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## CASENOTES

### Application of the "Exculpatory No" Defense to Prosecutions Under 18 U.S.C. § 1001: *United States v. Fitzgibbon*

During the past thirty years, the federal judiciary has confronted a number of novel and troublesome applications of the federal false statements statute, 18 U.S.C. § 1001.<sup>1</sup> To limit the scope of the statute, the Fifth Circuit originated the "exculpatory no" defense in 1962.<sup>2</sup> The question has now arisen whether the defense should apply to protect those who give false statements to United States Customs officials. In *United States v. Schnaiderman*,<sup>3</sup> the Fifth Circuit held that the defense does apply in such situations.<sup>4</sup> However, the Tenth Circuit recently held

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1. 18 U.S.C. § 1001 (1976) originated in legislation enacted over 100 years ago. Act of March 2, 1863, ch. 67, 12 Stat. 696. A number of amendments have broadened the original provision against false statements. For a summary of these amendments, see *United States v. Bramblett*, 120 F. Supp. 857 (D.D.C.), *rev'd on other grounds*, 348 U.S. 503 (1954). In 1948 the statute was amended to its present form as 18 U.S.C. § 1001. Act of June 25, 1948, ch. 645, 62 Stat. 683. The statute provides as follows:

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

Recent cases arising under this statute include those concerning persons who file false statements on tax returns, see *Marchetti v. United States*, 390 U.S. 39 (1968); Note, *Constitutionally Privileged False Statements*, 22 STAN. L. REV. 783 (1970), and informants who give false information to the F.B.I., see *United States v. Lambert*, 501 F.2d 943 (5th Cir. 1974).

2. *Paternostro v. United States*, 311 F.2d 298 (5th Cir. 1962). The defendant in *Paternostro* was questioned by Internal Revenue agents about a "graft money" scheme in the New Orleans Police Department. The defendant answered negatively when asked whether he knew about or had participated in the scheme. These answers were later found to be false. The court stated that "mere negative responses to questions propounded . . . by an investigating agent during a question and answer conference, not initiated by the [defendant]" are not statements as required by 18 U.S.C. § 1001 (1976). *Id.* at 305. This is commonly referred to as the "exculpatory no" defense.

3. 568 F.2d 1208, 1213 (5th Cir. 1978).

4. *Schnaiderman* was a Venezuelan who entered the United States at Miami, Flor-

to the contrary in *United States v. Fitzgibbon*.<sup>5</sup>

On March 31, 1977, Kenneth C. Fitzgibbon landed in the United States at Denver, Colorado, on an airline flight from Canada. Upon his arrival, Fitzgibbon returned customs form 6059-B to an airport customs official.<sup>6</sup> The form requests the passenger to indicate whether he is carrying more than \$5,000 in coin, currency, or monetary instruments. Fitzgibbon checked a "no" response to this question. Persons carrying more than \$5,000 are required to report additional information about the money on a separate form.<sup>7</sup> During a subsequent routine inspection, a customs official repeated the question orally and Fitzgibbon again answered "no." At this point the official noticed that Fitzgibbon was nervous and conducted a search in which more than \$10,000 was found in Fitzgibbon's boots.

Fitzgibbon was later convicted of knowingly and willfully making a false statement in violation of 18 U.S.C. § 1001. The conviction was based solely on the false written answer that Fitzgibbon had given on the customs form. On appeal,<sup>8</sup> Fitzgib-

ida, on a flight from Caracas. When asked if he was carrying more than \$5,000, he answered "no." He also responded "no" to the same question on customs form 6059-B. When Schnaiderman was searched, however, more than \$8,000 was found in his pockets. The Fifth Circuit applied the "exculpatory no" doctrine to reverse Schnaiderman's conviction under 18 U.S.C. § 1001 (1976).

5. 619 F.2d 874 (10th Cir. 1980).

