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CA NO. 05-50375

JUN 26 2006

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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JUN 26 2006

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MALIK SMITH,

Defendant-Appellant.

DC# CR 03-728-PA

Panel Decision

Filed May 26, 2006, by D.W.
Nelson and O'Scannlain, CJJ,
and Jones, DJ

Appellant's Petition for Rehearing and Petition for Rehearing En Banc

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

HONORABLE PERCY ANDERSON
United States District Judge

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Introduction

This case should be reheard, or reheard en banc, because the use of the constitutionally deficient Ninth Circuit Model Jury Instruction the panel decision¹ affirms is not only capable of repetition, but certain to repeat itself with regularity.

Malik Smith was convicted of the crime of assault with a dangerous weapon, to wit: a knife made from Styrofoam trays. The use of a dangerous weapon--that is, a weapon that, as used, is capable of causing death and serious bodily injury--is an element of that offense. But the jury that convicted Mr. Smith was instructed, per Ninth Circuit Model Jury Instruction 8.5, that the Government was only required to prove three elements, none of which was the use of a dangerous weapon. Instead, the jury was instructed that the Government was required to prove the use of a "prison-made knife." Although there may be some cases where it could be said that a prison-made knife is, per se, a dangerous weapon and thus that the error was harmless, this was not such a case: the knife in question was made from non-contraband Styrofoam prison trays, it caused only minor injuries, and it broke under the stress. In short, the jury instruction omitted an element of the offense, and the omission prejudiced Mr. Smith.

The panel decision upholding Mr. Smith's conviction glosses over the constitutional deficiency of the instruction by citing an inapposite case, United States v. Frega, 179 F.3d 793, 806 n. 16 (9th Cir. 1999), for the general proposition that the relevant inquiry is whether the instructions as a whole are misleading or inadequate to guide the jury's deliberation--without explaining how reading the jury instructions as a whole in this case cures the error, and without

¹The panel's decision is included in Appendix A to this petition.

mentioning or distinguishing a closer and more relevant case, United States v. Brooksby, 668 F.2d 1102 (9th Cir. 1982), cited by appellant.

This case should be reheard or reheard en banc because the Ninth Circuit Model Jury Instruction given in this case (1) omits an element of the offense, (2) conflicts with both the model instruction provided in Federal Jury Practice and Instructions and every other circuit's model instruction on an analogous offense, and (3) prejudiced Mr. Smith. The evidence that the Styrofoam/plastic knife Mr. Smith used was a "dangerous weapon" was very weak. If this Court does not reexamine this issue in Mr. Smith's case, it is unlikely to do so in any case. If this Court does correct the issue in another case, it will likely be too late to overturn Mr. Smith's unconstitutional conviction. This Court should rehear Mr. Smith's case, or rehear it en banc, to address and correct this error now.

Background

Mr. Smith was charged with two offenses: assault with intent to commit murder, in violation of 18 U.S.C. § 113(a)(1); and assault with a dangerous weapon, in violation of 18 U.S.C. § 113(a)(3). At trial, the jury was also instructed on the lesser included offense of simple assault. Mr. Smith was found not guilty of assault with intent to commit murder, and guilty of assault with a dangerous weapon. Given the conviction on the assault with a dangerous weapon, the jury did not reach the simple assault.

The incident that gave rise to the prosecution occurred at the United States Penitentiary in Lompoc, California. Four inmates were placed into a "recreation cage" together: Mr. Smith, his codefendant Charles Helem,² the victim George W.

²Mr. Helem's and Mr. Smith's trials were severed.

Jeffries, and an uninvolved prisoner. After hearing scuffling sounds, prison staff went to the cage where they saw Mr. Helem holding Mr. Jeffries from behind. Mr. Smith was seen striking Mr. Jeffries in a downward motion--“really forcefully,” “putting all of his effort into it”--with a Styrofoam/plastic instrument. The instrument broke and Mr. Smith was seen continuing to strike Mr. Jeffries with the broken instrument. Mr. Jeffries eventually broke away.

The Styrofoam/plastic instrument was described as having been made from melting down Styrofoam or very thin plastic food trays that prisoners collected to use as soap dishes or the like. They were not counted, collected, or viewed in any other way by the prison as contraband or a potential weapon. The injuries Mr. Jeffries suffered were described as requiring only “minor first aid.” There was, however, some evidence provided by a “physician’s assistant” that, if the instrument were used to stab a “vital organ,” the injury could be fatal.

The Court instructed the jury as to three offenses: assault with intent to commit murder, assault with a dangerous weapon, and the lesser included offense of simple assault. As to the assault with a dangerous weapon, the jury was instructed as requested by the Government in an instruction tracking Ninth Circuit Model Jury Instruction 8.5:

The defendant is charged in count 2 of the indictment with assault with a dangerous weapon, in violation of Section 113(a)(3) of Title 18 of the United States Code.

In order for the defendant to be found guilty of that charge, the Government must prove each of the following elements beyond a reasonable doubt: First, the defendant intentionally struck or wounded George Jeffries; second, the defendant acted with the specific intent to do bodily harm to George Jeffries; and third, the defendant used a prison-made knife.

A prison-made knife is a dangerous weapon if it is used in a way that is capable of causing death or serious bodily injury.

(emphasis added).³

Mr. Smith objected to this instruction because the portion regarding the “ ‘prison made knife usurp[ed] the jury’s role as the finder of fact.’ ” Mr. Smith proposed the following instruction:

Malik Smith is charged in Count Two of the indictment with assault with dangerous weapon, with intent to do bodily harm, and without just cause or excuse, in violation of Section 113(a)(3) of Title 18 of the United States Code. In order for Malik Smith to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, Malik Smith intentionally struck or wounded George Jeffries;

Second, Malik Smith acted with the specific intent to do bodily harm to George Jeffries; and

Third, Malik Smith used a dangerous weapon.

An object is a dangerous weapon if it is used in a way that is capable of causing death or serious bodily injury.

(emphasis added).⁴

The jury found Mr. Smith not guilty of assault with intent to commit murder, but guilty of assault with a dangerous weapon. On appeal, Mr. Smith challenged his conviction, inter alia, on the ground that the jury instructions

³Ninth Circuit Model Jury Instruction 8.5 is reproduced at Appendix B. The instruction as given at trial is at Appendix C.

⁴Defendant’s proposed instruction is at Appendix D.

relieved the Government of its burden to prove that Mr. Smith used a dangerous weapon. The panel opinion rejected the claim in a single sentence:

The jury instructions did not relieve the government of its burden to prove that the prison-made plastic knife employed in the offense was a dangerous weapon. See United States v. Frega, 179 F.3d 793, 806 n. 16 (9th Cir. 1999) (“In reviewing jury instructions, the relevant inquiry is whether the instructions as a whole are misleading or inadequate to guide the jury’s deliberation.”) (emphasis added).

Appendix A at 2.

Argument

1. This Case Should be Reheard because the Panel Decision Affirms the Use of a Constitutionally Deficient Model Jury Instruction

The panel decision affirms the use of a model jury instruction that is constitutionally deficient because it omits an element of the offense. Malik Smith was convicted of assault with a dangerous weapon. There is no dispute that the use of a dangerous weapon is an element of that offense. See United States v. Etsitty, 130 F.3d 420, 437 (9th Cir. 1997) (holding that the three elements of 18 U.S.C. § 113(a)(3) are that defendant intentionally struck or wounded the victim, acted with specific intent to do bodily harm, and used a dangerous weapon). And there is no dispute that whether an object is a dangerous weapon is a question of fact for the jury. United States v. Riggins, 40 F.3d 1055, 1057 (9th Cir. 1994). Still, the jury in Mr. Smith’s trial was instructed, per Ninth Circuit Model Jury Instruction 8.5, that there are three elements: (1) that the defendant intentionally struck or wounded the victim, (2) that the defendant acted with specific intent to do bodily harm to the victim, and (3) that the defendant used a prison-made knife. Although the jury was provided with a sort of definition of a dangerous weapon--

“A prison-made knife is a dangerous weapon if it is used in a way that is capable of causing death or serious bodily injury”--it was not instructed that the Government was required to prove that the Styrofoam knife was a dangerous weapon. Thus, the instruction amounted to a directed verdict on the question whether the Styrofoam knife was a dangerous weapon. In short, the jury was not instructed as to an essential element of the offense: that the Government was required to prove that Mr. Smith used a dangerous weapon.

