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Neutral Citation No. [2023] EWCA Crim 707

IN THE COURT OF APPEAL

CRIMINAL DIVISION

CASE Nos 20230623/A5, 202300624/A5,
202300627/A5



5,

Royal Courts of Justice
Strand
London
WC2A 2LL
Thursday 8 June 2023

Before:

LORD JUSTICE DINGEMANS
MRS JUSTICE FOSTER DBE
MR JUSTICE SWEETING

REFERENCE BY THE ATTORNEY GENERAL UNDER
S.36 OF THE CRIMINAL JUSTICE ACT 1988

REX

V

MARK WALKER, DAMIEN DRACKLEY, LORRAINE FRISBY, LESLIE ALLEN

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MR W EMLYN-JONES KC appeared on behalf of the Attorney General

MR J KWONG appeared on behalf of the Offender Walker

MR S BAILEY appeared on behalf of the Offender Drackley

MR D WOOD appeared on behalf of the Offender Frisby

MR I JOBLING appeared on behalf of the Offender Allen

JUDGMENT

LORD JUSTICE DINGEMANS:

Introduction

1. This is the hearing of an application on behalf of the Attorney General for leave to refer to this court sentences for offences of conspiracy to pervert the course of justice and for offences contrary to the Juries Act 1974.
2. Mr Drackley and Miss Frisby (his mother) pleaded guilty to the Juries Act offences. Miss Frisby pleaded guilty to an offence of conspiracy to pervert the course of justice and Mr Drackley, Mr Walker and Mr Allen, and one other co-defendant, had a trial for conspiracy to pervert the course of justice in the Central Criminal Court before Cavanagh J. All were convicted.
3. On 27 January 2023 in the Central Criminal Court, Mr Drackley, Miss Frisby and Mr Allen were sentenced for offences of conspiracy to pervert the course of justice, contrary to section 1(1) of the Criminal Law Act 1977 and in the case of Mr Drackley and Miss Frisby for offences contrary to the Juries Act 1974 to which they had pleaded guilty on an earlier occasion. On 3 February 2023 Mr Walker was sentenced for his part in the same conspiracy to pervert the course of justice. He had been unable to be produced to the court because of medical issues and the need for wheelchair access.
4. The sentencing judge was the trial judge, Cavanagh J, sitting at the Central Criminal Court on 27 January, but in the Crown Court sitting at Isleworth where there was disabled access on 3 February 2023.
5. As far as the individuals are concerned who are the subject of this application to refer, there is Mr Damien Drackley, who is now 37 years old. He had one previous conviction

(before the offending which is the subject of this Reference) for two offences when in 2005 he pleaded guilty to an offence of using a false instrument with intent for it to be accepted as genuine and an offence of using a vehicle whilst uninsured. He was given an overall sentence of four years, being four years for the conspiracy and 14 months concurrent on each of the Juries Act offences.

6. Miss Frisby is 57 years old. She is Mr Drackley's mother and she had one previous conviction in 1982 for shoplifting. She had the benefit of a guilty plea and there was accepted at the sentencing hearing to be genuine remorse. She was given an overall sentence of two years three months for the conspiracy and 12 months' imprisonment concurrent for the Juries Act offences.
7. Mr Walker is 57 years old. He had seven previous convictions for 17 offences including offences of dishonesty but dating back to 1996. He had disabilities, meaning that prison would have been more difficult for him because he had lost a leg and suffered kidney problems. He also suffered infections when in custody. He was given a sentence of nine months' imprisonment for the conspiracy.
8. Mr Allen is 66 years old. He had, before his conviction for the drugs offences which gave rise to the conspiracy, a previous conviction in 1979. He was given a sentence of five years for the conspiracy to pervert the course of justice, which was consecutive to a 13-year sentence of imprisonment for his conviction for the original offending of possessing drugs with intent to supply, which conviction the conspiracy to pervert the course of justice and Juries Act offences were intended to prevent. His earliest release date is calculated to be when he will be around 80 years old.
9. It is submitted on behalf of the Attorney General that the sentences imposed in the case of each of the four offenders was unduly lenient in that they failed to reflect the seriousness

of the offending and the need for punitive and deterrent sentences for conduct of this nature. It is also submitted that the sentences did not adequately recognise the seriousness of the underlying offending for which Mr Allen was originally on trial, which the respondents intended he should be wrongly acquitted of. There was, it was submitted, insufficient deterrence because of the sentences passed, in particular for Mr Allen who was trying to save himself from a 13-year sentence.

