IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NUMBER: 09-13929-DD

APPEALED FROM

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA

CASE NO.: 1:08-CR-153-TWT-RGV

UNITED STATES OF AMERICA,

APPELLEE,

V.

EDGAR JAMAL GAMORY,

APPELLANT

BRIEF OF APPELLANT

APPELLANT IS INCARCERATED

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1 and Local Rule 26.1, Appellant, Edgar Jamal Gamory, discloses that he is an individual and there is no publicly-held corporation or entity which has a direct financial interest in the outcome of this litigation. The following list contains the names of any and all persons that have an interest in the outcome of this case or appeal:

Lisa Tarvin, Assistant United States Attorney

Edgar Jamal Gamory, Defendant/Appellant

Hon. Judge Thomas W. Thrash, Jr., District Court Judge

James W. Parkman, III, Appellant Counsel

R. Martin Adams, Appellant Counsel

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REQUEST FOR ORAL ARGUMENT

Oral argument is requested by the Defendant.

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STATEMENT OF JURISDICTION

The District Court had subject matter and original jurisdiction over this case pursuant to 18 U.S.C. § 3231, because it involved the possible violation of a federal law, namely, the Appellant was charged with one count of conspiracy to distribute and possess with intent to distribute at least 5 kilo grams of cocaine and at least 1000 kilograms of marijuana in violation of 21 U.S.C. § 846; with four counts of knowingly engaging in or attempting to engage in a monetary transaction in criminally derived property that was of a value greater than $10,000.00; and with a criminal forfeiture count against his property.

The District Court has made its final decision in the case and the Appellant hereby asserts that this appeal is from a Final Order of Judgment that disposes of all parties' claims by the Honorable Thomas W. Thrash, Jr., Judge for the Northern District of Georgia, signed on July 24, 2009. (Doc 235). The Eleventh Circuit now has jurisdiction over this case pursuant to 28 U.S.C. § 1291. Further, the Eleventh Circuit has jurisdiction because the Appellant has the right to appeal pursuant to 18 U.S.C. § 3742(a).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. A. WAS THE TRIAL COURT'S DENIAL OF DEFENDANT'S REQUEST FOR AN EVIDENTIARY HEARING ON HIS SUPPRESSION MOTION AN ABUSE OF DISCRETION AND CONTRARY TO FRANKS v. DELAWARE, 438 U.S. 154 (1978), ILLINOIS v. GATES, 462 U.S. 213 (1983) AND APPELLANT'S DUE PROCESS RIGHTS?

B. WAS THE TRIAL COURT'S ASSESSMENT, AGAINST DEFENDANT, OF THE TESTIMONY AND CREDIBILITY OF WITNESSES AT SUPPRESSION HEARING OF CO-DEFENDANT ERRONEOUS AND IN CONTRAVENTION OF THE CONFRONTATION CLAUSE, COMPULSORY PROCESS CLAUSE AND THE RIGHT TO COUNSEL CLAUSE OF THE SIXTH AMENDMENT AS WELL AS THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT?

II. WAS THE ADMISSION, OVER DEFENDANT'S OBJECTION AND WITHOUT LIMITED INSTRUCTIONS, OF IRRELEVANT MUSIC VIDEO CONTAINING UNCENSORED, RACIALLY, VIOLENTLY AND SEXUALLY CHARGED LYRICS, INCLUDING RANTS OF DRUG DEALING AND MURDER, INADMISSIBLE HEARSAY AND FATALLY PREJUDICIAL?

III. DID THE GOVERNMENT'S REASONS INDICATING THAT BLACK JURORS WERE STRICKENED BECAUSE THEY WERE FAVORABLE TO ACQUIT FAIL THE BASTON TEST AND REQUIRE REVERSAL PURSUANT TO BUI V. HALEY, 321 F.3D 1304 , 1316 (11TH CIR. 2003)?

IV. DOES THE ENACTMENT OF 21 USC § 846, WITHOUT REQUIRING PROOF OF AN OVERT ACT, MAKE CONSPIRACY A MENTAL CRIMINAL OFFENSE AND, THUS, AN UNCONSTITUTIONAL EXERCISE OF CONGRESSIONAL POWER UNDER THE COMMERCE CLAUSE, REQUIRING REVERSAL OF THE CONSPIRACY CONVICTION AND A DISMISSAL OF THAT COUNT?

V. **WERE THE TAX RECORDS OF DEFENDANT AND HIS FAMILY RELEVANT TO THE CHARGES AGAINST HIM AND, IF SO, WAS ANY PROBATIVE VALUE THE TAX RECORDS MAY HAVE HAD SUBSTANTIALLY OUTWEIGHED BY CONFUSION AND UNDUE PREJUDICE, MAKING THEIR ADMISSION ERRONEOUS?**

VI. **DID THE TRIAL COURT'S INSTRUCTIONS IMPERMISSIBLY BROADEN THE BASES UPON WHICH DEFENDANT COULD BE FOUND GUILTY OF CONSPIRACY BY CONSTRUCTIVELY AMENDING THE INDICTMENT TO INCLUDE SECTION 841 AS A CRIMINAL OFFENSE OF WHICH DEFENDANT COULD BE FOUND GUILTY, REQUIRING REVERSAL? (not raised below)**