The panel decision affirms the use of Ninth Circuit Model Jury Instruction 8.5, despite the fact that it omits an element of the offense. The panel writes that the “jury instructions did not relieve the Government of its burden to prove that the prison-made plastic knife employed was a dangerous weapon” and cites Frega, supra, for the general proposition that the Court looks to the instructions as a whole. Appendix A at 2. The panel does not explain how reading the instructions as a whole cures the error of omitting an essential element of the offense; Frega is completely inapposite; and the panel did not mention, let alone distinguish, Brooksby, a closer case cited by the appellant.

The panel does not explain how reading the jury instructions as a whole cures the error of omitting an essential element of the offense. The entire instruction given on the assault with a deadly weapon is set forth, supra, at 3, and at Appendix C. The only possible explanation for the panel’s ruling is that the panel believed that (1) the fact that the jury was instructed that Mr. Smith was charged with “assault with a dangerous weapon,” and/or (2) the fact that the jury was advised that “[a] prison-made knife is a dangerous weapon if it is used in a way that is capable of causing death or serious bodily injury,” somehow instructed the jury that the Government was required to prove that Mr. Smith used a

dangerous weapon. But such a ruling would run counter not only to common sense but also this Court's precedent. The use of a term of art in the charge cannot possibly cure the omission of an essential element of the offense. Otherwise, courts could simply read the indictment to the jury and send it to deliberate. Nor could the advice regarding the circumstances in which a prison-made knife is a dangerous weapon have ensured that the jury understood that it needed to find that those circumstances were met to convict, where the jury was not instructed that the use of a dangerous weapon was an element of the offense.

The panel decision cites United States v. Frega, 179 F.3d at 806 n.16, as support for its holding. Frega involved charges against an attorney and various state court judges on mail fraud and conspiring to conduct affairs of state court through a pattern of racketeering activity in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO). Id. at 798. One of the claims on appeal was that the trial court had erred in refusing defendant's jury instructions on the predicate acts that formed the pattern of racketeering necessary to the RICO charge. Id. at 806-807. This Court rejected the argument, holding that most of the proposed instructions were misstatements of the law, and that the legally correct instructions were fairly and adequately covered by the instructions that the court did give, although "not in the precise words preferred by Frega." Id. at 807.⁵ Frega did not involve a claim that the instruction on the essential elements of an

⁵Regarding the two legally correct proposed instructions, this Court quoted the instructions given by the trial court to cover the issues. On the first one, this Court noted that "[t]he instruction [given by the court] carefully set forth the distinction that Frega requested be drawn." Frega, 179 F.3d at 807. On the second, the court explained that "the district court was well within its discretion in declining to give an instruction on what does not constitute official action when it correctly instructed on what does." Id.

offense omitted an essential element.

The panel decision does not mention or attempt to distinguish this Court's decision Brooksby, which cites a Sixth Circuit case for the proposition that the "omission of an essential element cannot be cured." 668 F.2d at 1104 (citing United States v. Pope, 668 F.2d 663 (6th Cir. 1977)). In Brooksby, the defendant was charged with falsely subscribing her tax returns, in violation of 26 U.S.C. § 7201(1). Id. at 1103. Title 26, United States Code § 7201(1) uses the term "willfully," and there was no dispute that the mental state required was willfulness. Id. at 1104. Still, for some reason, the district court refused to instruct the jury that willfulness was an element of the offense. Id. at 1103-04. Rather, the jury was instructed that, to sustain its burden of proof, the Government was required to prove three elements, none of which was that the defendant acted willfully. Id. at 1103.

The court in Brooksby did, however, "correctly state[] the law by reading the indictment and the statute" to the jury, each of which included the willfulness requirement. Id. at 1105. Moreover, the court gave two instructions on willfulness: one defining willfulness, and the other emphasizing what the Government was required to prove to meet its burden to prove willfulness. Id. at 1104. That is, the jury was advised that the defendant was charged with willfully subscribing a false tax return; was read the statute, which defines the offense to include willfulness; was given an instruction that defined willfulness; and was also instructed that the Government was required to prove willfulness separately from the other elements of the offense. Nevertheless, this Court held that, "notwithstanding that the indictment, the statute and an instruction on 'wilfully' were read to the jury, the failure to instruct them that 'willfulness' was an essential

element of the crime prejudiced the defendant.” Id. at 1105. None of the trial court’s actions cured the error of omitting an element of the offense from the definition, Id.

The omission in Mr. Smith’s case was far more glaring than in Brooksby. In Brooksby, although the instruction defining the essential elements of the offense omitted willfulness, the instructions clearly stated elsewhere that the Government was required to prove willfulness: “For the Government to meet its burden of proving that the defendant acted willfully and with the specific intent to disobey or to disregard the law, the Government must prove willfulness by evidence independent from the understatement of income. That is to say, willfulness cannot be inferred merely from the understatement of income on the Forms 1040 for 1973 and 1974.” Id. at 1104. Here, the panel decision’s implication notwithstanding, the jury was nowhere instructed that the Government was required to prove that Mr. Smith used a dangerous weapon. If the definition of “willfulness” along with the admonition that the Government must prove willfulness by evidence independent of the other elements of the offense was not enough to cure the omission in Brooksby, id. at 1105, the definition of dangerous weapon with no instruction that the Government must prove the element cannot possibly said to have cured the omission here. Rather, the definition amounted to a directed verdict on the factual question whether the prison-made knife was a dangerous weapon. Reading the instructions “as a whole” does nothing to cure the constitutional error of omitting an essential element from the elements of the offense.

Thus, the panel decision affirms the use of a Model Jury Instruction--one that is routinely used in federal assault trials in the Ninth Circuit--that is

constitutionally deficient. It allows Mr. Smith's conviction to stand notwithstanding that there is no way to know whether the jury would have convicted him if it had known that the Government was required to prove that the Styrofoam/plastic knife was a "dangerous weapon." And it does so without explaining its reasoning, by citing an inapposite case, and by ignoring this Court's precedent in Brooksby. This error warrants rehearing or rehearing en banc.

2. This Case Should Be Reheard Because the Panel Decision Affirms the Use of a Model Jury Instruction that Conflicts with Both the Model Instruction Provided in Federal Jury Practice and Instructions and Every Other Circuit's Model Instruction on an Analogous Offense

The constitutionally deficient jury instruction given in this case tracked Ninth Circuit Model Jury Instruction 8.5. Indeed, the Government responded to Mr. Smith's objections by noting that "[t]he instruction as written exactly tracks the language of Ninth Circuit Model Jury Instruction 8.5, and there is no good reason to change it." But there is good reason to change it: the Model Instruction is constitutionally deficient. Indeed, the Model Instruction conflicts not only with the model instruction provided in Federal Jury Practice and Instructions, but also the model instruction of every other circuit that has an analogous instruction. The panel decision affirming the use of this Model Instruction leaves this Circuit out of step.

The treatise and practice guide Federal Jury Practice and Instructions, Criminal provides the following model instruction for assault with a dangerous weapon, 18 U.S.C. § 113(a)(3):

In order to sustain its burden of proof for the crime of assault with a dangerous weapon with intent to do great bodily harm and without just cause or excuse as charged in Count ___ of the indictment, the government must prove the following four (4) essential elements beyond a reasonable doubt:

One: Defendant ___ intentionally [*struck*] [*injured*] ___ (*the individual named in the indictment*);

Two: Defendant ___ used a dangerous weapon, that is a ____, as charged in Count ___ of the indictment;

Three: Defendant ___ acted with the intent to do bodily harm to ___ (*the individual named in the indictment*); and

Four: Defendant ___ intentionally [*struck*] [*injured*] ___ within the special maritime and territorial jurisdiction of the United States.

2 K. O'Malley, J. Grenig, & W. Lee, Fed. Jury Prac. & Instr., Crim., § 25.06 (5th ed. 2000) (emphasis added).⁶ The volume also contains a model definition for “dangerous weapon”:

As used in these instruction, the term “with a dangerous weapon” means any object, instrumentality, or a part of [*his*] [*her*] body used in a manner by Defendant ___ that has the potential to inflict serious bodily harm.

Id., § 25.12. Thus, Federal Jury Practice and Instructions recommends that the jury be instructed that the Government bears the burden to prove that the defendant “used a dangerous weapon,” and then be instructed what a “dangerous weapon” means.

Federal Jury Practice and Instructions identifies only one circuit with a model jury instruction for assault with a dangerous weapon: the Ninth Circuit. See 2 Fed. Jury Prac. & Instr. § 25.06 (notes). But four circuits provide a model jury instruction for the analogous offense of assault on a federal officer with a deadly or dangerous weapon, 18 U.S.C. § 111(b). The Fifth, Eighth, and Eleventh

⁶Federal Jury Practice and Instructions, Criminal, § 25.06 is reproduced at Appendix E.