6. Form 6059-B is given to all passengers entering the United States. It is one of several forms used by the United States Customs Service pursuant to the Currency and Foreign Transactions Reporting Act, 31 U.S.C. §§ 1051-143 (1976), and regulations promulgated thereunder, 31 C.F.R. §§ 103.11-51 (1979).

7. Form 4790 of the Internal Revenue Service of the Treasury Department, entitled "Report of International Transportation of Currency or Monetary Instruments," is used to report sums greater than \$5,000. This report is required by 31 U.S.C. § 1101 (1976), which reads in pertinent part:

[W]hoever . . . knowingly—

- (1) transports or causes to be transported monetary instruments—
  - (A) from any place within the United States to or through any place outside the United States, or
  - (B) to any place within the United States from or through any place outside the United States . . .

in an amount exceeding \$5,000 on any one occasion shall file a report . . .

For a discussion of the contents of form 4790, see *United States v. San Juan*, 405 F. Supp. 686, 692 (D. Vt. 1975), *rev'd on other grounds*, 545 F.2d 314 (2d Cir. 1976).

8. This was actually the second time the Tenth Circuit had heard an appeal of Fitzgibbon's case. The first appeal, *United States v. Fitzgibbon*, 576 F.2d 279 (10th Cir.), *cert. denied*, 439 U.S. 910 (1978), resulted in affirmance of the defendant's conviction. After being incarcerated, Fitzgibbon filed a motion pursuant to the federal habeas corpus statute, 28 U.S.C. § 2255 (1976), to vacate and set aside his sentence. The district court denied the motion and this second appeal followed. *United States v. Fitzgibbon*, 619 F.2d 874, 875 (10th Cir. 1980).

bon claimed that he had been denied the effective assistance of counsel at trial because his attorney had failed to raise the "exculpatory no" defense.<sup>9</sup> The Tenth Circuit thus faced for the first time the question of whether the "exculpatory no" defense should prevent a conviction under section 1001 for giving false negative answers to United States Customs officials. In a unanimous decision the court affirmed the conviction and held that the defense does not apply.<sup>10</sup>

The Tenth Circuit began its analysis of the customs situation with an extensive review of the reasoning in *Schnaiderman*. The court delineated the five elements of a section 1001 offense and concluded that these elements had been established at Fitzgibbon's trial.<sup>11</sup> Particular emphasis was placed on the element of "knowledge and willfulness." The court explained that the "exculpatory no" defense was based on the assumption that a negative response, by itself, is not sufficient to establish that a defendant acted willfully.<sup>12</sup> In this particular case, however, Fitzgibbon had been notified of the currency reporting requirements by large signs in the Denver airport.<sup>13</sup> The court determined that this additional evidence, when combined with the negative response, was sufficient to prove that Fitzgibbon had acted with the required intent.<sup>14</sup>

After determining that the statutory elements had been met, the court gave two other reasons why the "exculpatory no" defense should not apply. First, the defense was established to prevent convictions for giving false answers to "investigative agents" of the government.<sup>15</sup> According to the Tenth Circuit, the function of the customs officials was not investigative, but ad-

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9. The Tenth Circuit observed that the defendant's counsel had, in fact, raised the "exculpatory no" defense before the trial court on a motion to dismiss and in the first appeal. The court elected to reach the issue, however, "both because it was apparently not properly articulated in the prior proceedings and because it [was] an issue which [had] not been previously decided by this Court." 619 F.2d at 876.

10. 619 F.2d at 880. This result was in direct conflict with the Fifth Circuit's decision in *United States v. Schnaiderman*, 568 F.2d 1208 (5th Cir. 1978).

11. The offense requires (1) a statement, (2) that the statement be false, (3) that the statement be material, (4) that the statement be made in a "matter within the jurisdiction of any department or agency of the United States," and (5) that the statement be made knowingly and willfully. 619 F.2d at 879.

12. *Id.* at 876-77.

13. *Id.* at 880.

