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80-1086, 80-1088, 80-1116, 80-1117, 80-1118,
80-1206, 80-1219, 80-1208, 80-1205, 80-1214
(641 F.2d 1311 (9th Cir. 1981))

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NO. 80-1088

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

ROBERT B. STEINER

Defendant-Appellant.

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APPELLANT'S REPLY BRIEF

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

Respectfully submitted,

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BOXER & WOLPERT
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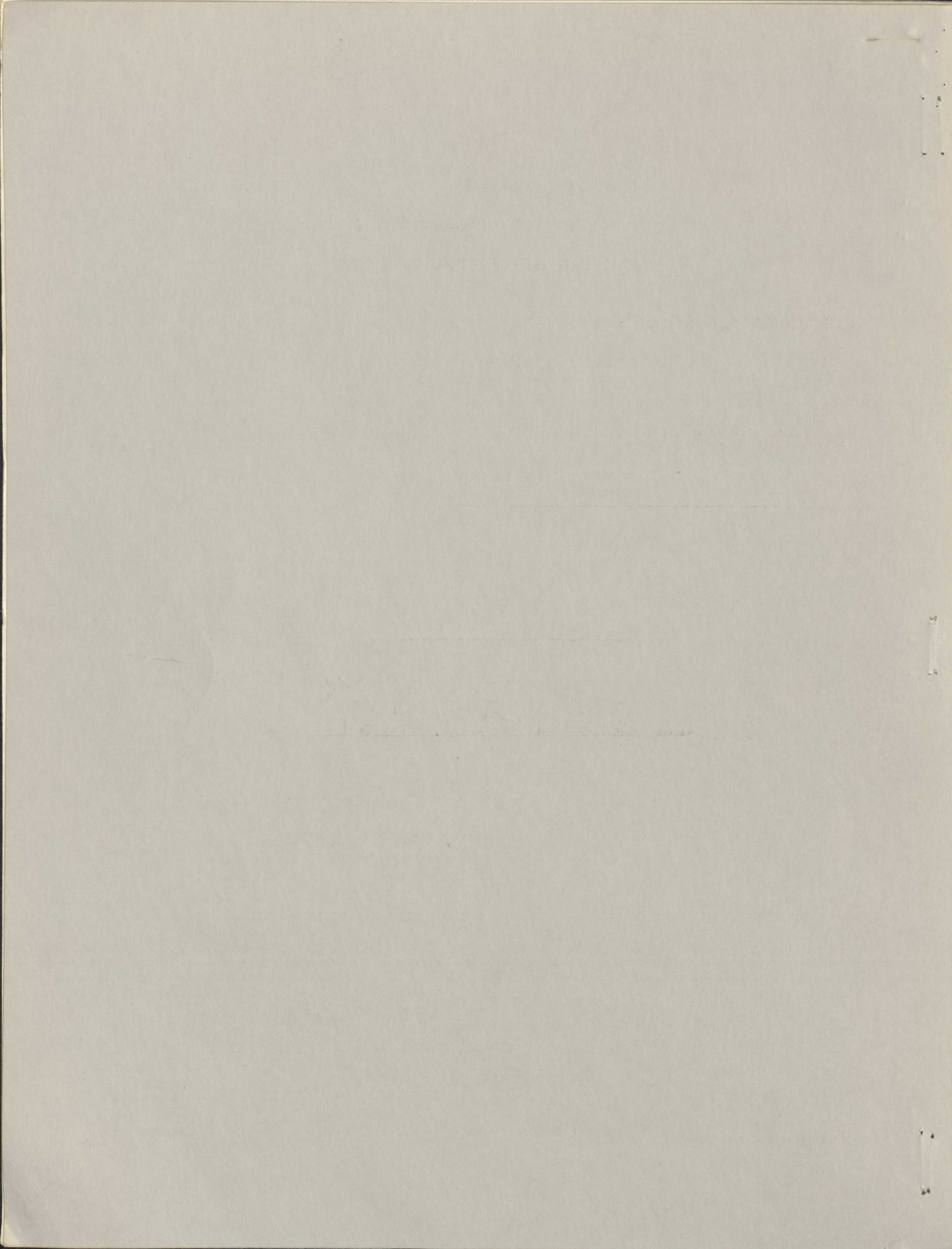
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Attorneys for Appellant
ROBERT B. STEINER

DATED: September 11, 1981

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APPELLANT'S REPLY BRIEF

I

INTRODUCTION

The Government's Opening Brief in the instant appeal fails completely to address any of the substantial claims of error raised in defendant Steiner's brief. The trial court by failing to sever defendant Steiner's trial from that of his co-defendant created such a prejudicial situation that a conviction of co-defendant Greene assured a conviction of defendant Steiner. Furthermore, the evidence, independent of the prejudice arising from the joint trials was simply insufficient for proof beyond a reasonable doubt.