Circuits define the relevant element as “[t]hat in doing such acts the defendant used a deadly or dangerous weapon” (5th Circuit), “the defendant forcibly assaulted (describe federal officer by position and name) with a deadly or dangerous weapon” (8th Circuit), and “[t]hat in so acting the Defendant used a deadly or dangerous weapon” (11th Circuit). See 2 Fed. Jury Prac. & Instr. § 24.06 (notes) (emphases added).⁷ That is, the Fifth, Eighth, and Eleventh Circuits all require, as an essential element of the offense, that the Government prove the defendant used a deadly or dangerous weapon. Again, the Ninth Circuit stands alone with Ninth Circuit Model Jury Instruction 8.2, which provides a model instruction that suffers from the same problem as Model Instruction 8.5: It defines the relevant element as “the defendant used a [*weapon*].” Id.

In sum, in affirming Mr. Smith’s conviction, the panel decision affirms the use of a model jury instruction that conflicts with both the model instruction provided in Federal Jury Practice and Instructions and every other circuit’s model instruction on an analogous offense. The case should be reheard, or reheard en banc, not only to ensure that the Ninth Circuit’s Model Instruction conforms with constitutional requirements for the Government’s burden of proof as to each element of the offense, but also to ensure inter-circuit uniformity on this important question.

⁷Federal Jury Practice and Instructions, Criminal, § 24.06, is reproduced at Appendix F.

As with the definition for assault with a dangerous weapon, Federal Jury Practice and Instructions provides an accurate definition of the elements of the offense, with the relevant element requiring proof that “The assault was made while using a deadly or dangerous weapon.” 2 Fed. Jury Prac. & Instr. § 24.06. (emphasis added).

3. This Case Should Be Reheard Because the Panel Decision Affirms the Use of a Model Jury Instruction that Prejudiced Mr. Smith

Finally, and importantly, Mr. Smith's case should be reheard, or reheard en banc, because his is a case in which the use of the Model Instruction was not harmless. Mr. Smith's case involved a Styrofoam/plastic knife, assembled using melted non-contraband prison-provided Styrofoam food trays that inmates collect to use as soap dishes and the like. Despite evidence that Mr. Smith was wielding the instrument with all his force, while another inmate was holding the victim immobile, the victim suffered only minor injuries. And the instrument broke from the stress. In other words, if this Court does not confront the problem with Model Jury Instruction 8.5 in this case, when will it?

In Neder v. United States, 527 U.S. 1, 15 (1999), the United States Supreme Court held that the omission of an element from the judge's charge to the jury, although constitutional error, is still subject to harmless error analysis. The test for determining whether a constitutional error is harmless is "whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Id. (internal quotation marks and citation omitted); cf. Kotteakos v. United States, 328 U.S. 750, 765 (1946) ("The inquiry cannot be merely whether there was enough evidence to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence."). Under this standard, it is unquestionable that the error in this case was not harmless.

The question in Neder, 527 U.S. at 16, was whether the court's failure to submit the question of "materiality" to the jury in a tax fraud case constituted harmless error. In that case, the evidence supporting materiality was overwhelming and uncontested. Id. The Supreme Court thus found the error

harmless, holding that, “where a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error, the erroneous instruction is properly found to be harmless.” Id. at 17.

The omitted element in this case was neither uncontested nor supported by overwhelming evidence. Indeed, as set forth above, the evidence that the Styrofoam/plastic knife was capable, as used, of causing death or serious bodily injury was underwhelming. In view of the evidence in this case, it cannot be said that the instruction was harmless beyond a reasonable doubt. If this Court does not reexamine this issue in Mr. Smith’s case, it is unlikely to do so in any case. If this Court does correct the issue in another case, it will likely be too late to correct the injustice suffered by Mr. Smith. This Court should rehear Mr. Smith’s case, or rehear it en banc, to address and correct this error now.

Conclusion

For the foregoing reasons, rehearing en banc is appropriate and necessary unless the panel amends its decision to reverse Mr. Smith’s conviction.

Respectfully submitted,

SEAN K. KENNEDY
Acting Federal Public Defender

DATED: June 16, 2006

By 

DAVINA T. CHEN
Deputy Federal Public Defender

/

Certificate of Compliance

Pursuant to Ninth Circuit Rule 40-1, I hereby certify that this petition for panel rehearing and petition for rehearing en banc complies with Rule 32(c) of the Federal Rules of Appellate Procedure and does not exceed 15 pages.

DATED: June 16, 2006

By 

DAVINA T. CHEN
Deputy Federal Public Defender

Appendices

- A. Panel Decision
- B. Ninth Circuit Model Jury Instruction 8.5
- C. Instruction Given at Trial
- D. Instruction Proposed by Defendant
- E. Federal Jury Practice and Instructions, Criminal, § 25.06
- F. Federal Jury Practice and Instructions, Criminal, § 24.06

Appendix A: Panel Decision

FILED

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

**CATHY A. GATTERSON, CLERK
U.S. COURT OF APPEALS**

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MALIK SMITH, a/k/a Michael Marvin
Montana, Tarid M. Smith, Tarik N. Smith,
Tarik Smith, Tarik Marchand Smith, Tarik
Malik Smith, Milik and Tarid Smith,

Defendant - Appellant.

No. 05-50375

D.C. No. CR-03-00728-PA-01

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Percy Anderson, District Judge, Presiding

Argued and Submitted April 3, 2006
Pasadena, California

Before: D.W. NELSON and O'SCANNLAIN, Circuit Judges, and JONES**,
District Judge.

* This disposition is not appropriate for publication and may not be
cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The Honorable Robert C. Jones, District Judge for the District of
Nevada, sitting by designation.

Malik Smith appeals his conviction for assaulting a fellow inmate with a dangerous weapon in violation of 18 U.S.C. § 113(a)(3). He also appeals his 100-month sentence imposed consecutively to his undischarged term of imprisonment.

We have jurisdiction pursuant to 28 U.S.C. § 1291. The facts are known to the parties and will not be repeated here.

The jury instructions did not relieve the government of its burden to prove that the prison-made plastic knife employed in the offense was a dangerous weapon. *See United States v. Frega*, 179 F.3d 793, 806 n.16 (9th Cir. 1999) (“In reviewing jury instructions, the relevant inquiry is whether the instructions *as a whole* are misleading or inadequate to guide the jury’s deliberation.”) (emphasis added).

The evidence in this case was sufficient to support the jury’s finding that the knife was a dangerous weapon. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

The government concedes, as it must, that the district court’s imposition of a non-treatment drug testing supervised released condition that failed to state the maximum number of drug tests constituted an impermissible delegation of the court’s statutory duty under 18 U.S.C. § 3583(d). *See United States v. Stephens*, 424 F.3d 876, 883-84 (9th Cir. 2005).

The government also conceded, at oral argument, that the district court erroneously consulted U.S.S.G. § 5G1.3(a) instead of U.S.S.G. § 5G1.3(c) when it denied Smith's request for a concurrent sentence. We conclude that this error was not harmless. Because the district court failed to consult § 5G1.3(c), we cannot confidently conclude that the district court considered the appropriate factors when deciding whether to impose a wholly concurrent, partially concurrent, or consecutive sentence.

Because we conclude that the district court's error in applying the wrong guideline was not harmless, we do not reach Smith's claim that his sentence is unreasonable. *See United States v. Cantrell*, 433 F.3d 1269, 1280 (9th Cir. 2006)

Accordingly, we **AFFIRM** Smith's conviction but **REVERSE** and **REMAND** for re-sentencing as to the non-treatment drug testing supervised release condition and as to the determination to impose Smith's sentence concurrently, partially concurrently, or consecutively to his undischarged term of imprisonment.

CA NO. 05-50375
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FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MALIK SMITH,

Defendant-Appellant.

DC# CR 03-728-PA

Panel Decision
Filed March 31, 2008

Opinion by O'Scannlain, C.J.
Dissent by Nelson, D.W., C.J.

Appellant's Petition for Rehearing En Banc

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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United States District Judge

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CA NO. 05-50375

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MALIK SMITH,

Defendant-Appellant.

) DC# CR 03-728-PA

) Panel Decision
) Filed March 31, 2008

) Opinion by O'Scannlain, C.J.
) Dissent by Nelson, D.W., C.J.