10. The respondents submit that the sentences imposed in this case were imposed by the trial judge who had heard the trial and was therefore best placed to reflect on the criminality disclosed in this particular case. The judge had taken all the relevant points into consideration. The sentences were appropriate. There was real deterrence. Mr Drackley had been in prison for the first time, jurors will not be tempted to offend in this manner, Mr Allen will not be released until he is much older, and there was no gross error. It was also submitted that if the sentences were lenient they were not unduly lenient and the applications should be dismissed.

11. We are very grateful to Mr Emlyn-Jones KC, Mr Bailey, Mr Wood, Mr Kwong and Mr Jobling for their helpful written and oral submissions.

The factual circumstances and the roles in the conspiracy

12. In November 2018, Mr Allen stood trial in the Crown Court at Warwick before His Honour Judge Lockhart KC and a jury on charges relating to the supply of one kilogram of cocaine and 10 kilograms of cannabis and also the possession of a prohibited weapon, which was a pepper spray. He was in fact guilty of these offences, as the evidence now discloses, but contested the case.

13. The charge of conspiracy to pervert the course of justice in the instant case related to an effort by the respondents to subvert the trial process in an attempt to secure for Mr Allen

an acquittal.

14. There were two parts of the conspiracy. The first involved Mr Allen and two persons who agreed to give false evidence to the jury. One was Laurence Hayden who gave false explanations for incriminating text messages about "white" powders and "cake" and the other, Daniel Porter, who dishonestly claimed that it was him and not Mr Allen who had been in possession of the drugs which were the subject matter of the trial. Mr Hayden had in fact, before the conspiracy to pervert the course of justice trial absconded and the trial continued in his absence. Mr Hayden was located in Spain and Mr Porter had died.
15. Mr Allen's role encompassed this part of the conspiracy and also a further part of the conspiracy involving Mr Drackley, Miss Frisby and Mr Walker. Mr Drackley was a member of the jury trying Mr Allen in Warwick Crown Court. After the first day he told his mother, Miss Frisby, about the subject matter of the trial. She later made contact with Mr Allen via Mr Walker and the four of them agreed together that Mr Drackley would attempt to persuade his fellow jurors to acquit Mr Allen. For this Mr Drackley hoped to be paid £5,000. In the event, after the jury retired other jurors became suspicious of Mr Drackley and they reported their concerns to the trial judge. Mr Drackley was in fact discharged from the jury. Those remaining then voiced further concerns about whether he had nodded towards a witness at the trial and what he had known about, with the result that the judge discharged the jury as a whole and proceeded to return the verdicts himself, which of course he was now entitled to do pursuant to section 46 of the Criminal Justice Act 2003. Mr Allen was convicted by the judge of all the charges and sentenced to a total of 13 years' imprisonment. He made unsuccessful attempts to appeal his conviction and sentence.

The drugs trial

16. The relevant facts giving rise to the drugs trial were these. Mr Allen was a former boxing promoter who lived in Coventry and he ran a gym there. In June 2016 the police stopped his car which was being driven by one of his sons. The son ran into Mr Allen's house. Both Mr Allen and his son locked themselves in the house, and there was reinforced security on the doors and the police had to break down several doors to get to them. That was when 10 kilograms of cannabis was found on the kitchen floor. When the police examined the CCTV system which Mr Allen had installed in his home, they discovered footage of him carrying those bags into the property and storing it. Separately one kilogram of cocaine of 88 per cent purity was found in the boot of Mr Allen's car. The pepper spray, which was a prohibited weapon, was found in a desk in the house.
17. The prosecution relied upon text messages from Mr Allen's phone which the prosecution contended showed evidence of drug dealing. One of those was the message sent to Mr Laurence Hayden which said: "What u saying Mr Alan do u think I will be able to grab one of them white cakes before u go to the boxing 2nite if not [don't] worry Mr A." The reply came: "Yes, come now". The prosecution alleged that "white cakes" was street slang for compressed cocaine. That was what gave rise to the conspiracy with Mr Hayden, with Mr Hayden agreeing to give a false explanation for the text exchange.

