

In The
United States Court of Appeals
For The Fourth Circuit

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MARTIN F. SALAZAR,

Defendant - Appellant.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
AT AIKEN**

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

In its Brief, the Government sought to introduce facts that are not contained in the Record to bolster its contention that an evidentiary hearing was not required to resolve Appellant's Motion for New Trial based upon newly discovered evidence. In doing so, the Government tacitly acknowledged that a factual record actually was necessary to determine whether a new trial was warranted. Moreover, Appellant files this Reply to clarify his position and make factual corrections to the Government's brief with appropriate citations to the Record. In doing so, Appellant establishes that his convictions should be vacated and remanded for new trial.

At the outset, the Government never challenges Appellant's argument that the Government presented no evidence of the location of Appellant's birth from someone who was present at said birth. Rather, the Government argues it had several forms of evidence, including Appellant's birth registration in Mexico and admissions from Appellant. As outlined in Appellant's brief, the Mexican birth registration had several issues, including the fact that it was filed in 1957, several months prior to the date the Government alleged Appellant was born, January 30, 1958. Such inconsistency renders the Government's evidence unreliable. Coupled with the affidavit of Appellant's sister who was present at his birth, an evidentiary hearing on Appellant's Motion for New Trial was warranted. Moreover, the

Government fails to recognize uncontroverted facts that the Department of Energy completed Appellant's retirement application, affixed the 1954 birthdate on the application, verified it through its human resources records, which included evidence of birthdate discrepancies, and then presented the retirement application to Appellant for his signature.¹ In doing so, the Government failed to acknowledge any of its obligations and responsibility for an incorrect birthdate on Appellant's retirement application, begging the question of whether agents of the Department of Energy fraudulently induced and entrapped Appellant to affirm an incorrect birthdate presented to him by the Department of Energy.

II. RESPONSIVE FACTS

The Government states that it was a fact that Appellant "was born in Nogales, Mexico, a town across the international border from Nogales, Arizona." (Govt's Br. at 5.) In making this statement, the Government seeks to establish that there was a distinct border line between Nogales, Arizona and Nogales, Mexico and that they were separate and distinct towns, rather than one town with an international border running through it. It is clear from the record that Appellant was born in Nogales. However, it is far from clear that Appellant was born on the Mexican side of the border. While his family raised him with his Mexican

¹ It should be noted that the Settlement Agreement reached between Appellant and the Department of Energy required him to apply for early retirement with a retirement date of August 26, 2005, as calculated by the agency.

heritage, as his father was a Mexican citizen, that heritage does not necessarily mean he was physically born in Mexico. Appellant provided evidence in the form of his sister's affidavit, who states she was present at his birth and that Appellant was born at his grandmother's house in Nogales, Arizona. (J.A. 615.) Even the birth registration presented by the Government establishes that Appellant's maternal grandmother lived in Nogales, Arizona at the time of Appellant's birth. (J.A. 267 [2-18].)

In support of its contention that Appellant was born in Nogales, Mexico, the Government presented and admitted into evidence an INS green card it received from Appellant's ex-wife. (J.A. 222 [1-204].) However, Appellant established that the INS green card could not be authenticated, as USCIS was unable to locate any records of Appellant's claimed naturalization. (J.A. 652-54.) As such, the reliability and authenticity of the INS green card remains in question and should not have been considered by the jury.

