IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

_____

No. 13-3183

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

ANNA MILLER,

Defendant-Appellant

_____

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

_____

UNITED STATES' RESPONSE TO DEFENDANT ANNA MILLER'S MOTION FOR CLARIFICATION OR PANEL REHEARING PURSUANT TO FRAP 40

_____

The United States respectfully submits this response to defendant Anna Miller's motion for clarification or panel rehearing, filed September 10, 2014. Miller was convicted of two felony offenses: 18 U.S.C. 371 (Count 1, conspiracy) and 18 U.S.C. 249(a)(2) (Count 2, willfully causing bodily injury because of a person's religion). On August 27, 2014, this Court reversed Miller's conviction on Count 2. Miller asserts that this Court should either clarify that the Court's decision also vacated her conviction on Count 1 for conspiracy, "or rehear the

question whether Count 1 should be reversed." For the reasons set forth below, Miller's motion should be denied.

BACKGROUND

1. This case arises out of a series of assaults over a two-month period by members of a religious community in Bergholz, Ohio, against practitioners of the Amish religion. On March 28, 2012, the government filed a ten-count Superseding Indictment charging 16 defendants in connection with five religiously motivated assaults. The indictment alleged that, in the fall of 2011, defendants willfully caused bodily injury to the victims by restraining and assaulting them, including forcibly cutting off their beards and hair because of their religion, in violation of 18 U.S.C. 249(a)(2), a provision of the Matthew-Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009. The indictment also charged related counts of conspiracy, obstruction of justice, and making false official statements to federal law enforcement officers.

Anna Miller was charged with two counts: Count 1 (conspiracy) and Count 2 (Section 249(a)(2)). Count 1 charged all 16 defendants with conspiracy in violation of 18 U.S.C. 371, and alleged three distinct objects of the conspiracy: (1) violation of Section 249(a)(2); (2) obstruction of justice, in violation of 18 U.S.C. 1519; and (3) making false official statements, in violation of 18 U.S.C. 1001. Count 1 alleged numerous overt acts relating to each of the objects of the

conspiracy. (Indictment, R. 87, Page ID# 1186-1196). Count 2 alleged a violation of Section 249(a)(2) in connection with the September 6, 2014, assault on Miller's in-laws, Barbara and Marty Miller. (Indictment, R. 87, Page ID# 1197-1198).

2. Miller was convicted on both counts. The special verdict form for Count 1 specifically provided that if the jury found that the conspiracy was proven, it should indicate "one or more objects" of the conspiracy, which included: (1) willfully causing bodily injury to the victims because of religion; (2) knowingly and intentionally obstructing justice; and (3) making false official statements. The jury found that there were *two* objects of the conspiracy – violating Section 249(a)(2) *and* obstructing justice in violation of Section 1519. The jury also specifically found that Miller knowingly and voluntarily joined the conspiracy. (Verdict Form, R. 230, Page ID# 2036-2037, 2048).

3. On August 27, 2014, this Court reversed Miller's conviction on Count 2, concluding that the jury instruction on the meaning of "because of" in Section 249(a)(2) was incorrect, and that the error was not harmless. The Court did not address her conviction (or any of the defendants' convictions) on Count 1 (conspiracy), or the convictions of some of the other defendants for obstruction of justice and making false official statements, other than to state that "[n]one of the defendants challenges their convictions for concealing evidence and lying to the FBI." Slip op. 6.

4. Miller now asks this Court to either "clarify" that its decision reversing her Section 249(a)(1) conviction also reversed her Count 1 conspiracy conviction, or grant panel rehearing to address "whether Count 1 should be reversed." Motion 2. Although she correctly acknowledges that the jury, in finding all defendants guilty of conspiracy, specifically found two independent objects of the conspiracy (violating Section 249 and obstruction of justice), and also that Miller "knowingly and voluntarily joined that conspiracy" (Verdict Form, R. 230, Page ID# 2036-2037, 2048), she suggests that the conspiracy conviction cannot stand because the jury was not asked to identify, and therefore did not identify, which defendants conspired to commit which of the objects of the conspiracy.

DISCUSSION

Anna Miller's motion for clarification or panel rehearing should be denied. First, Miller has waived the argument that her conviction for conspiring to obstruct justice as charged in the Count 1 of the indictment should be reversed. Second, even if this issue were properly before the Court, the law is clear that because the jury – on a special verdict form – found Miller of conspiring both to violate Section 249(a)(1) *and* to obstruct justice, reversal of her conviction for violating Section 249 has no effect on her unchallenged conviction for conspiring to obstruct justice.

