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FOURTH CIRCUIT HOLDS THAT THE COMMON LAW DEFINITION OF "MALICIOUSLY" DOES NOT APPLY IN THE CONTEXT OF 18 U.S.C.A. § 35—UNITED STATES V. HASSOUNEH, 199 F.3D 175 (4TH CIR. 2000)

SHAHNAZ PANCHBHAYA

THE FOURTH CIRCUIT reviews jury instructions subject to an abuse of discretion standard.[1] When reviewing the adequacy of such jury instructions, the Fourth Circuit follows *Teague v. Bakker*[2] and will not reverse jury instructions as long as the controlling law is properly stated.[3] In *United States v. Hassouneh*,[4] the Fourth Circuit held that the district court's jury instruction that defined the word "maliciously" did not state the controlling law.[5] The district court defined "maliciously" in accordance with the common law as an act "committed intentionally or with willful disregard of the likelihood that damage or injury would result."[6] In contrast, the Fourth Circuit found that the common law definition did not suffice and that "maliciously" included some type of evil intent in its definition.[7] This fact is important because the circuit court successfully established that using the word "maliciously" distinguished one penalty from the other[8] when examining two different penalties under 18 U.S.C.A. § 35 assessed to those who convey false information about placing destructive devices aboard a civil aircraft.[9] Although the court did

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[1] *See* United States v. Hassouneh, 199 F.3d 175, 181 (4th Cir. 2000). In *United States v. Bostian*, 59 F.3d 474, 480 (4th Cir. 1995), the Fourth Circuit reviewed jury instructions relating to a criminal case under an abuse of discretion standard.

[2] 35 F.3d 978 (4th Cir. 1994).

[3] *See id.* at 985 (explaining that the district court will be given discretion and jury instructions will not be reversed as long as they "adequately state the controlling law").

[4] 199 F.3d 175 (4th Cir. 2000).

[5] *Id.* at 182.

[6] *Id.* at 181.

[7] *Id.* at 182

[8] *See id.*

[9] *See id.* at 179.

not arrive at its own definition of the word "maliciously," this holding exemplifies the analysis necessary in examining whether the use of a common law definition would best fit in context of a penalty assessed, or whether another definition should be created.

On Saturday, November 15, 1997, Mahmoud Hassouneh was scheduled to take a flight from North Carolina to Orlando, Florida on AirTran Airways.[10] Upon his arrival at the AirTran ticket counter, an airline employee asked him if any unknown person had asked him to carry anything on board the aircraft.[11] Hassouneh responded that two men had given him a bomb to carry.[12] The airline employee escorted Hassouneh to a security area to have his bag examined.[13]

Hassouneh's bag was run through the x-ray machine, thoroughly examined, and eventually destroyed by a bomb specialist.[14] Later inspection showed that Hassouneh's bag did not have a bomb or any explosives in it.[15] A police officer questioned Hassouneh, who claimed to have been joking about the bomb.[16]

The government had two options. It could have filed suit under 18 U.S.C.A. § 35(a) that states:

> Whoever imparts or conveys or causes to be imparted or conveyed false information, knowing the information to be false, concerning an attempt or alleged attempt being made or to be made, to do any act which would be a crime prohibited by this chapter or chapter 97 or chapter 111 of this title shall be subject to a civil penalty of not more than $1000 which shall be recoverable in a civil action brought in the name of the United States.

But instead it filed suit against Hassouneh under the felony provision 18 U.S.C.A. § 35(b), which states:

> Whoever willfully and maliciously, or with reckless disregard for the safety of human life, imparts or conveys or causes to be imparted or conveyed false information, knowing the information to be false, concerning an attempt or alleged attempt being made or to be made, to do any act which would be a crime prohibited by this chapter or chapter 97 or chapter 111 of this title—

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[10] *Hassouneh*, 199 F.3d at 176.
[11] *Id.* at 177.
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Hassouneh*, 199 F.3d at 177.

shall be fined under this title, or imprisoned not more than five years, or both.[17]

Hassouneh was tried in the United States District Court for the Middle District of North Carolina.[18]

