No. 05-14989-GG

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee

v.

ARTHUR PICKLO,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

BRIEF FOR THE UNITED STATES AS APPELLEE

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United States v. *Arthur Picklo*
No. 05-14989-GG

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Counsel for United States of America hereby certifies, in accordance with Fed. R. App. P. 26.1 and 11th Cir. R.26.1-1, that the following persons may have an interest in the outcome of this case and were not included in the appellant's certificate of interested persons and corporate disclosure statement:

1. Guadalupe Frausto, victim;
2. Sarah E. Harrington, Civil Rights Division, United States Department of Justice, appellate counsel for the United States;
3. Wan J. Kim, Assistant Attorney General, Civil Rights Division, United States Department of Justice;
4. Tamra Phipps, Assistant United States Attorney, Chief, Appellate Division; and
5. Jessica Dunsay Silver, Civil Rights Division, United States Department of Justice, appellate counsel for the United States.

STATEMENT REGARDING ORAL ARGUMENT

Because the legal issues presented in this appeal are straightforward, the United States does not believe that oral argument is necessary. However, the United States does not object to oral argument should the Court feel it would be useful.

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No. 05-14989-GG

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ARTHUR PICKLO,

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF FOR THE UNITED STATES AS APPELLEE

STATEMENT OF JURISDICTION

The district court had jurisdiction under 18 U.S.C. 3231. The district court entered judgment against the defendant on August 30, 2005 (Doc. 99),[1] and defendant filed a timely notice of appeal on September 2, 2005 (Doc. 102). This Court has jurisdiction pursuant to 28 U.S.C. 1291.

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[1] "Doc. __, p. __" refers to the document number on the district court docket sheet and page number within the document of documents not included in the Record Excerpts. "Def. Br. __" refers to page numbers in defendant's opening brief to this Court.

STATEMENT OF THE ISSUES

1. Whether there was sufficient evidence to demonstrate that Picklo was acting under "color of law" when he robbed and attempted to kill Frausto.

2. Whether there was sufficient evidence to support Picklo's conviction under the Hobbs Act.

3. Whether there was sufficient evidence that Picklo attempted to kill Frausto in order to prevent him from reporting the robbery to federal officers.

STATEMENT OF THE CASE

1. Course of Proceedings And Disposition In The Court Below

On October 21, 2004, a federal grand jury returned an indictment, charging Arthur Picklo with four offenses: deprivation of civil rights, in violation of 18 U.S.C. 242 (Count One); robbery, in violation of the Hobbs Act, 18 U.S.C. 1951 (Count Two); obstruction of justice by attempted murder, in violation of 18 U.S.C. 1512(a)(1)(C) (Count Three); and use of a firearm during and in relation to, and possession of a firearm in furtherance of, crimes of violence, in violation of 18 U.S.C. 924(c)(1)(A) (Count Four) (Doc. 1).

A jury convicted Picklo on all counts and returned a special verdict (Doc. 84). As to Count One, the civil rights violation, the jury further found that Picklo had attempted to kill Guadalupe Frausto and that Frausto suffered bodily injury as a result of Picklo's criminal conduct (Doc. 84). With respect to Count Four, the firearm violation, the jury found that Picklo had used and carried a firearm during and in relation to a crime of violence, that he had possessed a firearm in

furtherance of a crime of violence, and that he had discharged a firearm during the commission of a crime of violence (Doc. 84).

The district court sentenced Picklo to a term of imprisonment of 480 months to 360 months for count one; 240 months for counts two and three, the terms to run concurrently with each other and with the term for count one; and 120 months for count four, the term to run consecutively to the terms for counts one, two, and three (Docs. 98, 99). This appeal followed (Doc. 102).[2]

2. Statement Of Facts

In the spring of 2000, investigators from the Florida Department of Insurance (DOI) and the Criminal Investigation Division of the Internal Revenue Service (IRS) opened an investigation into complaints lodged by local contractors about money laundering, insurance fraud, tax fraud, and the hiring of illegal aliens by building contractors and subcontractors in and around Jacksonville, Florida (Doc. 115, pp. 84-85; Doc. 116, pp. 107-108). Among the investigators were defendant Arthur Picklo and Tom Clark from DOI, and Mary Coleman, Frank Odom, and Jeff Breault from the IRS (Doc. 115, pp. 84-87; Doc. 116, p. 108).

One of the suspects in the investigation was Guadalupe Frausto (Doc. 115, pp. 90-91). Frausto ran a framing business, employing several crews of four to five men who framed houses in various developments in and around Jacksonville (Doc. 114, pp. 143-146, 156). He paid his men between $7 and $15 per hour,

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[2] On appeal, Picklo does not challenge his conviction on Count Four (the firearms violation), and does not challenge his sentence.

depending on their experience and responsibilities (Doc. 114, pp. 156-157). From April 2000 through September 2000 (when the crime in this case took place), Frausto bought nails, tools, equipment, and other supplies for use in his business from a Jacksonville establishment called First Coast Fasteners (Doc. 115, p. 74; Doc. 116, pp. 21-22; Gov't Exhs. 76A-E). First Coast Fasteners opened for business in April 2000 and sold "[a]ny kind of supplies for the construction industry, framers, carpenters [and] roofers" (Doc. 116, p. 21). First Coast Fasteners obtained its supplies from Senco Products, which is located in Chicago, Illinois, and ships its products from Senco's warehouse in Georgia (Doc. 116, p. 25; Gov't Exhs. 76 G-I). Frausto purchased nails that were manufactured in the United Arab Emirates (Doc. 116, p. 31; Gov't Ex. 75A) and a nail gun that was manufactured in Japan (Doc. 116, p. 31; Gov't Ex. 75B).

