981, 1006-1012, 1028-1035.[26]

4. The actual pricing behavior of the corporate conspirators was completely consistent with the testimony of the government's witnesses. During the period of the conspiracy, each general price increase announcement sent out by Mid Atlantic, Russell-Stanley, Van Leer, and Eastern was essentially the same for all the products listed. Further, the position of being first to announce the increase did, in fact, rotate among Mid Atlantic, Russell-Stanley, and Van Leer. And the effective dates were within a few weeks of each other. The justifications given for the increases were also consistent, in

---

[26] Documentary evidence confirms a meeting at O'Hare airport on November 9, 1988. DeBerry's expense account record shows a meeting with Milikowsky for lunch at the O'Hare Hilton. G.Ex. 134; JA 1004-1008. The expense record states that DeBerry and Milikowsky discussed steel purchases, but DeBerry testified that the purpose of the meeting was actually to discuss pricing and the effective date for the January 1989 price increase. JA 1007-1008. Lima was also present at the lunch, but DeBerry testified that he did not put Lima's name down on the expense record because he could think of no legal reason for the three to be lunching together. JA 1008.

Milikowsky's calendar for 1988 contains an entry for November 9, 1988 of "Chicago lunch, Bill & Ben." Gov.Ex. 69; JA 708-709, 1011. A petty cash slip signed by Milikowsky and a reservation slip and bill for Milikowsky's stay at the O'Hare Hilton on November 9 and 10, as well as records of phone calls on November 9, 1988, before 11:30 and after 2:42 from that room (but not during the lunch hour) support DeBerry's account of the meeting. Gov.Ex. 213, 223, 236; JA 709-717.

Russell-Stanley records also support DeBerry's account of a meeting with Lima. They show a charge to Lima's telephone credit card for a call to Russell-Stanley's main office at Red Bank (JA 194) at 3 p.m. on November 9, 1988, from a public pay phone at O'Hare airport located at a terminal directly across the street from the Hilton. G.Ex. 196; JA 792-797, 1026. This was approximately the same time that Milikowsky's phone calls from his hotel room resumed.

accordance with the coconspirators' discussions. See, e.g. G.Ex. 4-9, 178-183, 113.

B. Sentencing Determinations.

1. Guidelines Calculations. Under the Sentencing Guidelines incorporating amendments effective November 1, 1989[27], the base offense level for an individual defendant convicted of a Sherman Act violation such as price-fixing or bid-rigging is nine. U.S.S.G. §2R1.1(a). The offense level is adjusted "for volume of commerce attributable to the defendant".[28] In addition, if conduct involved participation in an agreement to submit non-competitive bids, the offense level is increased by one. U.S.S.G. §2R1.1(b)(1).

The United States asserted that the volume of commerce attributable to Milikowsky was in excess of $15 million and recommended at least a two-level enhancement for volume of commerce. JA 2053-2054. It also argued that Milikowsky's offense level should be increased for participation in bid-rigging. JA 2051-2053. It recommended a sentence within the guideline range.

Milikowsky contested the calculation of the volume of commerce and the bid-rigging enhancement. Milikowsky's Sentencing Mem., Dkt.#210 at 20-42. He asked the court to depart from the Guidelines range to give him a sentence of probation, based, inter alia, on his family and business responsibilities and his good character. Id. at 44-57.

---

[27] All U.S.S.G. citation in this brief are to that version of the Guidelines (U.S.S.G. (Nov. 1989)), unless otherwise noted.

[28] Two levels are added if volume of commerce is "[m]ore than $15,000,000," and three levels are added if volume is "[m]ore than $50,000,000." U.S.S.G. § 2R1.1(b)(2).

The probation officer recommended a two-level enhancement based on a volume of commerce of about $46 million, resulting in an adjusted offense level of eleven. JA 1926-1927.

2. The Sentencing Hearing and Judgment. At sentencing, the court ruled that it did not intend to apply the bid-rigging enhancement requested by the government, although the court applied it to MACC. JA 1705, 1727, 1738, 1740-1741. As to volume of commerce, it adopted the method of calculation used by the government and probation office, increasing the base offense level by two. JA 1741-1742. The resulting offense level, accordingly, was eleven. In view of Milikowsky's prior history (Category I), the applicable Guidelines sentence was 8 to 14 months' imprisonment. U.S.S.G. Ch.5, Part A. A split sentence was available under U.S.S.G. 5C1.1(d)(2), which allows a period of community confinement or home detention, but requires at least one-half of the minimum term to be satisfied by imprisonment.

Milikowsky requested a departure from level 11 that would result in probation or probation conditioned on home confinement or community service (see, e.g., JA 1769, 1779-1780).[29] The government argued against departure, noting that the "controlling consideration underlying this guideline is general deterrence." JA 1782, 1786-1788. The government asked the court not to send a message that an antitrust violator can "walk away from this crime with [probation] * * * if you are a small businessman whose [business'] very existence may depend on

---

[29] Milikowsky argued that departure was appropriate because the volume of commerce calculation "does not adequately take into account Mid-Atlantic's situation" (see, e.g., JA 1771); because Milikowsky's incarceration would harm employees at Jordan and Prospect, the pail manufacturing company in which Milikowsky has an interest, because Milikowsky's presence is allegedly needed to keep those companies in business (see, e.g., JA 1771-1777); and because his family would be hurt by his absence (JA 1777-1778).

you." JA 1783. The government contended that neither family nor employment situation placed Milikowsky outside the heartland of antitrust cases, and therefore departure was not appropriate. JA 1786-1788.

The court held that neither Milikowsky's charitable activities nor family responsibilities would permit departure, although the court recognized that Milikowsky had sizeable deposits in "the bank of life." JA 1794. The court ultimately arrived at the result Milikowsky wanted, however, stating that "although those things militate in his behalf, * * * what really gives the Court the extra opportunity to consider a departure here is the effect that [Milikowsky's] absence will have on his employees." JA 1795. The court thereupon departed to a level 10, allowing it to place Milikowsky on probation for 2 years including 6 months of home confinement. Ibid.[30]

SUMMARY OF ARGUMENT

1. The district court correctly found that DeBerry's testimony concerning when he first told the government that Chicago was the site of one of his meetings with Milikowsky was not false. DeBerry simply could not remember at trial when he first mentioned Chicago to the government as a meeting site. Further, the government was under no obligation to correct DeBerry's failure of recollection because it had disclosed to defense counsel prior to trial the fact that DeBerry had not identified Chicago as a meeting site until April 1993; indeed, defense counsel used that disclosure in a variety of ways at trial.

---

[30] The court also imposed a fine of $250,000 and a special assessment of $50. JA 1796.

In any event, Milikowsky was not prejudiced by DeBerry's failure to recall when he had first identified Chicago as a meeting site, whether or not that failure of recollection can somehow be characterized as false testimony. Milikowsky was able to establish that DeBerry had failed to identify Chicago as a meeting site in 1990 and 1991, during prior grand jury testimony, and to attack DeBerry's credibility generally. Finally, regardless of when DeBerry identified Chicago as a meeting site, there is no doubt that this meeting occurred. Abundant documentary evidence established that Milikowsky and his competitors, DeBerry and Lima, were all at Chicago's O'Hare Airport at the same time. Moreover, McEntee's testimony and documentary evidence established that Milikowsky fully participated in the conspiracy. Thus, DeBerry's testimony concerning when he first identified Chicago as a meeting site could not, in any reasonable likelihood, have affected the jury's verdict.

2. No admissible impeachment evidence concerning DeBerry was withheld from the jury. The defense is not entitled to introduce all evidence on cross-examination that it might wish, but is only entitled to an opportunity for effective cross-examination; this it received. Further, the evidence appellant wanted to introduce was not admissible under any theory, and the district court correctly refused to admit it. In any event, for the same reasons that Milikowsky was not prejudiced by DeBerry's failure of recollection, he was also not prejudiced by the exclusion of this evidence.

3. During closing argument, government counsel observed that defense counsel already knew what DeBerry would say about what was discussed at the Chicago meeting and thus had not asked DeBerry about those discussions. This remark was not improper because government

counsel was only suggesting that defense counsel did not want DeBerry to repeat his prior testimony concerning that meeting. In any event, Milikowsky was not prejudiced by the isolated remark. Indeed, his counsel refused the court's invitation to submit a curative instruction.