Appellant's Petition for Rehearing En Banc

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

HONORABLE PERCY ANDERSON
United States District Judge

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Introductory Statement

This case should be reheard en banc because the panel majority's opinion upholds the use of a jury instruction on the elements of the offense of assault with a dangerous weapon that omitted an essential element of the offense: the use of a dangerous weapon.¹ As such, it not conflicts not only with this Court's opinions in Medley v. Runnels, 506 F.3d 857 (9th Cir. 2007) (en banc), United States v. Caldwell, 989 F.2d 1056 (9th Cir. 1993), and United States v. Brooksby, 668 F.2d 1102 (9th Cir. 1982), but also with longstanding and well-established constitutional protections against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which one is charged. See, e.g., In re Winship, 397 U.S. 358, 364 (1970); United States v. Gaudin, 515 U.S. 506, 511 (1995).

Malik Smith was convicted of the crime of assault with a dangerous weapon, to wit: a knife made from Styrofoam trays. The use of a dangerous weapon--that is, a weapon that is capable as used of causing death and serious bodily injury--is an element of that offense. But the jury that convicted Mr. Smith was instructed that the Government was only required to prove three elements, none of which was the use of a dangerous weapon. Instead, the jury was instructed that the Government was required to prove the use of a "prison-made knife." Although there may be some cases where it could be said that a prison-made knife is, per se, a dangerous weapon and thus such error would be harmless, this was not such a case: the knife in question was made from non-contraband Styrofoam prison trays, it caused only minor injuries, and it broke under the stress.

¹A copy of the decision, United States v. Smith, 520 F.3d 1097 (9th Cir. 2008), is attached at Appendix A.

In short, the jury instruction omitted an element of the offense, and the omission prejudiced Mr. Smith.

The panel majority's opinion affirming Mr. Smith's conviction avoids the simple fact that the jury was instructed as to three elements, none of which was the use of a dangerous weapon, by holding that a "close connection" between the statement of the elements and the following instruction--which stated that "a prison-made knife is a dangerous weapon if it is used in a way that is capable of causing death or serious bodily injury"--cured the omission because the latter instruction "should be viewed as a clarifying instruction, part-and-parcel of the third element instruction in the elements list." App. A at 7. But the panel majority's view of how the instructions "should be viewed" does not comport with the commonsense reading of the instructions, nor does it implement the requirement that reversal is required where there is a "reasonable likelihood" that the jury was misled. Rather, the dissent's observation that the instruction simply did not require the Government to prove an essential element of the offense beyond a reasonable doubt, App. A at 11, is a better reading of both the instructions and the law of this Court.

Background

Mr. Smith was charged with two offenses: assault with intent to commit murder, in violation of 18 U.S.C. § 113(a)(1); and assault with a dangerous weapon, in violation of 18 U.S.C. § 113(a)(3). At trial, the jury was also instructed on the lesser included offense of simple assault. Mr. Smith was found not guilty of assault with intent to commit murder, and guilty of assault with a dangerous weapon. Given the conviction on the assault with a dangerous weapon,

the jury did not reach the simple assault. App. A at 5.

The incident that gave rise to the prosecution occurred at the federal penitentiary in Lompoc, California. Four inmates were placed into a “recreation cage” together: Mr. Smith, his codefendant Charles Helem, the victim George W. Jeffries, and an uninvolved prisoner. After hearing scuffling sounds, prison staff went to the cage where they saw Mr. Helem holding Mr. Jeffries from behind. Mr. Smith was seen striking Mr. Jeffries in a downward motion--“really forcefully,” “putting all of his effort into it”--with a plastic instrument. The instrument broke, and Mr. Smith was seen continuing to strike Mr. Jeffries with the broken instrument. Mr. Jeffries eventually broke away. App. A at 5.

The instrument in question was described as having been made from melting down Styrofoam or very thin plastic food trays that prisoners collected to use as soap dishes or the like. They were not counted, collected, or viewed in any other way by the prison as contraband or a potential weapon. The injuries Mr. Jeffries suffered were described as requiring only “minor first aid.” There was, however, some evidence provided by a “physician’s assistant” that, if the instrument were used to stab a “vital organ,” the injury could be fatal. App. A at 5.

The Court instructed the jury as to three offenses: assault with intent to commit murder, assault with a dangerous weapon, and the lesser included offense of simple assault. As to the assault with a dangerous weapon, the Government requested an instruction that tracked Ninth Circuit Model Criminal Jury Instruction 8.5:

The defendant is charged in count 2 of the indictment with assault with a dangerous weapon, in violation of Section 113(a)(3) of Title 18 of the United States Code.

In order for the defendant to be found guilty of that charge, the Government must prove each of the following elements beyond a reasonable doubt: First, the defendant intentionally struck or wounded George Jeffries; second, the defendant acted with the specific intent to do bodily harm to George Jeffries; and third, the defendant used a prison-made knife.

A prison-made knife is a dangerous weapon if it is used in a way that is capable of causing death or serious bodily injury.

(emphasis added). App. A at 5.²

Mr. Smith objected to this instruction because the portion regarding the “ ‘prison made knife usurp[ed] the jury’s role as the finder of fact.’ ” Mr. Smith proposed the following instruction:

Malik Smith is charged in Count Two of the indictment with assault with dangerous weapon, with intent to do bodily harm, and without just cause or excuse, in violation of Section 113(a)(3) of Title 18 of the United States Code. In order for Malik Smith to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, Malik Smith intentionally struck or wounded George Jeffries;

Second, Malik Smith acted with the specific intent to do bodily harm to George Jeffries; and

Third, Malik Smith used a dangerous weapon.

An object is a dangerous weapon if it is used in a way that is capable of causing death or serious bodily injury.

(emphasis added). The district court gave the instruction requested by the Government, App. B at ER 303, and the jury found Mr. Smith not guilty of assault with intent to commit murder, but guilty of assault with a dangerous weapon. App. A at 5.

On appeal, Mr. Smith challenged his conviction on the grounds that there

²The portion of the excerpt of record covering the jury instructions as given at trial is at Appendix B.

was insufficient evidence for the jury to conclude that the Styrofoam knife was a dangerous weapon and that the jury instructions relieved the Government of its burden to prove beyond a reasonable doubt that Mr. Smith used a dangerous weapon. In an unpublished memorandum disposition, the panel rejected both challenges and affirmed Mr. Smith's conviction. After this Court issued its en banc decision in Medley v. Runnels, 506 F.3d 857 (9th Cir. 2007) (en banc), the panel withdrew the memorandum disposition and filed the superseding opinion at issue here.

The Panel's Decision

In its superseding opinion, the panel rejects Mr. Smith's argument that the evidence at trial was insufficient as a matter of law to prove that the Styrofoam knife was a dangerous weapon, App. A at 9-10, and Mr. Smith does not challenge this holding here. But the panel majority also rejects the argument that the jury instructions relieved the Government of its burden to prove beyond a reasonable doubt every essential element of the offense, despite the fact that the instructions listed only three elements, none of which was the use of a dangerous weapon. App. A at 6-8. This is the holding Mr. Smith challenges.

The panel majority agrees with Mr. Smith that use of a dangerous weapon--that is, an object that is capable as used of causing death or serious bodily injury--is an essential element of the offense of assault with a dangerous weapon and that whether an object is a dangerous weapon is a question of fact for the jury. App. A at 6 (citing United States v. Estitty, 130 F.3d 420, 427 (9th Cir. 1997) (per curiam); United States v. Riggins, 40 F.3d 1055, 1057 (9th Cir. 1994)). The panel also agrees that due process protects the accused against conviction except upon

proof beyond reasonable doubt of every fact necessary to constitute the crime with which he is charged, App. A at 6 (citing In re Winship, 397 U.S. at 364), and that a conviction may not be sustained on appeal where the trial court's instruction relieved the Government of its burden as to any element of the crime of which the defendant has been convicted. App. A at 6 (citing Medley, 506 F.3d at 864). But, despite the fact that the jury instructions enumerated three elements that the Government must prove beyond a reasonable doubt, none of which was the use of a dangerous weapon, the panel majority nevertheless concludes that the jury instructions did not omit an element of the crime.

