IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 96-35020

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ROBERT W. GUTHRIE,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

BRIEF FOR APPELLEE UNITED STATES OF AMERICA

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STATEMENT OF ISSUES

1. Whether the district court erred in rejecting defendant's Sixth Amendment claim of ineffective assistance of counsel.

2. Whether the district court was required to hold an evidentiary hearing to determine whether defendant was prejudiced by an insignificant and irrelevant error in the trial transcript.

STATEMENT OF JURISDICTION

The appellee agrees with appellant's statement of jurisdiction (Guthrie Br. 1).

STATEMENT OF FACTS

I. COURSE OF PROCEEDINGS

On October 29, 1992, a jury convicted Robert Guthrie on two counts of violating section 1 of the Sherman Act, 15 U.S.C. 1,

for rigging the bids at two public real estate auctions in Spokane, Washington, on November 17, 1989, and April 6, 1990. On January 22, 1993, Guthrie was sentenced to pay a $20,000 fine and restitution in the amount of $4,859. He was placed on probation for one year in lieu of imprisonment.

On February 10, 1994, this Court affirmed Guthrie's conviction in an unreported memorandum decision (United States v. Guthrie, CA 9 No. 93-30066) (hereafter Guthrie I). The Court denied Guthrie's petition for rehearing on March 24, 1994, and the Supreme Court denied his petition for a writ of certiorari. Guthrie v. United States, 115 S. Ct. 87 (1994).

A year later, on October 5, 1995, Guthrie filed a motion to vacate his conviction under 28 U.S.C. 2255 on the ground that he had received ineffective assistance of counsel on appeal. The district court rejected the claim, holding that counsel's performance had not been deficient and that defendant had not suffered any prejudice. ER 58.[1]

II. STATEMENT OF THE CASE

1. Guthrie won the bids at two foreclosure sales for $1 over the minimum bid by paying off the other potential bidders on the properties in exchange for their agreements not to bid. In both foreclosures, the properties were located in Spokane,

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[1] "ER" refers to the Excerpts of Record filed by appellant Robert Guthrie. "Supp. ER" will refer to the Supplemental Excerpts of Record filed by the United States. References preceded by "Guthrie I" will refer to pleadings and filings in United States v. Guthrie, CA 9 No. 93-30066.

Washington; the mortgages on the properties were held by out-of-state lenders (one in Maryland and one in South Carolina); and the mortgages were insured by the Federal Housing Administration of the United States Department of Housing and Urban Development (HUD). After the mortgagor with respect to each property had defaulted on the loan, the lenders appointed trustees in Seattle, Washington, to conduct the foreclosure sales. The proceeds of the sales, less the trustees' expenses and costs, were remitted to the out-of-state lenders. Because the proceeds of the sales did not cover the total amount of the debt still owed, the lenders submitted claims for the balance to HUD in Washington, D.C., which HUD then paid. Guthrie I 7-8; Supp. ER 61-62.

Guthrie has never disputed any of the foregoing facts. In originally appealing his conviction, however, he argued, inter alia, that the district court had erred in instructing the jury on interstate commerce. Guthrie I Guthrie Br. 38-45; Supp. ER 45-52. The trial court had instructed the jury that the interstate commerce requirement would be met if the sales of the properties were "an essential part of the foreclosure transaction involving the transfer of funds from the State of Washington to Maryland [and South Carolina]." Jury Instruction 17; ER 11. Claiming that the facts proved a "purely local" activity, Guthrie asserted that the jury should also have been instructed to consider "whether [Guthrie] and the trustee intended and understood the funds simply went to the trustees for the deeds, and whether the funds acquired a different purpose and character

once in the hands of the trustees." Guthrie I, Guthrie Br. at 39, 44; Supp. ER 46, 51 (emphasis added).

In a unanimous, unpublished opinion, this Court rejected Guthrie's interstate commerce claim, holding that the district court's instruction was in conformity with the Supreme Court's holdings in Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975), and McLain v. Real Estate Bd. of New Orleans, 444 U.S. 232 (1980). Guthrie I at 6-7 & n.1; Supp. ER 60-61. The Court also rejected Guthrie's claim that there was insufficient evidence to support the jury verdict that the foreclosure sales "were necessary to enable the [out-of-state] banks to recover on their loans, and therefore were an essential part of the interstate foreclosure transactions." Id. at 7-8; Supp. ER 61-62.[2]