14. *Id.*

15. *Paternostro v. United States*, 311 F.2d 298, 305, 309 (5th Cir. 1962).

ministrative.<sup>16</sup> Second, the court saw no possibility of self-incrimination—a premise of the “exculpatory no” defense—in this customs situation.<sup>17</sup>

Although the Tenth Circuit in *Fitzgibbon* appears to have arrived at a better result than the Fifth Circuit in *Schnaiderman*, the reasoning of both courts was based, at times, on unsound interpretations of 18 U.S.C. § 1001.<sup>18</sup> In *Fitzgibbon*, the court stated that “[t]he predicate of the ‘exculpatory no’ defense is simply that a negative response cannot serve as proof of the requisite knowledge and willfulness required to convict under 18 U.S.C. § 1001.”<sup>19</sup> The court thus perceived the defense as centering on a narrow interpretation of the requirement of willfulness. This perception, however, is not entirely accurate.

The Fifth Circuit and a number of lower courts created the “exculpatory no” defense to limit the applicability of the false statements statute.<sup>20</sup> To accomplish this end, these courts restricted the scope of the term “statement” as used in section 1001, rather than the terms “knowing and willful.”<sup>21</sup> The courts

16. 619 F.2d at 880-81.

17. *Id.* at 881. In order for the “exculpatory no” defense to apply, the government inquiry must have created a potential for self-incrimination. See *United States v. Bush*, 503 F.2d 813 (5th Cir. 1974); *United States v. Lambert*, 501 F.2d 943, 946 n.4 (5th Cir. 1974); *United States v. Stark*, 131 F. Supp. 190, 207 (D. Md. 1955). In *Fitzgibbon*, the Tenth Circuit said that there was no potential for self-incrimination because “*Fitzgibbon* could not have been held criminally liable under the subject statute had he truthfully reported the . . . currency.” 619 F.2d at 881. The Fifth Circuit in *Schnaiderman*, however, felt that there was a possibility of self-incrimination in this type of situation. 568 F.2d at 1213-14. Only one federal court has had occasion to decide this fifth amendment issue directly. *United States v. San Juan*, 405 F. Supp. 686 (D. Vt. 1975), *rev'd on other grounds*, 545 F.2d 314 (2d Cir. 1976). In *San Juan*, the court held that the customs forms do not violate the fifth amendment. *Id.* at 694-95.

18. The only factual difference between the two cases is that *Fitzgibbon* was charged for having given a false written statement, whereas *Schnaiderman* was charged for having given a false oral statement. The distinction between oral and written statements, however, has been held to be insignificant. *United States v. Beacon Brass Co.*, 344 U.S. 43, 46 (1952).

19. 619 F.2d at 876.

20. See *United States v. Paternostro*, 311 F.2d 298 (5th Cir. 1962) (applying a limited view of the term “statement”); *United States v. Moore*, 185 F.2d 92, 95 (5th Cir. 1950) (calling for strict construction of § 1001); *United States v. Davey*, 155 F. Supp. 175 (S.D.N.Y. 1957) (holding negative responses incapable of perverting a governmental function); *United States v. Stark*, 131 F. Supp. 190 (D. Md. 1955) (applying a limited view of the term “statement”); *United States v. Levin*, 133 F. Supp. 88 (D. Colo. 1953) (calling for strict construction of § 1001 to preserve the validity of perjury statutes).

21. See *United States v. Paternostro*, 311 F.2d 298 (5th Cir. 1962); *United States v. Davey*, 155 F. Supp. 175 (S.D.N.Y. 1957); *United States v. Stark*, 131 F. Supp. 190 (D. Md. 1955).

interpreted the term "statement" to require an affirmative and voluntary expression or action on the part of the defendant—an expression or action capable of perverting some governmental function.<sup>22</sup> Under this view, mere passive, false responses to governmental inquiries do not constitute "statements" within the meaning of section 1001.<sup>23</sup> The "exculpatory no" defense was thus predicated on a narrow view of the type of statement that section 1001 proscribes, not on the degree of intent with which the statement was uttered.