1. First, because Miller did not challenge on appeal her conviction by the jury for conspiring to obstruct justice,[1] she has waived any argument that her conviction for conspiring to obstruct justice should be set aside. As this Court has recognized, if those arguments could have been made to the panel in the party's appellate brief, absent "extraordinary circumstances," the Court "typically do[es] not consider arguments raised for the first time in a petition for rehearing." *United States* v. *Shafer*, 573 F.3d 267, 275-276 (6th Cir. 2009) (citation omitted); see also *ibid.* (citing cases); *Costo* v. *United States*, 922 F.2d 302, 302-303 (6th Cir. 1990) ("Generally, an argument not raised in an appellate brief or at oral argument may not be raised for the first time in a petition for rehearing."). As this Court noted in *Shafer*, Federal Rule of Appellate Procedure 40(a)(2) states that a petition for rehearing must "state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended," and a panel cannot have "overlooked or misapprehended" an issue not presented to it. 573 F.3d at 276 (citations omitted). Miller points to no extraordinary circumstances warranting an exception to this rule, and there are none. In short, there is no basis for this Court to rehear an issue not presented to it in the first instance where, as here, appellant

[1] On appeal, Miller challenged her conspiracy conviction only to the extent of arguing that the evidence was insufficient to establish that she conspired to "commit a hate crime by willfully causing bodily injury to anyone." Brief of Defendant-Appellant Anna Miller, No. 13-3183 (filed November 22, 2013), at 34.

had the opportunity to do so. See generally *Easley* v. *Reuss*, 532 F.3d 592 (7th Cir. 2008) (per curiam) (panel rehearing not a vehicle for presenting new arguments); *United States* v. *Levy*, 416 F.3d 1273 (11th Cir. 2005) (addressing court's prudential rule of declining to consider issues raised for the first time in a petition for rehearing).[2]

2. Even if this issue were not waived, it is clear that Miller's conviction for conspiracy to obstruct justice stands.

As indicated, Count 1 of the indictment charged each of the 16 defendants with engaging in a conspiracy, the objects of which were to violate Section 249, to obstruct justice, and to make false official statements. (Indictment, R. 87, Page ID# 1186-1196). As noted above, on its special verdict form, the jury found Miller (and her co-defendants) guilty of conspiring to violate Section 249 and to obstruct justice, but not guilty of conspiring to make false official statements. (Verdict Form, R. 230, Page ID# 2036-2037). The jury also specifically found that Miller (and, individually, all of the defendants) "[d]id knowingly and voluntarily join that conspiracy." (Verdict Form, R. 230, Page ID# 2048). Just as the jury's not-guilty finding on the conspiracy to make false official statements charge had no effect on

[2] For the same reasons, this Court should not "clarify" its opinion by addressing an issue, *i.e.*, the validity of the jury's special verdict finding her guilty of conspiring to obstruct justice, that Miller did not raise on appeal.

its finding of a conspiracy to obstruct justice, neither did this Court's subsequent reversal of the substantive charges for violations of Section 249.

The district court recognized as much, albeit in dicta, in its recent denial of co-defendant Linda Schrock's motion for release from incarceration. (Opinion and Order, R. 561, Page ID# 7947-7948). The district court correctly noted that this Court's decision "overturned the substantive hate crimes convictions because of an erroneous jury instruction, but the court expressly noted that none of the three defendants convicted of obstruction of justice * * * challenged their convictions on those counts." (Opinion and Order, R. 561, Page ID# 7948). The court observed that this Court's decision "does not talk about the continued validity of the conspiracy conviction given that the conspiracy conviction also encompassed obstruction of justice." (Opinion and Order, R. 561, Page ID# 7948). Although not the district court's holding (because the court found Schrock's motion premature), the court's discussion of this issue in our view is correct.[3]

Miller contends (Motion 4) that "[b]ecause the jury was not asked to determine whether a specific defendant had a particular goal, the jury relied on the defective hate-crime instruction in convicting any given defendant under Count 1." This contention is belied by the special verdict form, in which the jury specifically

[3] We are also filing today our opposition to Schrock's motion for release from incarceration (Appeal No. 13-3194).

found that each defendant (specifically including Anna Miller) knowingly and voluntarily joined "that conspiracy." (Verdict Form, R. 230, Page ID# 2048). "[T]hat conspiracy" refers to the conspiracy found by the jury, which included, as found by the jury, two objects – conspiracy to commit a hate crime *and* conspiracy to obstruct justice. In other words, the jury found that Miller joined a conspiracy with two objects, and even if one of the objects is disallowed, she is still guilty of joining a conspiracy to commit the other, unchallenged, object of the conspiracy.

