NO. 13-12385-C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff/appellee,

v.

ISAAC FELDMAN,
Defendant/appellant.

On Appeal from the United States District Court
for the Southern District of Florida

REPLY BRIEF OF THE APPELLANT ISAAC FELDMAN

Respectfully submitted,

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THIS CASE IS ENTITLED TO PREFERENCE
(CRIMINAL APPEAL)

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STATEMENT OF THE FACTS

Throughout its statement of facts the government mischaracterizes the nature and extent of Mr. Feldman's involvement in this case.

To begin with, the government asserts that Feldman "put Simchuk's mother, who had no involvement at all, on the club's (Stars Lounge, L.L.C.) Articles of Incorporation. [G.Br.9]. Contrary to the government's assertions, Simchuk conceded on cross-examination that Stars had been incorporated and had an operating bank account over a month before Feldman ever became a shareholder and that it was Simchuk himself who arranged that his mother put her name on Stars Lounge, L.L.C. Articles of Incorporation. [DE:1128:20-21, 234-35].

The government next incorrectly asserts that at Stars, Feldman hired staff; helped coordinate the B-Girls travel, housing and recruitment; drove them to bars to meet victims; and sent money overseas. [G.Br. 9]. A number of witnesses testified that Feldman was not involved in this activity. Simchuk testified Feldman didn't recruit any woman in Stars, that he himself paid for the B-Girls travel tickets and that Kipperman paid for their housing. [DE:844:212, 239]. Marina Turcina confirmed Feldman never recruited anyone and that she came to the United States to work for Simchuk and Kipperman. [DE:1132:165, 203]. Detective King likewise confirmed that he was unaware of any girl Feldman recruited for Stars.

[DE:1132:165]. And Julija Vinogradiva confirmed that Feldman did not routinely drive girls to bars to meet victims; nor did he hire or recruit the girls or have authority to fire employees. [DE:1123:49-51, 57].

Although the record evidence established that Feldman only invested $10,000 in Stars through Feldman Global Trading account, the government, nonetheless, states that he sent additional wire transfers overseas. [G.Br.24]. That statement is contradictory to the testimony elicited from FBI Special Agent Carpenter. Carpenter's review of the relevant documents revealed no wire transfers from Feldman or Feldman Global Trading to accounts in Latvia. [DE:58]. The wire transfers made to accounts in Latvia were from accounts which Mr. Feldman did not have signatory authority. [DE:45-46, 59-60, 157-58].

The government's assertion that Simchuk and Feldman brought girls to the United States from Latvia and Estonia is also incorrect. [G.Br. 23]. Simchuk had already brought girls to the United States prior to entering his first business venture with Feldman at VIP. [DE:1149:133-140]. Those girls were then used by Simchuk to staff Stars; and Simchuk acknowledged that he was responsible for bringing the B-Girls to the United States to work. [DE:1128:44].

The government also misstates that Feldman and Simchuk opened VIP, and then, along with others, formed a third club, Stars Lounge. In actuality, Feldman opened VIP along with Max Ruchkin. The club was financially failing and

Simchuk saw it as an opportunity to put his girls to work while he was waiting for his new club, Stars, to open. [DE:1149:133-41, 152-56]. Feldman was not involved in forming Stars. Rather, he was a minority investor who purchased a small percentage of the existing club after Simchuk had set it up. [DE:1128:6].

The government contends that despite the defendants' claims at trial of many satisfied customers two at most were found. [G.Br.29]. This contention is belied by the paucity of responses to the over 100 victim letters the government sent out.

ISSUE I

Mr. Feldman had prepared to go to trial and defend against fraud and money laundering charges arising from his participation as a minority investor in two Miami Beach nightclubs. Prior to trial, his Motion *In Limine*, requesting to exclude the government from making reference to the Russian Mafia during its case in chief, had been granted. [DE:808; 826; 1120:41]. At trial, however, the government's fraud and money laundering prosecution quickly evolved into exactly what Mr. Feldman had struggled to prevent. The introduction of a smorgasbord of irrelevant, incurably prejudicial evidence, featuring Russian organized crime and the Russian Mafia, at the top of the menu.