Nevertheless, the degree of intent required by the statute was a controlling issue in *Fitzgibbon*. Both the Fifth Circuit and the Tenth Circuit approaches to finding willfulness require a showing that the defendant acted with bad intent. In both circuits, the government is expected to provide travelers with a certain amount of notice concerning the currency reporting requirements of 31 U.S.C. § 1101.<sup>24</sup> Unless a defendant has received this notice, the courts will find him incapable of forming the intent to pervert the functions of the Customs Service.<sup>25</sup> In *Schnaiderman*, the court held that the defendant had not received sufficient notice to have this level of willfulness.<sup>26</sup> The Tenth Circuit, however, indicated that large signs in the Denver airport gave Fitzgibbon sufficient notice of the reporting laws to enable his conduct to be willful.<sup>27</sup>

It is arguable that both courts defined willfulness too narrowly. The legislative history of section 1001 does not give any indication of what Congress intended the word "willful" to mean.<sup>28</sup> The federal courts, however, agreed on a definition of

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22. Compare *United States v. Gilliland*, 312 U.S. 86, 93 (1941) with *Paternostro v. United States*, 311 F.2d 298 (5th Cir. 1962) and *United States v. Stark*, 131 F. Supp. 190, 205 (D. Md. 1955).

23. *United States v. Stark*, 131 F. Supp. 190, 206 (D. Md. 1955).

24. In the Fifth Circuit, the government must show that the defendant not only knew about the reporting requirements, but that he also knew it was not a crime to transport more than \$5,000 as long as it had been reported. *United States v. Schnaiderman*, 568 F.2d 1208, 1213 (5th Cir. 1978). The Tenth Circuit apparently requires only that the government notify travelers of the reporting requirements. This can be inferred from the court's great effort to show that Fitzgibbon had been so notified. 619 F.2d at 880.

25. This theory was first set forth in *United States v. Gomez-Londono*, 422 F. Supp. 519 (E.D.N.Y. 1976), *rev'd on other grounds*, 553 F.2d 805 (2d Cir. 1977). See also *United States v. Schnaiderman*, 568 F.2d at 1213.

26. 568 F.2d at 1213.

27. 619 F.2d at 880.

28. For a detailed discussion of the legislative history of § 1001, see *United States v. Gilliland*, 312 U.S. 86 (1941); *United States v. Bramblett*, 120 F. Supp. 857 (D.D.C.),

the term some twenty-five years ago. In 1951, the Tenth Circuit held it unnecessary for "the Government to prove . . . an evil intent" in cases under section 1001.<sup>29</sup> The only intent required was an intent to utter the false statement. "Willful," the court stated, "means no more than that the interdicted act is done deliberately and with knowledge."<sup>30</sup> The Fifth Circuit in 1955 defined "willful" in the same terms<sup>31</sup> and did not change its definition until *Schnaiderman*.<sup>32</sup> In 1969, the Supreme Court lent its approval to these early definitions used by the Fifth and Tenth Circuits.<sup>33</sup> The Court spoke of willfulness in terms of "know[ing] the falsity of [one's] statement at the time it was made," and of not being the "product of an accident, honest inadvertence, or duress."<sup>34</sup>

The requirement of bad intent, which was adopted in both *Schnaiderman* and *Fitzgibbon*, appears to be the result of an erroneous interpretation of *United States v. Gilliland*.<sup>35</sup> In *Gilliland*, the Supreme Court held that a 1934 amendment to section 1001<sup>36</sup> was intended "to protect the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive practices described [in the statute]."<sup>37</sup> From this statement the Fifth Circuit erroneously concluded that section 1001 requires an "intent to pervert the purpose of" the customs regulations.<sup>38</sup> The Tenth Circuit required a similar finding of intent.<sup>39</sup> The Supreme Court's statement in *Gilliland*, however, does not require a finding of intent

*rev'd on other grounds*, 348 U.S. 503 (1954).