Moreover, contrary to Miller's suggestion (Motion 4), the jury was properly instructed as to the conspiracy count. The court correctly charged the jury concerning a conspiracy to commit three separate offenses. The court instructed the jury that the government "does not have to prove that the Defendants agreed to commit each of these crimes, but you must unanimously agree that the Government has proved an agreement to commit at least one of them for you to return a guilty verdict on the conspiracy charge." (Jury Instructions, R. 542, Page ID# 7245). The court further instructed that "[i]n order to find a Defendant guilty of Count 1, you need only unanimously find that he or she entered into an agreement to bring about a religiously motivated assault, or that he or she entered into an agreement to obstruct justice, or that he or she entered into an agreement to make false statements to the FBI." (Jury Instructions, R. 542, Page ID# 7248). Finally, the court instructed the jury that Count 1 "accuses the Defendants of

committing the crime of conspiracy in more than one possible way. * * * The Government does not have to prove all three objects for you to return a guilty verdict on this charge. * * * Proof beyond a reasonable doubt of any one of these offenses is enough. However, in order to return a guilty verdict, all 12 of you mush unanimously agree upon which one or more of the three offenses was the object of the conspiracy and indicate such finding on the appropriate verdict form. If you cannot agree on at least one of these offenses in that manner, you must find the Defendant not guilty." (Jury Instructions, R. 542, Page ID# 7249). Thus, the court's instructions required the jury to unanimously agree with respect to each of the objects of the conspiracy alleged in the indictment, and with respect to each individual defendant.

The cases Miller cites (Motion 5-7) are inapposite, as they address situations where a reviewing court is unable to ascertain whether the jury relied upon a valid or invalid legal theory in rendering a general verdict. The detailed special verdict used by the jury in this case leaves no doubt that it found that each of the defendants in this case entered into a conspiracy whose purpose was to obstruct justice. Indeed, where a special verdict form in a conspiracy count lists multiple objects of the conspiracy, a finding of not guilty as to one object of the conspiracy does not affect conviction on the others. See, *e.g.*, *United States* v. *Corrales-Quintero*, 171 F. App'x 33, 34-35 (9th Cir. 2006) (noting that special verdict form

presented one conspiracy with two objectives, and "acquittal of one objective does not affect conviction on the other objective").

To be sure, the issue of the validity of conspiracy convictions often arises in the context where a special verdict form is *not* used, but these cases prove our point. In *United States* v. *Palazzolo*, 71 F.3d 1233 (6th Cir. 1995), for example, defendants were charged with conspiracy to commit three offenses. The jury was instructed that it was sufficient for the government to prove that defendants were involved in a conspiracy to commit "any one or more" of three listed offenses. *Id.* at 1234-1235. The jury found defendants guilty of conspiracy, but the district court granted a motion for new trial on one of the substantive offenses that was an object of the conspiracy because of an improper jury instruction. *Ibid.* On appeal, this Court reversed the conspiracy conviction. *Id.* at 1238. The Court stated that a "one-is-enough" conspiracy charge "makes it impossible to know if the jury found an agreement for the commission of all, some or only one of the target crimes," and "nullifies the argument that the jury 'necessarily' based its verdict on a finding that the defendants conspired to commit one of the offenses properly defined in the instructions." *Id.* at 1237. See also *United States* v. *Boots*, 80 F.3d 580, 589 (1st Cir. 1996) (absent specific verdict form, court could not determine if the jury found conspiracy based on one of the valid objects of the conspiracy rather than the invalidated object; conspiracy conviction vacated); *United States* v. *Manarite*, 44

F.3d 1407, 1413-1414 (9th Cir. 1995) (reversing conspiracy conviction where indictment charged multiple objects of the conspiracy, one of the objects was invalidated, and the general verdict form gave no indication of which object or objects formed the basis of the conspiracy conviction).

Given the specific jury verdict in this case, there is no basis for this Court to "clarify" the effect of its decision on Miller's conviction for conspiracy to obstruct justice, or address in the first instance on rehearing an argument she never made to the panel – *i.e.*, that her conviction for conspiring to obstruct justice was invalid. Contrary to Miller's contention, this is not a case where this Court does not know the basis of her conspiracy conviction.[4]

[4] For this reason, there is no basis for this Court to accept Miller's invitation (Motion 6-7) to "reexamine" the evidence to determine whether it was sufficient to support her conviction for conspiring to obstruct justice. Her failure to raise a sufficiency (or other) argument on appeal renders the jury's verdict against her on this charge a final determination.

CONCLUSION

This Court should deny Anna Miller's motion for clarification or panel rehearing.

Respectfully submitted,

STEVEN M. DETTELBACH
United States Attorney

MOLLY J. MORAN
Acting Assistant Attorney General

s/ Thomas E. Chandler

THOMAS E. GETZ
BRIDGET M. BRENNAN
Assistant United States Attorneys
Office of the United States Attorney
Northern District of Ohio
801 West Superior Avenue
Suite 400
Cleveland, OH 44113
(216) 622-3810

DENNIS J. DIMSEY
THOMAS E. CHANDLER
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 307-3192

CERTIFICATE OF SERVICE

I hereby certify that on September 22, 2014, I electronically filed the foregoing UNITED STATES' RESPONSE TO DEFENDANT ANNA MILLER'S MOTION FOR CLARIFICATION OR PANEL REHEARING PURSUANT TO FRAP 40 with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit using the Appellate CM/ECF system.

I further certify that all parties are CM/ECF registered, and will be served electronically.

s/ Thomas E. Chandler
THOMAS E. CHANDLER
Attorney