4. The district court erred in departing down from the applicable Sentencing Guideline range to avoid imprisoning Milikowsky and possibly harming his businesses. A departure for this reason ignores the deterrence rationale of the Antitrust Guideline. In any event, every court of appeals that has considered this issue has held that the possibility that incarceration might have an adverse impact on a defendant's business and its employees is not a valid basis for departure under the Guidelines. The circumstances of appellant's companies did not differ from the usual small business whose executive is convicted of an antitrust offense.

ARGUMENT

I. DEBERRY'S TESTIMONY CONCERNING WHEN HE FIRST TOLD THE GOVERNMENT THAT CHICAGO WAS THE SITE OF ONE OF HIS MEETINGS WITH MILIKOWSKY DID NOT DEPRIVE MILIKOWSKY OF HIS RIGHT TO A FAIR TRIAL

Milikowsky argues (D.Br. 12-39) that DeBerry "testified falsely by claiming to have told the prosecutors about the Chicago O'Hare meeting in one of his first interviews in 1990" (D.Br. 14); that the government failed to correct this allegedly false testimony and exploited it during closing argument; and that Milikowsky was prejudiced because DeBerry was the "key witness" (D.Br. 12) against him. In fact, DeBerry simply testified that he did not recall when he first identified Chicago as a meeting site and thus did not testify falsely. Moreover, Milikowsky's argument completely ignores McEntee's testimony (see supra, pp. 6-8) and documentary evidence establishing

Milikowsky's participation in the conspiracy; the government's pretrial disclosure of DeBerry's statements concerning the Chicago meeting which Milikowsky in fact used to impeach DeBerry; and uncontradicted documentary evidence including Milikowsky's own diary (see n.26) that proves that he did in fact meet in Chicago with his competitors just as DeBerry testified at trial. Accordingly, there is simply no factual basis for Milikowsky's claim that he did not receive a fair trial.

A. DeBerry's Testimony

1. In a pretrial letter dated November 10, 1993 (D.Ex. 589 (for identification only)(JA 1599-1608)), the government advised defense counsel that DeBerry had told the government at an interview on May 10, 1990, that one of his meetings with Milikowsky had occurred at the Newark Airport Marriott and that "[h]e was unsure of the location of the other meeting." JA 1606.[31] The letter also stated that DeBerry told the government on April 1, 1993, that "his best recollection at that time was that the [second] meeting occurred at the O'Hare Hilton Hotel outside of Chicago." Ibid.

In a second pretrial letter, dated February 25, 1994, the government apprised defense counsel that DeBerry, during an interview on February 23, 1994, and after reviewing G.Ex 134 (his expense record) "which helped refresh his recollection," had "stated that his best recollection was that his meeting with Daniel Milikowsky and William Lima at the O'Hare Hilton took place on November 9, 1988." D.Ex. 587 (for identification only)(JA 1598).

---

[31] The letter also stated that "DeBerry indicated that the Newark Airport Marriott meeting may have occurred in May 1989, and that his calendar entry suggested May 23, 1989." Ibid. (emphasis added). The letter further informed the defense that "[o]ther records indicate that Mr. DeBerry was not in Newark, New Jersey on that date." Ibid.

2. At trial, DeBerry testified that he had attended at least two face-to-face meetings with Milikowsky and Lima in furtherance of the conspiracy -- one at the Hilton at O'Hare Airport and the other at the Marriott Airport hotel in Newark. JA 980-981. DeBerry identified the O'Hare airport meeting as having occurred on November 9, 1988. JA 1006-1009. The date and place of the O'Hare meeting were corroborated by documentary evidence, including Milikowsky's own calendar, which contained the notation "Chicago lunch, Bill & Ben," and Milikowsky's expense records, as well as DeBerry's and Lima's expense records. See supra, n.26. While DeBerry was not certain of the date of the Newark meeting, he was sure that it had occurred. JA 1028-1036.[32]

On cross-examination, Milikowsky's counsel sought to impeach DeBerry by showing that DeBerry's recollection of the date and location of the two meetings had changed over time. See, e.g., JA 1323. In particular, counsel sought to show that DeBerry's memory of the O'Hare meeting was suspect because it had become more detailed with the passage of time. Moreover, Milikowsky sought to introduce into evidence the government's two pretrial letters (D.Ex. 587, 589) to demonstrate that DeBerry's recollection of the Chicago meeting had become more detailed over time. JA 1323, 1333. The government objected, noting that the letters were not DeBerry's statements, and had never been adopted by him. See, e.g., JA 1324, 1328. The court considered the issue at various points in the trial, and each time ruled that the letters could be used only to refresh DeBerry's recollection. JA 1326, 1329, 1334, 1358-1359, 1393. Nevertheless, the jury in fact became aware of the content of both letters during

---

[32] This was not the 1987 Newark meeting to which Okra testified, which had occurred prior to DeBerry's significant involvement in the conspiracy. JA 1400.

defense counsel's unsuccessful attempt to refresh DeBerry's recollection using D.Ex. 589 (see JA 1321-1322, 1335-1339 ("I'm really reading the document")), and during direct questioning of DeBerry about his interview the previous month (JA 1404-1405). Milikowsky also requested the court to order the government to stipulate to the facts in the two letters, a request that the court denied. JA 1323-1324, 1346-1347, 1351-1352, 1358. Milikowsky indicated several times that he might subpoena and question the government attorneys who had interviewed DeBerry (JA 1325, 1328, 1349, 1351, 1393-1394), but he never did so.[33]

In addition to revealing the content of the D.Ex. 589 during an attempt to refresh DeBerry's recollection (and of D.Ex. 587 during cross-examination), defense counsel was able to adduce evidence that, on two separate occasions prior to trial, DeBerry had recollected fewer details about the O'Hare meeting than at trial. When DeBerry appeared before a grand jury in October 3, 1990, DeBerry was asked about the purpose of the November 9, 1988, lunch meeting at the O'Hare Hilton with Milikowsky that appeared on DeBerry's expense records; DeBerry responded, "I don't recall whether I met there or not." JA 1341-1342, 1406-1408, 1449-1450. And the jury learned that, in grand jury testimony on January 17, 1991, DeBerry had not been able to recollect the location of a second price-fixing meeting. JA 1368, 1377-1379, 1394-1395.[34]

---

[33] The court stated that it "may" grant a motion to quash "if there were an effort to subpoena the government counsel to testify with respect to these matters." It did not formally rule, since it was never presented with a subpoena request. JA 1393-1394.

[34] Defense counsel also adduced evidence that DeBerry told government investigators, as well as the January 17, 1991, grand jury, that he thought he met with Milikowsky and Lima in Newark in Spring (continued...)

Moreover, defense counsel was able to question DeBerry at length about when he had first informed the government that the second meeting had taken place in Chicago. DeBerry correctly stated that he had consistently told the government about two meetings. See, e.g., JA 1318-1319, 1320, 1321, 1337, 1339, 1343, 1365, 1368, 1448. He also stated repeatedly that he could not remember when he had told the government that one meeting had occurred at O'Hare -- that is, whether he mentioned O'Hare at his first interview in May 1990, or later. Ruling, JA 1836-1837. He also said a few times that he "thought" or that it was his "best recollection" that he told prosecutors of the Chicago location during a 1990 interview with the government, or at least prior to April 1, 1993. See infra, n.38. Overall, however, DeBerry was uncertain about when he informed the government about the Chicago location, explaining that he had been questioned by the government on numerous occasion, had testified twice before a grand jury, and had testified at trial in a related case, and that he could not remember what he had said on which occasion. Ruling, JA 1832-1833 (summarizing testimony).[35]

B. DeBerry's Testimony Was Not False And, In Any Event, Milikowsky Was Not Prejudiced By DeBerry's Failure Of Recollection

While the government may not obtain a conviction by allowing false evidence to go uncorrected, a defendant must show that the testimony was both false and material, and that the false testimony

---

[34](...continued)
1989, although his trial testimony was that he was not certain of the date of the Newark meeting. JA 1368-1377.