2. On October 5, 1995, Guthrie filed this pro se motion under 28 U.S.C. 2255, claiming a denial of his Sixth Amendment right to counsel. The factual basis for this claim was that "[a]ppellant counsel disregarded specific agreements to argue the

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[2] In his unsuccessful petition for rehearing, Guthrie argued that the panel's holding "that Guthrie's purchases of real estate were in the stream of interstate commerce because they were made in the course of 'single continuous' foreclosure sales . . . . overlooked undisputed evidence and circuit precedent which establish in fact and law that each foreclosure sale was not a 'single' event but instead consisted of two discrete events, and that Guthrie participated only in the local, not the interstate, transaction." Guthrie I Pet. for Rehearing at 2, also 4-7; Supp. ER 64, 66-69. Guthrie also claimed that the Court had "overlooked the law and evidence . . . establishing that the purchase by Guthrie was factually and legally separate from the interstate transaction, and that there was no evidence that either participation by bidders or an actual sale was essential to either the foreclosure or the interstate loan transaction." Id. at 2-3; Supp. ER 64-65.

"Come to Rest" doctrine challenging federal jurisdiction in the Appellant's Reply Brief and in oral argument be[fore] the Ninth Circuit Court of Appeals." ER 15. The motion was also based on an error in a portion of the trial transcript that the government had cited in its brief on appeal. Ibid.

The district court denied the motion on December 14, 1995. The court found that the argument Guthrie had wanted his lawyer to make "seeks to modify the elements involved in a bid rigging offense to include a requirement that the government prove his specific intent that the money involved cross state lines." ER 57. The court noted that such a requirement would be at odds with the per se rule applied in Sherman Act bid rigging cases, and with this Court's holding on Guthrie's prior direct appeal. Ibid. Thus, Guthrie failed to make out a claim of ineffective assistance of counsel: "Guthrie cannot maintain that his counsel performed deficiently by failing to raise a meritless argument. Moreover, he can hardly claim that he was prejudiced by such a failure." Id. at 58.

Guthrie's complaint with respect to the trial transcript error also related to his claim that the government was required to prove that he knew or intended the money he paid at the foreclosures to cross state lines. ER 58-59. The district court held that, since this was not an element of the offense, the error could not have prejudiced the outcome of petitioner's appeal. Id. at 59.

ARGUMENT

Although Guthrie argued on the original appeal of his conviction that the court's instructions on interstate commerce were incorrect and that the evidence did not support his conviction, this Court affirmed the conviction, and the Supreme Court denied review. In this collateral challenge to his conviction, Guthrie is seeking yet again to reverse these rulings on interstate commerce while attacking the competency of his appellate counsel for an alleged failure to make additional interstate commerce arguments. To the extent that Guthrie's interstate commerce claims are not simply a reformulation of arguments that this Court correctly rejected two years ago, they are plainly wrong as a matter of law and Guthrie could not have been prejudiced by his appellate counsel's failure to make them.

I. GUTHRIE'S APPELLATE COUNSEL DID NOT HAVE A CONFLICT OF INTEREST AND WAS NOT INEFFECTIVE

Guthrie claims that he received "ineffective assistance [of appellate counsel] resulting from conflict of interest" (Guthrie Br. 12). This "conflict of interest" purportedly arose because Guthrie's counsel failed "to make an argument before this Court after specifically agreeing to do so." Id. at 17. The argument that allegedly was not made involves the "come to rest" doctrine and Guthrie's contention that the transaction in question could not have been "in" interstate commerce because he "never intended the money would go to anyone outside the State of Washington." Id. at 11; 18-30.

In fact, there was no conflict of interest in this case and

the district court applied the correct legal standard in evaluating Guthrie's ineffective assistance of counsel argument.

A. The District Court Did Not Apply An Incorrect Standard

"The guarantee of effective assistance of counsel comprises two correlative rights: the right to reasonably competent counsel and the right to counsel's undivided loyalty." Fitzpatrick v. McCormick, 869 F.2d 1247, 1251 (9th Cir.), cert. denied, 493 U.S. 872 (1989).[3] Thus, a defendant may challenge a lawyer's "competence" or his "undivided loyalty" (i.e., "conflict of interest"). Where a claim of ineffective assistance of counsel is based on competence, a defendant must show that (1) counsel's performance was "deficient" in that it "fell below an objective standard of reasonableness;" and (2) that the deficient performance prejudiced the defense, i.e., that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 687-688 (1984); accord, Hensley v. Crist, 67 F.3d 181, 184-185 (9th Cir. 1995); Hendricks v. Calderon, 70 F.3d 1032, 1036 (9th Cir. 1995), cert. denied, ____ U.S. ____ (March 25, 1996).[4] "Failure to make the required

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[3] The Sixth Amendment guarantee of effective assistance of counsel extends to appellate counsel on direct appeal of a conviction. Evitts v. Lucey, 469 U.S. 387, 396 (1985); United States v. Merida, 985 F.2d 198, 202 (5th Cir. 1993).