To reach this conclusion, the panel majority points to three references in the instructions to dangerous weapons. First, the panel majority describes the "close connection" between the instruction on the elements and the immediately following instruction that "a prison-made knife is a dangerous weapon if it is used in a way that is capable of causing death or serious bodily injury." App. A at 7; see also App. B at 303. The panel majority explains that, given the "tight connection" between this instruction and the instruction on the elements, it "should be viewed as a clarifying instruction, part-and-parcel of the third element in the elements list." Second, the panel majority explains that the court prefaced the elements list with an instruction explaining that the defendant was charged in the indictment with "assault with a dangerous weapon." App. A at 7 (emphasis added in opinion); see also App. B at 303. And third, the panel majority expresses its view that, "in charging the jury on the lesser included offense of simple assault, the instructions again emphasized that the jury could only convict Smith for assault with a dangerous weapon if it was 'convinced beyond a reasonable doubt that [Smith was] guilty of . . . assault with a dangerous weapon with the intent to

do bodily harm.” App. A at 7 (emphasis added in opinion); see also App. B at 304. Based on these three references to dangerous weapons, the panel majority concluded that there was no reasonable likelihood that the jury convicted Smith without finding beyond a reasonable doubt that the Styrofoam knife was a dangerous weapon. App. A at 7; see Estelle v. McGuire, 502 U.S. 62, 67 (1991) (establishing “reasonable likelihood” proper inquiry).

Describing “the rationale for reversing Smith’s conviction” as “straightforward,” Judge D.W. Nelson wrote in dissent that “the three elements, as enumerated in the instruction, do not even include the term ‘dangerous weapon,’ even though use of such an instrument is an element of the offense.” App. A at 11. She further observed that this Court’s prior decisions in Medley and Brooksby counsel that Mr. Smith’s conviction should not be upheld. App. A at 12-13. She concluded that “there is at least a reasonable likelihood that the jury applied the instruction improperly, especially when we consider that ‘dangerous weapon does not appear anywhere in the instruction as an element of the crime.’” App. A at 13.

Argument

1. This Case Should be Reheard En Banc because the Panel Majority’s Opinion Upholding the Use of a Jury Instruction that Omits an Essential Element of the Offense Conflicts with the Law of the United States Supreme Court and of this Court

Although conceding that the instructions “would have been improved” if given as the defendant proposed, App. A at 7, the panel majority nevertheless upholds the use of an instruction on the elements of the offense of assault with a dangerous weapon that omits an essential element of the offense: the use of a dangerous weapon. In so holding, the panel majority misreads the instruction, the

requirements of due process, and the law of this Court.

Malik Smith was convicted of assault with a dangerous weapon. There is no dispute that use of a “dangerous weapon” is an element of that offense and that the question whether an object--such as a Styrofoam knife--is a “dangerous weapon” is a question of fact for the jury. Still, the jury in Mr. Smith’s trial was instructed, per Ninth Circuit Model Criminal Jury Instruction 8.5,³ that there were three elements that the Government was required to prove beyond a reasonable doubt, none of which was the use of a dangerous weapon. Although the jury was provided with a sort of definition of a dangerous weapon--“A prison-made knife is a dangerous weapon if it is used in a way that is capable of causing death or serious bodily injury”--it was not instructed that the Government was required to prove that the Styrofoam knife was a dangerous weapon. Although it is impossible to say what the jury made of this definition of a term that was not an element of the offense, it is clear that it was not instructed that the Government was required to prove beyond a reasonable doubt that the instrument involved in this case was a dangerous weapon, or that it was required to make any finding in this regard.

It is well-settled that the Constitution protects every criminal defendant “against conviction except upon proof beyond a reasonable doubt of every fact

³As Judge Nelson recognized in her dissent, the Ninth Circuit’s model instruction conflicts with instructions used in other circuits. App. A at 14 n. 1; see also 2 K. O’Malley, J. Grenig, & W. Lee, Fed. Jury Prac. & Instr., Crim., §§ 25.06, 25.12 (5th ed. 2000) (model instructions for assault with a dangerous weapon and definition of dangerous weapon); cf. 2 Fed. Jury Prac. & Instr., Crim. § 24.06 (model instructions on assault on a federal officer with a deadly or dangerous weapon).

necessary to constitute the crime with which he is charged.” In re Winship, 397 U.S. 358, 364 (1970). It is equally clear that the “Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged.” United States v. Gaudin, 515 U.S. 506, 511 (1995). Indeed, this Court, sitting en banc, recently held that an instruction that takes a critical issue of fact--whether a flare gun is a firearm--violated clearly established constitutional law. Medley, 506 F.3d at 864, 867. By upholding the use of an instruction that omits an element of the offense, the panel majority’s conflicts with these long-standing and well-established precedents.

As Judge Nelson writes in her simply worded and clearly reasoned dissent, the panel majority’s reasoning runs counter to a commonsense reading of the instructions as a whole. In response to the panel majority’s remarkable contention that the “close connection” between the instruction as to the elements of the offense and the following instruction defining a term that was not among the elements somehow cured the faulty instruction on the elements, Judge Nelson observes that the instruction on the elements “requires a finding beyond a reasonable doubt,” while the following instruction “appears to require something less (perhaps no finding at all).” App. A at 13. As to the panel majority’s implication that the trial court’s description of the charge as “assault with a deadly weapon” cures the omission, Judge Nelson observes that “it cannot be true that merely reciting the charge is sufficient for instructing the jury on what elements must be proven beyond a reasonable doubt.” App. A at 13.

Moreover, in reasoning that the faulty instruction enumerating the elements of the offense was cured by other instructions, the panel majority’s decision runs counter not only to common sense, but also this Court’s precedent. First, the

holding that the omission of an essential element of the offense was cured by other instructions runs contrary to this Court's holding in Brooksby, 668 F.2d at 1105, that an instruction that omits a key element of the offense cannot be cured by cobbling together other instructions that mention the missing element. In Brooksby, 668 F.2d at 1103-04, the trial court omitted the element of "willfulness" from a jury instruction defining the elements of an offense of which "willfulness" was an element. The trial court "correctly stated the law by reading the indictment and the statute" to the jury and also gave two instructions on willfulness: one defining willfulness and the other explaining what the Government was required to show to meet its burden to prove willfulness. Id. at 1104-05.⁴ Still, this Court held that, "notwithstanding that the indictment, the statute and an instruction on 'willfully' were read to the jury, the failure to instruct them that 'willfulness' was an essential element of the crime prejudiced the defendant." Id. at 1105. None of the trial court's actions cured the error of omitting an element of the offense from the definition, Id.

The omission in Mr. Smith's case was far more glaring than in Brooksby. In Brooksby, although the instruction defining the essential elements of the offense omitted willfulness, the instructions clearly stated elsewhere that the Government was required to prove willfulness: "For the Government to meet its burden of proving that the defendant acted willfully and with the specific intent to disobey or to disregard the law, the Government must prove willfulness by evidence independent from the understatement of income." Id. at 1104. Here, the jury was nowhere instructed that the Government was required to prove that Mr.

⁴There is no discussion in Brooksby of when, in relation to the instruction on the elements, the other instructions were read.

Smith used a dangerous weapon. If the definition of “willfulness” along with the admonition that the Government must prove willfulness by evidence independent of the other elements of the offense was not enough to cure the omission in Brooksby, *id.* at 1105, the definition of dangerous weapon with no instruction that the Government must prove the element cannot possibly said to have cured the omission here.

Second, the panel majority’s contention that the district court’s instruction that the crime charged in the indictment was assault with a dangerous weapon somehow remedied the district court’s failure to instruct that the use of a dangerous weapon was an element of the offense is in direct conflict with this Court’s previous holdings in both Brooksby and Caldwell that the use of a term of art in the charge cannot possibly cure the omission of an essential element of the offense. Caldwell, 989 F.2d at 1060 n. 8 (noting that instruction’s use of term “defraud” in description of offense did not cure the instruction’s failure to describe fraud as an element of the offense); Brooksby, 668 F.2d at 1104-1105 (rejecting argument that word “willfully” in indictment corrected the error of failing to define the essential elements of the offense to include “willfulness”). Otherwise, courts could simply read the indictment to the jury and send it to deliberate; no instructions would be required at all. Even less can the final instruction the panel majority relies on--“if any of you are not convinced beyond a reasonable doubt that the defendant is guilty of either assault with intent to commit murder or assault with a dangerous weapon with the intent to do bodily harm, and all of you are convinced beyond a reasonable doubt that the defendant is guilty of the lesser crime of simple assault, you may find the defendant guilty of simple assault,” App. B at ER 304 --be said to have “emphasized” to the jury that the offense of

assault with a dangerous weapon required a finding that the defendant used a dangerous weapon. This instruction does not even state the elements of assault with a dangerous weapon, let alone “emphasize” any particular element.