[35] On redirect, DeBerry testified that he had consistently told the government that there were two meetings, and had been consistent in describing the topic of the meetings. The government did not elicit from DeBerry any testimony regarding when he first told the government about the Chicago location. Ruling, JA 1834-1835.

was in fact left uncorrected. United States v. Boothe, 994 F.2d 63, 68 (2d Cir. 1993); United States v. Helmsley, 985 F.2d 1202, 1205-06, 1208 (2d Cir. 1993), quoting United States v. Agurs, 427 U.S. 97, 103 (1976); United States v. Blair, 958 F.2d 26, 29 (2d Cir. 1992); Mills v. Scully, 826 F.2d 1192, 1195-1196 (2d Cir. 1987); Taylor v. Lombard, 606 F.2d 371, 374-375 (2d Cir. 1979), cert. denied, 445 U.S. 946 (1980). The district court held that DeBerry's testimony concerning when he first told the government about the Chicago meeting was not false (JA 1837-1844) and that, in any event, any error was harmless (JA 1846-1849). Either holding is fatal to Milikowsky's argument.

1. DeBerry's Testimony Was Not False. The trial judge "watched the case unfold from day to day" and was "[c]onsequently * * * exceptionally qualified" to pass on claims of false testimony. United States v. Johnson, 327 U.S. 106, 111-112 (1946). See also, United States v. Pfingst, 490 F.2d 262, 273 n.11 (2d Cir. 1973), cert. denied, 417 U.S. 919 (1974). The court's factual finding (JA 1837-1844) that DeBerry's testimony was not false is fully supported by the evidence. Johnson, 327 U.S. at 111-112.

As the district court observed, DeBerry stated (over about 50 pages of testimony) at least fourteen times[36] that he could not recall when he gave the government the information in question. JA 1837-1838. At least once, he affirmatively indicated that he had told the government about the O'Hare meeting after his first interview with

---

[36] Addendum I ("Add.I") to this brief contains excerpts from the trial transcript with numbered marginal notations indicating testimony in which DeBerry discussed his recollection of what he said about the Chicago meeting during the 1990 interviews.

We count at least 18 statements by DeBerry (Items #1, 2, 3, 4, 5, 6, 7, 9, 14, 16, 17, 18, 19, 20-21, 23, 24, 25 and 26) that he could not remember when he told prosecutors about the location of the Chicago meeting.

prosecutors. Ruling, JA 1838 n.19, citing Tr. 1826 (Add. I, item #23). Even as to statements that appellant interprets as false,[37] DeBerry in almost every instance made clear that he was only expressing his current recollection, stating that he "thought" or he "recalled" that he mentioned the Chicago location in 1990.[38] He also explained several times that he had trouble remembering chronology because he had discussed the events on many occasions prior to this trial.[39]

Appellant does not assert that DeBerry lied about his recollection (see Ruling, JA 1841), but only that the few instances when he said he "thought" he told prosecutors about the Chicago location in 1990 gave the wrong impression as to what really happened.

---

[37] Appellant incorrectly cites "I don't recall that sir" (Add.I, item #9 (JA 1340), cited at D.Br. 16 & Add.C, item 2) as a false statement; on its face, it was an assertion only of lack of recall. Appellant also cites as false (D.Br., Add.C, item 7) DeBerry's statement that he "believed" that he told the government about the O'Hare location earlier than April 1, 1993; this answer is, however, most unclear taken as a whole, as the witness seems to be focusing on telling about two meetings in 1990 (Add.I, item #15 (JA 1343)). Appellant at D.Br. 16 (citing Tr. 1795; JA 1366) incorrectly claims as false an answer to a question to which the court sustained an objection.

[38] DeBerry said he "thought" he first told prosecutors about the Chicago meeting in 1990, but did not recall which meeting in 1990 (Add.I, item #10 (Tr. 1769; JA 1340)); and that he "thought" he told them before his grand jury testimony, "as best [he] can recall" (id., items #11, 12, 13 (Tr. 1769-1770, JA 1340-1341)). See also id., items #26 and 27 (Tr. 1878; JA 1449) ("I still have a difficult time. * * * I think that is correct. I think I told them before [sic] 1990.")

DeBerry also stated (id., item #8 (Tr. 1768; JA 1339)) that "[w]ithout seeing [D.Ex. 589], I would not know whether * * * [the] first time [I mentioned the Chicago O'Hare Hilton to the prosecutors] was my first or my second visit." However, since this account was not DeBerry's independent recollection, but instead based on his (mis)reading of D.Ex. 589, it is unlikely that jurors were misled.

[39] Add.I, items #4, 14, 20-21, 22, 23, 24, 26 are statements in which DeBerry explains why he is having trouble remembering the chronology. See also Ruling, JA 1841 at n.21

D.Br. 22-24. But these statements must be taken in the context of his many earlier and subsequent statements ((Ruling, JA 1837-1838); Mills v. Scully, 826 F.2d at 1195 (reviewing "entire record")) -- including one made in response to a direct question by the court (Add.I, item #16 (Tr. 1774; JA 1345) -- that he could not recall when he had told the government about the Chicago location. In context, his testimony was equivocal. As the district court found, the jury surely understood that DeBerry "did not know when he told the government" (JA 1839). Since "DeBerry himself provided evidence sufficient to correct any misimpression that he was certain as to when he told the government, or that he had been consistent in his story" (Ruling, JA 1842 n.22), there was no misleading impression or false statement for the government to correct. Ruling, JA 1841-1842; United States v. Lochmondy, 890 F.2d 817, 822-823 (6th Cir. 1989) (inconsistencies in testimony do not establish knowing use of false testimony); Mills v. Scully, 826 F.2d at 1195-1196 (witness' technically incorrect statement did not have to be corrected where witness later explained her meaning) (citing United States v. Petrillo, 821 F.2d 85, 89 (2d Cir. 1987)); United States v. Romano, 516 F.2d 768, 771 (2d Cir.)(witness recounting dates that are inconsistent with dates cited at earlier trial does not support claim that government acted improperly), cert. denied, 423 U.S. 994 (1975). Compare United States v. Wallach, 935 F.2d 445, 457 (2d Cir. 1991)(if jury had known of bald-faced lie, jury might have rejected entire testimony).[40]

---

[40] Contrary to appellant (D.Br. 24-25), the court did not overlook false testimony on the ground that it was made in good faith. It concluded that the testimony, on balance, did not leave a false impression.

2. The Testimony Was Not "Uncorrected," or Prejudicial. In any event, like the district court, we fail to see how DeBerry's failure of recollection, even if it can somehow be characterized as false testimony, prejudiced appellant. This case is unlike most of the cases on which Milikowsky relies in which the defense does not discover relevant impeaching evidence until the witness testifies (or after) and is thus unable to cross-examine the witness concerning the information. Rather, in this case, the government disclosed prior to trial when DeBerry first identified Chicago as the site of one of his meetings with Milikowsky (and the date of the meeting), and defendant used this information in a variety of ways at trial. DeBerry's testimony accordingly did not go uncorrected, but was corrected ab initio by pretrial disclosures. See Ruling, JA 1836-1837, n. 17, (citing Helmsley, 985 F.2d at 1208 (collateral attack)); Giles v. Maryland, 386 U.S. 66, 82 & n.1 (White, J., concurring); United States v. Blair, supra, 958 F.2d at 29. See also, e.g., United States v. Decker, 543 F.2d 1102, 1105 (5th Cir. 1976), cert. denied, 431 U.S. 906 (1977); Sanders v. United States, 541 F.2d 190, 194 (8th Cir. 1976), cert. denied, 429 U.S. 1066 (1977). Cf. United States ex rel Washington v. Vincent, 525 F.2d 262, 268 & n.8 (2d Cir. 1975) (suggesting defense obligation in ordinary case to pursue suspected falsity of government witness' answers), cert. denied, 425 U.S. 934 (1976); United States ex rel Regina v. LaVallee, 504 F.2d 580, 583 (2d Cir. 1974)(same), cert. denied, 420 U.S. 947 (1975).

Further, the allegedly false testimony could not, in any reasonable likelihood, have affected the judgment of the jury. See Ruling, JA 1846-1849 (citing United States v. Helmsley, 985 F.2d at

1205-1206).[41] Although DeBerry did testify a few times that he "thought" he told the government about the Chicago location in 1990, the jury learned that DeBerry had failed to identify the Chicago location in his grand jury testimony in both 1990 and 1991. Ruling, JA 1847. In addition, DeBerry admitted during cross-examination that he remembered the Chicago date only immediately prior to trial. JA 1404-1405. Finally, the contents of D.Ex. 589 was revealed in the course of defense counsel's attempts to refresh DeBerry's recollection by showing him the document and asking him about it. JA 1322 (describing D.Ex. 589 as "a letter from the government to defense counsel"), 1335-1339. Thus, additional evidence that DeBerry did not recollect the Chicago location in 1990 would have been merely cumulative, and there is no reasonable likelihood that it would have impacted on the jury's verdict. Mills v. Scully, 826 F.2d at 1196 (cumulative evidence); United States v. Petrillo, 821 F.2d 85, 89-90 (2d Cir. 1987).

