ST. VINCENT AND THE GRENADINES

IN THE COURT OF APPEAL

MCRAP 2007/084

BETWEEN:

CHARLES CONSTANCE

Appellant

and

COMMISSIONER OF POLICE

Respondent

Before:

The Hon. Mr. Hugh A. Rawlins	Chief Justice
The Hon. Mde. Ola Mae Edwards	Justice of Appeal [Ag.]
The Hon. Mr. Errol L. Thomas	Justice of Appeal [Ag.]

Appearances:

Mr. Richard Williams for the Appellant
Mr. Colin Williams and Mr. Granville Williams for the Respondent

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2008: February 12;
November 25.

Magisterial Criminal Appeal – section 41(1) (a) of the Proceeds of Crime and Money Laundering Prevention Act 2001 – section 308 of the Criminal Code – Appeal against conviction – inadmissible and insufficient evidence led in trial – Appeal against sentence – sentence too excessive – whether previous conviction should be taken into consideration when sentencing –

The appellant was convicted of two offences; concealing property, to wit, money which in whole or in part directly or indirectly represents the proceeds of criminal conduct and secondly being in possession of money reasonably suspected of being stolen or unlawfully obtained. As a result he was sentenced to four and a half years and one year imprisonment respectively. He appealed against his conviction on the ground that it was unsatisfactory having regard that the magistrate led inadmissible and insufficient evidence at trial. He appealed against sentence on the ground that it was excessive given that the guidelines for an offence of this type was 12-15 months. The prosecution's case was that the appellant obtained monies unlawfully and that the monies were the proceeds of criminal conduct. The prosecution further stated that the monies were not consistent with legitimate earnings. The appellant denied this indicating that he obtained United States

currency in three ways: 1. by purchasing from visitors to the island; 2. from the sale of leather goods which he possessed; and 3. from the proceeds of the business which he ran in his arcade.

Held: dismissing the appeal.

1. That given the nature of the charge and the evidence generally and in particular that of Cpl. Scott as to the appellant's explanation of the money found at his residence, admission of the evidence was permitted by the rules of evidence. Therefore the evidence on the whole was neither unfair nor prejudicial.

   R. v Sang [1980] AC 402 applied.

2. That the evidence against the appellant was overwhelming.

3. That it was a finding of fact that the sources identified by the appellant could not have yielded the money involved. Therefore, there is no basis upon which the learned magistrate's findings should be interfered with.

4. While guidelines are established for an offence of this nature, there are special facts and circumstances which require a departure. The purpose of sentencing being deterrence, retribution and rehabilitation must not be taken lightly. In light of the seriousness of this offence there shall be no reduction in the sentence.

JUDGMENT

[1] THOMAS J.A. [AG]: On 25 April 2007, Charles Constance, the appellant, was convicted of two offences. The first was under section 41(1)(a) of the Proceeds of Crime and Money Laundering Prevention Act 2001[1] ("the Proceeds of Crime Act"). With respect to this offence he was sentenced to four and a half years imprisonment. The second offence[2] was under Section 308 of the Criminal Code[3] ("the Code") and he was sentenced to imprisonment for one year.

[2] Charles Constance has appealed his convictions on the following grounds:

> "1. The conviction cannot be supported by the evidence presented.
> 2. Asking for the squashing of the conviction and the return of the finance.

[1] Criminal Suit No. SOC 139/07
[2] Criminal Suit No. SOC 140/07
[3] Chapter 124 (revised Edition of the Laws of St. Vincent and the Grenadines, 1990)

3. The money was legally obtained by business endeavours.
4. Prejudicial and inadmissible evidence was led in trial and relied upon by the learned magistrate.
5. The learned magistrate erred in convicting the defendant as no or no sufficient evidence was led to justify that the money was the proceeds of criminal conduct.
6. The sentence was excessive."

[3] Given the fact that some of the grounds of appeal overlap, they will be considered in the following order: ground 4 relating to the admissibility and sufficiency of the evidence; grounds 1 and 6 relating to the insufficiency of then evidence; grounds 2, 3 and 5 dealing with the source or sources of the money and ground 7 relating to the sentences imposed. Although ground 2 is grouped with grounds 3 and 5, it will not be treated as an independent ground but as a legal consequence which may flow from a successful appeal only.