In its brief, the Government establishes that federal early retirement requires the retiree to have at least twenty years of service and be at least fifty years old. In doing so, the Government presented testimony at trial that those requirements were not waivable. This requirement is set forth in 5 C.F.R. § 831.114(k). For early retirement, the agency or agency head must make the request from the Office of Personnel Management and justify the request among the following requirements:

- (1) Identification of the agency or specified component(s) for which the authority is being requested;
- (2) Reasons why the agency needs voluntary early retirement authority. This must include a detailed summary of the agency's personnel and/or budgetary situation that will result in an excess of personnel because of a substantial delayering, reorganization, reduction in force, transfer of function, or other workforce restructuring or reshaping, consistent with agency human capital goals;
- (3) The date on which the agency expects to effect the substantial delayering, reorganization, reduction in force, transfer of function, or other workforce restructuring or reshaping;
- (4) The time period during which the agency plans to offer voluntary early retirement;
- (5) The total number of non-temporary employees in the agency (or specified component(s));
- (6) The total number of non-temporary employees in the agency (or specified component(s)) who may be involuntarily separated, downgraded, transferred, or reassigned as a result of the substantial delayering, reorganization, reduction in force, transfer of function, or other workforce restructuring or reshaping;
- (7) The total number of employees in the agency (or specified component(s)) who are eligible for voluntary early retirement;
- (8) An estimate of the total number of employees in the agency (or specified component(s)) who are expected to retire early during the period covered by the request for voluntary early retirement authority; and
- (9) A description of the types of personnel actions anticipated as a result of the agency's need for voluntary early retirement authority. Examples include separations, transfers, reassignments, and downgradings.

5 C.F.R. § 831.114(c). Only an agency can initiate early retirement. Contrary to suggestions of the Government, Appellant could not initiate early retirement of his own accord.

At no point during the trial did the Government attempt to present any evidence that Appellant was aware of those requirements, much less the age requirements. Rather, when the settlement agreement between Appellant and the Department of Energy was reached, the Department of Energy calculated Appellant's qualification for early retirement for August 26, 2005. Because Appellant stopped physically working prior to twenty years of service, for Appellant to qualify for early retirement he had to remain on leave without pay until he reached twenty years of service. The retirement date was calculated by the Department of Energy from its records. There is no evidence of record to suggest the Department of Energy utilized Appellant's birthdate in calculating his earliest retirement date under the settlement agreement. The only early retirement requirement that Appellant knew was the 20 year-service requirement. Appellant learned of this requirement during settlement negotiations, which resulted in assigning August 26, 2005, as his earliest eligible retirement date.

The Government also seeks to paint a picture that the idea for early retirement was solely Appellant's proposal. However, at trial, Roger Butler testified that it was his idea.

Question: Initially, the discussion with Martin as far as settling this matter regarding retirement, who brought up that issue initially, do you recall?

Answer: Well, going back to the idea of me looking for a compilation of recommendations here to put in the Settlement Agreement, probably was me talking about that.

(J.A. 386 [2-137].) Further, Butler explained that “the presumed time that he would be earliest eligible time for retirement, for him to be separated.” (J.A. 386 [2-137].) Moreover, Butler testified that he believed that the settlement agreement separating Appellant from employment with the Department of Energy would resolve the matter and it would not be referred for prosecution. (J.A. 391 [2-142].) Significantly, Butler was the decisional officer with the authority to resolve Appellant’s employment related issues. (J.A. 379 [2-130].) Butler explained that with disparities in dates of birth in the files at the Savannah River Site of the Department of Energy, Butler testified that he would have opted for the earliest possible birth date to reach the minimum threshold at the earliest possible time. (J.A. 395 [2-146].) In completing the retirement paperwork for Appellant, Butler relied upon Human Resources, and specifically Doris Hixon and Terry Frizzell, to calculate Appellant’s earliest date of retirement. (J.A. 407 [2-158].)