In order to secure business from contractors, Frausto was required by law to carry a worker's compensation insurance policy (Doc. 114, p. 144). Because the cost of the insurance was more than Frausto could afford (Doc. 114, pp. 207-208), he let his policy lapse at some point, and instead began paying a man named Johnny Beavers for the use of Beavers's worker's compensation certificate (Doc. 114, p. 144). Under this scheme, the builders and contractors who employed Frausto's crews paid Beavers, believing that Beavers employed Frausto, and Beavers then cashed the checks, paid himself ten percent of the total, and gave the remaining cash to Frausto (Doc. 114, pp. 145, 147). Frausto in turn used the cash to pay himself and his workers, and to purchase tools and supplies for his framing

business (Doc. 114, p. 211; Doc. 115, pp. 73-74, 78). Beavers generally cashed checks for Frausto on a weekly basis – usually on Fridays and Saturdays – at an establishment called French's Check Cashing (Doc. 114, p. 147; Doc. 116, p. 151).

In order to identify contractors, crew leaders, and workers who were involved in the illegal activities under investigation, the DOI and IRS investigators began to surveil various check cashing businesses, including French's Check Cashing (Doc. 115, p. 84-86). At some point, Johnny Beavers, Frausto's check casher, agreed to become an informant for the investigators (Doc. 115, p. 89). In late August or early September 2000, the investigators decided that Picklo should go undercover, posing as "Tony Tozzi" of "Tozzi Construction" (Doc. 115, pp. 88-91; Doc. 116, pp. 109-110; Doc. 119, pp. 81-82). Beavers introduced Picklo as "Tony Tozzi" to various contractors – including Frausto on September 2, 2000 – at French's Check Cashing, explaining that Picklo/Tozzi was available to serve as a check casher for Frausto (Doc. 114, pp. 149-150; Doc. 115, pp. 94, 115; Gov't Exhs. 11A-J). After Beavers cashed checks for Frausto on September 2, Frausto left French's with approximately $60,000 in cash (Doc. 115, p. 112). The next week, on September 8, Beavers again cashed checks for Frausto at French's while Picklo was present in the parking lot (Doc. 115, pp. 116-119). Frausto left French's that day with approximately $56,000 in cash (Doc. 115, p. 123).

On September 15, 2000, the DOI and IRS investigators, including Picklo, began surveilling Frausto early in the morning, beginning at his home and

following him to his various job sites until mid-day (Doc. 115, pp. 124-125; Doc. 116, pp. 112-113). Sometime that day, Beavers informed the agents that he had checks to cash for Frausto (Doc. 114, pp. 157-158; Doc. 115, pp. 124-126). In order to set up surveillance of Beavers's cashing of checks for Frausto, the agents, including Picklo, met at Boone Park (near French's) shortly after 2: p.m. (Doc. 115, p. 126; Doc. 116, p. 116). They then proceeded to French's and the area around French's to monitor the meeting between Beavers and Frausto (Doc. 116, pp. 45-47). As soon as Frausto arrived at French's, Beavers cashed the checks, took his percentage, and gave the rest of the cash to Frausto – about $37,000 in "[h]undreds and fifties" (Doc. 114, pp. 158-163, 177; Doc. 115, pp. 131-132, 140). Frausto then took the bag containing the money and checks, climbed into his truck, put the bag into the center console, and departed French's at approximately 3:30 p.m. (Doc. 114, p. 167; Doc. 116, p. 51).

For purposes of Picklo's undercover role, the State of Florida had leased a silver Chevrolet Blazer for Picklo to drive (Doc. 115, p. 144; Doc. 116, p. 111; Gov't Exh. 16D). As Frausto left French's, Picklo got into his Blazer and said to Agent Clark over his state-issued Nextel walkie-talkie, "Let's follow [Frausto] * * *. Let's see where he goes" (Doc. 115, pp. 136-137, 195-197; Doc. 116, pp. 123-127; Gov't Exh. 55). There had been no advance plan to follow Frausto that day; Agent Clark testified that he told Picklo there was insufficient personnel for the task (Doc. 115, p. 137; Doc. 116, p. 124). Picklo was also scheduled for another undercover operation with a separate suspect at 4 p.m. (Doc. 115, pp. 139-

141; Doc. 116, pp. 53, 129). Clark did not accompany Picklo as he followed Frausto, but returned to the investigators' staging area in Boone Park (Doc. 116, p. 128).

Meanwhile, Frausto drove his car onto the interstate, where he found traffic at a standstill (Doc. 114, pp. 168-169). While Frausto was stopped in traffic, Picklo drove up next to him in the right-hand emergency lane (Doc. 114, p. 169). After Picklo honked his horn to get Frausto's attention, Frausto rolled down his window, and said, "What's up Tony?" (Doc. 114, p. 170). Picklo held up a "police badge," stated that he was not Tony Tozzi, and asserted that he was "with the North Florida Investigators" or "[s]omething like that" (Doc. 114, p. 170). Picklo then got out of his truck, walked to the passenger side of Frausto's truck, and took Frausto's phone (Doc. 114, p. 171). Picklo said "there w[ere] some other people that wanted to talk to [Frausto]" and told Frausto to follow him (Doc. 114, p. 171). As Picklo returned to his vehicle, he said, "By the way, Johnny [Beavers] is working with us" (Doc. 114, p. 171).

Frausto testified that he believed he "had to do what" Picklo told him to do because he believed that Picklo was a police officer (Doc. 115, pp. 25-26). Frausto assumed he was in trouble over the check-cashing scheme and testified that he was frightened because he thought Picklo was going to take him to jail (Doc. 114, pp. 171-172; Doc. 115, pp. 25-26, 72-73). Frausto followed Picklo off the interstate and into a nearby neighborhood (Doc. 114, p. 172). The two parked along the side of the road, Picklo got into the passenger's seat of Frausto's truck, and asked

Frausto if he had a gun (Doc. 114, pp. 172-173). When Frausto said that he did not have a gun, Picklo asked where Frausto had put the money (Doc. 114, p. 173). Frausto told Picklo that the money was in the center console and Picklo removed it (Doc. 114, p. 173). Picklo then told Frausto that he had "a pretty good chance to get out of it" and instructed Frausto to turn off the truck (Doc. 114, pp. 173-174; Doc. 115, pp. 39-40). Frausto testified that, as he reached for the ignition key, he felt his "head explode[]" (Doc. 114, pp. 173-174; Doc. 115, pp. 39-40).