The government initiated the onslaught by introducing irrelevant and incurably prejudicial evidence depicting threats of retribution against a number of witnesses, violent acts of retaliation against a key government witness, Alec

Simchuk, and repeated references to Russian organized crime and the Russian Mafia [DE:1124-132, 1125-113,197]. None of this evidence was admissible against Mr. Feldman in this trial; nor would it have been admissible against him in any separate trial under any recognized legal theory. Mr. Feldman timely and repeatedly moved for severance to no avail. [DE:1121:53, 1124:170-172, 1125:6-7,114].

The government essentially raises two arguments to support its position that the district court correctly denied Mr. Feldman's motions for severance. First, without meaningful discussion or analysis, the government merely recites a general proposition that "there is a preference in the federal system for joint trials of defendants who are indicted together," *Zafiro v. United States*, 506 U.S. 534, 113 S.Ct. 933 (1993), and that "preference is particularly compelling when the defendants have been indicted for conspiracy." *United States v. Baker*, 432 F.3d 1189 (11th Cir. 2005). [G.Br.57.] Second, the government posits, that in any event, the evidence of threats and physical retaliation against Simchuck were somehow rendered benign because they were not directly attributable to Messrs. Feldman or Pavlenko. [G.Br.65-66]. Both arguments should be rejected.

The government does not and cannot credibly contend that the evidence detailing the threats and violent acts of retaliation directed towards and visited upon Simchuk, was not powerfully incriminating and inherently prejudicial. Nor

can the government plausibly assert that this evidence was admissible against Mr. Feldman in this or any separate trial under any accepted evidentiary theory. Moreover, the government cannot seriously contend that a limiting instruction, given the devastating, prejudicial nature of the evidence and the direct efforts by Simchuk to eviscerate whatever minimal effect that instruction may have had in the first instance, was sufficient to protect Mr. Feldman's right to a fair trial.[1] Thus, any arguable initial preference for a joint trial in this case must necessarily yield to the more fundamental constitutionally grounded principles of fairness and due process guaranteed Mr. Feldman.

The record thoroughly contradicts the government's second argument that the evidence of threats and of Simchuk's leg breaking was effectively neutered since it did not directly implicate Messrs. Feldman and Pavlenko. After describing the threats he had received and the subsequent armed assault that resulted in a severe fracture of his leg, Simchuk proclaimed "these people (referring to all defendants on trial) want me to die in Russia." [DE:1126:282]. His intended message was simple, direct and could not have been clearer. He blamed each of the accused, including Mr. Feldman, for everything that had occurred. This was *not* the

[1] Simchuk personally vetoed the district court's cursory limiting instruction on this evidence when he dramatically proclaimed "these people want me to die in Russia." [DE:1126:282]. That testimony (which was also inadmissible) was clearly directed toward each defendant on trial, including Mr. Feldman.

only salvo Simchuk fired casting blame on each of the defendants. [Emphasis added.] At one point during his testimony, he *sua sponte* argued to the court and jury that he should be allowed to expand his testimony and volunteer more information about Pavlenko stating, "[c]ome on guys. I mean, I give you my leg for this."[2] [DE:1125-197]. Again, the message was clear: he blamed not only Takhalov, but rather all of the accused on trial.[3]

The government's efforts to distinguish *United States v. McLain*, 823 F.2d 1457 (11th Cir. 1987), and *United States v. Engleman*, 648 F.2d 473 (8th Cir. 1981), are simply unavailing. Contrary to the government's claim, this Court's opinion in *McLain* does not reflect that the trial judge failed to give a limiting instruction to the jury regarding the drug evidence that pertained solely to McLain. Moreover, it is reasonable to assume that the trial judge would have made it clear, (just as in any other case) either in its preliminary or final instructions to the jury, that the drug offenses in which only McLain was charged applied only to McLain and not Sher, the co-defendant.

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[2] "This" in context plainly refers to his decision to cooperate and become a government witness against all the defendants.