During open court proceedings, Hassouneh indicated that his comment involving the bomb in the bag was a joke and asked to bring in character evidence showing that he was known for being a jokester. The court denied the request, ruling that such evidence was irrelevant because being a jokester was not a defense to the crime.[19] The district court instructed the jury that under 18 U.S.C.A. § 35(b), the government must prove that Hassouneh acted willfully and maliciously.[20] Hassouneh was found guilty under 18 U.S.C.A. § 35(b),[21] and he subsequently appealed, claiming that the district court had erred in instructing the jury on the meaning of the word "maliciously."[22] The Fourth Circuit agreed with Hassouneh, vacated his conviction and sentence, and remanded the case for a new trial.[23]

Writing for the court of appeals, Judge Williams[24] reviewed the jury instructions under an abuse of discretion standard,[25] as proscribed by *Teague v. Bakker*,[26] holding that jury instructions would not be reversed as long as the controlling law was stated.[27] Hence, the Fourth Circuit needed to determine whether the district court had improperly instructed the jury on the meaning of the word "maliciously."[28]

According to the court of appeals, the jury instruction on the word "maliciously" failed to meet the *Teague* standard.[29] The court found that the district court borrowed only a part of the Eighth Circuit's definition of "maliciously" in *United States v. Sweet*, omitting the "intent to vex, annoy, or injure another or an

17 18 U.S.C.A. § 35(a) (West 2000).

18 *Hassouneh*, 199 F.3d at 175.

19 *Id.* at 178.

20 *Id.*

21 *Id.* at 179.

22 *Id.* at 176.

23 *Id.*

24 Judges Wilkins and Butzner joined Judge Williams' opinion. *See* United States v. Hassouneh, No. 98-4401, 2000 U.S. App. LEXIS 427, at *1 (4th Cir. Jan. 13, 2000).

25 *Hassouneh*, 199 F.3d at 181.

26 35 F.3d 978 (4th Cir. 1994).

27 *Hassouneh*, 199 F.3d at 181.

28 *Id.* at 181-82.

29 *Id.* at 182.

intent to do a wrongful act" portion.[30] The court further determined that Congress intended a different meaning of the word "maliciously" from its common law definition because of its two separate penalties.[31] Finally, the court concluded that Hassouneh's proposed definition of "maliciously" more accurately reflected the legal standard necessary to convict a person under 18 U.S.C.A. § 35(b) because it included an evil motive.[32]

The Fourth Circuit correctly remanded this case based on the district court's erroneous definition of the word "maliciously."[33] The court did not prohibit the use of citing the *Sweet* court's definition of "maliciously,"[34] but recognized the need to adopt another meaning in this particular context. The court assumed that Congress intended the term "maliciously" to mean an act "with an evil purpose or motive."[35] By exploring the evolution of § 35 over time,[36] in order to decipher Congress' intent for having two separate penalties under this section, the court demonstrated that each penalty required concise meanings in its assessment to avoid redundancy between the two penalties.

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[30] *Id.* at 181. In *United States v. Sweet*, 985 F.2d 443, 445 (8th Cir. 1993), the Eighth Circuit reviewed the definition of "maliciously" as used in § 35(b).

[31] *Id.* at 182.

[32] *Id.*

[33] *Hassouneh*, 199 F.3d at 184.

[34] In *United States v. Gullett*, 75 F.3d 941, 947 (4th Cir. 1996), the Fourth Circuit adopted *Sweet's* definition of the word "maliciously" since Congress did not define the word in Title 18, U.S.C., Section 844(i)—the statute that the defendant allegedly violated.

[35] *Hassouneh*, 199 F.3d at 181.

[36] Congress clearly intended a different definition of "maliciously" as evidenced by the evolution of 18 U.S.C.A. § 35. *See Hassouneh*, 199 F.3d at 179-81. Before 1961, 18 U.S.C.A. § 35 (known as the "Bomb Hoax Act") did not have two parts as it does now. The original provision stated,

> Whoever willfully imparts or conveys or causes to be imparted or conveyed false information, knowing the information to be false, concerning an attempt or alleged attempt being made or to be made, to do any act which would be a crime prohibited by this chapter or chapter 97, or chapter 111 of this title—shall be fined not more than $1,000, or imprisoned not more than one year, or both.

