IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DAVID P. TRUE
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY

UNITED STATES' RESPONSE IN OPPOSITION TO DEFENDANT-APPELLANT DAVID P. TRUE'S MOTION TO MODIFY THE RECORD, AND UNITED STATES' MOTION TO STRIKE REFERENCES TO NON-RECORD MATERIAL

This is an appeal from a district court order denying defendant-appellant David P. True's application for attorney's fees and expenses pursuant to the Hyde Amendment, 18 U.S.C.A. §3006A note ("Attorney Fees and Litigation Expenses to the Defense") (1999 Pocket Part), Pub. L. 105-119, §617, 111 Stat. 2440, 2519 (Nov. 26, 1997). True has filed a Motion To Modify the Record. That motion is untimely because it was not filed until briefing in this Court was completed. The United States does not otherwise oppose True's request to supplement the record in this case with materials from the public record in a sentencing proceeding before the same district judge who entered the Hyde Amendment order from which this appeal arises. The United States does oppose True's request to supplement the record with excerpts from a deposition that was not available to the district court or to government counsel. The United States also moves to strike all references to non-record materials in True's Reply Brief.

BACKGROUND

True was charged with conspiring to fix prices, rig bids and allocate customers in violation of section 1 of the Sherman Act, 15 U.S.C. §1. R. 1. He was tried and acquitted by jury in the United States District Court for the Western District of Kentucky, Owensboro Division, before United States District Judge Joseph H. McKinley, Jr. R. 247.

On October 22, 1998, True filed his Application for Fees and Expenses Pursuant to the "Hyde Amendment." R. 253. On January 8, 1999, the district court denied the application, "conclud[ing] that the Defendant is not entitled to fees and expenses because the position of the United States in pursuing this prosecution was not vexatious, frivolous, or in bad faith." R. 262. True's notice of appeal from this order was filed on January 15, 1999. R. 263.

Appellant True filed his brief in this Court on March 15, 1999; appellee United States filed its brief on April 14, 1999; True filed his reply brief and his motion to modify the record on April 28, 1999. In Section II.C.2 of his reply brief, True relies on three documents that are not part of the record on appeal, contending that they support his allegations concerning the government's use at the criminal trial of John Bussey's testimony that his boss, Joseph Longmire, told Bussey that Waller Caldwell (Longmire's superior)[1] talked with True to get True to cooperate in a price increase.

The three documents (Exhibits E, F, and G to the motion to modify the record), which True now asks this Court to add to the record, are: 1) the government's September 25, 1998, Motion for a Downward Departure, under Section 5Kl.1 of the Sentencing Guidelines, with

[1]Longmire, Caldwell and Bussey were employed by Atlas Powder Company, a competitor of True's employer, Austin Powder Company.

respect to Longmire; 2) a transcript of the October 1, 1998, sentencing of Longmire, in the Western District of Kentucky, before Judge McKinley; and 3) excerpts from Longmire's deposition taken on March 30, 1999, in a private civil antitrust action, *In re Commercial Explosives Antitrust Litigation*, No. 2:96 MDL 1093S (D. Utah).

Upon receiving True's motion, the Clerk of this Court instructed True to file a motion to modify the record in the district court; True did so on May 5, 1999.[2] The Clerk also deferred further proceedings in this Court pending a decision by the district court on that motion.[3]

ARGUMENT

The district court fully considered True's Hyde Amendment application on the basis of "the arguments of counsel and the record in this case." R.262. True appealed that decision; this Court will review it on that record under an abuse of discretion standard, *see* US Br. at 21-25; and briefing has been completed. True's request that this Court "modify the record" at this point is untimely to say the least, and the documents he seeks to present are irrelevant. Nonetheless, the United States does not object to supplementing the record with the first two documents -- the government's motion regarding Longmire's sentence and the sentencing transcript. At the time of True's Hyde Amendment application, these documents were part of the record in a related criminal proceeding before the same district judge who ruled on True's application, and in which the United States was represented by the same counsel who prosecuted True. The United States

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[2]The United States files this Response now to comply with the time limit of Fed. R. App. P. 27(a)(3). The United States also will file a response to the district court motion, and may seek leave to file a supplemental response in this Court after the district court acts.