II

ARGUMENT

A.

THE ANTAGONISTIC DEFENSE OF
DEFENDANT STEINER'S CO-DEFENDANT
DEPRIVED DEFENDANT STEINER OF A
FAIR TRIAL

Defendant Steiner in his opening brief has strongly urged this Court to reverse his conviction because of the unfairly prejudicial conduct of his trial. Specifically he alleged that he was deprived of a fair trial because of the totally antagonistic nature of co-defendant Greene's defense and the trial court's refusal to sever his trial from that of Greene. The government's answer to this allegation fails to address this assignment of error with any suitable reply.

As more fully set forth in defendant Steiner's opening brief, co-defendant Greene's entire defense was contained in his closing argument. He did not put on any witnesses, he did not introduce evidence, and he rarely cross-examined any of the government's witnesses. Instead co-defendant Greene put forward to the trial court and jury the proposition that he was improperly charged [R.T. 414-432].^{1/} Greene argued, that he did all of the acts alleged by the government (including conspiring with defendant Steiner), but that those acts amounted to violations of state rather than federal law. Under Greene's argument, he

^{1/} "R.T." refers to Reporter's Transcript.

was therefore innocent of the major counts of the indictment.

Co-defendant Greene's short closing argument carried forward this theme. Counsel for Greene submitted to the jury that Greene did not dispute the government's factual contentions whatsoever. He went on to argue:

". . . I would be the first to admit to you, and so would my client, that he was a party to an arson. He is also a party to a conspiracy to commit arson." [R.T. 499-500]

Greene's attorney then went on to further detail his contention that co-defendant Greene and the other alleged conspirators had worked together to burn a building but that these actions did not amount to violations of federal law as charged [R.T. 500-506]. Counsel for co-defendant Greene went so far as to argue to the jury that as to certain counts of the indictment, a guilty verdict was appropriate and that the jury should vote to convict him [R.T. 503-504].

The trial record clearly and without any ambiguity shows the tremendous prejudice with which defendant Steiner was forced to deal. Following the devastating appeal made to the jury by Greene's attorney, counsel for defendant Steiner was placed in the position of denying not only the truth of the government's allegations but those of co-defendant Greene as well. The admissions made before the jury by Greene's attorney, however, could not possibly be remedied by any argument of Steiner's attorney for they constituted a complete concession to the government's theory

of the case.

The government in their brief attempts to defend the unfair and prejudicial nature of the trial by re-stating the law regarding the standard of review on appeal and by asserting that defendant Steiner has failed to show sufficient prejudice. The government's response, however, misses the mark.

Defendant Steiner does not quarrel with any of the law cited by the government. Defendant Steiner in his brief acknowledge the standard of review indicated in such cases. Defendant Steiner submits, however, that the standard has been met and surpassed in the instant case and that the record clearly supports his position.

The defenses offered by co-defendants Greene and Steiner were so antagonistic to each other that they reached the point of being mutually exclusive. Co-defendant Greene admitted through his attorney each and every factual allegation made by the government including that he conspired with defendant Steiner. Defendant Steiner, on the other hand, denied in every way possible his knowledge of and membership in any conspiracy.^{2/} When co-defendant Greene in his defense admitted all of the government's allegations, he, in effect, threw the weight of his argument behind that being

^{2/} It should be remembered that Greene himself did not testify against Steiner. Hayter, Grissom and Ruisi all introduced hearsay testimony as to that which Greene allegedly told them of Steiner. By taking the position he did, Greene, through his attorney, completely corroborated the testimony of these three witnesses without ever having been subject to cross-examination.

proffered by the prosecution. Any doubt that the jury had as to the truth of the government's case was easily dismissed by the corroboration provided by co-defendant Greene. Defendant Steiner therefore appeared as nothing more than the lone hold-out amongst the conspirators. All of the conspirators had either testified for the government, been dismissed from the case, or admitted, albeit through their attorney, that they took part in the crime.

The defenses here were so antagonistic as to deprive defendant Steiner of a fair trial. Defendant Steiner was, as a practical matter, precluded from answering the admissions of co-defendant Greene. The damage done to defendant Steiner's case by the defense offered by Greene was so immense that a reversal of defendant Steiner's conviction is the only appropriate remedy.