29. *Walker v. United States*, 192 F.2d 47, 49 (10th Cir. 1951).

30. *Id.*

31. *McBride v. United States*, 225 F.2d 249, 253-55 (5th Cir.), *cert. denied*, 350 U.S. 934 (1955).

32. *See generally* *United States v. Mekjian*, 505 F.2d 1320, 1324 (5th Cir. 1975); *United States v. Parten*, 462 F.2d 430, 432-33 (5th Cir.), *cert. denied*, 409 U.S. 983 (1972). Both of these Fifth Circuit cases retained the original definition of "willfulness" as merely being "deliberate."

33. *See Bryson v. United States*, 396 U.S. 64, 69-70 (1969).

34. *Id.*

35. 312 U.S. 86 (1941).

36. Act of June 18, 1934, ch. 587, 48 Stat. 996. The amendment eliminated a requirement that a defendant's false statement must have resulted in pecuniary or property loss to the government. For a detailed discussion of this amendment, see *United States v. Gilliland*, 312 U.S. 86 (1941).

37. 312 U.S. at 93.

38. *See United States v. Schnaiderman*, 568 F.2d 1208, 1213 (5th Cir. 1978).

39. The court emphasized that *Fitzgibbon's* false statement was "designed to conceal information relevant to the administrative process." 619 F.2d at 880. In other words, *Fitzgibbon* intended to pervert the function of the customs agent.

to pervert the functions of government. It merely states that perversion of governmental functions is the likely result of false statements and that the amendment was intended to prevent such perversion by punishing those who utter false statements.

Thus, the proper interpretation of the term "willful" as used in section 1001 is not nearly as restrictive as the courts in *Fitzgibbon* and *Schnaiderman* believed. There is no requirement of bad intent—an intent to pervert a governmental function. All that is required is that the defendant intend to make the statement and that the defendant know that his statement is false when he makes it. Under this standard, both *Fitzgibbon* and *Schnaiderman* clearly acted knowingly and willfully within the meaning of section 1001.

Another reason for the Tenth Circuit's refusal to apply the "exculpatory no" defense was its belief that the customs agents were not performing an "investigative" function.<sup>40</sup> *United States v. Paternostro*,<sup>41</sup> which established the defense, restricted its use to cases in which an "investigating agent" propounded questions to the defendant.<sup>42</sup> Under the *Paternostro* test, this issue is determined by whether the government official is "performing essentially the [investigative] functions of a 'policeman.'"<sup>43</sup> This would include investigating possible criminal activity. But there is no clear answer as to how customs agents should be classified under the *Paternostro* test.<sup>44</sup>

Debate over the correct classification, however, is unnecessary. The distinction between investigative and administrative agents arose from a narrow interpretation of the term "jurisdic-

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40. 619 F.2d at 880-81.

41. 311 F.2d 298 (5th Cir. 1962).

42. *Id.* at 305, 309.

43. *Id.* at 309.

44. Certain factors support and others refute the classification of customs officials as "investigative agents." The express purpose of the Currency and Foreign Transactions Reporting Act, 31 U.S.C. §§ 1051-143 (1976), is "to require certain reports . . . where such reports . . . have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings." *Id.* § 1051. One federal district court has said that the Act is more criminal than regulatory. *United States v. San Juan*, 405 F. Supp. 686, 693 (D. Vt. 1975), *rev'd on other grounds*, 545 F.2d 314 (2d Cir. 1976). Furthermore, the Act provides criminal as well as civil sanctions for its violation. 31 U.S.C. § 1058 (1976).