[3]The briefing order entered by the Court on February 1, 1999, provided that the deferred joint appendix would be filed May 5, and the parties' final briefs, with Joint Appendix cites, on May 26.

does oppose supplementing the record with the Longmire deposition excerpts, however. The deposition was taken *after* the Hyde Amendment ruling and thus was not before the district court prior to its ruling. There is absolutely no basis under Federal Rule of Appellate Procedure 10(e) or other authority for making it a part of the record in this case, and there is no reason for this Court to consider it.

1. Under the Federal Rules of Appellate Procedure: "The following items constitute the record on appeal: 1) the original papers and exhibits filed in the district court; 2) the transcript of proceedings, if any; and 3) a certified copy of the docket entries prepared by the district clerk." Fed. R. App. P. 10(a). This formal record, of course, should accurately reflect the district court proceedings. *See, e.g., United States v. Barrow*, 118 F.3d 482, 487-88 (6th Cir. 1997). Rule 10(e) provides a remedy if some correction or modification of the record is necessary. Specifically, Rule 10(e)(1) provides that the district court is to settle "any difference . . . about whether the record truly discloses what occurred in the district court"; Rule 10(e)(2) allows the parties by stipulation, the district court, or the court of appeals to correct any material and accidental "omission or misstatement in the record"; and Rule 10(e)(3) provides that "[a]ll other questions as to the form and content of the record shall be presented to the court of appeals."[4]

In this case, True does not contend that there was any error or accidental omission in the record with respect to any filing or evidence that came before the district court. Rather, invoking Rule 10(e)(3), he seeks to present for consideration by this Court "three *additional* documents

[4]The language and organization of Rule 10(e) were amended in December 1998, and Rule 10(e) was divided into three subparts. The changes were "to make the rule more easily understood [and were] stylistic only." Fed. R. App. P. 10(e) advisory committee note.

that were *not* before the district court because all three post-date the conclusion of the criminal trial that gave rise to this appeal." Motion at 1 (emphasis added).

Appellant cites no Sixth Circuit decision in support of his request. The general rule, of course, is that "only those matters that were in fact presented to the district court are considered part of the record on appeal." 16A Charles Allan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure §3956.1, at 322 (1999). However, some courts of appeals hold that "[*i*]*n special circumstances* . . . a court of appeals may permit supplementation of the record to add material not presented to the district court." *Id*. at 349-51 (emphasis added) (citing cases granting and denying permission to supplement the record). The two cases on which True relies (Motion at 2), *In re Capital Cities/ABC's Application*, 913 F.2d 89, 97 (3d Cir. 1990), and *United States v. Aulet*, 618 F.2d 182, 185-87 (2d Cir. 1980), support only the proposition that *some* courts of appeals *in some circumstances* -- pursuant to Rule 10(e) or in the exercise of their inherent authority -- have supplemented records on appeal.[5]

It appears that this Court has not definitively resolved the question of its authority to supplement the record with material not presented to the district court. It has clearly established, however, that the district courts may only correct the record and may not add new material. *See, e.g., United States v. Barrow*, 118 F.3d at 487-88. And this Court has emphasized that "[f]air and effective appellate review requires . . . a stable record." *See S&E Shipping Corp. v. Chesapeake & O. Ry. Co.*, 678 F.2d 636, 642 (6th Cir. 1982). Thus, in a footnote to an

[5]The Third Circuit in *Capital Cities* declined to supplement the record. 913 F.2d at 98. In *Aulet*, an ineffective assistance of counsel claim was raised on appeal, and the Second Circuit permitted the government to supplement the record with section 3500 (witness) statements where the trial transcript demonstrated that government counsel had given defense counsel the statements. 618 F.2d at 187.

unpublished decision, this Court (striking material that the district court had added under Rule 10(e)), observed: "While the court on appeal has discretionary authority to supplement the record with material not reviewed by the district court, . . . most courts have disapproved of adding new material to the record." *Stotts v. Memphis Fire Dep't*, 774 F.2d 1164 (table of decisions without reported opinions), 1985 WL 13722 at ** 3 n.2 (6th Cir. 1985).[6]

Therefore, whatever authority this Court has to supplement the record should be used sparingly and only in special circumstances where it is consistent with proper judicial administration and fair to all parties. The Court's authority to supplement the record on appeal is not a license for appellants to put extraneous material before this Court in the first instance.