[4] See also Darden v. Wainwright, 477 U.S. 168, 185-186 (1986) ("a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be

showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." Strickland, 466 U.S. at 700. "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Id. at 691.[5]

To establish ineffective assistance of counsel based on a conflict of interest, defendant must show that (1) his attorney "actively represented conflicting interests," and (2) this "actual conflict of interest adversely affected his lawyer's performance." Strickland, 466 U.S. at 692; Cuyler v. Sullivan, 446 U.S. 335, 348 & n.10, 350 (1980); Fitzpatrick v. McCormick, 869 F.2d at 1251. Thus, while the defendant does not have to establish "prejudice" where an actual conflict of interest is proved, he still must establish a nexus between the conflict and the attorney's performance.

In this case, the district court analyzed Guthrie's Sixth Amendment claim under the "competence" standard of Strickland, and rightly concluded that Guthrie had failed to show either that counsel's performance was deficient, or that Guthrie had been prejudiced. ER 56-58. Guthrie apparently concedes that the facts he alleges do not constitute "incompetence" under Strickland. He argues, however, that the trial court should have

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considered sound trial strategy.'") (citations omitted).

[5] Indeed, the prejudice analysis must not only focus on outcome determination, but on the question of whether or not the result of the proceeding was fundamentally unfair or unreliable. Lockhart v. Fretwell, 506 U.S. 364, 369 (1993).

applied Strickland's "conflict of interest" standard instead. He claims that an actual conflict of interest exists simply because his lawyer failed to make a promised argument. Guthrie Br. 15-18. There are at least two problems with this argument: (1) even assuming Guthrie's allegations are correct, such conduct does not constitute an actual conflict of interest and does not otherwise meet the requirements of Strickland and Cuyler v. Sullivan; and (2) Guthrie's counsel in fact made Guthrie's "come to rest" argument in the district court and mentioned it in Guthrie's opening brief on appeal.

1. The Failure To Make An Agreed On Argument Does Not Of Itself Constitute A Conflict Of Interest

"An 'actual conflict of interest' occurs when counsel 'actively represents conflicting interests.'" Maiden v. Bunnell, 35 F.3d 477, 480 (9th Cir. 1994), citing Strickland. Conflicts of interest arise out of "personal interests of counsel that [are] inconsistent, diverse or otherwise discordant' with those of his client and which affected the exercise of his professional judgment on behalf of his client." Govt. of Virgin Islands v. Zepp, 748 F.2d 125, 135 (3d Cir. 1984). In conflict of interest cases, including those relied on by Guthrie (Guthrie Br. 16-18), conflicts may arise where counsel simultaneously or successively represents others whose interests may be inconsistent, divergent, or in conflict with those of the defendant,[6] or where counsel's

[6] Even where multiple representation of defendants occurs, the defendant must identify an actual conflict of interest to

own personal interests are in conflict with the defendant's. Id. at 135-136; Fitzpatrick v. McCormick, 869 F.2d at 1252; see Maiden v. Bunnell, 35 F.3d at 480-481 (conflict can occur where attorney "switches sides" in related cases, learns of privileged matter from a former client that may affect current client, or simultaneously represents clients with divergent interests); Ciak v. United States, 59 F.3d 296, 305-306 (2d Cir. 1995) (conflict in representing defendant and sister whose interests conflicted, and where current defense theory conflicted with position taken by attorney in prior litigation); (United States v. Iorizzo, 786 F. 2d 52, 54-58 (2d Cir. 1986) (conflict where defense counsel had formerly represented a key government witness); United States v. Miskinis, 966 F.2d 1263, 1268-1269 (9th Cir. 1992) (possible conflict where defendant and another witness might have testified to facts that would have impugned lawyer's integrity, and counsel might have had personal motive in deciding not to raise an "advice of counsel" defense or have client testify in his own defense); Sanders v. Ratelle, 21 F.3d 1446, 1454-1455 (9th Cir. 1994), (conflict in multiple representation of defendant and his brother for the same crime, possibly affecting counsel's decision to forego the defendant's strongest line of defense); Govt. of Virgin Islands v. Zepp, 748 F.2d at 136 (conflict based on allegation that trial counsel had potential criminal liability for the same charges on which appellant was tried); cf. In re

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prevail on an effective assistance of counsel claim. Cuyler v. Sullivan, 446 U.S. at 348 & n.14.