In short, the panel majority’s decision upholding the use of a constitutionally deficient model jury instruction--one that is routinely used in federal assault trials in the Ninth Circuit--conflicts with the law of the United States Supreme Court and of this Court. It allows Mr. Smith’s conviction to stand notwithstanding that there is no way to know whether the jury would have convicted him if it had known that the Government was required to prove that the Styrofoam/plastic knife was a “dangerous weapon.” And it does so in conflict with the Supreme Court’s decisions in Winship and Gaudin as well as this Court’s precedent in Medley, Brooksby and Caldwell. This error warrants rehearing en banc.

2. This Case Should Be Reheard En Banc Because the Erroneous Model Jury Instruction Prejudiced Mr. Smith

Finally, Mr. Smith’s case should be reheard en banc because the use of the faulty model jury instruction prejudiced Mr. Smith. Mr. Smith’s case involved a Styrofoam knife, assembled using melted non-contraband prison-provided food trays that inmates collect to use as soap dishes and the like. Despite evidence that Mr. Smith was wielding the instrument with all his force, while another inmate was holding the victim immobile, the victim suffered only minor injuries. And the instrument broke from the stress. Although the panel majority notes that the model instruction could benefit from a retooling, and that “Office of the Circuit Executive may wish to bring this decision to the attention of the Ninth Circuit Jury Instructions Committee,” App. A at 14 n. 3, it would be tragically ironic if Mr. Smith’s appeal resulted in a correction of the deficient jury instruction, but not a

reversal of his own conviction, where the evidence on the element was hotly contested and underwhelming.

In Neder v. United States, 527 U.S. 1, 15 (1999), the United States Supreme Court held that the omission of an element from the judge's charge to the jury, although constitutional error, is still subject to harmless error analysis. The test for determining whether a constitutional error is harmless is "whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Id. (internal quotation marks and citation omitted). Under this standard, it is unquestionable that the error in this case was not harmless.

The question in Neder, 527 U.S. at 16, was whether the court's failure to submit the question of "materiality" to the jury in a tax fraud case constituted harmless error. In that case, the evidence supporting materiality was overwhelming and uncontested. Id. The Supreme Court thus found the error harmless, holding that, "where a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error, the erroneous instruction is properly found to be harmless." Id. at 17.

The omitted element in this case was neither uncontested nor supported by overwhelming evidence. Indeed, as set forth above, the evidence that the Styrofoam/plastic knife was capable, as used, of causing death or serious bodily injury was underwhelming. In view of the evidence in this case, it cannot be said that the instruction was harmless beyond a reasonable doubt. Because the use of the faulty model jury instruction prejudiced Mr. Smith, this Court should rehear this case en banc to address and correct this error now.

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//

Conclusion

For the foregoing reasons, rehearing en banc is appropriate and necessary.

Respectfully submitted,

SEAN K. KENNEDY
Federal Public Defender

DATED: May __, 2008

By _____
DAVINA T. CHEN
Deputy Federal Public Defender

/

Certificate of Compliance

Pursuant to Ninth Circuit Rule 40-1, I hereby certify that this petition for panel rehearing and petition for rehearing en banc complies with Rule 32(c) of the Federal Rules of Appellate Procedure and does not exceed 15 pages.

DATED: May __, 2008

By _____
DAVINA T. CHEN
Deputy Federal Public Defender

Appendices

A. Panel Decision

B. Jury Instructions as Given at Trial

Excerpt of Record 297-307 (Reporter's Transcript of Proceedings, June 10, 2004, Jury Trial, Day Three, Pages 22-32)

Appendix A: Panel Decision

FILED

JUL 3 - 2008

No. 05-50375

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MALIK SMITH,

Defendant-Appellant.

GOVERNMENT'S RESPONSE TO PETITION FOR REHEARING EN BANC

APPEAL FROM
THE UNITED STATES DISTRICT COURT
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No. 05-50375

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MALIK SMITH,
Defendant-Appellant.

GOVERNMENT'S OPPOSITION TO PETITION FOR REHEARING EN BANC

I

INTRODUCTION

Defendant Malik Smith ("Smith") and his cell mate Charles Helem ("Helem") were charged with attempted murder and assault with a dangerous weapon arising out of a 1999 attack on fellow inmate, George Jeffries's ("Jeffries"), using a prison-made knife fashioned out of melted plastic. The attack left Jeffries with significant injuries, including several full-skin thickness lacerations to his head and eye that required multiple stitches.

At trial, the defense argued, among other things, that the weapon did not constitute a dangerous weapon, characterizing it instead as a "Styrofoam" knife and pointing to the prison medical

examiner's report. In that report, the examiner had checked the box for "minor first aid" in describing the treatment Jeffries received for his injuries, although the examiner also described the injuries as "extensive."

In instructing the jury on the elements of the offense, the government proposed an instruction that tracked Ninth Circuit Model Criminal Instruction No. 8.5. Although the defense argued that the model instruction did not include the element that defendant's weapon constituted a "dangerous weapon" and offered its own instruction, the district court opted for the model instruction. On appeal, the panel majority held that, although the model instruction could have been "improved," the instructions taken as a whole were neither misleading nor inadequate to guide the jury's deliberations.

Defendant argues that the panel's decision conflicts with this Court's decisions in Medley v. Runnels, 506 F.3d 857 (9th Cir. 2007), United States v. Brooksby, 668 F.2d 1102 (9th Cir. 1982), and United States v. Caldwell, 989 F.2d 1056 (9th Cir. 1993). These cases, however, are distinguishable. As discussed more thoroughly below, the error in Medley "was not presenting all factual issues to the jury." Rameses v. Kernan, 2007 WL 4200814 (E.D. Cal. Nov. 27, 2007). Put another way, the trial court in Medley created a "mandatory presumption" on one element of the offense. 506 F.3d at 864. In Brooksby and Caldwell, the

court's instruction omitted an element of the offense.

No such errors occurred in this case. Neither the district court nor the wording of the disputed instruction left out any element or took any issue away from the jury. To the contrary, the disputed instruction included a definition of dangerous weapon and read as a whole conveyed to the jury that, to find defendant guilty, the jury must first find that the prison-made knife he used met that definition. As such, the instruction adequately guided the jury.

II

STATEMENT OF FACTS

In August 1999, defendant and his co-defendant Helem brought two prison-made knives into a recreational cage at United States Penitentiary at Lompoc intending to stab fellow inmate Jeffries. The apparent reason for the attack was that Jeffries testified for the government in a Washington, D.C. murder case several years earlier. See Ruffin v. United States, 642 A.2d 1288, 1289 (D.C. Ct. App. 1994).

The attack consisted of Helem holding Jeffries from behind while defendant stabbed Jeffries multiple times with one of prison-made knives. (RT 6/9/04: 23-25; ER 95-97). The knife was about six inches long, flat, with a slight hourglass shape in the main body, and sharpened to a point at one end. (GER 4, 6). According to testimony at trial, the knives had been fashioned

out of melted plastic, not Styrofoam as the defense claimed. Lt. Jamie Bengford, who recovered the two knives, explained that the one used in the attack "appears to be made from a common-fare tray with possibly cellophane -- common fare trays come with a kosher meal inside, and they're a thin, plastic tray . . . and it looks like it would be accumulating a few of them and melting it down with heat[.]" (RT 6/9/04: 87-88; ER 159-60).

Contrary to defendant's claims, the wounds defendant inflicted were serious and required far more than "minor first aid." Reynaldo Nisperos, the government's medical expert, examined Jeffries and described his injuries as "very extensive." (RT 6/9/04: 144; ER 216). One of the cuts he observed was about eight centimeters long and cut completely through the skin of Jeffries's right eyelid. (RT 6/9/04: 151; ER 223). He also observed a second even larger cut ten centimeters long to the upper eyelid which was also a full-skin thickness cut. (Id.). He observed an "eight centimeters full-skin thickness laceration . . . on the left parietal area of the head." (Id.). Nisperos also noted a "superficial abrasion" on Jeffries neck that was about six centimeters long and "multiple superficial abrasions and lacerations in the left lower back, ranging from 2 centimeters to 12 centimeters." (RT 6/9/04: 152; ER 224). The jury saw photographs of each of the injuries. (Exs. 13, 14, 15, 17; GER 8, 9, 10, 11).

In addition to the severity of the actual injuries that defendant inflicted, Nisperos believed that defendant's prison-made knife could have inflicted a fatal injury. (RT 6/9/04: 140-41; ER 212-13). Specifically, he identified wounds to "a major artery, like the carotid or the jugular vein" as major wounds or "if you hit internal organs, like the liver, the heart, those would be major injuries." (RT 6/9/04: 129; ER 201). Nisperos was asked to examine the pieces of the broken prison-made knife and stated that "[i]t could cause very fatal injuries." (RT 6/9/04: 161; ER 233). Defendant's attorney cross examined Nisperos but did not question his opinion that the knife could inflict a fatal injury. (RT 6/9/04: 162-68; ER 234-40).