The offences

[4] As indicated before, the two offences were under Section 41(1)(a) of the Proceeds of Crime Act and Section 308 of the Code.

[5] Section 41(1)(a) of the Proceeds of Crime Act provides:

> "41. (1) A person commits an offence if he
> (a) conceals or disguises any property which is, or in whole or in part directly or indirectly represents, his proceeds of criminal conduct…;
>
> (b) ….
> for the purpose of avoiding prosecution for a drug trafficking or relevant offence or the making or enforcement in his case of a confiscation order."

[6] On the other hand, section 308 of the Code states as follows:

> "308. Any person who is charged with having in his possession in any place, or conveying in any manner, anything which is reasonably suspected of being stolen or unlawfully obtained and who does not give an account to the satisfaction of the court as to how he came by the same, is guilty of an offence and liable to imprisonment for six months."

Ground 4

[7] This ground raises essentially, the matter of the admissibility and prejudicial effect of the evidence resulting in the convictions for the two offences.

Submissions

[8] On this ground Mr. Richard Williams, learned counsel for the appellant submits that evidence was led of conduct which took place since 1996. In this regard learned counsel points to the evidence of several witnesses including: Sabrina Neehal[4] who submitted financial information related to 1997 – 2002; Carlita Tyrell[5] whose evidence covered the period 1994 – 2002 and Rusendal Francis[6] whose financial analysis covered the period 1999 to 27th June, 2005.

[9] For the respondent the following submissions were tendered by Mr. Colin Williams in relation to ground 4:

> "The Respondent respectfully submits that the evidence led was not prejudicial and inadmissible as the facts which were placed before the court were part of the same transaction which is the subject of the charge. The evidence is necessarily admissible as to fact which are closely and inextricably mixed up with the history of the guilty act itself as to form part of one chain or relevant circumstances and so could not be excluded in the presentment of the case before the court without the evidence being thereby rendered unintelligible.
>
> The Accountant's evidence is set out at pages 13 & 14 at paragraph 12 with an exhibit at page 312 of the notes of evidence marked MIR 1. This evidence chronicles the history of income potentially earned from the games arcade from 1994 to 2005. The appellant was charged with the offence on June 27th 2005, the Accountant's evidence on page 14; the penultimate lines conclude that for the relevant period activity dropped significantly during 2004 and 2005, she arrives at a conclusion in the last line which is based upon exhibit MIR 1. She concludes that the monies could not be generated from the arcade business. It was therefore critical that the history of deposits be clearly established to make the evidence intelligible to the court.
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> It is the respectful submission of the Respondent that the evidence of the accountant was relevant to the charge before the court. It was evidence as to facts so closely and inextricably mixed up with the history of the

[4] At page 11 of the Record
[5] Ibid
[6] At page 313 of the Record

guilty act itself as to form part of one chain of relevant circumstances and so could not be excluded in the presentment of the case before the court without the evidence being rendered unintelligible. It was evidence that was logically probative and was therefore admissible to show the disparity in income during the years when the arcade was in operation as against those years when it was no longer operating and the monies were claimed to be derived from the same. An inference prejudicial to the appellant could be drawn from the evidence but such as inference cannot per se render it inadmissible. The test is whether the prejudicial effect is out of all proportion to its evidential value.

In light of the foregoing, the decision of the Learned Magistrate was reasonable in all the circumstances of the case."

[10] The grounds of appeal combined with the submissions thereon require an outline and/or a discussion of the following matters: the offences, the legislation, the presumptions regarding legislation, the evidence in outline and Magistrate's reasons for the decision.

The charges

[11] The charge under Section 41(1)(a) of the Proceeds of Crime Act reads:

> "That Charles Constance of Paul's Avenue on the 27th day of June 2005 at Paul's Avenue in St. Vincent and the Grenadines and within the first Magisterial District concealed property to wit twenty-four thousand, eight hundred and seventy United States Dollars ($24,870.00), which in whole or in part directly and indirectly represent your proceeds of criminal conduct…"

[12] The charge under Section 308 of the Code reads:

> "On 27th day of June, 2005 at Paul's Avenue in St. Vincent and the Grenadines and within the first Magisterial District, had in your possession twenty-four thousand, eight hundred and seventy United States Dollars ($24,870.00) reasonably suspected of being stolen or unlawfully obtained…"

Commencement of the Legislation

[13] In terms of penal statutes the commencement date of the enactment of the relevant sections thereof is of critical importance.