Agent Orange Product Liability Litigation, 800 F.2d 14, 19-20 (2d Cir. 1986) (rejecting motion to disqualify counsel in a class action suit based on multiple representation of different members of the class because no actual conflict shown).[7]

Thus, a conflict of interest does not exist simply because an attorney breaks a promise to his client. "[U]ntil a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance." Cuyler v. Sullivan, 446 U.S. at 350. Guthrie has never alleged that his counsel "actively represented conflicting interests." Rather, Guthrie asserts that counsel's broken promise constituted a "breach of contract" and a violation of "the ABA Rules of Professional Ethics" and, as such, constituted a conflict of interest. Guthrie Br. 17 (citing no authority for position). Even assuming that counsel's conduct constituted a breach of ethics, it would not constitute a denial of the Sixth Amendment right to counsel. Nix v. Whiteside, 475 U.S. 157, 165 (1986) ("Under the Strickland standard, breach of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel"); Don v. Nix, 886 F.2d at 207 (an attorney's performance does not constitute "ineffective assistance of counsel" every

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[7] Don v. Nix, 886 F.2d 203 (8th Cir. 1989), on which Guthrie relies, does not involve a conflict of interest at all. There the court analyzed an ineffective assistance of counsel claim under the "deficient performance" standard of Strickland, which Guthrie eschews, and held that appellate counsel's performance had not been deficient. Id. at 206-208 & n.3.

time he takes action that is inconsistent with his client's wishes, and "[c]ounsel . . . may exercise professional discretion in deciding which issues to raise on appeal");[8] see also Myers v. Johnson, ____ F.3d ____ (5th Cir. 1996) (1996 WL 75728 at *3-4 (Feb. 22, 1996) (a defendant who clearly and unequivocally asserts his right to present pro se brief on appeal must be allowed to preserve actual control over his appeal; but if he invites or agrees to standby counsel's substantial participation in preparation of brief, he abandons such control).

Even if broken promises were sufficient to raise an inference of a "conflict of interest," moreover, Guthrie would still have to establish: (1) that a plausible alternative defense strategy that "possessed sufficient substance to be a viable alternative" might have been pursued; and (2) that the defense was "not undertaken due to the attorney's other loyalties or interests." Winkler v. Keane, 7 F.3d 304, 309 (2d Cir. 1993), cert. denied, 114 S. Ct. 1407 (1994); United States v. Gambino, 864 F.2d 1064, 1070-1071 (3d Cir. 1988), cert. denied, 492 U.S. 906 (1989); United States v. Fahey, 769 F.2d 829, 836 (1st Cir. 1985); Cuyler v. Sullivan, 446 U.S. at 349; Maiden v. Bunnell, 35

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[8] "[D]ecisions that fall squarely within the ambit of trial strategy . . . if reasonably made, will not constitute a basis for an ineffective assistance claim . . . . Counsel certainly is not required to engage in the filing of futile or frivolous motions." United States v. Nersesian, 824 F.2d 1294, 1321-1322 (2d Cir.), cert. denied, 484 U.S. 957, 958 (1987); "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." Strickland 466 U.S. at 690; accord, Hendricks v. Calderon, 70 F.3d at 1040; Hensley v. Crist, 67 F.3d at 185.

F.3d at 481 (citation omitted)(defendant must prove that, due to a conflict, "some effect on [counsel's] handling of particular aspects of the trial was likely"). In this case, counsel did not forego any "viable" defense strategy because the arguments that allegedly were not made were frivolous (see pages 17-20, infra). And Guthrie never attempted to show how his counsel's decisions were motivated by "other loyalties or interests." See Winkler, supra.