[3] There were, of course, several other instances of the government's argument or their witnesses' testimony referencing threats to witnesses or acts of violence attributable to individuals other than Feldman that further demonstrate the manifest necessity of a severance in this case. Govt. Opening Statement; [DE:1121-47]; testimony of Julija Vinogradova; [DE:1124:132]; testimony of Marina Turcina; [DE:1131-225].

The government also urges that *McLain* is somehow different because there "the drug evidence about the co-defendant related to an entirely separate conspiracy." It is not. Here, as in *McLain,* the objectionable, incurably prejudicial evidence also related to a separate, albeit uncharged conspiracy – a conspiracy to obstruct justice and intimidate and retaliate against witnesses, which according to the government, certainly involved Takhalov; and just as certainly did not involve either Messrs. Feldman or Pavlenko.

The government next contends that in *Engleman,* "the district court refused to give any instructions to the jury about the co-defendant's act (a murder that had occurred years before and was unrelated to the pending charges." [G.Br.66]. The government is absolutely incorrect and in fact blatantly misstates what occurred in that case. The trial judge *did* give a limiting and cautionary instruction when the first government witness testified about the murder. [Emphasis added.] Although the trial judge declined to contemporaneously repeat his earlier instruction when a second witness testified about the event, he added that the jury would be fully instructed at the close of the evidence. [4]

[4] In *United States v. Engleman, supra,* the court noted that although the failure of the district court to give a second cautionary instruction when the second witness testified about the event compounded the prejudice, the basis for reversing the conviction was that the evidence concerning the murder "was so prejudicial that a new trial must be ordered," *United States v. Engleman*, at 482.

In the last analysis, the teachings and holdings of *United States v. McLain*, 823 F.2d 1457 (11th Cir. 1987), and *United States v. Engleman*, 648 F.2d 473 (8th Cir. 1981), not only apply to this case, but, in addition, dictate that it was error for the district court to deny Mr. Feldman's requested severance. That error compels reversal of his convictions.

ISSUE II

On one level the Government is correct. Prior to trial, the district court in fact entered an order precluding the government from making reference to the term "Russian Mafia" during its case in chief. [G.Br.67]. However, shortly after the order was entered Simchuk, suddenly, and according to the government, unexpectedly disclosed for the first time information about the threats he had received and the true circumstances surrounding the breaking of his leg. When this evidence was subsequently admitted over objection, and Mr. Feldman's motion for severance was denied, the district court's pretrial order was rendered meaningless.

To the extent that the government suggests that it was Mr. Feldman who interjected evidence about the Russian Mafia in the trial, [G.Br.67], the government is totally incorrect. Rather, Takhalov's counsel, in an effort to show that other individuals besides Mr. Takhalov had a motive to retaliate against Simchuk, began to cross examine Simchuk about his membership in the Russian Mafia. [DE:1128-132, 139, 140, 145]. Mr. Feldman engaged in no such cross

examination. To the contrary, he had moved for severance and continued to do everything within his power to extricate himself from the trial that had become incurably infected by this irrelevant, highly inflammatory and prejudicial evidence.

The government's argument also ignores the troubling nature and extent of "Russian" evidence that was heard by the jury. That evidence included: Simchuk's membership in the St. Petersburg Mafia; the murder of Simchuk's close friend and fellow Mafia member, Sergi Otz; [DE:1128:128-145]; the common practice among Russian criminals to put family members names on business documents; [DE: 1129-53]; testimony of the B-Girls, Vinogradova and Turcina, about threats directed to them or their families by Simchuk's well-connected partner in Eastern Europe; [DE:1124-132,1131-25]; Det. King's testimony that he was not surprised that Simchuk was Russian Mafia after seeing how the Stars operation worked; [DE:1142:19-55]; co-defendant Zagari's playing the "Russian card" to demonstrate that his client, the only non-Russian on trial, was not involved in the charged fraud; [DE:1140:15-16]; the government eliciting testimony on redirect suggesting that the retired police officer, Sgt. Smolinsky who had met with Mr. Feldman early in their investigation, was some sort of expert on Russian organized crime; [DE:1140-8]; and one of the alleged fraud victims giving a made for Hollywood story how he feared he was going to be mugged or shot by mobsters when the girls brought him back to an empty club; [DE:1142:19-55].