[14] The Proceeds of Crime Act 2001, including section 41, came into operation on 18 December 2001[7]. On the other hand, the Proceeds of Crime and Money Laundering (Prevention) (Amendment) Act 2005, which amended section 41 and other provisions of the Proceeds of Crime Act 2001, came into operation on 13 May 2005. However, there is nothing in either enactment to warrant a retrospective rather than a prospective operation in either case. Therefore in plain terms it means that Parliament intended certain conduct as embodied in section 41 of the Proceeds of Crime Act 2001, as amended, to be an offence on and after the commencement of the Act.

[15] On the other hand, the Code came into operation on 30 October 1989, and the same principle as outlined would also apply. However, the commencement date and the nature of the offences must be kept in perspective.

The evidence

[16] It is common ground that on 27 June 2005, a party of police officers, including P.C. Chambers and Cpl. Scott from the Drug Squad and the RRU went to the home of the appellant, situate at Paul's Avenue, to execute a warrant.[8]

[17] When the police officers arrived at the appellant's home, the appellant was called and although he answered, he refused to open the door as requested by the officers, whereupon the officers used a haligan tool to cut the burglar bars in order to gain entry.

[18] Inside the house the officers saw and spoke to the appellant and another man, a Venezuelan. In their searches of the top floor the officers found nothing mentioned in the search warrant; but on the ground floor they saw a locked safe which the

[7] Section 1(1) of the Proceeds of Crime Act provides that: "This Act may be cited as the Proceeds of Crime and Money Laundering (Prevention) Act, 2001 and shall come into operation on such day as the Governor-General may appoint by notice in the Gazette." On the face of the statute indicating assent by the Governor-General the date of 18th December 2001 is recorded.
[8] Exhibit FS/1

appellant refused to open after he was requested so to do. Again, the haligan tool was used to gain entry.

[19] In this safe, the officers found a number of plastic bags containing Eastern Caribbean and United States currencies. The United States currency was seized and upon counting it, a total of US$24,870.00 resulted. The appellant was subsequently charged.

[20] The evidence characterized as inadmissible and prejudicial by learned counsel for the appellant arose as a result of production orders[9] to two banking institutions and further investigations carried out by the police.

[21] Mr. Williams for the appellant points in particular to the evidence of Sabrina Nehall, of the Bank of Nova Scotia, Carlita Tyrell of the St. Vincent Cooperative Bank Limited, Accountant, Marilyn Richards and ASP Rouzandel Francis.

Sabrina Nehall

[22] In her evidence in chief Ms. Nehall testified that she is Assistant Manager of Operations and Services, Bank of Nova Scotia. She testified further that upon receipt of a production order from the Financial Intelligence Unit (FIU) certain documents were submitted. These she identified as Exhibit SN/1.

[23] In her covering letter dated September 9, 2005 to the Director, Financial Intelligence Unit, Ms. Nehall said:

> "Dear Madam:
> Re: Court Order #10/2005 Account Number 70163 Charles Constance
> As requested, we attach documents on the subject:
> - Copies of Statements for period December 1997[10] to November 1999
> - Copies of statements for period October 2000 to June 2002 Account was closed in June 2002.

[9] See for example the evidence in chief of Sabrina Nehall at page 11 of the Record.
[10] It is to be noted that although Ms. Nehall mentions December 1997 as the starting date in relation to the documents in fact documents starting at 1994 from Bank of Nova Scotia were tendered and admitted into evidence.

> In addition we enclose history on account # 92533 for Jamal Boucher who is also included in this order.
> We hold no connections for other names listed.
> As advised, additional data is collected on Account #70163, which we will provide by September 30th, 2005.
> Kindly provide confirmation of the foregoing."

[24] The documents supplied relate to Account #70163 in the joint names of Charles Constance and Jamal Boucher, and in some instances in the name of the appellant alone.