In these circumstances, the trial court did not need to "conduct[] a hearing to determine if agreements to make specific arguments existed" (see Guthrie Br. 17). The court assumed for the purpose of its analysis that such agreements did exist. Those agreements simply did not constitute a Sixth Amendment violation. See Bonin v. Calderon, 59 F.3d 815, 838 (9th Cir. 1995) (because defendant "failed to allege facts which, if proved, would entitle him to relief, the district court was not required to hold an evidentiary hearing"), cert. denied, 116 S. Ct. 718 (1996); accord, United States v. McGill, 11 F.3d 223, 225-226 (1st Cir. 1993). Because the district court applied the correct legal standard in evaluating Guthrie's ineffective assistance of counsel argument, and because Guthrie does not contend that his allegations establish ineffective assistance of counsel under that standard, the district court's decision can be affirmed without further inquiry.

2. A "Come to Rest" Argument Was In Fact Made

In any event, while Guthrie did not offer any direct proof of his own "intent" with respect to the "come to rest" doctrine at trial, his counsel litigated the issue vigorously. He cross-examined bank representatives and the Washington-based trustees about the nature of the foreclosure transactions, attempting to establish that Guthrie's payments had "come to rest" with the trustees and had not remained in the flow of interstate commerce. Tr. 315-319, 355, 378-379; 458-460, 463-465, 528-530, 538, 541-550; Supp. ER 7-14, 18-37. In moving for acquittal at the close of the government's case, defense counsel argued to the trial court:

> my client's money entered into the trustee's possession where it there changed character . . . . That is a substantial interruption [in the flow of interstate commerce].

Tr. 579; Supp. ER 38. And in his closing argument, defense counsel argued to the jury that the flow of commerce had essentially come to rest when Guthrie tendered his payments to the bank trustees (Tr. 695-696; Supp. ER 39-40)(emphasis added):

> [E]very witness . . . agreed that Guthrie owed no money to the bank, that the bank was not selling anything to Mr. Guthrie. Guthrie's funds were never intended to go to South Carolina or Maryland, they were intended to go to the trustee in Seattle or Everett. Because Mr. Guthrie was simply buying title to a piece of property from the trustee. Exchanging cash for deed. And as Mr. Bell told us, that was it.
>
> Look who the checks were written to. The checks are all in evidence. Mr. Guthrie did not write checks to banks in South Carolina and Maryland. He wrote a check to Mr. Bell

> and another one to TSI in the State of Washington. That's where he intended the funds to end, because he said so in the way he wrote his check.

This was the best "come to rest" argument available to Guthrie and his counsel ably and forcefully raised it.[9]

Moreover, the trial court charged the jury on this come to rest defense (Tr. 656-657; ER 10-11) (emphasis added):

> The Government can demonstrate a restraint on trade if it can show that the conspiracy directly involves goods or transactions moving across states lines. If the Government proves only an indirect or incidental relationship between an agreement to restrain trade and interstate commerce, you must find the defendant not guilty.
>
> Funds in interstate commerce are considered in commerce until they reach the point where their movement is intended to end.

By its verdict, therefore, the jury rejected the defense that Guthrie now claims he was denied.

Moreover, contrary to Guthrie's assertions (Guthrie Br. 19, 23, 27-28), the trial court never precluded Guthrie from presenting evidence to show that he did not intend the money he paid the trustees to cross state lines. The transcript passage to which he refers for this allegation (Guthrie Br. 19) concerns an entirely separate issue: whether Guthrie's "good faith" belief that what he was doing was legal was a defense to bid rigging. Defendant wanted to present evidence that he received

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[9] The government presented substantial evidence to show that the parties to the foreclosure sales did not in fact intend the funds to "come to rest" with the trustees, however. See Guthrie I 7-8; Supp. ER 61-62.

advice from lawyers that his conduct was not illegal. The district court properly excluded "lawyers' opinions" relating to that alleged "good faith" defense (Tr. 114-115; Supp. ER 1-2), and this Court affirmed that determination. Guthrie I at 3; Supp. ER 57.[10]

Finally, despite Guthrie's claim that his counsel failed to make a come to rest argument on appeal, the opening brief in his original appeal claimed:

> [The trial court erroneously] directed a verdict against Guthrie without regard to whether the jury considered that he was directly in the continuous flow of interstate commerce or not, and without regard to whether he and the trustee intended and understood the funds simply went to the trustees for the deeds, and to whether the funds acquired a different purpose and character once in the hands of the trustees.

Guthrie I Guthrie Br. at 44; Supp. ER 51. The Court rejected this argument in affirming Guthrie's conviction.[11]

Thus, to the extent Guthrie's "intent" was relevant to the interstate commerce element, the issue was litigated at his trial and resolved against him on his former appeal.