Impeachment of DeBerry, by showing that his recollection of the Chicago meeting changed over time, was also merely cumulative of general impeachment evidence. DeBerry admitted at trial that his initial recollection of the date of the Newark meeting was faulty, and that the information he gave the prosecutors in 1990 concerning the possible date of the meeting was incorrect. JA 1399-1400. In addition, DeBerry was impeached by evidence of an allegedly fraudulent violation of a severance agreement with Van Leer (JA 1281-1310); with

---

[41] This Court reviews the record to determine if there is any reasonable likelihood that false or misleading testimony affected the verdict. See United States ex rel. Washington, 525 F.2d at 267. Milikowsky's claim (D.Br. 28) that the district court required him "to prove that the jury would have acquitted" is incorrect. It applied an "any reasonable likelihood of acquittal standard," relying on Helmsley. JA 1846, 1847.

prior arguably inconsistent statements at an earlier trial that DeBerry was not comfortable meeting with groups of competitors (JA 1422-1431); with evidence of expense account irregularities (JA 1408-1416, 1445); with evidence of untruthful statements to his employer about antitrust compliance (JA 1443-1445), and with the fact of governmental immunity. See Ruling, JA 1848 n.30. Thus, the quantum of additional general impeachment that would have been provided, if DeBerry had affirmatively testified that he did not remember the Chicago location in meetings with prosecutors in 1990, was not significant.

In any event, DeBerry's testimony about the Chicago meeting was "only one of many pieces of evidence tending to prove that DeBerry, Lima, and Defendant Milikowsky met on November 9, 1988 at the Chicago O'Hare Hilton." Ruling, JA 1848 (citing Lima's telephone billings from O'Hare, Milikowsky's calendar entry "Chicago Lunch with Bill and Ben," and Milikowsky's hotel and petty cash records). This evidence showed that, prior to the January 1989 price increase, DeBerry, Lima, and Milikowsky met at the O'Hare Hilton for lunch. The jury could conclude that there was no legitimate reason for these three competitors to lunch together. See JA 1008. Thus, even if the jury had been aware that DeBerry did not remember the location of the Chicago meeting during interviews with prosecutors in 1990, and ignored his testimony concerning the nature of that meeting, other evidence and inferences established that Milikowsky met with his competitors, and that he fixed prices. Indeed, the district court stated its belief that "DeBerry's testimony was the least convincing of the evidence presented as to the date and location of the Chicago meeting." JA 1848 n.29. Finally, even if DeBerry's testimony is

completely ignored, McEntee's testimony (see supra, pp. 6-8) and the government's documentary evidence[42] were sufficient to establish Milikowsky's knowing participation in the conspiracy. Under these circumstances, Milikowsky was not prejudiced by the testimony he claims was false.

C. The Government's Closing Argument Did Not Misrepresent The Evidence

Milikowsky contends (D.Br. 20) that "the government affirmatively adopted" DeBerry's allegedly false testimony during its closing argument. But, as the district court held, since DeBerry did not testify falsely, there was no false testimony for the government to adopt. JA 1845-1846.

Milikowsky also accuses the government of creating "the false impression" that DeBerry had identified Chicago as a meeting site in 1990. D.Br. 20; see also Ruling, JA 1845 n. 27 (stating court's belief that government counsel had inaccurately interpreted DeBerry's testimony but concluding that any error was harmless). In fact, government counsel did not say or imply[43] what DeBerry had said at that

---

[42] Documentary evidence tied Milikowsky to the conspiracy -- such as monthly reports referring to the conspiracy that were prepared for Milikowsky; records, including Milikowsky's calendars, that Milikowsky had attended the Newark meeting of May 22, 1987, and the Chicago meeting of November 9, 1988; a fax containing agreed-on prices found in Jordan's files, with "threshold prices" noted in Milikowsky's handwriting; and summaries of telephone records from Jordan (Milikowsky's main office) showing that contacts with competitors increased markedly during periods when prices were being raised.

[43] Counsel stated: "[A]sk yourself how is it that when Mr. DeBerry first came to the government, in May of 1990, he didn't know what this phone analysis would show? He didn't know that there would be spikes in all the right months, at the times he said there was increased phone activity. He didn't know that Russell-Stanley had bought zero steel out of the $50 million for 1988. He didn't know that Mr. Milikowsky's 1988 calendar would say "Chicago lunch, Bill and Ben." He didn't know that Mr. Lima had made a phone call from the United Airlines terminal at O'Hare Airport that very afternoon. He (continued...)

first interview. He merely observed that DeBerry had no way of knowing what the government's corroborating evidence would show, and nonetheless was confident enough of his facts to "c[o]me to the government" with evidence of illegal activity. The government in no way implied that the corroborating evidence it cited was the subject of that first meeting; indeed, some evidence cited, such as the summary of telephone records prepared for trial, clearly could not have been. In short, the government did not misstate the evidence before the jury.

In any event, as the district court held (JA 1845-1846 at n.27), any error was harmless, "'considering the severity of the misconduct; the measures adopted to cure the misconduct; and the certainty of conviction absent the improper statements.'" Ibid., quoting United States v. Tutino, 883 F.2d 1125, 1136 (2d Cir. 1989), cert. denied, 493 U.S. 1081, 1082 (1990).[44] The court instructed the jury that counsel's closing statements were not evidence, and that they should rely on their own recollection of the evidence. JA 1593, 1594. The government's reference was passing and inferential -- if it was made at all. As we discussed supra, at pp. 26-28, even the government's failure to clarify a direct statement by DeBerry, that he thought he had told the government about the Chicago location in 1990, would not

---

[43](...continued)
didn't know that Mr. McEntee would testify about this one occasion when Van Leer was 10 cents less. Mr. DeBerry didn't have any of this." JA 1552.

[44] "'[A] criminal conviction is not to be lightly overturned on the basis of a prosecutor's inappropriate comments standing alone,' in an otherwise fair proceeding." 883 F.2d at 1136 (citing United States v. Young, 470 U.S. 1, 11-12 (1985)). This Court will consider the cited factors in reviewing to determine whether a prosecutor's improper remarks caused "substantial prejudice" to the defendant, and therefore denied him due process. Ibid.

have been reversible error in this case. A passing reference in closing argument, therefore, cannot be reversible error. As the district court held, "the gravity and import of the misstatements were minor, and the effect upon the verdict was insignificant." (JA 1845-1846 at n.27). Therefore, any error in closing was harmless.[45]

II. THE DISTRICT COURT DID NOT IMPROPERLY RESTRICT APPELLANT'S CROSS-EXAMINATION OF DEBERRY

Milikowsky asserts (D.Br. 31-39) that his conviction should be reversed because he was not able to impeach DeBerry concerning when DeBerry told the government about the location and date of the Chicago meeting. He claims that he should have been permitted to call the prosecutors as witnesses, have the court order the government to sign

---

[45] Appellant complains (D.Br. 17-19, 22-27) that the government on redirect improperly attempted "to convince the jury that DeBerry's story to the government -- especially concerning the Chicago meeting -- had always been the same." But the DeBerry testimony cited (JA 1476-1499) makes no mention of the Chicago meeting, and does not address whether DeBerry's evidence about the Chicago meeting changed over time. See Ruling, JA 1845 n.26 (prosecutors "stayed within the proper bounds of rehabilitation, without eliciting any testimony in regard to when DeBerry recalled the location of the second meeting").

While the government did bring out that DeBerry had been consistent in saying there had been two meetings and in describing their subjects, this consistency is undisputed.

a stipulation, or gain admission in evidence of D.Ex. 587 and 589.[46] The district court (JA 1849-1856) correctly rejected these arguments.[47]

1. The Confrontation Clause guarantees only "an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." Delaware v. Fensterer, 474 U.S. 15, 20 (1985)(emphasis in original). The trial court "retain[s] wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on * * * cross-

---

[46] Since appellant never attempted to subpoena the prosecutors and never obtained a definitive ruling (see supra, n.46), he cannot complain now that he was not permitted to call the prosecutors as witnesses. He also fails to cite any authority (see D.Br. 36) holding that a court can order the government to stipulate to the content of a witness summary prepared by government attorneys and provided to the defense as possible Brady material. Indeed, stipulations are by their nature voluntary. See, e.g., United States v. Three Winchester * * * Carbines, 504 F.2d 1288, 1290 (7th Cir. 1974). Appellant's primary complaint, therefore is that D.Ex. 587 and 589 were not admitted in evidence, although the jury learned their content.