Mr. Feldman did everything in his power to prevent the trial of his fraud case from being diverted to an indictment of Russian organized crime, and the accompanying inescapable inference that those of Russian ethnicity, such as Mr. Feldman, were inexorably linked to that criminality. Unfortunately, he was not successful. Because Mr. Feldman's Russian ethnicity was irrelevant, but nonetheless became a centerpiece of the case, he was denied his constitutional rights to due process and equal protection of the law. His convictions must be reversed. *See e.g., United States v. Doe*, 903 F.2d 16 (D.C.Cir. 1990), *Rose v. Mitchell*, 443 U.S. 545, 545, 99 S.Ct. 2993, 3000 (1979)(because such evidence may well appeal to the jury's racial or ethnic bias and impermissibly sway the jury's verdict it has no place in a criminal trial).

ISSUE III

The government offers a number of arguments to support its position that the district court did not abuse its discretion by rejecting the defendants' request for a read back of the witness testimony requested by the jury. First and foremost, the government argues that a read back would have been too time consuming. [G.Br.74]. Although the requested read back would have taken some time, it was clearly necessary given the circumstances of this case. To begin with, the government's theory of prosecution was not only novel, but, in addition, it was presented through a number of witnesses whose native language was Russian, but

chose to testify in English. These witnesses, including Simchuk, were, as the record demonstrates, difficult to understand. Equally difficult to understand were recorded conversations between Det. King (who testified in English) and native Russian speakers including Simchuk, Marina Turcina, Julija Vinogradova (who testified at trial through a Russian interpreter), Mr. Feldman, and Mr. Takhalov.[5]

Moreover, Mr. Feldman's testimony was replete with numerous instances where not only his attorney, but also the jury, had difficulty comprehending his answers to a number of questions. [DE:1149:49].

The government speculates that Mr. Feldman cannot show prejudice because the requested testimony "did not clearly benefit" the defendants. [G.Br.75]. In support of its theory, the government relies on the naked assertion that Simchuk and King's testimony powerfully reinforced the defendants' guilt. [G.Br.75]. The government chooses to ignore the fact that both Simchuk and King were not only impeached on cross-examination when confronted with evidence of their own misdeeds and disregard for the truth, but in addition, substantial portions of Simchuck's testimony was directly contradicted by the B-Girls, Vinogradova and Turcina. [DE:1123:6, 49-51, 61-63,117,180-189]. Moreover, the girls' testimony

[5] A number of these conversations were played for the jury during the testimony of Det. King. Mr. Feldman has pointed out a number of the language difficulties in his initial brief. *See* Br.43-45.

substantially corroborated important segments of Mr. Feldman's testimony, which the jury also requested a read back on.[6] [DE:1121:16].

Lastly, the government argues that the mixed verdict shows that jurors were able to sift carefully through their recollections. [G.Br.75]. To the contrary, a mixed verdict is no more indicative of thoughtful deliberation based on a clear and comprehensive recollection of the testimony, than it is of a simple compromise engendered by a faulty or incomplete recollection of critical testimony that could have been cured by a read back.

The right to trial by jury secured by the Sixth Amendment is a fundamental cornerstone of the American system of justice. For that right to have real meaning and fulfill its intended function, a jury must have the tools necessary to perform its duties. Time should not be a compelling or controlling factor. If a read back will assist the jury in reaching a decision that is not the product of non-existent, incomplete, faulty, distorted or incorrect recollection, it should be provided.