The next time Frausto was aware, he was lying on his steering wheel; he was in pain and could feel blood running down his body (Doc. 114, p. 174). Passers-by found Frausto in his truck, "slumped over" and covered in blood (Doc. 113, pp. 11-15, 20-22, 26, 102-103; Gov't Exhs. 13A-B, 27). They called 911 to seek help for Frausto (Doc. 113, pp. 21-22; Gov't Exhs. 26, 27). During a conversation that included Frausto, the people who stopped to help him, the police dispatcher, and the rescue dispatcher, Frausto reported that he had been shot in the head and that the shooter had left (Gov't Exh. 27, p. 2). He also gave a description of the shooter and of the car he was driving (Doc. 113, pp. 36-37; Gov't Exh. 27, pp. 3-4). Asked why the shooter had been in the car with him, Frausto said, "[P]olice officer, he pulled me over" (Gov't Exh. 27, p. 5). When an officer from the Jacksonville Sheriff's Office arrived on the scene, Frausto again reported that a police officer had stopped him, entered his truck, shot him, and driven off in a silver Blazer (Doc. 114, pp. 33-34, 38).

Frausto, who had been shot in the face, was taken to the hospital with bullet wounds in his head and neck (Doc. 113, pp. 41, 59; Doc. 114, p. 36). Frausto had "significant injury to the soft tissue within his mouth" including the roof of his mouth, several broken bones on both sides of his face, injury to "two of the bony processes that stick off the back of the neck bones," and a lacerated tongue (Doc. 113, pp. 43-46). Because of the excessive bleeding in his mouth and the swelling of his tongue, Frausto might have died from blood entering his lungs, an inability to breathe, or blood loss if he had not been found when he was (Doc. 113, p. 47). The bullet in Frausto's neck was "just a centimeter" away from having shattered his spinal cord, which would have left him unable to breathe on his own; had that happened, Frausto would have died within minutes of the shooting (Doc. 113, p. 47-48).

On or about September 20, Frausto remembered that his assailant had been introduced to him as "Tony" and that information was communicated to the police (Doc. 114, p. 192). On September 27, Detective Mills from the Jacksonville Sheriff's Office took a photo line-up to Frausto's home; from the photo line-up, Frausto identified Picklo as the shooter (Doc. 114, pp. 196-197; Doc. 117, pp. 67-68; Gov't Exh. 22). Detective Mills also showed Frausto several badges, and Frausto indicated that the DOI badge and Treasury badges were the same size and color as the badge his assailant had shown him (Doc. 117, pp. 60-61, 130, 136).

Detective Mills arrested Picklo on October 18, 2000 (Doc. 117, p. 86).[3]

STANDARD OF REVIEW

Picklo moved for judgment of acquittal at the close of the United States' case in chief and, again, at the close of all of the evidence (Doc. 119, p. 21; Doc. 120, p. 45). This Court reviews *de novo* preserved challenges to the sufficiency of evidence to support a conviction. *United States* v. *Verbitskaya*, 406 F.3d 1324, 1334-1335 (11th Cir. 2005), cert. denied, 126 S. Ct. 1095 (2006).

SUMMARY OF ARGUMENT

The only question Picklo raises on appeal is whether there was sufficient evidence before the jury to support his convictions on Counts One through Three. There was more than sufficient evidence to support Picklo's conviction for violating 18 U.S.C. 242, which makes it a crime to deprive a citizen of a federal right while acting under color of law. The evidence showed that (1) Picklo was on duty as a state law enforcement officer, flashed a badge, and identified himself as working for a law enforcement agency when he stopped Frausto on the highway, (2) Frausto reasonably believed that he had to do what Picklo told him to do because Picklo was a law enforcement officer, and (3) Picklo learned of Frausto's whereabouts and that he would be carrying a large amount of cash through his

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[3] A great deal of additional evidence was presented to the jury connecting Picklo to the crimes against Frausto. Much of that evidence went to Picklo's identity as the shooter (including forensic evidence related to the gun and bullets used in the crime) and to financial motives Picklo may have had for committing the robbery. Because Picklo does not challenge his identity as the assailant and thief in this case, the government has omitted a summary of much of this evidence.

official duties as a law enforcement officer. Under the precedents of this Court and the Supreme Court, this evidence was more than sufficient to prove that Picklo was acting under color of law when he robbed and attempted to murder Frausto.

The evidence also supported Picklo's conviction for violating the Hobbs Act by committing a robbery that affected interstate commerce. Picklo targeted Frausto because he knew that Frausto would be carrying cash. As part of his business, Frausto regularly purchased items that traveled in interstate commerce. The robbery depleted Frausto's business of assets that would have been used for that purpose. This Court has repeatedly held that a Hobbs Act violation may be sustained on a showing of even a "minimal" impact on interstate commerce. The evidence adduced in this case showed more than such a minimal impact.

Finally, the evidence was sufficient to convict Picklo of violating 18 U.S.C. 1512(a)(1)(C) by attempting to murder Frausto in order to prevent him from reporting the robbery to federal officials. The government demonstrated that federal officials were investigating Frausto, and that Picklo knew this to be true because he was working with those federal officials. The jury also learned that Picklo had been introduced to Frausto in the course of that investigation, and that Frausto recognized Picklo when he was pulled over. There was more than sufficient evidence for the jury to conclude that Frausto might have reported the robbery to federal officials – either directly or through the informant who had introduced him to Picklo – and that Picklo shot him in an attempt to prevent such communication.

ARGUMENT

I

THERE WAS SUFFICIENT EVIDENCE TO PROVE THAT PICKLO WAS ACTING UNDER COLOR OF LAW WHEN HE ROBBED AND SHOT FRAUSTO

A jury convicted Picklo of violating 18 U.S.C. 242, which makes it a crime for a person acting "under color of any law," to deprive another of "any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States." In order to prove that a defendant has violated Section 242, the government must demonstrate that (1) the defendant's conduct deprived the victim of rights secured or protected by the Constitution or a federal law, (2) the defendant acted under color of law, and (3) the defendant acted willfully. See, *e.g.*, *United States* v. *Lanier*, 520 U.S. 259, 264, 117 S. Ct. 1219, 1224 (1997); *United States* v. *Cobb*, 905 F.2d 784, 787 (4th Cir. 1990). Picklo does not now dispute that both the robbery and shooting of Frausto deprived Frausto of rights secured by the Constitution and laws of the United States. Nor does Picklo contend that there was no evidence that he acted with a specific intent to violate Frausto's protected rights. Rather, Picklo argues (Def. Br. 20-26) that there was insufficient evidence for the jury to find that he acted "under color of law." Picklo's argument is incorrect.