The conspiracy

18. Mr Allen also involved Mr Porter who agreed to give false evidence on Mr Allen's behalf. Mr Porter had been released from prison for an unrelated offence two days before he gave evidence in the Crown Court at Warwick. Mr Hayden picked Mr Porter up on his release and conveyed Mr Allen's instructions to him. Mr Porter gave evidence to the jury claiming that the drugs had been in his possession. He said he had been instructed by some drug dealers to whom he owed a drug debt to transport the drugs from Rugby to

Birmingham. He said he told them that he would transport them to Coventry instead where he would hand them over. He said that a friend had taken the drugs but the dealers had not turned up to collect them. Mr Porter's evidence was that he needed to store the drugs on a short-term basis and asked Mr Allen if he could borrow his car and that he had stored the drugs without Mr Allen's knowledge with a view to returning later. He said that in the evening the drug dealers drove to Rugby, picked him up to collect the drugs but were then scared off when they saw the police at Mr Allen's house. Mr Porter did not answer questions about why these events had not been mentioned earlier and how he came to give evidence at the trial about this some two-and-a-half years later. As Cavanagh J, the sentencing judge in the conspiracy to pervert the course of justice observed, these explanations were preposterous and full of holes. There was no evidence as to what Mr Hayden and Mr Porter expected to receive from Mr Allen in return for their giving the false evidence.

19. The second part of the conspiracy had a different genesis because it arose when Mr Drackley was selected as a juror at Mr Allen's trial. At the commencement of the trial, in accordance with standard practice, it was made clear to Mr Drackley and his fellow jurors that they should not talk about the case with anyone and they should not disclose the deliberations that took place in the jury room. The importance of complying with those rules and the potential consequences for the trial and for a juror who broke the rules was also made clear to them.

20. Notwithstanding those instructions, from the outset of the trial Mr Drackley deliberately and frequently breached the rules. At the end of every single court day he spoke to his mother by telephone and described the events that had taken place in court to her. It is fair to report that having looked at the transcripts of the phone calls it is apparent that he

did so with encouragement from Miss Frisby. He also discussed the trial with her in person on Friday 16 November and on Sunday 18 November 2018. He discussed charges and evidence with her, he disclosed to her information about the other jurors and their voting intentions and once the jury had retired he gave a detailed description of the nature and content of the jury deliberations. Mr Drackley additionally discussed events at court in breach of the instructions and legal obligations with his then girlfriend.

21. Telephone conversations between Mr Drackley and his mother had been recorded by an app which Mr Drackley had installed on his mobile phone but which he had forgotten about. This was later discovered by the police. During these conversations he made clear that he was going to make it his business to try to persuade fellow jurors to secure an acquittal for Mr Allen and that he had decided from the outset of the trial that he was going to vote for an acquittal regardless of what evidence might come out.
22. During those conversations his mother had encouraged him to tell her details of the case and expressed her own views about the outcome, including the view that these offences were not particularly serious. This was plainly an inaccurate view as demonstrated by the sentences that were ultimately passed on Mr Allen for his offending. She had encouraged Mr Drackley to argue for an acquittal and made suggestions about how he might do that.
23. The trial itself had begun on Tuesday 13 November 2018 and information was shared throughout that period. After the trial adjourned on Friday 16 November, Mr Drackley had spoken to his girlfriend and told her that: "Me and my mum know people that know the geezer that's on trial ... we know someone that knows him ... I'm gonna try and get the others to say the same as me" namely that Mr Allen was not guilty. Telephone billing data showed contact between the phones of Mr Walker and Mr Hayden, and the timing of the calls made it clear that Miss Frisby was passing on information from her son about

the trial.