[47] Appellant claims that "Brady (373 U.S. 83 (1963))was rendered worthless" (D.Br. 32) and that he was denied a fair trial because he could not use his preferred methods for impeaching DeBerry. However, he did not argue in the district court that, notwithstanding the government's pretrial disclosure of Brady material, Brady was violated because of restrictions on cross-examination. Rather, he made only generalized claims of denial of constitutional rights and claims of unfairness, in addition to claiming denial of Confrontation Clause rights. JA 1327, 1348, 1351, 1385, 1390, 1391; Dkt. No. 203 at 35-45. Accordingly, this Court should review only for plain error. United States v. Torres, 901 F.2d 205, 228 (2d Cir. 1990), cert. denied, 498 U.S. 906 (1990).

In any event, this attempt to extend Brady must fail. Appellant was not, as he claims, utterly frustrated in his efforts to use the timely Brady material at trial. He used the knowledge gained by the pretrial disclosure to cross-examine DeBerry, employing grand jury transcripts disclosed by the government, with the result that the jury learned that DeBerry did not recollect the Chicago location before grand juries in 1990 and 1991; the jury also heard DeBerry admit that he did not mention the date of the meeting until shortly before trial. While Milikowsky may have also hoped to convey to the jury, by obtaining admission of D.Ex. 587 and 589, the misleading impression that, because the government conveyed certain matters to the defense as possibly exculpatory, the government somehow agreed with the defense's cross-examination, Brady creates no right to bolster the defense case in this manner.

examination," based on expeditious and fair conduct of the trial. Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986). A defendant's inability to introduce extrinsic evidence to prove that a government witness' testimony was inconsistent with his earlier statement does not violate the defendant's Confrontation Clause rights as long as "the jury is in possession of facts sufficient to make a 'discriminating appraisal' of the particular witness's credibility." United States v. Roldan-Zapata, 916 F.2d 795, 806 (2d Cir. 1990), cert. denied, 499 U.S. 940 (1991).

As we have already noted, Milikowsky was able to impeach DeBerry in a variety of ways both as to his general credibility and as to his specific recollection of the Chicago meeting. In view of the multiple methods used by appellant to attack DeBerry's testimony, including his testimony about the Chicago meeting, the trial court did not violate his Confrontation Clause rights by declining to allow the defense to use all the methods it wished to attack DeBerry's credibility. See Ruling, JA 1853-1856.

2. The evidence that appellant sought to introduce was, in any event, properly excluded. Milikowsky correctly notes the general proposition that a party may attack the credibility of an adverse witness by showing that he made statements that are inconsistent with some material part of his testimony. United States v. Jordano, 521 F.2d 695, 697-698 (2d Cir. 1975). He then contends (D.Br. 32) that the failure of DeBerry to mention the location of the Chicago meeting in interviews in 1990 was "inconsistent" with his later recollection of the Chicago location at trial. However, as the district court noted, prior silence is often ambiguous, particularly where "'belatedly recollected facts merely augment that which was originally

described.'" JA 1850-1853, citing United States v. Leonardi, 623 F.2d 746, 756 (2d Cir.), cert. denied, 447 U.S. 928 (1980). See also, Jenkins v. Anderson, 447 U.S. 231, 239 (1980) (impeachment with prior failure to state a fact is permissible if that fact naturally would have been asserted); United States v. Hale, 422 U.S. 171, 179-180 (1975)(silence may be so ambiguous as to be of little probative force); Victory v. Bombard, 570 F.2d 66, 69-70 (2d Cir. 1978)(silence does not necessarily amount to inconsistency).

The decision whether prior silence is sufficiently probative to qualify as inconsistency, for purposes of impeaching a witness, is a matter committed to the sound discretion of the district court. United States v. Agajanian, 852 F.2d 56, 58 (2d Cir. 1988). The district court held that, as in Leonardi, DeBerry did not contradict prior testimony, but "merely augmented his previous statements to prosecutors." JA 1852. Further it held that it was not clear that it would have been "natural" (see 447 U.S. at 239) for DeBerry to have told the prosecutors about the Chicago location in 1990, if he had been truthful.[48] The district court concluded that DeBerry's silence in 1980 was not sufficiently probative to qualify as an "inconsistency" subject to attack by the defendant. This conclusion was correct and not an abuse of discretion.[49]

---

[48] The record "does not reveal the manner in which, or the depth with which, prosecutors questioned him on this subject during his first interviews." Ruling, JA 1853. Neither does the record show "whether prosecutors used any documents to try to refresh DeBerry's recollection during those interviews." Ibid.

[49] Appellant now complains (D.Br. 34) that he was not permitted to call the prosecutors to develop evidence about the manner in which DeBerry was questioned at the 1990 interviews. But, at trial, appellant did not give this as a reason for calling the prosecutors; and indeed, he never actually subpoenaed them. The court certainly would have been within its discretion to refuse to engage in a mini-
(continued...)

Milikowsky also claims (D.Br. 34-35) that he should have been able to introduce evidence of DeBerry's prior silence to contradict DeBerry's statement at trial that he "thought" he told prosecutors about the Chicago meeting in interviews in 1990. The district court reviewed this claim both at trial (JA 1392-1393) and on motion for new trial, and concluded that "the overall impression created by Defendant's cross-examination of DeBerry was that he had not been consistent in his recollection about the Chicago meeting over time, and that he was unable to recall when he told prosecutors the location of that meeting." JA 1852-1853 at n.33. The court ruled that "DeBerry's testimony in this regard was not sufficiently inconsistent with the Brady disclosures to warrant the use of extrinsic evidence." Ibid. This view of the testimony was accurate (see supra, pp. 22-24), and the court's decision that there was no "inconsistency" was not an abuse of discretion. Agajanian, 852 F.2d at 58. Moreover, with respect to the government's two pretrial letters (D.Ex. 587 and 589) disclosing the government's recollection of when DeBerry identified Chicago as a meeting site (and the date of the meeting), the court's ruling was correct for the additional reason that these letters were hearsay, since Milikowsky wanted to use them as evidence of what DeBerry had said.

Milikowsky argues that the letters were admissible under Fed. R. Evid. 801(d)(2), as admissions of a party opponent.[50] However, he

---

[49](...continued)
trial to determine the collateral issue of the reasons for DeBerry's 1990 silence. See Delaware v. Van Arsdall, 475 U.S. at 679.

[50] Appellant also claims (D.Br. 37-38)that they were admissible as public records (Fed.R.Evid. 803(8)(B)) and under Fed.R.Evid 803(24) (interests of justice). These grounds were not advanced at trial, and therefore are reviewed only for plain error. Further the public
(continued...)

cites no instance in which a Brady disclosure provided to the defense before trial has been treated as a party admission.[51] Indeed, this Court has held that evidentiary use of government admissions in criminal cases "must be circumscribed to avoid trenching upon other important policies." United States v. McKeon, 738 F.2d 26, 32-33 (2d Cir. 1984). See also, United States v. Valencia, 826 F.2d 169, 172 (2d Cir. 1987)(care must be used in permitting use of counsel's statement against client). While most government attorneys currently disclose any information that might be characterized as exculpatory even when the government believes that the exculpatory theory is preposterous simply to avoid subsequent Brady claims, a rule characterizing such disclosures as "admissions" will surely cause the government to be much more grudging in its disclosures. The result will be that defendants will receive less useful information rather than more. See Ruling, JA 1853-1854 at n.34; Valencia, 826 F.2d at 173 (excluding defense counsel's out-of-court statements to avoid chilling plea negotiations).

In any event, this Court has treated prior government pleadings and arguments at trial as admissions only in limited circumstances, where "clear" inconsistencies exist between prior and current assertions of fact. United States v. GAF, 928 F.2d 1253, 1261 n.3 (2d

---

[50](...continued)
records exception expressly excludes "in criminal cases matters observed by * * * law enforcement personnel." And, since the evidence was cumulative, it was not a candidate for Rule 803(24). See Robinson v. Shapiro, 646 F.2d 734, 742 (2d Cir. 1981)(residual exception to be used sparingly).