This Court reviews the sufficiency of the evidence supporting the jury's verdict *de novo*, viewing the evidence "in the light most favorable to the government and resolv[ing] all reasonable inferences and credibility evaluations in

favor of the jury's verdict." *United States* v. *Clay*, 376 F.3d 1296, 1300 (11th Cir. 2004). The Court must uphold the jury's verdict if it finds that "a reasonable factfinder could conclude that the evidence establishes guilt beyond a reasonable doubt." *Ibid.*

The government presented substantial evidence that Picklo was acting under color of law when he robbed and attempted to kill Frausto. *First*, it is undisputed that Picklo was on duty as a law enforcement officer at the time of the robbery and assault (Doc. 116, p. 107; see also generally Doc. 119, pp. 70-121, 185-188 (Picklo's testimony)). En route from one undercover operation to another, Picklo took a brief detour to victimize Frausto, one of the targets of his investigation. *Second*, Picklo identified himself as a law enforcement officer to Frausto and displayed indicia of his law enforcement authority. Frausto testified that Picklo pulled up alongside his car and signaled to him (Doc. 114, pp. 169-170); when Frausto greeted Picklo by his undercover name of Tony, Picklo said "I'm not Tony," flashed what looked to Frausto like "a police badge," and stated that he was with the North Florida Investigators, or "[s]omething like that" (Doc. 114, p. 170). After taking Frausto's phone from him, Picklo told Frausto that there were some other people who needed to talk to him and that Frausto needed to follow Picklo. Picklo also stated that Johnny Beavers, who had introduced Frausto to then-undercover Picklo, "is working with us" (Doc. 114, p. 171). *Third*, Frausto testified that he believed Picklo was a law enforcement officer (Doc. 115, pp. 21, 25-28, 32-33), and that Picklo was taking him to jail (Doc. 114, p. 172; Doc. 115,

p. 26). Frausto testified that he was scared and believed he was in trouble. He followed Picklo precisely because he understood Picklo to be a law enforcement officer and thought that he *had to* follow him (Doc. 114, p. 172; Doc. 115, p. 28).[4] *Finally*, Picklo knew both where Frausto was and that he was carrying a large sum of cash only because Picklo was a law enforcement officer investigating Frausto. His only contact with Frausto resulted directly from his performance of official duties, and his position as a law enforcement officer provided him with access both to the information that Frausto was carrying a large sum of cash and to the whereabouts of Frausto at the time of the crime.

This Court and other courts of appeals have acknowledged that determining whether a defendant acted under color of law is rarely a formulaic exercise, but instead requires an assessment of the totality of circumstances surrounding the illegal activity. See*, e.g.*, *Griffin* v. *City of Opa-Locka*, 261 F.3d 1295, 1303-1304 (11th Cir. 2001);[5] *Martinez* v. *Colon*, 54 F.3d 980, 986 (1st Cir. 1995); *Revene* v.

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[4] Moreover, as he lay bleeding in his truck after being shot, Frausto was asked by the responding police officer why he had been in the car with the shooter and replied, "[P]olice officer, he pulled me over" (Gov't Exh. 27, p. 5).

[5] The bulk of the "color of law" cases reported in the courts of appeals involve civil suits under 42 U.S.C. 1983 rather than criminal prosecutions under 18 U.S.C. 242. But this Court has noted that the term "color of law" is to be given the same meaning in both contexts. See *Norton* v. *McShane*, 332 F.2d 855, 871 (11th Cir. 1964) (noting that the Supreme Court held in *Screws* "that the same interpretation of acts under 'color of law' under [Section] 242, applied with like force to 42 U.S.C. § 1983"); see also *West* v. *Atkins*, 487 U.S. 42, 49, 108 S. Ct. 2250, 2255 (1988) (noting that analysis of "color of law" in Section 1983 cases relies on the traditional definition of acting under color of law articulated in

(continued...)

Charles County Comm'rs, 882 F.2d 870, 872 (4th Cir. 1989); *Stengel* v. *Belcher*, 522 F.2d 438, 441 (6th Cir. 1975). In this case, however, the line is not difficult to draw and there is no question that Picklo's actions rest squarely on the "color of law" side of that line. By relying on the knowledge he gathered through his official duties, brandishing his badge when he stopped Frausto, identifying himself as working with a state investigative agency, invoking the name of the person who had introduced them and implying that Johnny Beavers was cooperating, and ordering Frausto to follow him – *all while on duty* – Picklo was acting under color of law. The Supreme Court and this Court have left no doubt that an officer acts under color of law when he acts under pretense of law, regardless of whether he is acting under actual authority of law. See *Screws* v. *United States*, 325 U.S. 91, 111, 65 S. Ct. 1031, 1040 (1945) ("It is clear that under 'color' of law means under 'pretense' of law."); *United States* v. *Jones*, 207 F.2d 785, 786-787 (5th Cir. 1953)[6] ("Color of law, as used in the statute, means pretense of law: it may include, but does not necessarily mean, under authority of law.").

When Picklo identified himself as working for a law enforcement agency, his words and actions were calculated to make a reasonable person believe that he was acting by virtue of his authority as a law enforcement officer – and in fact

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[5](...continued)
Classic).