24. Mr Walker met with Mr Allen and loaned him his mobile phone so that Mr Allen could contact Miss Frisby knowing that he was being in contact with the mother of one of the jurors at the trial. The use of Mr Walker's phone was done to disguise Mr Allen's contact with someone. When they spoke, Miss Frisby said her son would do all that he could to persuade the jury to acquit. They discussed what Mr Allen would give him in return and Mr Allen made it clear it would be something substantial. The following day, Mr Allen informed Mr Walker he would pay Mr Drackley for his assistance and Mr Walker in turn passed this offer on to Mr Drackley and Miss Frisby and the cash offer was accepted. Mr Drackley later admitted to his girlfriend that the sum involved was £5,000. It was clear that Mr Drackley and his mother were motivated by their belief that it would be in their interests to do a favour for a local criminal and they would benefit from his support and protection in the future.
25. The jury retired to consider their verdicts on 19 November, so four days after the trial had started. From the outset of the deliberations Mr Drackley had made it clear that he was going to vote for an acquittal and that no discussion or consideration of the evidence was going to change his mind. He attempted to persuade fellow jurors that they should acquit and after that day and the next day he again spoke to his mother. She asked him whether he was keeping on with "your reasonable doubt though" and suggested some lines of argument that might be used to persuade fellow jurors.
26. The next day Mr Drackley continued with attempts to persuade the fellow jurors to acquit. In the event, the plan to use false evidence and to exploit Mr Drackley's position on the jury failed. The other jurors were attempting to comply with the rules and a number of them became suspicious about the way that Mr Drackley was behaving. His

attempts to persuade his colleagues on the jury were incompetent. He hectored them, he was truculent, he refused to take account of the evidence and made it clear he had a closed mind. He was not in the slightest bit persuasive.

27. On 20 November he gave details of the geography of Mr Allen's house and the gym next to it which had not been in evidence. That led the jurors to suspect that Mr Drackley had been conducting his own research in breach of the judge's clear instructions and that was why the jury's concerns were reported to the judge. A number of jurors had also seen Mr Drackley and Mr Hayden exchange a wink or a nod when Mr Hayden had come to court.

28. In addition to other breaches of instructions, it was discovered that Mr Drackley had failed to switch off his mobile phone as he had been told to do so and one of the jurors had expressed a concern that the phone had been used to record their deliberations. In fact it had not been but that was why the phone was seized and examined by police officers after Mr Drackley had been discharged and after those further concerns had been raised.

29. The jury was discharged. The judge handed down the verdicts. As already indicated he found Mr Allen guilty on all counts and sentenced him to 13 years' imprisonment.

The arrests and interviews

30. Mr Drackley was arrested on 21 November 2018, so very shortly after the trial. For the first part of the interview he made no comment and then he went on to explain that he decided that Mr Allen was not guilty and to admit that he had spoken to his mother about the case. He denied trying to influence the jury and he said his concern had always been that there be a fair trial. He said he had been aware of a nod from Mr Hayden but assumed it was due to nerves on the part of the latter. He did not answer any questions

about financial incentives.

31. Miss Frisby was arrested on 22 November, so the day after her son, and she was interviewed. She accepted she had spoken to Mr Drackley about the case but out of nosiness. She did not know the man who was being tried and she denied encouraging her son to get Mr Allen off.

32. Mr Walker was arrested about five months later on 21 March 2019. He denied knowledge of Mr Drackley, Mr Allen and Mr Hayden. He said he may have spoken to Miss Frisby about a car and said he had known her from when he was a child. Text conversations with Miss Frisby, including the message: "Hi hun, did you see your man" would have been about cars. If he had been in contact with Mr Hayden it would have been about a car. He denied any involvement.

33. Mr Allen was interviewed on 18 September 2019. He prepared a statement denying any involvement and thereafter did not answer questions.

The sentencing remarks

34. It is necessary in this particular case to consider at some length the remarks made by the judge because of the basis on which the application to refer has been made.

35. The judge rightly pointed out that there are no sentencing guidelines for the offence but that the courts had made it clear on numerous occasions that offences of conspiracy to pervert the course of justice undermine the very system of criminal justice. As such, they were to be treated seriously and it was almost always necessary to impose immediate custody unless there were exceptional circumstances. The court had to have regard to the seriousness of the substantive offences, in this case the drug offences, the nature of the conspiracy and the degree of persistence of the conduct. Each case depended on its own facts.

36. The judge recorded that the substantive offences were serious because the main offences with which Mr Allen were charged were serious drug offences and the street value of 10 kilograms of cannabis was £56,000-odd and the street value of high purity cocaine was £100,000. That meant that each of the defendants was involved in a conspiracy to procure by dishonest means the acquittal of a substantial drug dealer who was guilty of the offences with which he was charged.