[51] Compare United States v. GAF Corp., 928 F.2d 1253, 1258-1262 (2d Cir. 1991)(bill of particulars); Andrews v. Metro North Commuter R. Co., 882 F.2d 705, 707 (2d Cir. 1989) (civil case; pleadings); United States v. McKeon, 738 F.2d 26, 30-33 (2d Cir. 1984) (opening statement, argument to jury), cited at D.Br. 37.

Cir. 1991); McKeon, 738 F.2d at 33. It has also indicated that earlier statements should be excluded if there is a need to explore the circumstances in which they were made to explain them, with attendant confusion of the current trial; and the district court must determine that the inference to be drawn is fair. United States v. Salerno, 937 F.2d 797, 811 (2d Cir. 1991); McKeon, 738 F.2d at 32.

In this case, as the district court noted, there was no inconsistency between D.Ex. 587 and 589 and DeBerry's trial testimony. JA 1853-1854 at n.34. This fact-based holding is correct,[52] and the district court did not abuse its "considerable discretion" (Valencia, 826 F.2d at 173) in ruling that D.Ex. 587 and 589 were not party admissions.

3. Finally, even if the district court erred in excluding extrinsic evidence that DeBerry did not remember the Chicago location in 1990, any error was harmless beyond a reasonable doubt. Ruling, JA 1856, citing Van Arsdall, 475 U.S. at 681-684. The question 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." 475 U.S. at 684. In this case, if the jury had actually seen D.Ex. 587 and 589 (or read a stipulation), it would merely have seen what it knew already from the DeBerry's grand jury testimony and from defense counsel's attempt to refresh DeBerry's recollection using the letters, and cross-examination of DeBerry. This additional information is at

---

[52] In addition, the court could properly have ruled that exploring the circumstances of the 1990 interviews would have confused the trial, and that the inference sought to be drawn was not the only one possible.

most cumulative, and its exclusion harmless beyond a reasonable doubt. See Ruling, JA 1856.

III. THE GOVERNMENT'S CLOSING ARGUMENT WAS PROPER

In addition to the claim that the government misled the jury during closing argument concerning when DeBerry first mentioned Chicago as a meeting site, Milikowsky also argues (D.Br. 39-44) that the government erred in summation in saying:

> [Defense counsel] asked hundreds of questions to Mr. DeBerry. * * * But [defense counsel] didn't ask Mr. DeBerry one question about what took place in that meeting on November 9th. * * * [A]nd of course he didn't, because he already knew the answer. He knew that these three competitors weren't meeting to talk about steel purchases. They were meeting to fix prices. JA 1538-1539.

Defense counsel objected to this argument, claiming that the government was suggesting that Milikowsky had told defense counsel that he had fixed prices. JA 1574. The court said the statement was ambiguous because it could mean that there was not much point in asking the question in light of DeBerry's prior testimony. It asked counsel to prepare a corrective instruction. JA 1575-1577, 1583. Government counsel confirmed that he had meant only that defense counsel knew what DeBerry would say, on the basis of DeBerry's earlier testimony. JA 1576. In closing, defense counsel did an effective job of rebutting the government's argument (JA 1589-1590) -- adopting the construction that the government attorney had put on his own remarks -- by pointing out that he had not further questioned DeBerry because DeBerry would just have repeated his testimony on direct if he had been asked about the Chicago meeting. Defense counsel did not provide the court with a corrective instruction, stating that his preference was "just leave the matter where it is at this point." JA 1588.

The government's argument was not improper because, as defense counsel told the jury, the government merely was observing that defense counsel did not ask about what happened at the Chicago meeting because he knew the answer would have further bolstered the government's case, if DeBerry had repeated his direct testimony. But even if, as the district court held (JA 1870-1872), these remarks although ambiguous were subject to improper construction, the error was harmless. As the district court held, citing Tutino, 883 F.2d at 1136-1137, the misconduct was "'very minor,' * * * isolated within a lengthy summation, at the end of a trial that lasted over two weeks. * * * [A]s in Tutino, there is no indication that the prosecutor intended to improperly remark upon the knowledge of opposing counsel." JA 1872. Further, counteractive measures were taken, in the form of defense counsel's explanation that he had not questioned DeBerry further for tactical reasons, not because of independent knowledge gained from his client. Ruling, JA 1873. While no curative instruction was given, this was at defense counsel's request. Ibid. The court did charge the jury that statements, questions, and arguments of counsel are not evidence, and that the juror's recollection should guide them. JA 1593, 1594. The trial court properly concluded that the government's statement did not affect the certainty of conviction, and that there was no substantial prejudice to appellant. JA 1873-1874; Tutino, 883 F.2d at 1136.

IV. THE DISTRICT COURT ERRED IN DEPARTING FROM THE GUIDELINES SENTENCE ON THE BASIS OF POSSIBLE ADVERSE EFFECTS OF MILIKOWSKY'S INCARCERATION ON COMPANIES OWNED BY HIM

A. Standard of Review.

The Sentencing Reform Act generally requires a court to "impose a sentence of the kind, and within the range," of the applicable

Sentencing Guideline. 18 U.S.C. 3553(a)(4) and (b). In applying the Guidelines, a court is also required to follow policy statements and commentary adopted by the Sentencing Commission. Williams v. United States, 112 S.Ct. 1112, 1119-1120 (1992)(policy statements); Stinson v. United States, 113 S.Ct. 1913 (1993)(commentary). "The only circumstance in which the district court can disregard the mechanical dictates of the Guidelines is when it finds 'that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission ....'" Burns v. United States, 501 U.S. 129, 133 (1991)(quoting 18 U.S.C. 3553(b)); see 18 U.S.S.G §5K2.0, p.s.

This Court reviews de novo the sentencing judge's "legal conclusion that a given circumstance justifies departure * * * while the clearly erroneous standard governs a factual finding that the circumstance is present." United States v. Restrepo, 936 F.2d 661, 666 (2d Cir. 1991). Accord United States v. Lara, 905 F.2d 599, 602 (2d Cir. 1990). The extent of the downward departure is reviewed for reasonableness. Restrepo, 936 F.2d at 668.

If the district court relied on an invalid factor in departing from the Guidelines, "a remand is appropriate unless the reviewing court concludes, on the record as a whole, that the error was harmless; i.e., that the error did not affect the district court's selection of the sentence imposed." Williams, 112 S.Ct. at 1120-1121. See also 18 U.S.C. 3742(f)(1),(2).

B. The Possibility That Milikowsky's Businesses Might Be Adversely Affected By His Incarceration Is Not A Valid Basis For Departure.

The District Court departed downward in this case to avoid imprisoning Milikowsky and thereby possibly having an adverse impact

on two of his businesses. This basis for departure is inconsistent with the deterrence rationale of the Antitrust Guideline and is contrary to numerous decisions expressly rejecting the possibility of such adverse consequences as a basis for departure.

1. The Sentencing Reform Act revolutionized sentencing in federal criminal cases. Burns, 501 U.S. at 132. While the primary goal was to reduce disparity in sentencing (id. at 133), the Sentencing Commission also recognized that courts had been too lenient under the old sentencing system with some classes of offenses. See 28 U.S.C. 994(m). The antitrust guideline, U.S.S.G. §2R1.1, was one of those crafted to ensure that particular types of offenders received more severe sentences.

In commentary to the antitrust guideline, the Sentencing Commission explained its rationale for seeking more severe sentences for antitrust offenders. The Commission noted that, prior to adoption of the Guidelines, only 39 percent of antitrust offenders had been imprisoned. U.S.S.G. 2R1.1, comment. (backg'd.). In making a "substantial change from present practice," the Commission assigned antitrust offenders a base offense level (nine) designed to insure that "prison terms for these offenders should be much more common, and usually somewhat longer, than currently is typical." Ibid. Imprisonment was necessary for antitrust offenders, the Commission believed, because "the most effective method to deter individuals from committing this crime is through imposing short prison sentences coupled with large fines. The controlling consideration underlying this guideline is general deterrence." Ibid. Indeed, the Commission believed so strongly that antitrust offenders should be imprisoned that it expressly stated its intent "that alternatives such as

community confinement not be used to avoid imprisonment of antitrust offenders." U.S.S.G. §2R1.1, comment. (n.5).