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[10] Guthrie devotes a good portion of his "Statement of the Facts" to rehash this "good faith" defense (Guthrie Br. 5-8), but does not (and could not) raise this issue to collaterally attack his conviction. See United States v. Addonizio, 442 U.S. 178, 185-186 (1979), and discussion at page 20, infra.

[11] If, as Guthrie appears to believe, his "come to rest" argument was not made in his opening brief, then his attorney would have been precluded from making that argument for the first time in a reply brief or at oral argument. All Pacific Trading v. Vessel M/V Hanjin Yosu, 7 F.2d 1427, 1434 (9th Cir. 1993), cert. denied, 114 S. Ct. 1301 (1994).

B. Guthrie's "Come to Rest" Argument Misstates The Law

Guthrie's "come to rest" argument would have required the jury to acquit him if it found that he did not intend the money he paid on the rigged foreclosures to cross state lines. Guthrie claims that the defendant's intent was "determinative" of interstate jurisdiction. Guthrie Br. 21, also 11. This argument confuses the Sherman Act's jurisdictional requirements with its criminal intent standards, and is an incorrect statement of the law.

As the Supreme Court held in Hospital Bldg. Co. v. Rex Hospital Trustees, 425 U.S. 738, 744 (1976), "the fact that an effect on interstate commerce might be termed 'indirect' because the conduct producing it is not 'purposely directed' toward interstate commerce does not lead to a conclusion that the conduct at issue is outside the scope of the Sherman Act." Accord, Lease Lights, Inc. v. Public Service Co., 701 F.2d 794, 798-799 (10th Cir. 1983); Const. Aggregate Transport, Inc. v. Florida Rock Industries, Inc., 710 F.2d 752, 766 n. 30 (11th Cir. 1983). Whether defendants "intended their restraint to affect interstate commerce" is "simply irrelevant." Hospital Bldg. Co. v. Rex Hospital, 425 U.S. at 745.

Contrary to Guthrie's assertions, therefore, the government was not required to prove that the defendant knew of the interstate nature of the foreclosure transactions in order to convict. This Court so held in Guthrie's first appeal. In rejecting Guthrie's claims, the Court made clear that the

government need only prove one thing about a defendant's mental state in a Sherman Act case involving a per se offense such as bid rigging: that the defendant knowingly agreed to rig bids. The government need not prove that the defendant intended to restrain trade or achieve anticompetitive effects, or that defendants knew such effects were likely. Guthrie I at 1-3; Supp. ER 1-3; accord, United States v. Alston, 974 F.2d 1206, 1210 (9th Cir. 1992); United States v. Brown, 936 F.2d 1042, 1045-1046 (9th cir. 1991).[12]

The "come to rest" doctrine does not negate these principles. That doctrine, which is not limited to Sherman Act cases, involves the jurisdictional question of when the movement of goods shipped in interstate commerce comes to an end. If goods have come to rest within a state before the defendant's involvement, then defendant's activities are purely local in nature rather than in the flow of commerce.[13] United States v.

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[12] Consistent with this rule in Sherman Act cases, this Court has also ruled in cases under other federal statutes that a defendant's knowledge of the interstate nature of the conduct charged is not required. See, e.g., United States v. Lothian, 976 F.2d 1257, 1266 (9th Cir. 1992) (transportation of fraudulently obtained property); United States v. Michaels, 796 F.2d 1112, 1117 (9th Cir. 1986) (transportation of explosives), cert. denied, 479 U.S. 1038 (1987); United States v. Napier, 518 F.2d 316, 318-319 (9th Cir.) (kidnapping), cert. denied, 423 U.S. 895 (1975); United States v. Masters, 456 F.2d 1060, 1061 (9th Cir. 1972) (transportation of stolen goods); Bibbins v. United States, 400 F.2d 544, 545-546 (9th Cir. 1968) (transportation of stolen vehicle).