37. The judge went on to record that this was complex, carefully planned and a very cynical conspiracy. The judge had analysed this as two strands of the conspiracy which struck at the heart of the criminal justice process. That process depended to a large extent upon witness evidence and so was dependent upon witnesses complying with their oath to tell the truth. Conspiracies to lie on oath were therefore a very serious matter. The judge went on to say:

"It is even more serious however, for defendants to involve themselves in a conspiracy to suborn a juror and for a juror willingly to offer to break his jury oath for the benefit of a criminal. Jury service is probably the most important public service a member of the public will be called upon to do. The criminal justice system depends upon jurors faithfully and honestly carrying out their functions."

38. The judge said:

"The consequences, if faith in the jury system was lost by juror misconduct, are too horrible to contemplate."

39. The judge turned to consider persistence and the fact that the conspiracy was unsuccessful. The judge also went on to say that this conspiracy was inept in many ways and some of the participants were grossly incompetent but that this had limited, if any, value as mitigation because the fact remained that each participant knowingly and

willingly took part in a serious and determined attempt to pervert the course of justice.

40. The judge noted that there was some mitigation, that there was no evidence of threats or intimidation to force anyone to take part, there were no threats to or intimidation of third parties and there was no evidence that Mark Walker was placed under pressure to play his part. It was an aggravating feature that by taking responsibility for the drugs, Daniel Porter (who had only just been released from prison) was placing himself at the risk of a lengthy prison sentence.

41. The judge then turned to the individual conspirators and relayed the individual facts for each case. When sentencing Mr Allen he noted that there must be a deterrent element for offending such as this which strikes at the heart of the criminal justice system. The judge said that he had taken the totality guideline into account and in particular had sought to ensure that the overall sentences are just and proportionate. He said that in the special circumstances of this case it was not appropriate to make a substantial reduction for totality because to do so would be to reward Mr Allen for his attempts to tamper with the jury and to obtain an acquittal by placing false evidence before the court. The judge imposed a sentence of five years and made that, as already indicated, consecutive to the 13-year sentence.

42. The judge turned next to Mr Drackley and talked about him acting flagrantly in breach of the jury oath and the fact that he had done so willingly and almost flippantly. The judge characterised that as an outrageous breach of trust. The judge did note that Mr Drackley's mother had undoubtedly encouraged him in his misconduct and it would probably never have occurred to him to contact Leslie Allen but for his mother's involvement. The judge recorded that that was small mitigation because when the opportunity to accept a bribe for swaying the jury arose, Mr Drackley had enthusiastically pursued it.

43. So far as the sentencing was concerned, the judge also recorded:

"... there had to be an element of deterrent to your sentence because it must be made clear to those who are called to perform the duty and privilege of jury service, that they must take their obligations seriously and must not contemplate acting corruptly."

44. He then imposed a sentence of four years.

45. He turned next to Miss Frisby (Mr Drackley's mother) and noted that she was a pivotal character in the second part of the conspiracy and without her the bribe would not have been offered or accepted. Her culpability was therefore high and there must be a deterrent element. The judge noted the guilty pleas and the effective good character of Miss Frisby and also her positive good character, namely her work as a volunteer for a food bank and her work assisting neighbours. The judge also noted that Miss Frisby's husband was in poor health and that Miss Frisby was his primary carer. None of those were matters that explained involvement in the conspiracy but they are significant mitigation, nonetheless. The judge also took account of the fact there had been a delay between plea and sentence and considered that the appropriate sentence after trial would have been three years three months. Giving appropriate discounts for guilty pleas that gave the sentence of two years three months.

46. The judge finally turned to Mr Walker who was only involved in the second part of the conspiracy. He had, the judge found who had heard the trial, the most minor role by a considerable margin. That was because he had helped Miss Frisby to make contact with Mr Allen and was involved in a substantial number of contacts with Miss Frisby and Mr Hayden and with Mr Allen using Mr Hayden's phone. The judge noted that it is not clear what the reward was and the judge said this:

"You are 57 years old; you are not in good health. You have lost a leg. It was clear during the trial and from the medical evidence that I have seen that your amputated leg causes you pain and discomfort and affects your mobility. You have had problems with your prosthetic leg, you have other health difficulties, including kidney problems. I have taken this into account, and I accept that this may cause you some difficulties in the prison environment. However, there is no reason to think that your health problems cannot be managed in prison."

He then imposed the sentence set out earlier.