[6] In the en banc decision in *Bonner* v. *City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981), this Court adopted as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981.

caused Frausto to believe just that. See *United States* v. *Tarpley*, 945 F.2d 806, 809 (5th Cir. 1991) (off-duty police officer was acting under color of law in assaulting his wife's boyfriend when he identified himself as a police officer and "claimed to have special authority for his actions by virtue of his official status"); see also *Williams* v. *United States*, 341 U.S. 97, 99-100, 71 S. Ct. 576, 578-579 (1951) (private detective who took an oath as a special police officer was acting under color of law when he "flash[ed] his badge" while assaulting victims). Indeed, Frausto's testimony that he followed Picklo precisely because he believed that Picklo was exercising police authority makes clear that Picklo could not have committed the crime had he not operated under the cloak of law enforcement authority. See *Crews* v. *United States*, 160 F.2d 746, 750 (5th Cir. 1947) ("An officer of the law should not be permitted to divest himself of his official authority in actions taken by him wherein he acts, or purports, or pretends, to act pursuant to his authority, and where one, known by another to be an officer, takes the other into custody in a manner which appears on its face to be in the exercise of authority of law, without making to the other any disclosure to the contrary, such officer thereby justifies the conclusion that he was acting under color of law in making such an arrest."). In addition, in this case, Picklo's contact with Frausto and his information about Frausto's location and possession of a large sum of cash resulted directly from his performance of official duties. See *Brown* v. *Miller*, 631 F.2d 408, 411 (5th Cir. 1980); see also, *e.g.*, *United States* v. *Causey*, 185 F.3d 407, 415

(5th Cir. 1999), cert. denied, 530 U.S. 1277, 120 S. Ct. 2747 (2000); *Cassady* v. *Tackett*, 938 F.2d 693, 695 (6th Cir. 1991) (per curiam).

Picklo argues that he could not have been acting under color of law when he robbed and shot Frausto (1) because the act of robbery (and, presumably, attempted murder) "is conduct clearly outside the scope of his official duties" (Def. Br. 24), (2) because Picklo "never identified himself as a law enforcement officer" (Def. Br. 25), and (3) because when Picklo robbed and shot Frausto he was motivated by personal gain (Def. Br. 25-26). Picklo is wrong on all counts.

It is well-settled that a state official acting in his official capacity acts under color of law even when engaging in illegal activity. In *United States* v. *Jones*, 207 F.2d 785, 786 (5th Cir. 1953), a prosecution of a state prison official for whipping inmates, this Court explained that, "paradoxical as it may seem, the defendant was whipping these prisoners under color of law although doing it in violation of law." Moreover, as discussed *supra*, Picklo's assertion (Def. Br. 25) that he neither identified himself as a law enforcement officer nor used any indicia of law enforcement that would make a reasonable person believe that he was acting in his official capacity is simply inconsistent with the record.

Picklo's suggestion that he could not have been acting under color of law because he was motivated only by thoughts of personal gain is similarly unavailing. The fact that a state official misuses his authority for purely personal reasons is irrelevant to the question whether he did so under color of law. This Court held in *Brown* v. *Miller*, 631 F.2d 408, 411 (5th Cir. 1980) that it is "not

significant" to the color of law analysis that the defendant's misuse of power "was motivated solely for purely personal * * * gain." Similarly, the Supreme Court stated in *Griffin* v. *Maryland*, 378 U.S. 130, 135, 84 S. Ct. 1770, 1773 (1964) that:

> If an individual is possessed of state authority and purports to act under that authority, his action is state action. It is irrelevant that he might have taken the same action had he acted in a purely private capacity or that the particular action which he took was not authorized by state law.

See also *Crews*, 160 F.2d at 749 (5th Cir. 1947) (holding that the defendant Constable was acting under color of law when he invoked his official capacity in assaulting and murdering a man even though he was "actuated by personal anger, hate, malice, and a desire for revenge"). Other circuits have also held that a defendant's personal motivations for misusing his official status do not defeat a claim that he acted under color of law. See, *e.g.*, *United States* v. *Giordano*, 442 F.3d 30, 43-44 (2d Cir. 2006) (holding that Mayor acted under color of law in sexually abusing minors even though he encountered his victims outside the scope of his official duties and engaged in the abuse for personal gratification); *Van Ort* v. *Stanewich*, 92 F.3d 831, 838 (9th Cir. 1996) (holding that defendant "also might have been acting under color of law if he had purported or pretended to act under color of law, even if his goals were private and outside the scope of authority"), cert. denied, 519 U.S. 1111, 117 S. Ct. 950 (1997); *Tarpley*, 945 F.2d at 809 ("Nor does *Screws* mean that if officials act for purely personal reasons, they necessarily fail to act 'under color of law.'"); *Basista* v. *Weir*, 340 F.2d 74, 80-81 (3d Cir. 1965) ("Assuming arguendo that [defendant's] actions were in fact motivated by

personal animosity that does not and cannot place him or his acts outside the scope of" the statute if he assaulted the victim "under color of a policeman's badge.").

In support of his argument, Picklo relies on this Court's decision in *Almand* v. *DeKalb County*, 103 F.3d 1510 (11th Cir.), cert. denied, 522 U.S. 966, 118 S. Ct. 411 (1997), in which the Court held that a police officer was not acting under color of law when he broke down the door of a woman's apartment and forcibly raped her even though he had made her acquaintance in the course of his official duties. Although the defendant officer, while acting in his official capacity, had entered the victim's apartment with her permission just prior to the assault, this Court found dispositive the fact that the defendant was ejected from the apartment and the door was closed behind him before he forcibly reentered the premises. *Id.* at 1514-1515. This holding was not, as Picklo suggests (Def. Br. 26), premised on the fact that the defendant's actions were motivated by personal urges instead of professional duty; rather, the Court relied on the fact that the defendant used brute force and did *not* use his status as a police officer in order to gain entry to the apartment to commit the assault. 103 F.3d at 1515.

In fact, this Court made exactly that point in *Griffin* v. *City of Opa-Locka*, 261 F.3d 1295 (11th Cir. 2001), when it found that the defendant in that case had acted under color of law when he used his official status to gain entry into the apartment of the victim, whom he then forcibly raped. The *Griffin* Court distinguished the decision in *Almand*, reasoning that, although the defendants in both cases had learned of their victims' existence and whereabouts in the course of

the defendants' official duties, the defendant in *Almand* had not used his authority as a police officer to enter the victim's apartment while the defendant in *Griffin* had indeed used his authority in order to enter his victim's apartment. *Id.* at 1306. The instant case is on the *Griffin* side of that line. Picklo not only met Frausto and learned that he would be carrying a large amount of cash and where he would be as a result of his official duties, but actually used his official position in order to get Frausto alone on a deserted road and in order to enter Frausto's vehicle so that he could rob Frausto and attempt to kill him. The facts of this case leave no room for doubt about whether Picklo was acting under color of law.