[13] Under the Sherman Act, an activity can be "within the flow of" interstate commerce or "substantially affect" interstate commerce for jurisdiction to attach. E.g., Thornhill Publishing

American Service Corp., 580 F.2d 823, 826 (5th Cir. 1978), cert. denied, 439 U.S. 1071 (1979) (but "[a] temporary pause in transit does not necessarily terminate the interstate journey"); United States v. Cadillac Overall Supply Co., 568 F.2d 1078, 1083-1086 (5th Cir.), cert. denied, 437 U.S. 903 (1978); Plymouth Dealers Ass'n v. United States, 279 F.2d 128, 135 (9th Cir. 1960). In come to rest cases, the courts consider many factors, including the intent of the parties involved in the interstate shipments, to determine whether, in a "practical sense," the required nexus with interstate commerce has been established. Goldfarb v. Virginia State Bar, 421 U.S. 773, 784 (1975); see Northern California Pharmaceutical Ass'n v. United States, 306 F.2d 379, 386-387 (9th Cir. 1962), cert. denied, 371 U.S. 862 (1962); see also United States v. Nukida, 8 F.3d 665, 671 (9th Cir. 1993)("no precise rule exists 'for determining when an interstate movement has come to an end,'" citing cases under various federal statutes). But while the jury may consider evidence of the parties' intent in deciding whether goods are in the flow of commerce, they are not required to rely on the defendant's intent as "critical" or controlling on the issue (compare Guthrie Br. 22). Indeed, in Northern California Pharmaceutical Ass'n, 306 F.2d at 387, on which Guthrie relies, the court looked, not to the movement of a single transaction, but to "the usual course of the whole trade, what ultimate disposition of the product is

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Co. v. General Telephone & Electronics Corp., 594 F.2d 730, 736-737 (9th Cir. 1979). The government tried this case on a "flow" theory only.

contemplated by the business people involved" to decide whether "there is a practical continuity of movement." Accord, Plymouth Dealers' Ass'n, 279 F.2d at 135 (determination on interstate commerce is a "practical one, drawn from the course of business, which the Supreme Court has stressed as controlling") (citations omitted). In "come to rest" cases, as in all other Sherman Act cases, the ultimate jurisdictional determination is whether the defendant's activity "was an integral part of an essentially continuous [interstate] transaction." United States v. Licavoli, 604 F.2d 613, 624 (9th Cir. 1979), cert. denied, 446 U.S. 935 (1980). That determination is for the jury, id.; Northern California Pharmaceutical Ass'n, 306 F.2d at 387; Las Vegas Merchant Plumbers Ass'n v. United States, 210 F.2d 732, 745 (9th Cir.), cert. denied, 348 U.S. 817 (1954), and the jury decided the issue against defendant Guthrie in this case.

Finally, Guthrie argues at length that the trial court's instructions on interstate commerce were defective and that the evidence on interstate commerce was deficient because his purchase at the foreclosure sale was a purely local transaction that was separate and distinct from the remainder of the foreclosure proceeding (Guthrie Br. 24-30). These nonconstitutional arguments were raised in his direct appeal and decided against him (see pages 3-4 & n.2, supra); they are not cognizable in this § 2255 proceeding in the absence of intervening law or new evidence. United States v. Addonizio, 442 U.S. 178, 184-186 (1979); Thompson v. United States, 7 F.3d 1377,

1379 (8th Cir. 1993), cert. denied, 114 S. Ct. 1383 (1994); United States v. Warner, 23 F.3d 287, 291 (10th Cir. 1994), cert. denied, 116 S. Ct. 1030 (1996); United States v. Orejuela, 639 F.2d 1055, 1057 (3rd Cir. 1981)(per curiam); Cauley v. United States, 294 F.2d 318, 320 (9th Cir. 1961).

II. THERE WAS NO NEED TO CONDUCT A HEARING TO DETERMINE WHETHER A MINOR ERROR IN THE TRANSCRIPT PREJUDICED GUTHRIE

Guthrie claims that the trial court should have conducted a hearing to determine whether an error in the trial transcript that was not detected until 1994 prejudiced Guthrie. This claim is frivolous.

Although Guthrie characterizes the transcript error as "seriously prejudicial" (Guthrie Br. 30, argument "D"), it was neither serious nor prejudicial. The correction has no bearing on Guthrie's involvement in bid rigging, does not dilute the force of the evidence on interstate commerce, and does not even affect Guthrie's irrelevant claim that he had no knowledge of the interstate nature of the foreclosure sale.

Edward Payne, an unindicted coconspirator, testified that Guthrie gave him $1,000 for agreeing to withdraw from bidding on one of the foreclosed properties. Tr. 389-391; Supp. ER 15-17. According to the original transcript, Payne testified (Supp. ER 15):

> He [Guthrie] said that -- explained we're just going to bid this up, and give the excess money over what the Government expects on the minimum bid is what we'll be paying.

In the corrected version, Payne stated:

> He [Guthrie] said that -- explained we're just going to bid this up, and give the excess money over what the Government expects on the minimum bid, we'll go to the bank.