Milikowsky was convicted of participation in an antitrust conspiracy which involved millions of dollars of sales over several years. Nevertheless, the district court refused to imprison him, and candidly stated that it was departing to a level ten, in order to avoid imprisoning him. JA 1794-1795. This departure was contrary to the general deterrence rationale of the antitrust guideline. United States v. Haversat, 22 F.3d 790, 797-780 & n.7 (8th Cir. 1994).

2. The fact that imprisoning Milikowsky might have an adverse impact on the employees of two of his businesses does not remove this case from the "heartland" of antitrust cases and thus cannot be a basis for departure. By statute, a court is permitted to depart from a guideline-specified sentence only when it finds "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." 18 U.S.C. 3553(b); Burns, 501 U.S. at 133. Thus, each Guideline carves out "a 'heartland,' a set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted." U.S.S.G. Ch.1, Pt. A(4)(b). Certain factors are expressly listed by the Guidelines as impermissible bases for departure -- including race, religion, and socio-economic status (U.S.S.G. §5H1.10, p.s.). Otherwise, the Commission did not intend to limit the factors that may be considered

"in an unusual case." U.S.S.G. Ch.1, Pt. A(4)(b), intro. comment.; see also, United States v. Haynes, 985 F.2d 65, 68 (2d Cir. 1993).

The Commission, however, did not believe that courts would depart "very often." U.S.S.G. Ch.1, Pt.A(4)(b). This is because the Guidelines are intended to reflect sentencing practice in all but "unusual cases." Ibid.; see also, United States v. Williams, 2d Cir. No. 94-1030 (Oct. 6, 1994), slip op. 7575 (departure power to be used sparingly); Haynes, 985 F.2d at 68 (departure to be employed only in an unusual case); Lara, 905 F.2d at 603 (extraordinary situation).

In this case, Milikowsky claimed at sentencing that his presence at Jordan and Prospect was essential because only his knowledge and skill in steel buying, customer relations, and creditor relations could keep those businesses afloat, and that they would be likely to fail even if he were only absent 4 months. He asked for departure on behalf of the Jordan and Prospect employees who would lose their jobs if these two companies failed. JA 1771-1777.

However, the Sentencing Guidelines specify that "vocational skills are not ordinarily relevant in determining whether a sentence should be outside the guidelines." U.S.S.G. §5H1.2, p.s. This provision has been construed broadly to include "work-related contribution[s] to society," such as Milikowsky's managerial abilities and his good customer and creditor relations. United States v. Sharapan, 13 F.3d 781, 784-785 (3d Cir. 1994) (purpose underlying §5H1.2 includes excluding management ability, reputation, personal contacts as ground for departure). Nor are "community ties" or "employment record" ordinarily relevant for determining whether a sentence should be outside the guidelines range. U.S.S.G. S§5H1.5,

1.6, p.s.[53] Appellant analogized his employees to a bereft family (JA 1774-1777), but the Guidelines also provide that "family ties and responsibilities" are not ordinarily relevant in determining whether a sentence should be outside the guidelines. U.S.S.G. §5H1.6, p.s.

Moreover, every court of appeals that has considered the business effects of a white collar offender's incarceration has determined that these effects are not a ground for departure. "[T]here is nothing extraordinary in the fact that the incarceration of a company's principal might 'cause harm to the business and its employees.'" United States v. Reilly, 33 F.3d 1396, 1423-1424 (3d Cir. 1994)(defendant sought departure because of possible future debarment from government contracts of defendant and family members; district court properly denied departure). Harm to a business and its employees may result "in a great many cases in which the principal of a small business is jailed." Sharapan, 13 F.3d at 785 (impact of small business' failure on its employees, and defendant's supposedly unique ability to keep it afloat, not ground for departure). "The very nature of the crime dictates that many defendants will likely be employers, whose imprisonment may potentially impose hardship upon their employees and families." United States v. Rutana, 932 F.2d 1155, 1158 (6th Cir.) (defendant's status as owner of business that may fail does not distinguish him from the "mine-run" of cases; no departure permitted), cert. denied, 112 S. Ct. 300 (1991). See also, United States v. Mogel, 956 F.2d 1555, 1557, 1563-1564 (11th Cir.) (possibility that defendant's business would fail if she was not

---

[53]A provision effective November 1, 1991, clarified that "employment-related contributions" and similar prior good works are not ordinarily relevant to determining departures. U.S.S.G. §5H1.11. p.s.

present, not extraordinary circumstance permitting departure), cert. denied, 113 S. Ct. 167 (1992). Cf. United States v. Monaco, 23 F.3d 793, 798 n.7 (3d Cir. 1994)(fact that defendant lost his business not a basis for departure; loss of business is "consequence[] common to many white collar felons, and th[is] factor[] w[as] carefully considered by the Sentencing Commission").

And while this Court has not expressly addressed the issue, it has recognized that "[d]isruption of the defendant's life, and the concomitant difficulties for those who depend on the defendant, are inherent in the punishment of incarceration. The Commission made this clear by explaining that such disruption of the defendant's exercise of responsibility, as a general matter, should not be cause for downward departure." United States v. Johnson, 964 F.2d 124, 128 (2d Cir. 1992). For exactly the same reason, the possibility that a defendant's imprisonment might have an adverse impact on his business cannot serve as a reason for departure. The Guidelines have already taken this "heartland" circumstance into account in setting sentencing ranges for antitrust offenses.

Indeed, permitting departure for individuals on the ground that they hold managerial positions may run afoul of the blanket prohibition of U.S.S.G. 5H1.10, p.s., against using socio-economic status as a ground for departure. Rutana, 932 F.2d at 1158; Mogel, 956 F.2d at 1563-1564. Allowing Milikowsky to avoid prison creates an untoward socio-economic disparity between him and middle-level managers who cannot make the same indispensability claim. In this case, Gaev and Bergwall, both middle-level executives who could not make Milikowsky's "indispensable executive" claim, were sentenced to imprisonment. Yet Milikowsky, who unlike Gaev and Bergwall, had the

power and authority to bring the conspiracy to an abrupt halt by simply refusing to participate, has been excused by the district court from serving any prison sentence. This is the type of disparity that U.S.S.G. §5H1.10's prohibition was intended to prevent.

The goal of the antitrust guideline was to overcome the favorable treatment that many executives had been receiving, and to ensure that all receive some period of imprisonment, as a general deterrent. The departure in this case undermines that goal, and it was not justified, because Milikowsky failed to show how he was different from other small business owners, convicted of antitrust offenses, whose companies might suffer during their absence.

CONCLUSION

The conviction should be affirmed. The sentence should be vacated and the case remanded for resentencing.

Respectfully submitted.

ANNE K. BINGAMAN
Assistant Attorney General

DIANE P. WOOD
Deputy Assistant Attorney General

JOHN J. POWERS, III
MARION L. JETTON
Attorneys

Department of Justice
Antitrust Division - Rm. 3224
10th & Pennsylvania Avenue, N.W.
Washington, D.C. 20530
(202) 514-3680

OF COUNSEL:

PETER J. LEVITAS

Attorney
Department of Justice
Antitrust Division
Washington, D.C. 20001

DECEMBER 1994

CERTIFICATE OF SERVICE

I hereby certify that on December 12, 1994, I caused two copies of the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE AND CROSS-APPELLANT was served by messenger upon:

Steven A. Steinbach, Esq.
Regina C. Maloney, Esq.
Williams & Connolly
725 12th Street, N.W.
Washington, D.C. 20005

MARION L. JETTON
Attorney
Department of Justice
Antitrust Division
Washington, D.C. 20530
(202) 514-6380

ADDENDUM I

P. 1747

P. 1748

P. 1749

Q. In May 1990, you said one meeting was at the Newark Marriott, but you couldn't remember the location of the second meeting, right? #1

A. I don't recall that. I recall -- I recall saying that there were two meetings.

Q. Correct.

A. I don't recall now whether I told them the exact location of the meetings, but I recall there were two specific meetings -- #2

Q. Correct.

A. -- with Mr. Milikowsky and Mr. Lima and myself sitting face-to-face discussing pricing. #2 Cont.

Q. You said one was at the Newark Marriott Airport, correct? You said that in May of 1990?

A. I don't remember that, sir.

Q. You don't remember even saying that in May of 1990?

A. Well, I recall saying there were two meetings, and I can recall now where the two meetings were.

Q. I'm not asking you that.

A. I don't recall at this point whether I told them where the two meetings were. #3

Q. A couple minutes ago, I asked you that exact question, and you said, "Yes, I told them in May of 1990 that one of the meetings was at the Newark Marriott Airport."