2. A threshold defect in True's motion to supplement the record is that it is untimely. The sentencing motion and transcript *pre-date* True's October 22, 1998, Hyde Amendment *application*, as well as the district court's January 8, 1999, order denying that application. True does not claim that he was unaware of the motion and transcript when he filed the application, or that there was any other reason he could not have submitted them with any of his Hyde Amendment filings. He simply chose not to. Although the sentencing and the Hyde Amendment application were both before Judge McKinley, True also did not ask the district court to include the sentencing materials in the record on appeal on the ground that they had, in effect, been before the district court on the application.

Longmire's civil deposition was taken after the district court denied the Hyde Amendment application, but True did not have to wait for the deposition to find out that

[6]Pursuant to Circuit Rule 10(f), a copy of this unpublished decision is attached as Addendum A.

Longmire denied the conversations to which Bussey testified. True's counsel knew at the time of trial that Longmire and Caldwell had "denied or professed no recollection" of such conversations with True because, in compliance with the United States' *Brady* obligations, government counsel had so informed defendant. *See* Motion, Exh. C at 2; U.S. Br. at 45.

If True wanted to introduce an affidavit or testimony from Longmire (or Caldwell) in support of his Hyde Amendment application, he should have sought to do so in the district court before the court ruled on the application. However, True's request for discovery in his supplemental memorandum in the district court (R.255 at 15-16), which the district court properly denied (*see* U.S. Br. at 46-49), referred only to "discovery from the government"; he did not ask to obtain or present testimony from Longmire.[7] Instead, now that his Hyde Amendment application has been denied, True argues that the district court should be reversed based on excerpts from a deposition in another case of a witness whose testimony he never sought to put before the district court prior to its ruling. Disgruntled litigants should not be permitted to use Rule 10(e)(3) to supplement their arguments on appeal with such extraneous and irrelevant material.

Further, True's motion fails to explain why he did not file it until April 28, 1999, *after* the United States had filed its brief in this Court. True's counsel apparently knew about the sentencing materials even before he filed his Hyde Amendment *application*, and certainly before he filed the notice of appeal, and he was present at the deposition on March 30, 1999. There

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[7]We do not suggest that an affidavit or testimony from Longmire would have been relevant or that True would have had a right to compel testimony from Longmire in support of his Hyde Amendment application. *See* U.S. Br. at 46-49. Rather, our point is that because True did not offer such evidence or request such discovery in the district court, he has not presented or preserved the issue for argument to this Court.

simply is no excuse for seeking to put new material into the reply brief in this way and at this late date, delaying and complicating the appellate schedule for all concerned.

3. True's proposed supplements to the record are not material to the Hyde Amendment issues now before this Court. They are not part of the record in the criminal case itself, and "the position of the United States" is to be evaluated for purposes of the Hyde Amendment on the basis of that record, *see* U.S. Br. at 46-47. Moreover, even in terms of appellant's arguments, the deposition excerpts are at most cumulative evidence on an undisputed and immaterial point -- that if Longmire had been called as a witness he would have denied or professed no recollection of the conversations to which Bussey testified. As the United States explained in its brief in this Court (U.S. Br. at 44-45), Longmire's denials do not suggest that government counsel's decision to call Bussey, even if viewed in isolation,[8] was in any way improper. The district court admitted Bussey's testimony concerning True's communications with Longmire and Caldwell under Rule 801(d)(2)(E) (co-conspirator statements), having considered and rejected the argument from True's counsel that it would be misleading to put on only Bussey, when the other potential witnesses -- Longmire and Caldwell -- denied or did not recall the such conversations.

The United States had no obligation to call Longmire and Caldwell as trial witnesses, and True chose not to. Assuming that Longmire testified truthfully at his deposition, his denials of conversations that Bussey described in his trial testimony illustrate only what the United States had disclosed in this case, prior to the criminal trial, in the *Brady* letter and what is common in

[8]In a criminal case that has gone to trial, the Hyde Amendment calls for an evaluation of the United States' position that the defendant should be indicted, tried and convicted, not an evaluation of each statement or litigating decision by government counsel. *See* U.S. Br. at 38 n.26.

criminal cases: witnesses, even when truthful, do not always have the same recollections; they may disagree with one another and, indeed, may contradict their own prior statements. It would be absurd to suggest that a defendant may recover fees under the Hyde Amendment whenever the United States brings a case in which the witnesses are not in unanimous agreement concerning every relevant event; thus, Longmire's deposition adds nothing to the meritless argument True already has made concerning Bussey's trial testimony. Further, the deposition transcript *itself* could not be relevant to True's arguments about what government counsel knew when True was indicted and tried since the deposition took place *after* the trial.