ER 40. Under both the erroneous and corrected transcripts, it was clear that Guthrie knew that "the Government" was expecting a certain minimum bid.[14] Other trial evidence indeed suggests that Guthrie knew that the properties involved were federally insured by HUD. Deft. Exh. 24, p. 2; Supp. ER 43 (HUD advertises property, noting ad "is limited to foreclosure sales by FHA approved lenders only"); Tr. 155-156; Supp. ER 5-6 (cross-examination of Swartout), Tr. 127-128; Supp. ER 3-4 (opening statement) (defense suggests there is more "risk" involved in buying HUD properties because bidders cannot enter the properties to inspect them before auction); Govt. Exh. 10e, Supp. ER 41 (Trustee's notice of sale lists bank as "beneficiary," although it does not give its address). This belies Guthrie's assertions that he believed that the only party in interest in these foreclosure actions was the state-based trustee.

While the original version of Payne's testimony suggests

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[14] Guthrie suggests that, because the government referred to the erroneous transcript passage in its brief on the original appeal, the passage must have had an undue prejudicial effect on the Court's consideration of the interstate commerce issue (Guthrie Br. 31-32). But the government's reliance on this passage had nothing to do with the interstate commerce issue; rather, the passage was referred to in the government's "statement of facts" to show how the conspiracy operated and how Guthrie persuaded the other potential bidders at the foreclosure sales not to bid on the properties. Guthrie I U.S. Br. 5-6; Supp. ER 53-54.

that Guthrie told other potential bidders that they should not "just . . . bid this up" because the excess money would go to the government, the new version suggests that the "excess money" would go "to the bank."[15] This amendment has no effect whatever on whether or not Guthrie knew that the money would cross state lines (the banks who were the beneficiaries of the properties were, of course, out-of-state lenders), and does not enhance Guthrie's factual claim that he did not intend the money to cross state lines. Thus, even if defendant's knowledge of whether the funds would cross state lines were relevant, which it is not, Guthrie can claim no prejudice from the erroneous transcription.

In affirming Guthrie's conviction, this Court found substantial evidence to support "the jury's conclusion that the rigging occurred in the course of a single continuous interstate transaction." Guthrie I at 7-8; Supp. ER 61-62. The Court did not rely on or refer to any part of the erroneous transcription for this holding. Ibid. Thus, Guthrie's statement that "[t]he correction took away the only evidence in the trial transcript by which this Court could have affirmed the jury's finding of the

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[15] In context, "we'll go to the bank" is a non sequitur. "We'll," perhaps should have been spelled "will," suggesting that Guthrie knew that the Government expected that the money received at the auction would "go to the bank." But whether Guthrie meant that the excess money the conspirators saved from competing against each other would go into their own bank accounts instead of to the "Government," or whether he meant that competitive bidding would just result in the bidders paying "excess money" over what the "Government expect[ed]" would "go to the bank," is irrelevant because Guthrie's knowledge of where the money would ultimately wind up was not essential to his conviction.

'flow of commerce' starting in the possession of the defendant"[16] (Guthrie Br. 33, emphasis added) ignores this Court's opinion and the substantial record evidence on which it relied.

CONCLUSION

The district court's judgment should be affirmed.

Respectfully submitted.

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[16] Contrary to Guthrie's suggestion, moreover, there is no requirement that the "flow of commerce" "start[] with the defendant" (Guthrie Br. 33). The issue is whether Guthrie's payments were an integral part of a transaction that, at some point (either before, during, or after Guthrie's direct involvement), crossed state lines. United States v. Nukida, 8 F.3d 665, 671 (9th Cir. 1993). In this case, the funds Guthrie paid in Washington for Washington properties were transmitted to out-of-state lenders in Maryland and South Carolina to complete foreclosures that had been initiated in those states.

STATEMENT OF RELATED CASES

There are no known related cases pending in this Court. This case relates to an earlier appeal, United States v. Guthrie, No. 93-30066, in which this Court affirmed the conviction of Robert W. Guthrie. In the current proceeding, Guthrie is collaterally attacking that conviction.

Certificate of Service

I hereby certify that on this 2nd day of April, 1996, I served two copies of the accompanying BRIEF FOR APPELLEE UNITED STATES OF AMERICA and one copy of the APPELLEE'S EXCERPT OF RECORD by United States first class mail, postage prepaid, on:

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