It has also been argued, however, that the distribution of form 6059-B is strictly administrative in nature. 619 F.2d at 880-81. The form is not required by the Act but is merely an administrative tool used to help customs officials determine which travelers need to file a report. See note 7 and accompanying text *supra*. "There [is] no indication of criminal investigation or police coercion" surrounding completion of the form by a traveler. 619 F.2d at 880.

tion" as used in 18 U.S.C. § 1001. In *United States v. Davey*,<sup>45</sup> a federal district court held that the investigative function of the F.B.I. was not a "matter within the jurisdiction of a department or agency of the United States." After *Davey*, other courts began to distinguish between investigative and administrative functions. *Paternostro* made the distinction a part of the "exculpatory no" defense in 1962,<sup>46</sup> and the Eighth Circuit followed suit in 1967.<sup>47</sup> In 1969, however, the Supreme Court dealt what should have been a deathblow to this distinction. In *Bryson v. United States*,<sup>48</sup> the Court stated:

Because there is a valid legislative interest in protecting the integrity of official inquiries, . . . we think the term "jurisdiction" should not be given a narrow or technical meaning for purposes of § 1001 . . . . A statutory basis for an agency's request for information provides jurisdiction enough to punish fraudulent statements under § 1001.<sup>49</sup>

The Court cited with approval a case from the Second Circuit that severely criticized the classification of governmental functions as being either administrative or investigative.<sup>50</sup>

Accordingly, the debate over whether customs officials should be classified as investigative or administrative agents is futile. The distinction, based on a narrow reading of "jurisdiction" under section 1001, has been expressly condemned.<sup>51</sup> The information that customs officials request concerning currency has the statutory basis required by *Bryson*, and that statutory basis has been held constitutional.<sup>52</sup> Whether the agent's function is administrative or investigative is irrelevant. The critical question is whether a defendant's false statements are capable of perverting a government agent's function.

Both the Fifth Circuit and the Tenth Circuit agree that a customs agent's function with respect to the currency reporting

45. 155 F. Supp. 175 (S.D.N.Y. 1957).

46. 311 F.2d at 305, 309.

47. *Friedman v. United States*, 374 F.2d 363 (8th Cir. 1967).

48. 396 U.S. 64, 70-71 (1969).

49. *Id.* (citations and footnotes omitted).

50. *See United States v. Adler*, 380 F.2d 917, 921-22 (2d Cir.), *cert. denied*, 389 U.S. 1006 (1967), *cited with approval in Bryson v. United States*, 396 U.S. at 70-71 (1969).

51. *See Bryson v. United States*, 396 U.S. 64, 70-71 (1969).

52. In *California Bankers Ass'n v. Shultz*, 416 U.S. 21 (1974), the Supreme Court upheld the statutory basis underlying the currency reporting requirements. *See also United States v. San Juan*, 405 F. Supp. 686 (D. Vt. 1975), *rev'd on other grounds*, 545 F.2d 314 (2d Cir. 1976).

requirement is to ensure that the transportation of more than \$5,000 into the United States is reported.<sup>53</sup> A negative answer on form 6059-B is capable of obstructing the agent's function. The question on form 6059-B is the agent's primary tool to prevent currency in excess of \$5,000 from going unreported. Unless there is some other overt indication that a traveler is lying, a false negative response will result in frustration of the agent's function.

Although the Fifth and Tenth Circuits arrived at opposite conclusions in *Schnaiderman* and *Fitzgibbon*, their reasoning was based on the same erroneous premises. Both courts applied too strict a definition of willfulness, and both courts relied on a classification of governmental functions that has been invalidated by the Supreme Court. In each case, these issues should have been resolved against the defendants. Thus, although based on unsound reasoning, the Tenth Circuit's conviction of *Fitzgibbon* was a correct result.

*James M. Dester*

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53. See *United States v. Schnaiderman*, 568 F.2d 1208, 1213 (5th Cir. 1978); *United States v. Fitzgibbon*, 619 F.2d 874 (10th Cir. 1980).