II

THE GOVERNMENT ADDUCED SUFFICIENT EVIDENCE TO PROVE THE NECESSARY INTERSTATE COMMERCE NEXUS UNDER THE HOBBS ACT

Picklo also challenges his conviction under the Hobbs Act, 18 U.S.C. 1951, which makes it a federal crime to commit a robbery that "in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity" in interstate commerce. Picklo claims (Def. Br. 26-30) that the government produced insufficient evidence that the robbery in this case affected commerce. In considering this claim, the Court should resolve all factual inferences and credibility choices in favor of the government. *United States* v. *Diaz*, 248 F.3d 1065, 1084 (11th Cir. 2001).

This Court has held that "[t]wo elements are essential for a Hobbs Act prosecution: robbery and an effect on commerce." *United States* v. *Rodriguez*,

218 F.3d 1243, 1244 (11th Cir. 2000), cert. denied, 531 U.S. 1099, 121 S. Ct. 832 (2001). In order to establish the requisite effect on commerce, this Court has repeatedly held that the government need only demonstrate a "minimal" actual effect on interstate commerce. See, *e.g.*, *United States* v. *Verbitskaya*, 406 F.3d 1324, 1331 (11th Cir. 2005) ("This Circuit long has held that the jurisdictional requirement under the Hobbs Act can be met simply by showing that the offense had a 'minimal' effect on commerce."), cert. denied, 126 S. Ct. 1095 (2006); *United States* v. *Carcione*, 272 F.3d 1297, 1300 (11th Cir. 2001) ("[W]e stress that under this Circuit's binding precedent, a conviction for Hobbs Act robbery may be sustained if there is proof that the defendant's conduct had even a minimal effect on interstate commerce."); *United States* v. *Le*, 256 F.3d 1229, 1232 (11th Cir. 2001), cert. denied, 534 U.S. 1145, 122 S. Ct. 1103 (2002).

This Court has held that the robbery or extortion of an *individual* violates the Hobbs Act when one of the following three conditions is met: "(1) the crime depletes the assets of an individual who is directly engaged in interstate commerce; (2) the crime causes the individual to deplete the assets of an entity in interstate commerce; *or* (3) the number of individuals victimized or the sums involved are so large that there will be a cumulative effect on interstate commerce." *Diaz*, 248 F.3d at 1085; see also *Verbitskaya*, 406 F.3d at 1332.[7] In the instant case, there

[7] This Court has also admonished that proof of one of these three conditions is not always necessary to prove that the robbery of an individual has the requisite effect on interstate commerce. Rather, the Court stated that, although proof of one

(continued...)

was more than sufficient evidence from which the jury could conclude that Picklo's robbery of Frausto had at least a minimal effect on interstate commerce by depleting Frausto's assets.

The evidence before the jury demonstrated that Frausto ran a framing business, that he employed 16 to 20 laborers at any given time, and that he paid his employees between $7 and $15 per hour (Doc. 114, pp. 143-146, 156-157). Frausto testified that the general contractors who employed his business paid him by writing checks to Johnny Beavers, who then cashed the checks and gave the cash to Frausto (Doc. 114, pp. 145, 147). Frausto used this cash to pay himself and his workers, and to purchase tools and supplies for his next project (Doc. 114, pp. 211, 145, 147; Doc. 115, pp. 73-74, 78; Doc. 116, p. 37). The jury heard that, beginning in April 2000, Frausto purchased most of his business supplies – including nails, tools, and construction equipment – from First Coast Fasteners (Doc. 115, p. 74; Doc. 116, pp. 21-22, 25, 31; Gov't Exhs. 75A-B, 76A-E, 76G-I). First Coast Fasteners in turn obtained its supplies, including those bought by Frausto, from Senco Products, which is located in Chicago, Illinois, and ships its products from Senco's warehouse in Georgia (Doc. 115, p. 74; Doc. 116, pp. 21-

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[7](...continued)
of these three elements "is an effective barometer for measuring a defendant's actions and their effect on interstate commerce, we have repeatedly held that 'in determining whether there is a minimal effect on commerce, each case must be decided on its own facts.'" *United States* v. *Carcione*, 272 F.3d 1297, 1301 n.6 (11th Cir. 2001) (quoting *United States* v. *Rodriguez*, 218 F.3d 1243, 1245 (11th Cir. 2000)).

22, 25; Gov't Exhs. 75A, 76A-E). In addition, the nails Frausto purchased were manufactured in the United Arab Emirates (Doc. 116, p. 31; Gov't Ex. 75A) and a nail gun he purchased was manufactured in Japan (Doc. 116, p. 31; Gov't Ex. 75B).

Thus, the jury heard evidence that the money Picklo stole from Frausto would have been used in part to purchase tools and supplies that had traveled in interstate commerce for his business (Doc. 114, p. 211; Doc. 115, pp. 73-74, 78; Doc. 116, pp. 21-25, 31; Gov't Exhs. 75A-B, 76G-I). By robbing Frausto of his cash, Picklo affected interstate commerce by depleting the assets Frausto would have used to purchase supplies and tools for his business. This Court has held that, in order to show that the robbery depleted Frausto's assets, the government need not show that Frausto's assets were eliminated or exhausted; rather, it is sufficient that Frausto's assets were "'lessen[ed] in number, quantity, content, or force or in vital power or value.'" See *Diaz*, 248 F.3d at 1090 (citation omitted); see also *United States* v. *Gray*, 260 F.3d 1267, 1276 (11th Cir. 2001), cert. denied, 536 U.S. 963, 122 S. Ct. 2677 (2002); *United States* v. *Jackson*, 748 F.2d 1535, 1537 (11th Cir. 1984); *United States* v. *Jamison*, 299 F.3d 114, 119 (2d Cir. 2002), cert. denied, 537 U.S. 1196, 123 S. Ct. 1258 (2003).