In instructing the jury, the district court first explained that "[i]n following my instructions, you must follow all of them and not single out some and ignore others. They are all equally important." (RT 6/10/04: 23; ER: 298). The court further instructed the jury that "defendant is charged . . . with assault with a dangerous weapon" and the court then immediately gave the jury the elements of the assault-with-a-dangerous-weapon charge which tracked the Ninth Circuit Model Jury Instruction:

The defendant is charged in Count 2 of the indictment with assault with a dangerous weapon, in violation of Section 113(a)(3) of Title 18 of the United States Code.

In order for defendant to be found guilty of that charge, the Government must prove each of the following elements beyond a reasonable doubt: First, the defendant intentionally struck or wounded George

Jeffries; second, the defendant acted with the specific intent to do bodily harm to George Jeffries; and third, the defendant used a prison-made knife.

A prison-made knife is a dangerous weapon if it is used in a way that is capable of causing death or serious bodily injury.

(RT 6/10/04: 28; ER 303).¹

Finally, the court explained that if the jury was not convinced that defendant was guilty of assault with a dangerous weapon, it could still find him guilty of "simple assault," and the court gave the elements of that offense, which did not include a finding that the defendant used a "dangerous weapon."

(RT 6/10/04: 29; ER 304).

Before the jury had been instructed, defendant objected to

¹ The Ninth Circuit Model Jury Instruction 8.5 provides:

The defendant is charged in [Count _____ of] the indictment with assault with a dangerous weapon in violation of Section 113(a)(3) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant intentionally [struck or wounded [victim]] [used a display of force that reasonably caused [victim] to fear immediate bodily harm];

Second, the defendant acted with the specific intent to do bodily harm to [victim]; and

Third, the defendant used a [weapon].

[A [weapon] is a dangerous weapon if it is used in a way that is capable of causing death or serious bodily injury.]

the wording of the instruction defining the elements of the offense, arguing instead for the following (changes from version given are underlined and bolded):

In order for [defendant] to be found guilty of that charge, the Government must prove each of the following elements beyond a reasonable doubt:

First, [defendant] intentionally struck or wounded George Jeffries;

Second, [defendant] acted with the specific intent to do bodily harm to George Jeffries; and

Third, [defendant] used a dangerous weapon.

An object is a dangerous weapon if it is used in a way that is capable of causing death or serious bodily injury.

(ER 59).

Defendant was convicted of assault with a dangerous weapon and appealed. He argued, among other things, that the jury instruction relieved the government of proving an element of the offense. This Court first issued an unpublished opinion in which all three judges rejected defendant's claims. This Court then issued the en banc decision in Medley v. Runnels, 506 F.3d 857 (9th Cir. 2007), and the panel filed a superseding opinion.

In that superseding opinion, the panel majority rejected defendant's claim that the disputed jury instruction omitted an element of the offense or relieved the government of its burden of proving that the knife was a dangerous weapon. The panel majority recognized that "the relevant inquiry is whether the

instructions as a whole are misleading or inadequate to guide the jury's deliberation." United States v. Smith, 520 F.3d 1097 (9th Cir. 2007). The panel majority concluded that, while the instruction could have been "improved," "the instructions as a whole were not misleading or inadequate to guide the jury's deliberation and that there is no 'reasonable likelihood' that the jury convicted [defendant] without proof beyond a reasonable doubt that he used a 'dangerous weapon.'" Id.

The dissent, by contrast, first concluded that the instruction ran afoul of Medley. 520 F.3d 1097. The dissent conceded that the alleged error was not as "egregious" as that found in Medley and did not say that the instruction created any mandatory presumption. Id. Nevertheless, it concluded that the instruction impermissibly "blurred" the government's burden of proof and impeded the jury's deliberation. Id. Next, relying on Brooksby, the dissent concluded that the instruction omitted entirely the element of whether defendant's knife met the definition of dangerous weapon. Id.

III

ARGUMENT

THE PETITION SHOULD BE DENIED AS THE MAJORITY OPINION DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT

A. READING THE INSTRUCTIONS AS WHOLE DEMONSTRATED THAT THE DISTRICT COURT PROPERLY INSTRUCTED THE JURY

According to defendant, the district court abused its discretion in framing the instruction because it did not include the term "dangerous weapon" among the elements, defining the third element, instead, as requiring defendant to have used a prison-made knife. Defendant argues that, worded this way, the disputed instruction both omitted an element of the offense and created a mandatory presumption on that same element.

Contrary to defendant's narrow focus on whether the term "dangerous weapon" was used in describing the third element of the offense, the question is whether there is "a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution." Middleton v. McNeil, 541 U.S. 433, 437 (2004). Read in context of the whole provision (and in light of the other instructions) there is no such likelihood here, as the panel majority correctly determined.

Specifically, in instructing the jury on the elements of the offense at issue, the court began by stating that defendant was charged with "assault with a dangerous weapon." The court then noted the elements of that offense including the third element

that defendant used a weapon, in this case a "prison-made knife." Immediately following the third element, the court read the definition of dangerous weapon, stating that a prison-made knife is a dangerous weapon only "if it is used in a way that is capable of causing death or serious bodily injury." (Emphasis added).

The instruction, taken as a whole and read in common sense manner, informed the jury that: (1) defendant was charged with assault with a dangerous weapon; (2) the government had to prove that defendant used a weapon, which here was a prison-made knife; and (3) a prison-made knife constituted a dangerous weapon only "if it is used in a way that is capable of causing death or serious bodily injury." And, as noted above, the court also gave a further instruction to the jury that, if they were unable to find that defendant assaulted the victim with a dangerous weapon, they could convict defendant of simple assault, a lesser included offense. Reading the instructions as a whole thus demonstrates that the jury was properly instructed and, in fact, found defendant guilty because the assault involved a dangerous weapon, i.e., an object that was "used in a way that is capable of causing death or serious bodily injury."

Both the dissent and defendant suggest the opposite result by downplaying the definitional sentence that followed the third element, but its importance cannot be ignored. Phrased in the

conditional form, common sense suggests that the jurors would have considered the definition, as the majority pointed out, "part-and-parcel" of the third element and determined "if" the knife met the given definition of a dangerous weapon.² Indeed, any other reading would render the definition surplusage and, as the majority concluded, would require the jury to have ignored the district court's earlier admonition that it must "follow all of [the instructions] and not single out some and ignore others." Smith, 520 F.3d 1097.

The majority's common sense reading of the instruction as a whole is consistent with settled principles of law. As this Court has explained, "[a] single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." United States v. Dixon, 201 F.3d 1223, 1230 (9th Cir. 1999). "In reviewing jury instructions, the relevant inquiry is whether the instructions as a whole are misleading or inadequate to guide the jury's deliberations." Id. Applied to this case, just as one instruction cannot be singled out from the rest, it logically follows that one line in one instruction cannot be viewed in "artificial isolation" either.

² Although the dissent questions how the jurors would have used the definition, if at all, jury instructions in the form used here with conditional definitions clarifying elements of the offense are not unusual. For example, the same conditional form is used in model instruction 3.18 ("A person has possession of something if . . .") and in instruction 5.6 ("An act is done knowingly if . . .").

Moreover, ignoring the definition of when a prison-made knife constitutes a dangerous weapon -- as defendant suggests the jury did here -- improperly treats that definition as merely surplusage, as the panel majority noted, and contravenes the settled principle that juries are presumed to follow the instructions, which here means the instruction in its entirety, not simply part of the instruction. See, e.g., United States v. Brady, 579 F.2d 1121 (9th Cir. 1978) ("[W]e are required to assume that the jury followed the instructions"). Common sense and logic thus demonstrate that the instruction in its entirety guided the jury's determination.

Finally, from the jury's perspective, defendant's proffered instruction was not functionally different from the instruction actually given. Defendant wanted the instruction to read in part as follows (wording of actual instruction shown parenthetically and highlighted):

Third, Malik Smith used a dangerous weapon (prison-made knife)

An object (prison-made knife) is a dangerous weapon if it is used in a way that is capable of causing death or serious bodily injury.

(ER 59).

The differences between defendant's instruction and the one given is the use of the terms dangerous weapon/object instead of prison-made knife. Whether the instruction used the term "dangerous weapon" or "prison-made knife," however, the result

from the jurors' perspective would have been identical: To convict under either version, the jurors had to rely on the last sentence of the instruction and decide whether the object/prison-made knife was "capable of causing death or serious bodily injury." In other words, neither "dangerous weapon" nor "prison-made knife" have any inherent meaning apart from the definition of "dangerous weapon." While the petition questions whether the jury considered the last sentence of the instruction, it fails to recognize that defendant's preferred version depends on the jury doing just that.