A. I --

Q. Do you remember that or don't you?

A. I'm trying to make sure I'm not inaccurate. I'm suggesting to you or stating very clearly that I recall telling them there were two meetings that were attended by Mr. Milikowsky, Mr. Lima and I, that I attended.

Q. I understand that. We're past that part. Where were the meetings?

A. What I don't recall is whether or not it was at the May meeting with the federal U.S. #4

p. 1749 cont.

attorneys, or whether there was another meeting with them, or whether it was in the grand jury testimony, or whether it was in the Bruil trial. But I clearly stated and I recall two specific meetings.

Q. Let me ask you this: Do you remember telling the prosecutors on May 10, 1990, that one of the meetings you had was at the Newark Marriott Airport?

A. I recall saying there were two meeting locations.

Q. I know, you've said that. The question is do you recall telling them that one of the meetings was at the Newark Marriott Airport?

A. In May did I tell them that, you're asking?

p. 1750

Q. Correct.

A. I believe I did.

Q. You have some uncertainty about that?

A. Well, my question, as I said earlier, is whether or not it was with the federal prosecutors in May or whether it was at a later date with them.

Q. In that meeting in May of '90, did you mention anything ever about the Chicago O'Hare Hilton?

A. I don't recall that I did, sir. #5

Q. So your recollection is you don't remember or you remember that you didn't?

A. My recollection is that I told them about two meetings.

Q. And where did you tell them the meetings were?

A. I recall that there were two meetings. #6 I don't recall whether I told them during the May meetings that they were the Hilton at O'Hare and the Marriott in Newark or whether it was at a later date.

P. 1768

Q. Mr. DeBerry, did you say anything in May of 1990 about the Chicago O'Hare Hilton?

A. I don't recall whether on May 10th, I mentioned both locations. I mentioned that there were two meetings. #7

Q. When is the first time, Mr. DeBerry, you mentioned the Chicago O'Hare Hilton to the prosecutors?

A. Without seeing this document, I would not know whether it was my first or my second visit. #8

Q. You didn't mention it in the grand jury, did you?

P. 1769

A. Ask your next question again.

Q. You didn't mention the Chicago O'Hare Hilton in the grand jury in 1991, did you?

A. I don't recall, sir.

Q. You didn't mention the Chicago O'Hare Hilton until 1993; isn't that correct?

A. I don't recall that, sir. #9

Q. Do you remember at all when you first told the government that you had a meeting with Mr. Milikowsky and Mr. Lima in the Chicago O'Hare Hilton?

A. I thought it was in 1990, that I told them. I don't recall which meeting it was in 1990. #10

Q. You believe you told them that before you testified in the grand jury?

A. I think I did. As best I can recall, I did. #11

Q. It's your testimony now that it's your best recollection that in 1990, you told the government that you met Mr. Lima and Mr. Milikowsky in the Chicago O'Hare Hilton?

A. That's my best recollection, yes. #12

Q. And that would have been before you testified in the grand jury; is that correct?

P. 1770

A. That is correct. #13

p. 1771

Q. Did you ever, in your grand jury testimony, ever indicate that the Chicago O'Hare Hilton was the location where you had a price-fixing meeting with Mr. Milikowsky and Mr. Lima?

A. Mr. Steinbach, I'm not sure whether it was in the grand jury testimony or whether it was in my proffers to the government, or whether it was in the '93 trial that I told them. I can't recall, or whether it was multiple occasions. #14

p. 1772

Q. Isn't, Mr. DeBerry, the first time that you ever said that the Chicago O'Hare Hilton was a location for a price-fixing meeting April 1st, 1993? Isn't that the first time you ever told that to the government?

A. I believe I told them earlier than that. I believe I mentioned the two meetings, which I did mention, I mentioned two meetings in May of 1990 to the government. #15

In subsequent meetings, I can't recall whether I mentioned the both locations or one location during my grand jury testimony. Without rereading it, I'm not going to know whether I mentioned both locations or one location. #15 Cont

p. 1774

Q. You don't know when you first told the government when the meeting was at the Chicago O'Hare Hilton?

MR. BYRNE: Objection; asked and answered.

THE COURT: One last time, sir. Do you recall when you first told them that?

THE WITNESS: I don't recall. #16

p. 1794

through January of 1991. All right?

A. Yes, sir.

Q. I've moved past the May 10 meeting which was eight months before, when you first met with the government, right?

A. Correct.

p. 1794 cont.

Q. And sitting here, you really can't remember what you said to the government other than the fact that there were two meetings, right?

A. If you're speaking in the context of the two locations and the two dates? #17

Q. Yes, sir.

A. Yes, that is correct. #18

Q. So we've established that your recollection now for the May interview is you remember two meetings, but you don't remember locations or you don't remember what you said about locations, and you don't remember what you may have said about dates?

A. I don't recall what was said on May 10th, whether it was May 10th or a different date. #19

p. 1796

Q. You specifically testified, did you not, at the grand jury, that one of the meetings was at Newark, correct?

A. I believe that is correct.

Q. But you're not certain?

A. What I can't recall is during which of the discussions with the government -- I'm trying to explain. #20

Q. Okay.

A. Or whether it was a matter of during the grand jury proceedings or the Bruil trial that both came out. I distinctly recall having told -- said many times that there were two meetings attended by the three of us, Mr. Lima, Mr. Milikowsky, but I can't recall exactly when that communication came up, that they were both -- that I knew both locations. #21

p. 1797

p. 1799

Q. Do you have any doubt about that?

A. It's the same difficulty I shared with you earlier.

Q. Is the answer yes?

A. It's not a question of testifying, I'm not sure whether I testified during the grand #22

p. 1800

jury proceeding or during the Bruil trial, because I have a difficult time differentiating between the dates and the places of the testimony. #22 cont.

p. 1825

Q. Well, you tell me. There's four price increase letters. We know that in the fall of 1988, you say one of them is in Chicago, correct? #23

p. 1826

A. One of the difficulties I continue to have, I've had four days of grand jury testimony, I think a similar number, three or four days in a previous trial, a number of communications with Mr. Schmoll or Mr. Byrne or others concerning, you know, price-fixing activities. #23 cont.

I consistently maintained, I believe, that there were two meetings, attended by Mr. Milikowsky and Mr. Lima and myself. What I don't recall is the sequence that, you know, I advised where the two meetings were. I always said there were two meetings, and my first recollection was the one in Newark at the Marriott. And in a later -- I don't recall how much later, what I indicated was that there was a meeting at O'Hare Hilton attended by all three of us to discuss pricing activities. #23 cont.

p. 1828

Q. You didn't mention the fall of 1988 in your grand jury testimony, right?

A. I don't recall whether it was the grand jury testimony or whether one of the trials or a proffer to the Justice Department. #24

p. 1877

Q. You told us today that you had told the government about the Chicago meeting prior to your grand jury appearance, right?

A. I think I said there were two meetings. One meeting was at the Marriott. One meeting was -- That there were two meetings. I can't recall when the actual -- I told the government that one meeting was the Marriott and #25

p. 1877 contd.

one other was O'Hare. But I told them about two meetings.

Q. Didn't you testify this morning that you had told the government prior to the grand jury appearance --

MR. BYRNE: Your Honor, I'm going to object. This is the same question I objected to earlier. Mr. DeBerry's testimony is he doesn't recall when it is he told the government these things. The letter that Mr. Steinbach showed Mr. DeBerry didn't refresh his recollection as to when he told the government that.

p. 1878

MR. STEINBACH: Your Honor, this was the section I asked the court reporter to mark and the court reporter has marked that, and I would request that the court reporter read that at this time.

THE COURT: Please.

(Record read.)

MR. STEINBACH: Thank you.

Q. So it's your best recollection that you told the government, prior to the grand jury appearance, that you had had a meeting in the Chicago O'Hare Hilton, right?

A. I still have a difficult time. I mean I -- #26

Q. That's what you testified this morning, sir.

A. I think that is correct. I think I told them before '90. #27