47. The judge said:

"As I have said, those who chose to become involved in conspiracies to pervert the course of justice, must expect an immediate prison sentence unless the circumstances are exceptional."

Relevant principles of law

48. There are currently no offence-specific guidelines for the offence of perverting the course of justice. There are draft guidelines on which there has been consultation, but it is common ground that this court cannot take them into account and does not do so.

49. Previous guidance from the authorities shows that it is necessary to consider (1) the seriousness of the substantive offence, (2) the degree of persistence in the conduct and (3) the effect of the attempt to pervert the course of justice. It has been pointed out that conduct which tends and is intended to pervert the course of justice strikes at the heart of the administration of justice and almost invariably calls for a custodial sentence, but an immediate sentence does not necessarily have to be of great length to achieve the important aim of deterrence. Circumstances vary and so only limited assistance can be derived from considering decisions in other cases. In assessing seriousness of the particular offence, relevant factors include the seriousness of the underlying offence, the

nature of the deceptive conduct, the period of time over which it continued and the success or otherwise of the attempt to pervert the course of justice. The offender's character and personal mitigation must be taken into account: see R v Tunney [2006] EWCA Crim 2066, [2007] 1 Cr.App.R (S) 91 at paragraph 10 and R v Abdulwahab [2018] EWCA Crim 1399, [2018] 2 Cr.App.R (S) 46 at paragraph 14.

50. In Tunney the defendant had given a false alibi in a police statement to a person who was accused of murder and convicted of manslaughter for driving over a farmer who was trying to stop the theft of his Land Rover. There had been a degree of persistence because the police arrested the defendant after he had given the false statement and he maintained his story in police interview before later in a further interview shading the times of his alibi. A sentence of three years imposed at first instance was reduced by the Court of Appeal Criminal Division to two-and-a-half years and that equated to a sentence of three years and nine months after trial.
51. In Abdulwahab the Court of Appeal allowed an appeal against a sentence of 15 months' imprisonment imposed on a defendant who had lied in interview about his role to exculpate a drug dealer whose class A and class B drugs had been found in the back of the defendant's car. The defendant's sentence was reduced to 11 months which equated to a sentence of 15 months after a trial.
52. Mr Emlyn-Jones points out that these are fact-specific cases and that the important point is to have regard to the particular principles which were highlighted in paragraphs 10 and 14 of the respective authorities.
53. It is also right to note that the lengths of sentences for this type of offence have not increased in the way that they have done in other specific areas of sentencing, for example sexual offences. On the other hand this might be addressed in a future

guideline.

54. It is also important to note that deterrence forms an important part of sentencing for these offences of conspiracy to pervert the course of justice, but a sentence of imprisonment is a substantial deterrent in itself.

Determination

55. In this case it is apparent that the judge had full regard to the relevant principles and appropriate regard to the relevant previous authorities. We can see no error of legal principle by the judge in his approach to sentence in this case. Mr Emlyn-Jones on behalf of the Attorney General accepted that that was the case, saying in submissions this morning that the judge's sentencing remarks were, apart from the final conclusion, a model of their kind.

56. The real issue therefore is whether the sentences were unduly lenient and in that respect it is submitted on behalf of the Attorney General that the original trial was multi-kilogram class A and class B drug offending, that the Conspiracy and Juries Act offences targeted the principle of independent juries which are central to the criminal justice system for serious crimes. The offending might have been relatively short-lived but that was simply because the trial was also short-lived, and that there were witnesses who gave false evidence and a jury that was attempted to be manipulated, albeit the jury was then discharged and the judge did go on to exercise his powers to deliver his verdicts.

57. These points were all noted by the judge and in circumstances where it is agreed that the judge did not misdirect himself on the law, the facts or the relevant factors to be considered, the question remains whether the sentences were unduly lenient.

58. In our judgment these sentences cannot reasonably be described as unduly lenient. It is true that some judges might have given slightly longer sentences but the judge was the

trial judge and was inevitably best-placed to consider the appropriate sentence for what is always a very fact-specific sentencing exercise. He had considered all the relevant factors. There were particular features of mitigation, for example that available to Miss Frisby and Mr Walker, which were unique to them.

59. For all these reasons, we therefore grant leave to bring the Reference because this is a case that justified a review, but we dismiss the Reference.

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