For these reasons, the panel correctly held that the district court did not abuse its discretion by formulating the jury instruction. Absent an intra- or inter- circuit conflict, the panel's determination is both correct and not the type of decision that warrants rehearing en banc.

B. THE PANEL'S DECISION DOES NOT CONFLICT WITH NINTH CIRCUIT PRECEDENT

In an attempt to demonstrate that rehearing en banc is warranted, defendant suggests that the panel's decision conflicts with Medley, Brooksby, and Caldwell. But no such conflict exists.

In Medley, the defendant had been charged with murder, including an enhancement for use of a "firearm," a term defined under California law. 506 F.3d at 860. The alleged firearm in question was a flare gun. The trial court concluded that the

flare gun met the definition firearm and instructed the jury that "[a] flare gun is a firearm." Id.

In reversing the conviction, this Court held that it was error because the trial court "did not permit the jury to make the factual determination as to whether the object used by Medley was designed to be used as a weapon and expels a projectile through the barrel by the force of an explosion." 506 F.3d at 864. The Court explained that "[t]rial courts may not create mandatory presumptions which relieve the prosecution of its burden to prove facts to the jury beyond a reasonable doubt." Id. at 861 (citations omitted); see also Rameses, 2007 WL 4200814, at 11 (describing error in Medley as the judge "taking . . . [a] factual matter from the jury").

Here, the instructions did not inform the jury that a prison-made knife was a dangerous weapon as a matter of law. To the contrary, the instructions informed the jury that defendant was charged with assault with a dangerous weapon, the weapon at issue was a prison-made knife, and that the weapon at issue was a "dangerous weapon" only if it was used in a way that was capable of causing death or serious bodily injury. Thus, as the panel majority correctly pointed out, unlike in Medley, the district court here "never took . . . a critical issue away from the jury's determination because the district court never instructed the jury that Smith's prison-made knife was a dangerous weapon."

Neither the dissent nor the petition can reasonably claim that the instruction included a mandatory presumption of the kind found objectionable in Medley. Rather, the dissent stated that while the alleged "error here may not have been . . . as egregious as . . . in Medley, . . . the effect was the same -- the prosecution's burden of proof was "blurred" and the instruction "impeded the jury's ability to ascertain for itself whether the prison-made knife was, indeed, a 'dangerous weapon.'" (Emphasis added). However, Medley did not discuss blurring and, thus, the panel's decision does not conflict with Medley on this point. And, as noted above, the panel correctly recognized that there was no such blurring here: the instruction instead correctly required the jury to make a finding on the element at issue.

Similarly, the panel's decision does not conflict with Brooksby. In Brooksby, the defendant was charged with falsely subscribing her income tax returns, an offense that required her to have acted willfully. 668 F.2d at 1103. The district court's instruction to the jury, however, failed to include any mention of willfully in the list of elements. Id. at 1104. The court did, however, define the term "willful" in a later instruction. And, although not clear when, at some point, the court also read the jury the indictment and the statute under which defendant had

been charged, both of which mentioned willfully. The Court held that "notwithstanding that the indictment, the statute and an instruction on 'willfully' [that] were read to the jury, the failure to instruct them that 'willfulness' was an essential element of the crime" was error. Id. at 1105.

As the majority explained in the instant case, "[t]he challenged elements list [in Brooksby] contained neither the required willfulness element nor stated that any particular mens rea was even required. The only reference to 'willfully' in the instructions came in a later instruction defining the term and indicating that the government had the burden to prove it. That later definition of 'willfully' failed to clarify any element within the elements list, and was not at all connected to any element of the list." 520 F.3d 1097.

Unlike in Brooksby, as the panel majority correctly held, a "close connection" existed here in a single jury instruction which informed the jury about the nature of the charged offense, the elements of that offense, and the operative definition of when a weapon is a dangerous weapon. Id. As the majority explained, "the district court's instructions here contained a close and articulated link from the elements list to the definition of a 'dangerous weapon' that immediately followed." Id. That close link emphasized to the jury defendant was charged with assault with a dangerous weapon, the weapon at issue was a

prison-made knife, and that the weapon at issue was a "dangerous weapon" only if it was used in a way that was capable of causing death or serious bodily injury. As such, the instruction here did not suffer from the defect in Brooksby where the jurors were not told that willfulness was an element of the offense (and the later untethered instruction mentioning willfulness did not inform the jury about that required element).

Finally, this Court's decision is Caldwell is likewise distinguishable. In Caldwell, defendant was charged with conspiracy to defraud the United States, the elements of which were: (1) defendant entered into an agreement; (2) to obstruct a lawful function of the government; (3) by deceitful or dishonest means; and (4) at least one overt act in furtherance of the conspiracy. 989 F.2d 1056, 1059. The government's theory was that it need not establish that the defendant acted by "deceitful or dishonest means." Id. According to the government, "any conspiracy to obstruct a government function is illegal." Id. (emphasis in original). The district court instructed the jury consistent with the government's theory, thereby failing to inform the jury that the defendant was required to have acted by "deceitful or dishonest means." Id. at 1060. The district court instead informed the jury that they could find the defendant guilty "if she merely agreed 'to defraud the United States by impeding, impairing, obstructing, and defeating the United

States.'" Id. When defining the elements the court also stated merely that "[t]he law relating to [this] element[] is as follows: . . . You must find beyond a reasonable doubt that there was a joint plan to obstruct, impede, impair, and defeat [the IRS]." Id. (alteration in original).

This Court rejected the attempt to eliminate the required element that the defendant acted by "deceitful or dishonest means." Id. at 1058-60. Because the district court had instructed the jury consistent with the government's theory -- thereby omitting that element from the instructions -- this Court held that the instruction was erroneous. Id. at 1060-61. In a footnote, this Court also noted that the instruction's initial use of the word "defraud" could not substitute for the missing element. Id. at 1060 n.8. The court noted that the term "defraud" could mean either that defendant "meant to defraud" -- the missing element -- or that defendant simply impeded, impaired, obstructed, and defeated the Internal Revenue Service. Id. The use of the term "defraud" thus did not clarify the instruction as read. And this Court further noted that the district court had used the term "defraud" only initially and not when further explaining the element. Id.

Rather than support his argument, the differences between this case and Caldwell demonstrate why the district court did not abuse its discretion here when instructing the jury. Unlike the

failure to include an element of the offense and the use of the undefined term "defraud," which did not clarify the instruction, here the district court informed the jury that: (1) defendant was charged with assault with a dangerous weapon; (2) the government had to prove that defendant used a weapon, which here was a prison-made knife; and (3) a prison-made knife constituted a dangerous weapon only "if it is used in a way that is capable of causing death or serious bodily injury." Unlike in Caldwell, the instruction provided a defined and unambiguous explanation of when a prison-made knife constitutes a dangerous weapon and that instruction, read as a whole and in a common sense fashion, informed the jury that they could only find defendant guilty of the charged offense of assault with a dangerous weapon if the prison-made knife met that definition.

IV

CONCLUSION


For these reasons, this Court should deny defendant's petition.

Dated: July 1, 2008

Respectfully submitted,

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**Form Must be Signed by Attorney or Unrepresented Litigant
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I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing en banc/answer is: (check applicable option)


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Signature of Attorney or
Unrepresented Litigant

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,)
)
Plaintiff-Appellee,)
)
v.)
)
MALIK SMITH,)
)
Defendant-Appellant.)
)
)
)

C.A. No. 05-50375
D. Ct. No. CR 03-728-PA
(Central District California)
DECLARATION OF SERVICE BY
MAIL

I, Tom Tanaka, declare:

That I am a citizen of the United States and a resident of Los Angeles County, California; that my business address is 312 North Spring Street, Los Angeles, California 90012; that I am over the age of 18 years, and am not a party to the above-entitled action; that on November 2, 2005, I caused to be deposited in the United States mails in Los Angeles, California, in the above-entitled action, in an envelope bearing the requisite postage, a copy of: **GOVERNMENT'S RESPONSE TO PETITION FOR REHEARING EN BANC** addressed to;

Davina Chen
Deputy Federal Public Defender
Office of the Federal Public Defender
321 East 2nd Street
Los Angeles, CA 90012

at his last known address, at which place there is a delivery service by United States mail.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: This 1st day of July, 2008.