[25] What is central to the grounds of appeal is the fact that the documents or statements relating to the said Account #70163 cover a period from January 1994[11] to June 2002.[12]

Carlita Tyrell

[26] The evidence reveals that Carlita Tyrell is a supervisor at the St. Vincent Cooperative Bank. This witness also testified that she received a production order with respect to Charles Constance and as a result copies of deposits made by the appellant were supplied. The documents were identified as CT/1.

[27] These documents relate to accounts held by Ormond Hannaway (Account #53857), Avanelle Cropper (Account #60175) and the appellant (Account #40482)[13].

[28] The documents cover the period April 1996[14] to November 2002[15].

Marilyn Richards

Marilyn Richards testified that she was asked to conduct an enquiry into Charles Constance.

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[11] See page 108 of the Record
[12] See page 135 of the Record.
[13] See page 135 of the Record.
[14] This diversity of account holders is explained by ASP Francis in his evidence, see para. 32, infra.
[15] See page 234 of the Record

She went on to testify that she received statements from Bank of Nova Scotia 1994 – 2002 and St. Vincent Cooperative Bank 1994 – 2005.

[30] Ms. Richards concluded her evidence in chief as follows:

> "I analysed the accounts and concluded with frequency of deposits and quantum were not in keeping with daily income.
>
> A. During 1996, account at Scotia – deposit $327,712.82. Withdrawals of $362,074.59.
> B. 1997 – St. Vincent Cooperative Bank – deposits $85,844.20. Withdrawals $77,565.75
> C. 1998 – Scotia Bank – Deposit $201,621.07. Withdrawals $164,455.35.
> D. 1999 – Deposit – Scotia Bank $168,217.53. Withdrawals $227,800.00.
>
> Activity dropped significantly during 2004 and 2005. MIR/ 1 – schedule of these figures.
> Summary of my analysis – MIR/1. This money could not have been generated from arcade business."

ASP Francis

[31] ASP Francis told the Magistrate's Court that he is the Chief Investigator at FIU and that he is an accredited financial investigator. The ASP then continued his testimony in this way:

> "On 20 June 2005 – I was on duty at FIU when I received a report from PC Chambers of Narcotics Unit. As a result I carried out financial investigations into affairs of defendant to verify whether or not the monies found in his possession at time of his arrest was unlawfully obtained or derived from criminal conduct. In investigations of defendant's financial affairs I have used period 27 June 1999 to 27 June 2005 being 6 years ending when defendant was arrested. I have been able to trace 5 accounts maintained by defendant with 2 financial institutions in St. Vincent. One account was maintained singularly by defendant in his name with Scotia Bank account #70163. Four accounts maintained by defendant with St. Vincent Cooperative Bank was jointly held in his name with Armond Hannaway, another with Olga Boucher, another account with Jamal Boucher and another with Avanelle Cropper.
>
> - Almond Hannaway is an associate of defendant who is unemployed.
> - Jamal Boucher is son of defendant – known to be unemployed.
> - Olga Boucher is mother of Jamal Boucher.
> - Avanelle Cropper – former common law wife of defendant up to 2005. She managed and operated arcade owned by defendant.

23 August 2005 – application for production order re defendant's bank accounts was made before Judge Bruce Lyle. Order granted. Order served on 2 banks – Scotia and Cooperative Bank.

1 November 2005 – restraint order applied for before Justice Thom – granted – restraining defendant from dealing with his assets, save as authorized by Court by that order. FIU was in receipt of documents from Scotia and Cooperative Bank. I analysed documents, made notes and compiled a report and printed off copies of my findings. RF/ 1 – report of financial findings of defendant."

[32] In cross examination ASP Francis gave evidence regarding the various accounts in these terms:

> "I did specific analysis re account with Hannaway for period under review - the account has been mainly dormant. Only account with Avanelle Cropper was active for period under review. Arcade was closed from end of 2003. From time arcade closed in 2003, there were less deposits.
> 2002 – Cooperative Bank $105,000 deposited and Scotia $52,000.
> 2003 - $118,000 – Cooperative Bank - Scotia Bank account closed.
> 2003 was last year arcade operated.
> 2004 - $20,000 Cooperative Bank.
> From the date the arcade closed, monies deposited by the defendant was reduced. 2005 - $9,400 deposit up to June 2005. After 2002 when account closed at Scotia that monies, substantial monies started to go into account at Cooperative Bank – denied.
> For period under review 1999 – 2005 – only after Scotia Bank closed that any substantial money went into Cooperative Bank account. It was not defendant choice to close bank account at Scotia. Avanelle was his girlfriend. After 2002 deposit started to go into account with Avanelle"

The Appellant

[33] The appellant in his evidence-in-chief in seeking to explain the money found at his residence at the material time said that he bought United States currency from people who came to St. Vincent from New York - $2,000 to $3,000. According to him, money also came from the sale of leather goods: $4,000 - $5,000 every three months. He added that "Bank dismiss me from the banking system."