Nor do the sentencing materials further True's argument that, if the government believed Bussey, it would have taken some action against Longmire and Caldwell if they did not corroborate his testimony. Failure of recollection does not violate a plea agreement, and to qualify for the departure recommendation, Longmire was not obligated to tell a particular version of events; he was obligated to tell the truth to the best of his recollection. Moreover, as the United States noted in its Brief (at 45 n.36), any leniency with respect to Longmire's sentencing would only undermine True's contention that the United States was "pressuring" or "coercing" witnesses in order to obtain their testimony against him.

4. Nonetheless, the United States does not object to supplementing the record with the sentencing materials True has submitted as Exhibits E and F. District Judge McKinley, who presided in True's trial and considered and denied his Hyde Amendment application, also sentenced Longmire, and counsel for the United States in True's case also represented the United States in the Longmire sentencing. Thus, the judge and the parties were fully aware of the

record in the sentencing proceeding, and it would be reasonable to assume that the district court found nothing there to support True's Hyde Amendment claim.

5. The United States *does* object, however, to inclusion of the excerpts selected by True's counsel from the transcript of Longmire's deposition (Exhibit G). Unlike the sentencing materials, the deposition excerpts were in no way, shape or form "before the district court." As we have noted, the deposition took place months after the district court had denied the Hyde Amendment application. Nor is there any basis for this Court to consider the deposition excerpts de novo in the context of this appeal.[9] This Court will review the district court's denial of the Hyde Amendment application under an abuse of discretion standard, and it should uphold, unless clearly erroneous, the district court's determination that the United States' position was not vexatious, frivolous, or in bad faith. *See* U.S. Br. at 21-25.

If True thought that the deposition testimony satisfied the standard of Federal Rule of Civil Procedure 60(b)(2) -- "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)" -- he could have sought relief under Rule 60(b), even after filing his notice of appeal. *See* 11 Wright, Miller & Mary K. Kane, Federal Practice and Procedure §2873 (1995). But he could not meet the Rule 60(b) standard, and he should not be allowed to use Federal Rule of Appellate Procedure 10(e)(3) to end-run it.

It would be particularly inappropriate for this Court to supplement the record with the excerpts True has selected from Longmire's deposition because the deposition is subject to a

[9] *Compare United States v. Aulet*, 618 F.2d 89, 97 (2d Cir. 1990) (supplementing record with material that had been available to both parties and was crucial to an ineffective assistance of counsel claim that the Second Circuit would consider in the first instance).

protective order entered by the Utah district court.[10] Thus while True's counsel attended the deposition (*see* Motion, Exh. G. at 2), counsel for the United States were not allowed to be present, and they may not even obtain a complete copy of the transcript without leave of that court. In these circumstances, neither this Court, the district court, nor the United States has any basis for assessing whether the selected portions of Longmire's deposition that True now relies on accurately reflect Longmire's entire testimony or, indeed, whether they are consistent with other evidence before the Utah district court.[11]

6. True's reply brief relies on materials that are not a part of the record in this case, and the deposition excerpts, in particular, should not be made part of this record. Accordingly, the Court should strike those portions of True's reply brief that rely on the deposition excerpts and on any other materials as to which his motion is denied. It should direct him promptly to refile that brief with all references to non-record materials removed (but with no other changes since the filing date has passed).

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[10]The protective order and an order permitting True to use discovery materials "in his defense in the criminal case" are attached as Addendum B and Addendum C to this Response. Those orders were discussed in the course of the criminal trial, but were not made a part of the record.

[11]We are *not* suggesting that disposition of this case should be delayed in order to determine whether the Utah district court would modify its protective order to allow counsel for the United States to have access to the discovery materials in the private case and to file additional parts of those materials with this Court in response to the arguments True has made in support of his Hyde Amendment application. Rather, proceedings in the Utah court to obtain access to the discovery materials in that case would further complicate and delay this appeal and burden all concerned, the deposition testimony is fundamentally irrelevant to the issues before this Court, and access to the depositions would still leave questions concerning the United States' right to cross-examination since it was not represented at any of the depositions. Thus, issues as to the protected status of the discovery materials in the Utah private case merely present an additional reason not to supplement the record in the Hyde Amendment appeal with True's selected excerpts from the Longire deposition.

CONCLUSION

This Court should deny True's Motion To Modify the Record at least as to the deposition excerpts (Exhibit G). It also should strike all references in his Reply Brief to non-record material.

Respectfully submitted,

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