The Government concedes that Hixon was aware of the discrepancies in Appellant’s birthdates as early as Spring, 2004. (Govt’s Br. at 20.) At trial, however, Hixon testified that she was not aware of discrepancies in Appellant’s

date of birth at the time her department completed Appellant's retirement papers and verified Appellant's date of birth as 1954. (J.A. 316-17 [2:76-68].) Specifically, she confirmed that she reviewed the security file and testified "I don't recall seeing anything that brought in a discrepancy on his birth date." Hixon's testimony, from an agency standpoint, was in error. Even Marianne O'Conner, the Personnel Security Specialist for the Savannah River Site, testified that from her interview of Appellant in 2000, it was clear that Appellant used several different dates of birth and Appellant was unaware of his true birthdate.² (J.A. at 107 [1-89].) Hixon herself later recanted trial testimony and explained in her declaration dated August 14, 2007, that she informed the Inspector General on or about April 13, 2004, of the inconsistencies in Appellant's date of birth in Human Resources and the date in the Background Reinvestigation. (J.A. 618B-619.) Notwithstanding these discrepancies, Hixon and Human Resources chose to use January 30, 1954 as Appellant's birthdate for retirement purposes.

While the Government concedes that Hixon was aware of the discrepancies, the Government contends that there is no evidence to suggest that Terry Frizzell was aware of these discrepancies. (Govt's Br. at 23.) Frizzell was the Director of

² It should be noted that the entire interview between Marianne O'Conner and Appellant was not entered into evidence. (J.A. 91 [1-73].) Only three pages of a twenty page interview were submitted to the jury over Appellant's objection that the entire interview should have been published pursuant to Rule 106 of the Federal Rules of Evidence. (J.A. 91 [1-73].))

Human Resources for the Savannah River Site, employed through the Department of Energy. In that capacity, he requested verification of Appellant's educational background in 2004. In that request, Frizzell inquired about Appellant with possible birthdates of January 30, 1954 and January 30, 1957. The Government seemingly acknowledged that Frizzell was aware of this discrepancy when examining Nancy Cohn, Assistant Director of Records for California State University Long Beach. The Government asked, "[i]n fact, were you given three separate possible dates of birth, January 30th of 1954, January 30th of 1957, and January 30 of 1958." Notwithstanding some knowledge of discrepancies in Appellant's birthdate, Frizzell signed a request for personnel action seeking early retirement for Appellant and noted that Appellant's date of birth was January 30, 1954. (J.A. at 621.) This request for personnel action was not supplied in discovery, but rather was received by Appellant after trial while litigating a civil matter against the Department of Energy.

III. ARGUMENT

A. Appellant's Conviction for False Statement Regarding Place of Birth Fails for Insufficient Evidence.

Faced with direct evidence from Appellant's sister, who was present at Appellant's birth at his grandmother's house in Nogales, Arizona, the Government seeks to rely heavily on what it perceives as the untimeliness of the submission of the evidence after trial. Appellant established below that he only learned of the

evidence after speaking with his aunt when trying to acquire birth and school records when he learned that the State of Arizona had no record of his birth. In response to a request for birth records from the State of Arizona in 2006, Arizona suggested in the middle of 2007 that Appellant secure school records from his childhood. The steps taken to discover this evidence constitute due diligence; Appellant commenced his investigation after his attorney was unsuccessful acquiring Appellant's records of vital statistics. In this regard, the requirement of due diligence under United States v. Singh, 54 F.3d 1182, 1190 (4th Cir. 1995), has been met.

Coupled with internal inconsistency in the birth registration presented by the Government that was filed in 1957 stating that Appellant was born in 1958, the testimony of Appellant's sister creates a substantial question of whether the jury verdict was correct. At least in the context of a Motion for New Trial, an evidentiary hearing was necessary to establish the credibility of Appellant's sister when weighed against the evidence adduced at trial because her testimony, if credible, would probably have produced an acquittal. See Singh, 54 F.3d at 1190 (for district court to grant new trial based on newly discovered evidence, newly discovered evidence must be such evidence that would probably produce acquittal.) Because serious questions of fact exist with respect to the affidavit of Appellant's sister and the Government's evidence produced at trial, the District

Court abused its discretion in denying Appellant an evidentiary hearing on his Motion for New Trial. See Castillo v. United States, 34 F.3d 443, 445 (7th Cir. 1994)(evidentiary hearing on motion for new trial necessary to resolve conflict between affidavits submitted).