[34] In cross-examination in the same vein the following testimony is recorded at page 20 of the record:

> "I purchased money from people that came from USA. People I purchase money from I know for a long time. These are people I know and strangers – they come for holiday and they need to change up money – people do not like to go in long lines. Why were they at Mas tent with $2,000US – so they could change money and enjoy themselves. Money – US money – I always accumulate the money from arcade. My arcade never close 2003. I always keep a flow of money in my safe in my shop. My arcade never close 2003. Put defendant never purchase US money at Mas tent – that is your suggestion. Put money did not come from any arcade or leather business to purchase this money. Defendant said I got money from arcade, sell property and change up some. I got money from arcade business, leather business."

Analysis

[35] In summary it can be said that the evidence admitted at the trial of the appellant covered the period 1994 and 2005 when he was charged. And starting in 1994 the amounts of money involved in the financial transactions with the banks concerned cannot reasonably be regarded as being insignificant. In fact the closing balances in the appellant's account at Bank of Nova Scotia (#70163) for the period January to June 1994 were EC$68,559.12, $68,795.79, $48,933.07, $40,187.57, $62,347.79 and $79,716.63, respectively[16]. Added to this, the evidence of the accountant Ms. Richards, shows the deposits and withdrawals from the two banks during the period 1996 to 1999 while ASP Francis' evidence relates to his analysis of the appellant's financial affairs for the six year period from June 1999 to June 2005.

[36] On the other hand, the appellant attempted to show that the money found at his residence came from legitimate sources. That he habitually kept money at home from equally legitimate purposes.

[37] The question of retrospectivity of a penal statute and the admission of prejudicial evidence undoubtedly has its place in the equation, but it must be balanced against the purpose for which the evidence was led by the prosecution.

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[16] See documents from Bank of Nova Scotia at pages 108, 110, 111, 112, 113 and 118 respectively, of the Record.

[38] It will be recalled that ASP Francis in his evidence in chief said that based on a report he received he carried out financial investigations into the affairs of the appellant to verify whether or not the monies found in his possession at the time of his arrest was unlawfully obtained or derived from criminal conduct. This brings certain rules of evidence into focus.

[39] In Vol. 11(2) of Halsbury's Laws of England (4th ed.) at paragraph 1057 it is stated in part as follows in relation to relevant facts:

> **"**In criminal proceedings the facts in issue are generally (1) those which is necessary for the prosecution to establish in order to prove the offence charged, and (2) any other facts which the accused alleges in denial of the offence or in support of a particular defence. An accused who pleads not guilty puts all the facts alleged by the prosecution in issue."

[40] And with respect to the relevance and admissibility the learning at paragraph 1059 reads thus:

> "Any evidence which is sought to be admitted must be of sufficient relevance. Evidence is relevant if it is logically probative or disapprobative of some matter which requires proof.
> Evidence which is relevant will not necessarily be admissible, for, while relevance is a condition precedent to admissibility, further rules of exclusion exist which may serve to exclude evidence which would generally be considered to be relevant. Thus evidence must be (1) relevant and (2) admissible according to the rules of exclusion."