Picklo claims that the government failed to establish an interstate commerce nexus because, with the help of his family, Frausto's work crews were able to complete their framing jobs. This fact, Picklo reasons (Def. Br. 30), indicates that the robbery had at most a "speculative indirect effect" on a business engaged in

interstate commerce (emphasis removed). But this Court does not require that the government demonstrate that Frausto's business came to a halt as a result of the robbery. Rather, it is enough to show that the victim "customarily purchases items in interstate commerce, [and] has [his] assets depleted through [robbery], thereby curtailing the victim's potential as a purchaser of such goods." *Jackson*, 748 F.2d at 1537; see also *Verbitskaya*, 406 F.3d at 1332. In *Jackson*, the defendant was convicted of violating the Hobbs Act by extorting $5,000 from a man who owned a construction company and, as part of that business "customarily bought materials and supplies that had traveled in interstate commerce." *Id.* at 1536-1537. This Court upheld the conviction, finding that the extortion had a sufficient effect on interstate commerce because "[t]he extorted payment of $5,000 depleted [the victim's] assets and burdened him with an additional cost for continuing his business." *Id.* at 1537. The same is true of the funds stolen from Frausto in the instant case.

In fact, the commerce nexus in the instant case is a good deal more direct than that required by this Court to uphold a Hobbs Act conviction. In *Verbitskaya*, the defendants stole several paintings that the victim was contemplating selling. 406 F.3d at 1329-1330. Although the victim had not identified any potential buyers – in-state or out-of-state – for his paintings, this Court held that, because the victim intended to sell the paintings, "the theft of the paintings interfered with their *potential* sale into interstate commerce." *Id.* at 1333. In the instant case, Frausto did more than plan to engage in interstate commerce; he ran a business with a

demonstrated record of engaging in interstate commerce. The commerce nexus in this case is also more direct than the nexus found sufficient in *United States* v. *Castleberry*, 116 F.3d 1384, 1385-1386 (11th Cir.), cert. denied, 522 U.S. 934, 118 S. Ct. 341 (1997), in which the defendant, a private attorney working with a city official who prosecuted DUI offenses, was convicted of violating the Hobbs Act by taking payoffs from citizens arrested for DUI offenses in exchange for dismissing the DUI charges. This Court rejected the defendant's contention that the interstate commerce evidence in that case was "thin and speculative, concerning matters that 'might' have occurred rather than matters that 'actually' occurred." *Id.* at 1388. The Court found a sufficient commerce nexus where a government expert testified that non-prosecuted DUI cases in general have an effect on interstate commerce by increasing the incidence of drunk driving, and that the fines paid in connection to DUI offenses went into the general fund of the City of Atlanta, which in turn purchased goods from companies involved in interstate commerce. *Ibid.* Again, the evidence adduced in the instant case demonstrates a more direct connection to interstate commerce than that found sufficient in *Castleberry* – namely, that Frausto intended to use the stolen funds to purchase goods that moved in interstate commerce for his business enterprise.

Finally, there is no merit to Picklo's suggestion (Def. Br. 29) that the requisite nexus to interstate commerce was not met because Frausto's business operated illegally in certain respects and was informal in that it did not maintain bank or business records. A targeted business need not be formal or legal,

however, for purposes of the Hobbs Act. See, *e.g.*, *United States* v. *Wilkerson*, 361 F.3d 717, 729 (2d Cir.) (commerce nexus sufficient even where victims' business "did not comply with all of the formalities observed in the legitimate business world"), cert. denied, 543 U.S. 908, 125 S. Ct. 225 (2004); *United States* v. *Thomas*, 159 F.3d 296, 297-298 (7th Cir. 1998) (cocaine distribution business is "in commerce" within meaning of Hobbs Act), cert. denied, 527 U.S. 1023, 119 S. Ct. 2370 (1999); *United States* v. *Jones*, 30 F.3d 276, 285 (2d Cir. 1994) (holding that commerce nexus needed to sustain Hobbs Act conviction need not involve goods traveling *legally* in interstate commerce).

III

THERE WAS SUFFICIENT EVIDENCE TO CONVICT PICKLO OF ATTEMPTING TO KILL FRAUSTO IN ORDER TO PREVENT HIM FROM REPORTING THE ROBBERY TO FEDERAL OFFICIALS

Finally, Picklo challenges his conviction under 18 U.S.C. 1512(a)(1)(C), which makes it a crime to "kill[] or attempt[] to kill another person, with intent to * * * prevent the communication by any person to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense." Picklo argues that the government presented insufficient evidence for the jury to find that he attempted to kill Frausto in order to prevent Frausto from communicating with federal authorities about the fact that Picklo had robbed him. At base, Picklo's argument is that the government did not produce enough evidence to demonstrate some federal involvement (what Picklo

calls the "federal nexus") beyond the federal nature of the underlying crimes.[8] In assessing this argument, this Court must "make all reasonable inferences and credibility choices in favor of the jury's verdict as [the Court] evaluate[s] the evidence to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States* v. *Veal*, 153 F.3d 1233, 1253 (11th Cir. 1998) (internal quotation marks omitted), cert. denied, 526 U.S. 1147, 119 S. Ct. 2024 (1999).