See, e.g., United States v. White, 475 F.2d 1228, 1231 n.4 (4th Cir. 1973) (quoting 18 U.S.C.A. § 35 in its 1956 form). In 1961, Congress added subsection (b) to section 35 and removed the word "willfully" from the 1956 version, which is now subsection (a). *See Hassounch*, 199 F.3d at 180. "These changes clearly indicate a congressional intent to subject anyone who provides false information of the type proscribed in the statute to punishment, but to punish those who make such statements 'willfully and maliciously, or with reckless disregard for the safety of human life' more severely." *Id.* (quoting 18 U.S.C.A. § 35(b)).

The Fourth Circuit's approach was precise in that the court justified its assumption of Congress' intent of the definition of "maliciously."[37] The court established that if "maliciously" meant "intentionally," then § 35(a) and § 35(b) would be identical and the need for both penalties would be unnecessary.[38] As the court acknowledged, one must act intentionally to commit either penalty under § 35.[39] Therefore, it was necessary for the court to adhere to a more meticulous definition of "maliciously," which more accurately reflected the intention of § 35(b).

Hassouneh had presented a jury instruction to the district court defining the word "maliciously."[40] Given the Fourth Circuit's assumptions of Congress' intent, Hassouneh's definition of "maliciously" would have been considered more reliable and accurate. Had Hassouneh's definition been applied, he might have been subject only to a civil penalty under § 35(a) rather than the felony provision under which he was tried.[41]

Judge Williams also addressed the definition of the word "willfully" as used in the district court's jury instructions.[42] Hassouneh's requested definition of "willfully" was practically identical to the one proposed by the district court.[43] Therefore, the Fourth Circuit upheld the district court's definition, holding that the definition of "willfully" did not have an evil purpose requirement, as Hassouneh suggested Congress had intended it to include.[44]

The Fourth Circuit also reviewed the district court's decision to prohibit Hassouneh from presenting evidence in relation to his character.[45] Hassouneh's reputation was indeed relevant evi-

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[37] *Hassouneh*, 199 F.3d at 182.

[38] *Id.*

[39] *Id.*

[40] *Id.* at 178 n.4.

[41] *See id.* at 181 (explaining that section 35 allows jokers who make false statements prohibited by this statute to be subject to a civil penalty under subsection (a) rather than a felony under subsection (b)).

[42] The district court defined "willfully" as "deliberately and intentionally, as contrasted with being made accidentally, carelessly or unintentionally." *Id.* at 183.

[43] Hassouneh defined "willfully" as "voluntarily and intentionally." *Hassouneh*, 199 F.3d at 183.

[44] *Id.* (holding that the district court was not in error when it omitted the "evil purpose" component from its definition of "willfully").

[45] *Id.* at 182-83.

dence of his character, and the court ordered this evidence to be presented on remand.[46]

The court in *Hassouneh* offers the Fourth Circuit's first look at a suitable definition of the word "maliciously" as used in § 35(b).[47] This court's precedent will require other courts to note which jury instructions will be more appropriate when considering the meaning of the word "maliciously." In addition, many other words defined in jury instructions will be given special attention where the definitions of these words could potentially alter a conviction from that of a greater offense to a lesser one. As a result, more carefully written jury instructions should result in circuit courts giving greater deference to the lower courts.

As *Hassouneh* illustrates, Congress intended to distinguish the word "maliciously" in § 35(b).[48] The district court might have considered the common law definition of "maliciously" when instructing the jury.[49] However, the common law definition of a particular word may not always apply in certain contexts, as this case illustrates.[50] As a result of this case, § 35(b) is more likely to be accurately construed when the word "maliciously" is applied. In the pursuit of a more efficient court system, steps should be taken at lower levels to ensure that the ambiguity existing among many words used in jury instructions are clearly defined in accordance with the particular statute being applied.

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[46] *Id.* at 183 (finding the denial of Hassouneh's reputation to be an abuse of discretion).

[47] *Id.* at 181 n.8 (explaining that only the Eighth Circuit has contemplated the word "maliciously" as used in section 35).

[48] *Id.* at 182 (explaining that by inserting the word "maliciously" in subsection (b) of section 35, Congress intended to distinguish it from subsection (a) of section 35).

[49] *Hassouneh,* 199 F.3d at 181 (finding that the district court might have used its definition of "maliciously" from *Sweet*).

[50] The common law definition of "maliciously" is consistent with the definition used in *Sweet. See id.* at 182. However, the Fourth Circuit opted to follow *Gullet's* reasoning in not adopting the common law definition of a word if it was obvious that Congress wanted the word to mean something else. *See id.*