ISSUE IV

The government cannot seriously contend that Simchuck did not *sua sponte* initiate a patently improper line of testimony that was plainly designed to, and in

[6] The jury also requested a readback of the testimony of Mr. Feldman's assistant, Ms. Nefadova. Significant portion of her testimony were favorable to Mr. Feldman and/or corroborated portions of his testimony. [DE:1131:13-18, 41-42, 56, 68, 88-89].

fact, did bolster his own credibility. Left with no other alternative, the government seeks to place the blame for Simchuk's misdeeds on the defendants' exercise of their Sixth Amendment right to cross-examination rather than where it belongs – squarely on the government's star witness, Alec Simchuk. [7]

By all accounts, Simchuck was the government's star witness. He was also, as he repeatedly demonstrated during the course of the several days he spent testifying, a witness who not only reveled in being on the witness stand, but in addition did and said virtually whatever he pleased as the mood struck him. He knew full well how to play the game. There is nothing in the record to suggest that the government took any steps, whatsoever, to curtail his rogue behavior, or insatiable flair for the dramatic. Nor does it appear the government had any incentive to do so. Simchuck's constant interjection of non-responsive and clearly inadmissible testimony furthered the government's case, and bolstered his own credibility.

Simchuck's credibility was a primary focal point in the case. The government does not dispute this. Instead, the government posits that a jury did not need the "bolstering" given that his testimony was corroborated by the B-Girls. [G.Br.72.] That is simply not the case. In many instances the testimony of

[7] The specific questions asked by defense counsel did not seek, nor can they be construed as eliciting Simchuk's opinion of what the attorneys and the judge in the Pennsylvania case thought of him or his credibility. [DE:1127:90-91].

Vinogradova and Turcina contradicted Simchuk on several material points.[8] Bolstering or repairing his testimony that had been or would be contradicted by other government witnesses or was otherwise impeached was, needless to say, of the utmost importance.

Finally the government's efforts to distinguish this Court's decision in *United States v. Sorondo*, 845 F.2d 945 (11th Cir. 1988) are unavailing. [G.Br.72]. To begin with, Simchuk was allowed to volunteer the improper testimony while spewing non-responsive answers to properly framed questions posed on cross-examination. Thus, as in *Sorondo* the government's own witness interjected the testimony constituting the improper bolstering. Second, it matters not that the improper testimony came from Simchuk himself or another government witness. The danger is the same – in the face of such testimony a jury may well abrogate its responsibility to bring in its own verdict and instead rely on the judgment of another authority (the Pennsylvania judge and attorneys) to make key credibility determinations. Where, as here, the testimony unfairly and strongly bolsters the testimony of a key witness (Simchuk) in the eyes of the jury plain error results and

[8] A few examples – Vinogradova testified Feldman had little involvement in the operation of Stars and did not address any operational questions; [DE: 1128-51]; she confirmed Feldman did not have authority to hire or fire personnel and had no input as to how the girls should work; [DE:1123-49-51]; she also testified Feldman was rarely present at Stars and questioned whether he was even aware of the alleged fraud that was taking place; [DE:1123-61, 180, 189]. All of this testimony flatly contradicted Simchuk.

reversal of the defendants' convictions is mandated. *United States v. Sorondo*, *Id*. at 950-951.

ISSUE V

B.

The government argues unconvincingly that the district court properly enhanced Mr. Feldman's guideline by two levels for sophisticated laundering pursuant to U.S.S.G. § 2S1.1(3). [G.Br.87]. Mr. Feldman was only convicted of conspiring to violate the international transfer prohibitions of 18 U.S.C. §1956. He was not convicted of violating or conspiring to violate the concealment prong of the statute. Nonetheless, the thrust of the government's argument seems to presume that Mr. Feldman was convicted of a concealment offense when in fact he was not. [G.Br.88](pointing out some purported level of sophistication in domestic financial transactions Mr. Feldman was not convicted of). Thus, the government's argument is flawed.