In order to convict a person of violating Section 1512(a)(1)(C), the government must present evidence that (1) the defendant attempted to kill someone, (2) that he did so in order to prevent his victim from reporting a federal crime to a federal official, and (3) that he did so intentionally. 18 U.S.C. 1512(a)(1)(C). Picklo argues that there was insufficient evidence for the jury to convict him of this crime because the government failed to demonstrate that he in fact believed that Frausto might communicate with federal authorities about the robbery. But in *Veal*, 153 F.3d at 1248-1252, this Circuit explicitly rejected requiring such a *mens rea* element. *Veal* involved defendants accused of violating 18 U.S.C. 1512(b)(3) – which prohibits, *inter alia*, engaging in misleading conduct in order to hinder, delay, or prevent the communication to a federal law enforcement officer of information relating to the commission or possible

[8] Picklo also argues that he should not have been convicted of violating Section 1512(a)(1)(C) because the underlying robbery was not a federal crime. For the reasons stated in Sections I and II of the argument, Picklo's robbery of Frausto was indeed a federal crime.

commission of a federal offense – rather than Section 1512(a)(1)(C). This Court, however, held that the federal nexus element is the same under that subsection as it is under Section 1512(a)(1)(C). See 153 F.3d at 1249-1250; see also *id.* at 1251 n.26; *United States* v. *Diaz*, 176 F.3d 52, 91 (2d Cir.), cert. denied, 528 U.S. 875, 120 S. Ct. 314 (1999). Relying on the statutory admonition in 18 U.S.C. 1512(g) (then codified at Section 1512(f)(2)) that, for purposes of all Section 1512 prosecutions, "no state of mind need be proved with respect to the" fact that the law enforcement official in question is a federal official, the *Veal* Court held that the government need not show either that the defendant knew the federal nature of the underlying crime about which he provided false information, or that he intended that a *federal* law enforcement officer receive the false information. 153 F.3d at 1252. Thus, the government was not required to prove either that Picklo knew the federal nature of the crimes he committed or that Picklo intended to prevent Frausto from reporting the crimes to federal law enforcement officers in particular.

In support of his argument, Picklo relies (Def. Br. 32-35) on cases from other circuits holding that, in order to prove a Section 1512(a)(1)(C) violation, the government must adduce "additional appropriate evidence" from which the jury could infer that Picklo attempted to kill Frausto because Picklo intended to prevent Frausto from reporting the robbery to federal officials. This Circuit has not adopted the "additional appropriate evidence" standard, see *United States* v. *Causey*, 185 F.3d 407, 422 (5th Cir. 1999) (noting that the Eleventh Circuit

employs a different evidentiary standard for proving the "intent" element of a Section 1521(a)(1)(C) violation), cert. denied, 530 U.S. 1277, 120 S. Ct. 2747 (2000), but even those Circuits that have done so have distinguished that requirement from a *mens rea* requirement regarding the involvement of federal law enforcement. Thus, the Third Circuit in *United States* v. *Bell*, 113 F.3d 1345, 1348 (3d Cir.), cert. denied, 522 U.S. 984, 118 S. Ct. 447 (1997), upon which Picklo relies, held that Section 1512(a)(1)(C) "expressly does *not* require that the defendant know or intend anything with respect to this federal character." Similarly, the Second Circuit in *Diaz*, 176 F.3d at 90, held both that it is "irrelevant" that a defendant intends to prevent his victim "from speaking with local, rather than federal, law enforcement officers," and that "it is irrelevant whether [the victim] actually contemplated going to law enforcement" at all. Rather, those courts require that the government produce "additional appropriate evidence" *not* illuminating the defendant's intentions or state of mind, but demonstrating some basis from which the jury could infer that the victim might communicate information regarding the offense to a federal entity. See, *e.g.*, *Bell*, 113 F.3d at 1349; *Diaz*, 176 F.3d at 90.

Courts requiring such "additional appropriate evidence" do not require that the additional evidence take any particular form, accepting, *e.g.*, evidence that the defendant had actual knowledge of the federal nature of the underlying crime, or evidence that there was a federal investigation in progress at the time. See *Causey*, 185 F.3d at 422-423; *Diaz*, 176 F.3d at 90; *Bell*, 113 F.3d at 1349. Again, this

Circuit has never adopted a requirement that the government produce "additional appropriate evidence" of the nature just described. Rather, the *Veal* Court explicitly rejected Picklo's proposal in the context of Section 1512(b)(3), stating both that the statute "does not require that a defendant know the federal nature of the crime" involved, 153 F.3d at 1252, and that the statute, "does not depend on the existence of imminency of a federal case or investigation but rather on the *possible* existence of a federal crime and a defendant's intention to thwart an inquiry into that crime," *id.* at 1250. This Court held that it is sufficient if there is "the *possibility* or *likelihood*" that the information would be relayed to federal officials. *Id.* at 1251.

Even if this Court had adopted the "additional appropriate evidence" requirement, the government adduced more than enough evidence for the jury to convict Picklo of violating Section 1512(a)(1)(C) under that standard. The jury learned that Frausto was being investigated by state and federal investigators working together (Doc. 115, pp. 84-91; Doc. 116, pp. 40-44, 107-108), and that Picklo knew that federal agents were involved in the investigation because Picklo himself was working with those agents (Doc. 115, pp. 87-94; Doc. 116, pp. 40-44, 107-108). The jury also knew that an informant working with the federal investigators was the one who introduced Frausto to Picklo while Picklo was undercover as "Tony Tozzi" (Doc. 114, pp. 149-151, 229; Doc. 119, pp. 81-82). The jury heard that Picklo did not disguise his appearance in any way when he stopped Frausto and robbed him, that Frausto recognized Picklo as Tony and stated

as much, and that Picklo revealed to Frausto that he was not, in fact, Tony Tozzi but was instead a law enforcement officer (Doc. 114, pp. 169-171, Doc. 115, pp. 16-18). This evidence is more than sufficient for the jury to conclude that Frausto might ultimately relay information about the robbery to federal officials – either directly or through the informant who had introduced Picklo to Frausto – and that, in attempting to kill Frausto, Picklo was attempting to stop Frausto from doing just that.

Thus, under any court of appeals' standard, the jury properly convicted Picklo of violating 18 U.S.C. 1512(a)(1)(C).

CONCLUSION

This Court should affirm Picklo's conviction in full.

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CERTIFICATE OF COMPLIANCE

I hereby certify that pursuant to Fed. R. App. P. 32(a)(7)(C), the attached Brief for the United States as Appellee is proportionally spaced, has a typeface of 14 points, and contains 8,584 words.

Date: May 3, 2006

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CERTIFICATE OF SERVICE

I hereby certify that on May 3, 2006, two copies of the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE were served by overnight mail, postage prepaid, on the following counsel:

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