B. Newly Discovered Evidence and Appellant's Testimony Would Have Entitled Appellant to a Jury Charge on the Affirmative Defense of Entrapment by Estoppel.

In his Motion for New Trial that the District Court denied without holding an evidentiary hearing, Appellant presented evidence that, had Hixon admitted that she knew about the discrepancies in Appellant's date of birth prior to her office completing Appellant's retirement application and selecting the 1954 date of birth, and had he been provided evidence that Frizzell signed off on Appellant's early retirement with a 1954 date of birth knowing about the same discrepancies, Appellant would have elected to testify at trial. The substance of the testimony is outlined in his affidavit. (J.A. 624-625.) Appellant would have testified that he asked Jean Stump, an employee of Human Resources and subordinate to both Hixon and Frizzell if the birthdate on the retirement papers was correct and verified before he signed the retirement papers with the date of birth selected by the Department of Energy. (J.A. 625.)

The Government's position in this regard is that Appellant merely presented impeaching evidence as to Hixon. It is well-established that newly discovered

evidence cannot be merely impeachment evidence. When a government witness recants his testimony after trial, the court may grant a motion for a new trial when it is “reasonably well satisfied” (1) that “the testimony given by a material witness is false,” (2) “[t]hat without it the jury might have reached a different conclusion,” and (3) “[t]hat the party seeking the new trial was taken by surprise when the false testimony was given and was unable to meet it or did not know of its falsity until after the trial.” United States v. Wallace, 528 F.2d 863, 866 (4th Cir. 1976) (quoting Larrison v. United States, 24 F.2d 82, 87-88 (7th Cir. 1928) (emphasis in original)). The Government explains that evidence was available in discovery that could have been used to impeach Hixon if Appellant’s trial counsel would have requested the District Court to issue a witness subpoena to Department of Energy Investigator Kevin Childress who had interviewed Hixon in 2004. (Govt’s Br. at 20.)³

However, Hixon’s change in her testimony highlights the error in the Government’s theory of the case. On multiple occasions, the Government stated and elicited testimony that the Human Resources files and security files were kept separate and that Human Resources only had January 30, 1954 in its file. (J.A. 164-65 [1:146-47]; 304-05 [2:55-56]; 528 [3-84].) Hixon’s corrected testimony

³ Appellant’s counsel attempted to secure the information from Hixon’s prior statement to the DOE, but the case agent who interviewed Hixon was not present at trial. Instead of issuing a witness subpoena to Childress, Appellant’s counsel attempted to secure the testimony from Gordon.

directly undermines the Government's theory of the case and supports Appellant's testimony and purported affirmative defense of entrapment by estoppel.

Moreover, Frizzell's direct knowledge of the discrepancies in Appellant's date of birth in 2004 when seeking to verify his academic credentials, along with the newly discovered evidence that Frizzell signed the request for personnel action for Appellant's early retirement listing a January 30, 1954 date of birth after his office verified it, also undermines the Government's theory that the date of birth discrepancies were not within the Human Resources world. Both Frizzell and Hixon had knowledge of discrepancies of Appellant's date of birth. Nonetheless, they approved the retirement package with a verified January 30, 1954 date of birth. Appellant's testimony by affidavit that he would have testified that he asked Jean Stump whether the date of birth was correct and verified, added to the fact that the department was aware of the discrepancies, supports his attempted affirmative defense of entrapment by estoppel.

IV. CONCLUSION

For the above and forgoing reasons, Appellant's convictions should be vacated and remanded for a new trial.

RESPECTFULLY SUBMITTED, this 16th day of July, 2008.

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Dated: July 16, 2008

/s/ Mario A. Pacella
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I hereby certify that on this 16th day of July, 2008, I caused this Reply Brief of Appellant to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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I further certify that on this 16th day of July, 2008, I caused this Reply Brief of Appellant to be served, via UPS Ground Transportation, to all case participants, at the above listed addresses.

/s/ Mario A. Pacella
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