

Tape Destruction

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The Supreme Court is considering whether to let stand the conviction on extortion charges of a reputed organized-crime leader in a case involving deliberate destruction by the FBI of tape recordings he wanted for his defense.

The tape destruction drew a sharp condemnation from the 2nd U.S. Circuit Court of Appeals.

It "falls into a regrettably sizable class of prosecutions in which the defense might have been hampered by the government's failure to live up to its strict statutory obligations with respect to preservation of evidence," Judge Wilfred Feinberg wrote for the court last May.

"A review of the precedents reveals a distressing number of shredded, discarded, abandoned and 'intentionally nonpreserved' documents, with those

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responsible for the most part—as here—professing no intention to suppress material evidence," Feinberg said.

The principal defendant in the case, Russell Bufalino, was described by federal officials in 1973 as the leader of one of the five Cosa Nostra families in Pennsylvania. The other defendants were Michael Sparber, an associate, and Herbert Jacobs, a New York City jeweler described by Feinberg as "singularly credulous."

A federal court jury in Manhattan convicted the trio last year. The sentences were: Bufalino, four years in prison to be followed by five years' probation, and \$20,000 in fines; Sparber, one year in prison, plus five years' probation, and Jacobs, three years' probation and a \$2,500 fine.

The appeals court, citing "the special circumstances that militate against reversal," let the convictions stand.

But, Feinberg wrote, "we will look with an exceedingly jaundiced eye upon future efforts to justify nonproduction (of evidence of the type at issue) by reference to (Justice) 'department policy' or 'established practice' or anything of the like "He went on to warn the government:

"There simply is no longer any excuse for official ignorance regarding the mandate of the law. Where, as here, destruction is deliberate, sanctions will normally follow, irrespective of the perpetrator's motivation, unless the government can bear the heavy burden of demonstrating that no prejudice resulted to the defendant."

The case began in 1976, when the "credulous" Jacobs, in exchange for a check, promises, and unauthorized invocations of the name of the Cosa Nostra leader as a credit reference, handed over diamonds valued at \$25,000 to one Jack Napoli.

The check bounced. The promises proved to be no better than the check. And so an angry Jacobs enlisted Bufalino and Sparber as collection

agents. They made a series of threats, including one in which Sparber told Napoli's girlfriend that if he didn't do "the right thing," she and her children would be in jeopardy.

Napoli then went to the FBI, which outfitted him with devices to record and transmit face-to-face and phone conversations.

In one chat, Bufalino and Sparber told Napoli that if he didn't pay up he would face bodily harm. In another, Bufalino cursed the wired debtor and threatened, "I'm going to kill you." In yet another, Jacobs held out hope, if Napoli would show "good faith, they're not gonna kill you."

Although tapes made by a so-called "Nagra" device worn by Napoli had certain gaps and inaudible passages, Judge Morris E. Lasker admitted them into evidence.

The deficiencies possibly could have been clarified by back-up tapes from equipment that received transmissions from another device carried by Napoli, a Kel transmitter. But the defense never got a chance to inspect the Kel tapes because an FBI agent destroyed them, saying they were useless.

The government offered an additional defense of the destruction: there was a shortage of shelf space and it would cost money to provide more to accommodate such materials.

Lasker, emphatically supported by the appeals court, said that added storage costs would be more than offset by gains in the fairness of trials and by the shielding of sound prosecutions from needless obstacles to success.

But Lasker heard and credited testimony that in contrast to the "relative high quality" of the Nagra tapes admitted into evidence, the destroyed back-up Kel tapes were "largely inaudible." In a ruling endorsed by the appellate court, he rejected a defense motion to suppress the Nagra tapes on the ground that the defense hadn't shown that its case had been prejudiced.