B

POST-CONSPIRACY STATEMENTS WERE
INTRODUCED WHICH INculpATED
DEFENDANT STEINER IN VIOLATION OF
THE PRINCIPLES OF BRUTON V.
UNITED STATES

As more fully set forth in defendant Steiner's opening brief, the government introduced tape recordings of a post-conspiracy conversation between Greene and Hayter which directly inculcate defendant Steiner. The introduction of these tapes violated the Sixth Amendment right to confrontation as well as the principles set forth in Bruton v. United States, 391 U.S. 123 (1968). Since the trial court did not sever the trials of co-defendant Greene and defendant Steiner, defendant Steiner's conviction should

be reversed.

Bruton v. United States, supra, held that the admission into evidence of a non-testifying co-defendant's statement that inculcates another defendant violates the Sixth Amendment. Bruton v. United States, supra, 391 U.S. at 126. The government in their brief argues that the rule in Bruton was not violated because the statement was "redacted to remove any incriminating references to Steiner. . . ." (Government's Opening Brief, p. 13). The government, without further argument, then concludes that defendant Steiner's assertion is without merit.

As set forth in greater detail in defendant Steiner's opening brief, the taped conversation between Greene and Hayter refers to the very money which Hayter testified was to have come from defendant Steiner [R.T. 257-258]. They discuss the fact that Grissom would receive \$2,000.00 [R.T. 257] and that Greene would only be keeping \$1,000.00 for his part in the conspiracy [R.T. 258].

When this post-conspiracy conversation is associated with Hayter's trial testimony to the effect that Greene told him that defendant Steiner was paying \$8,000.00 to have the job done and that Greene was keeping \$1,000.00 while Grissom received \$2,000.00, the incriminating nature of the tape recorded conversation against defendant Steiner is obvious. Furthermore, the mere fact that Greene and Hayter were discussing a split of the money, directly indicates that a third party was paying the money. Under the government's theory, that person was defendant Steiner.

Under the principles of Bruton, statements such as these may not in any way incriminate another defendant. Therefore, such statements may not allude or in any way refer to that another defendant and if they do the court must sever him from the joint trial. See: United States v. Hernandez, 608 F.2d 741, 749 (9th Cir. 1979); White v. United States, 415 F.2d 292 (5th Cir. 1969); United States v. Gray, 462 F.2d 164 (5th Cir. 1972).

Clearly, the post-conspiracy statement which was introduced by the government refers to defendant Steiner and inculcates him by reference. The use of such evidence in a joint trial is forbidden and defendant Steiner's conviction should be reversed.

C

THERE WAS INSUFFICIENT EVIDENCE
TO SUPPORT DEFENDANT STEINER'S
CONVICTION

The Statement of Facts contained in defendant Steiner's opening brief details the evidence which was introduced against him at trial. That evidence simply does not amount to proof beyond a reasonable doubt.

The evidence against defendant Steiner was not only entirely circumstantial, it was based on the liberal use of hearsay to which defendant Steiner was unable to reply. The government's total reliance on the testimony of Brian Holmes concerning defendant Steiner's alleged statement: "We had to have two fires," shows the weakness of their case. Even a cursory review of the transcripts indicates that the government's attempt to show that defen-

dant Steiner was suffering severe financial hardship completely failed.

A reasonable review of the evidence will show that the government failed to meet its burden, and that defendant Steiner's conviction should be reversed. It was the overwhelming evidence against co-defendant Greene combined with his antagonistic defense technique which assured defendant Steiner's conviction, not the government's evidence.

III

CONCLUSION

For the above stated reasons as well as those more fully set forth in the Appellant's Opening Brief, the instant conviction should be reversed and the case remanded to the trial court for proceedings consistent with this Court's judgment.

VERIFICATION

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I have read the foregoing _____ and know its contents.

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I am one of the attorneys for _____, a party to this action. Such party is absent from the county of aforesaid where such attorneys have their offices, and I make this verification for and on behalf of that party for that reason. I am informed and believe and on that ground allege that the matters stated in it are true.

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addressed as follows:

Robert A. Pallemon, Esq.
Assistant U.S. Attorney
1300 U.S. Courthouse
312 North Spring Street
Los Angeles, CA 90012

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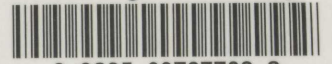
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