The appropriate analysis focuses on the international transfer violations to determine whether they were conducted in a sophisticated manner. The record demonstrates that they were not. To begin with, a contemplated international transfer of funds is an element of the conspiracy offense Mr. Feldman was convicted of. *See* 18 U.S.C. § 1956(a)(2), prohibiting the transmission of funds from a place in the United States to a place outside the United States with the

intent to promote the carrying on of specified unlawful activity. One cannot be convicted of conspiring to violate the statute unless one agreed that an international transfer of funds was to take place. Here, the record evidence simply established that funds were transferred from the Stars, LLC bank account at TD Bank (Mr. Feldman was not a signatory on the account) to individual bank accounts at Swed Bank and/or DNB Nord Banka in Riga, Latvia. Each of those bank accounts were titled in the true and correct name of the account holder, who were receiving the transferred funds. No aspect of any transaction was either intricate or concealed, and it is difficult to imagine how the transactions could have been conducted in a more simple and transparent fashion. The application of the sophisticated laundering enhancement was therefore erroneous.

D.

Rather than address the substantial legal issues surrounding the district court's erroneous application of a two level guideline increase based on Mr. Feldman's alleged perjurious trial testimony, the government simply claims that he is now merely attempting to reargue the truthfulness of his trial testimony – an issue that the trial judge has already decided. [G.Br. 83]. It is true that the trial judge may have decided the issue. The problem is he decided it incorrectly.

The government points out that the trial judge determined that Mr. Feldman's trial testimony was in conflict with Simchuk's trial testimony on a

number of key points. The government (as did the trial judge) ignores the fact that Simchuk's testimony on these points directly conflicted with the testimony of other cooperating government witnesses, including Julija Vinogradova and Marina Turcina. The testimony of these two government witnesses not only contradicted Simchuk, but corroborated Mr. Feldman's trial testimony on a number of matters in dispute. For example, Vinogradova confirmed that when there were disputes or questions about financial issues at Stars, they were discussed with Mr. Feldman's sister rather than Mr. Feldman himself. [DE:1122-68-71]. Contrary to Simchuk's assertions that Mr. Feldman was a working partner; who was deeply involved in the Stars operation; both Vinogradova and Turcina testified that Mr. Feldman was rarely present at the club, made no decisions and did not participate in the day to day operations. [DE:1123-6,49-51; 1132:165; 1133:92-96]. Again, directly contradicting Simchuk's testimony that Mr. Feldman was aware of everything that was going on at Stars, Vinogradova testified that Mr. Feldman may have had no knowledge of the alleged fraudulent activity occurring at the club. [DE:1123-180].

Given the fact that the substance of Mr. Feldman's trial testimony was corroborated by Vinogradova and Turcina, and that the testimony of these two witnesses contradicted Simchuck, the trial court abdicated its responsibility to address each element of the alleged perjury in a separate and clear finding, and explain why the court still found Simchuk's testimony credible and Mr. Feldman's

incredible. *United States v. Dunnigan*, 507 U.S. 87, 88, 113 S.Ct 1111, 1115-19 (1993), *United States v. Dobbs*, 11 F.3d 152, 155 (11th Cir. 1994).

The constitutional right of an accused in a criminal case to testify on his own behalf is too important to be compromised or chilled by the imposition of a sentence enhancement, which ultimately is predicated on a district court merely making a generalized credibility call in favor of a government witness, especially when the testimony of that witness was contradicted by the testimony of other government witnesses. The law requires more. *United States v. Dunnigan*, *Id.* at 88, *United States v. Dobbs*, *Id* at 155. The district court failed to make clear specific findings supporting the perjury enhancement. The reason is clear. The record would not support any such findings. The imposition of the enhancement pursuant to U.S.S.G. § 3C1.1 was error and Mr. Feldman's sentence must be vacated.

CONCLUSION

Based upon the foregoing argument and citations of authority, the Court should vacate the defendant's convictions and sentence and remand for a judgment of acquittal, a new trial, or in the alternative for resentencing.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this reply brief complies with the type-volume limitation set forth in FRAP 32(a)(7)(B), and that according to the program (WORD) on which it is prepared it contains 4540 words.

Respectfully submitted,

/s/ John E. Bergendahl
John E. Bergendahl

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Reply Brief was electronically filed with the Court on this 8th day of April, 2015 and thereby served upon all counsel of record.

Respectfully submitted,

/s/ John E. Bergendahl
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