[41] In her "Reasons for Decision" the learned magistrate advanced the following:

> "The primary question in relation to the first charge was whether or not the money found in the safe was proceeds of criminal conduct and in the second whether it was unlawfully obtained. The Court heard evidence from thirteen prosecution witnesses. The defendant was the only witness for the defence. The Court felt sure having heard all the evidence that these monies were the proceeds of criminal conduct. The Court accepted the financial analysis and the sum of money seized was not consistent with legitimate earnings. In particular, the Court accepted the accountant's analysis that these earnings were not consistent with projected arcade earnings. The defendant's evidence was completely rejected as being untruthful. Throughout the defendant's evidence, he provided different stories under cross-examination for the monies going into the accounts. The monies were accounted for by him by virtue of leather work, earnings from the arcade, changing money for people during

> the Carnival season, plumbing work. The defendant's explanation did not appear truthful under close cross-examination by the prosecution. The Court rejected the defendant's explanation that they were lawfully obtained.
>
> The sentence passed reflected the fact that the defendant had already been sentenced for similar offence, that this was a trial and that a large sum of money was involved. The seriousness of such offences and the appropriate penalties to be considered were dealt with in the UK case of BASRA. However, the UK maximum sentences for such offences are considerably less than the maximum in St. Vincent and the Grenadines for these offences."

[42] A number of issues emerge from the learned magistrate's reasons; the certainty that the monies were the proceeds of criminal conduct; the monies could not have come from projected arcade earnings; the different stories given by the appellant as to the sources of the monies and the total injection of those stories; the acceptance of the accountant's analysis that the monies seized were not consistent with legitimate earnings.

[43] Under Section 41(1)(a) of the Proceeds of Crime Act the appellant was charged with concealing property, to wit, money which in whole or in part directly or indirectly represent the proceeds of criminal conduct. On the other hand, under Section 308 of the Code the appellant was charged with being in possession of money reasonably suspected of being stolen or unlawfully obtained.

[44] Given the appellant's explanation as to the source of the money found at his residence, it was the prosecution's burden to rebut such explanation. This would account for the learned magistrate's decision to admit the evidence about bank transactions over such a period of time. In this respect it is to be noted that the case of R. v Sang[17] has affirmed the existence of discretion in the court to control the use of evidence so as to ensure a fair trial. Therefore, given the nature of the charges and the evidence generally and in particular that of Cpl. Scott as to the appellant's explanation of the money found at his residence, ("Is my money I sell

[17] [1980] AC 402

video games, property and me change up some.")[18], admission of the evidence was permitted by the rules of evidence. Further, that the evidence on the whole was neither unfair nor prejudicial.

[45] Ground 4 therefore fails.

Grounds 1 and 6

[46] These grounds challenge the conviction because of insufficiency of evidence. In this regard it is clear that the evidence against the appellant was overwhelming coupled with the fact that the learned magistrate rejected the appellant's evidence.

[47] These grounds therefore fail.

Grounds 2, 3 & 5

[48] These grounds seek to argue that the sources of the money in issue were legitimate. There is hardly any necessity to examine these grounds as they relate to questions of fact and negative findings by the learned magistrate. In other words, it was a finding of fact that the sources identified by the appellant could not have yielded the money involved. As such there is no basis advanced upon which these findings can be disturbed.

[49] These grounds of appeal therefore fail.

Ground 7

[50] Under this ground the contention is that the sentence was excessive.

[51] In her reasons for imposing the sentence, the learned magistrate indicated that she gave consideration to: 1. The fact that the appellant was already sentenced for a similar offence. 2. The fact that a large sum of money was involved. 3. The

[18] This aspect of Cpl Scott's evidence was repeated or restated in cross-examination.

seriousness of the offences. 4. The appropriate sentence in view of the penalties in the UK and St. Vincent and the Grenadines legislation.

[52] Counsel for the appellant submitted that the court had sentenced an accused with a previous conviction to a period of 25 months, the guidelines for an offence of this type was 12 – 15 months and that the sentence should be reduced to 12 months.

[53] Although guidelines are established, they do not rule out special facts and circumstances which require a departure there from. In this case I am of the view that considerations outlined by the magistrate to be sufficient to warrant such a departure. The further point is that the objects of sentencing being deterrence, retribution and rehabilitation must not be treated lightly. And they assume even greater importance when the offences are serious. Here the offences can be classified as money laundering offences or broadly criminal conduct. The result of such conduct is manifested in the evidence from the commercial banks.

[54] This ground must also fail.

Result

[55] The appeal under grounds 4; 1 and 6; 2, 3 and 5 and 7 are dismissed.

Errol L. Thomas
Justice of Appeal [Ag.]

I concur.

Hugh A. Rawlins
Chief Justice

I concur.

Ola Mae Edwards
Justice of Appeal [Ag.]