VII. **WAS THE TRIAL COURT'S DENIAL OF DEFENDANT'S MOTION FOR ACQUITTAL AS TO THE MONEY LAUNDERING CHARGES ERRONEOUS, REQUIRING REVERSAL?**

VIII. **WAS THE DISTRICT COURT'S DENIAL OF APPELLANT'S NEW TRIAL MOTION AN ABUSE OF DISCRETION?**

IX. DOES THE CUMULATIVE EFFECT OF THE ERRORS COMPLAINED OF IN POINTS I THROUGH VIII, INFRA. REQUIRE REVERSAL?

X. IS APPRENDI V. NEW JERSEY APPLICABLE TO 21 U.S.C. § 841(b)'S MANDATORY MINIMUM SENTENCING SCHEMES, REQUIRING FACTS THAT WILL INCREASE DEFENDANT'S SENTENCE BEYOND THE MANDATORY MINIMUM BE ENUMERATED IN THE INDICTMENT AND FOUND BY A JURY BEYOND A REASONABLE DOUBT?

XI. DID THE TRIAL COURT'S AND VERDICT SHEET'S INSTRUCTIONS DIRECTING THE JURY TO "CHECK THE LARGEST AMOUNT" OF COCAINE AND MARIJUANA LISTED ON THE VERDICT SHEET IMPERMISSIBLY DIRECTED A VERDICT ON "THE LARGEST AMOUNT" OF THOSE DRUGS AGAINST DEFENDANT, REQUIRING DEFENDANT'S SENTENCED TO BE VACATED AND DEFENDANT RESENTENCED PURSUANT TO THE RULE OF LENIENCY.

STATEMENT OF THE CASE

On June 17, 2008, the Federal Grand Jury of the Northern District of Georgia named Appellant in a five count superseding indictment. (Doc 34). The document alleged that Appellant (1) conspired to distribute and possess with intent to distribute at least 5 kilograms of cocaine and at least 1000 kilograms of marijuana, in violation of 21 U.S.C. § 846 (Count One); (2) knowingly engaged in or attempted to engage in a monetary transaction in criminally derived property that was of a value greater than $10,000.00 (Counts Two, Three, Four and Five); and (3) Appellant's property was subject to criminal forfeiture (Forfeiture Count). Appellant appeared and pled not guilty.

The matter proceeded to jury trial. On April 21, 2009, the jury returned a verdict finding Appellant guilty of Counts One, Two and Three and acquitted Appellant of Counts Four and Five. (Doc 175). The district court accepted the verdict, set the matter for sentencing and ordered the probation office to prepare a pre-sentence investigation report. (R7-1045-46).

That report was prepared prior to sentencing. Appellant timely filed written objections to the report. The district court sentenced Appellant to a term of Life imprisonment on the drug conspiracy (counts one); and 120 months on the money laundering counts (counts two and three), all to be served concurrently. (Doc 235).

Appellant filed a timely notice of appeal on July 31, 2009. (Doc 238).

STATEMENT OF THE FACTS

Prior to trial, a motion to suppress and brief in support thereof was filed with the court. (Doc. 54). Subsequently, Appellant's motion to suppress was denied without a hearing on said motion. (Doc. 132).

Prior to the jury been sworn in, defense counsel made a Batson motion. (R1-5). The government had six strikes, and four of those were used to strike African Americans, which had no race neutral basis. (R1- 5). When the government provided there reasons, specifically as to one juror, the reason stated was that he was from the Virgin Islands and might have some liberal drug views. (R1- 7).

At trial, the first witness called by the government was **Laci Larsen**, a special agent with the drug enforcement administration. (R1-33). Larsen testified that between 2006 and 2007, she approached an individual that was involved in possible criminal activity. (R1- 37 and 38). Larsen asked this individual if he would cooperate with the government in regards to co-conspirators. (R1-38). The individual, hereinafter, "CI", agreed to cooperate with the government. (R1-38). Agent Larsen testified that the CI would get paid for cooperating with the government and would receive a percentage of any assets seized. (R1-40). In all the CI was paid approximately $147,000. (R1-64). Further, she testified that he was not a legal resident, but he would have legal status in the United States as long as he was

working as a CI. (R1-40).

Larsen testified that the CI provided information that drugs were being delivered to a guy he knew as J.B. (R1- 43). Agent Larsen stated that she later learned from other witnesses that Edgar Gamory was referred to as J.B. and Boog. (R1-44).

Agent Larsen, with the help of the CI staged a buy, in which, Gamory was to purchase some cocaine.(R1-50). She testified that the CI had been in contact with Gamory, and the CI was supposed to meet him at a recording studio to purchase the cocaine. (R1-50). The CI had a recorder on him when he had these alleged conversations with Gamory, but it was not turned on at the time of the conversations. (R1-50). She went on to testify that surveillance was set up at Mr. Gamory's house and the recording studio prior to when the deal was to take place. (R1-51). Larsen testified that the meeting never took place, but they did follow a ford explorer that left Gamory's residence. (R1-51and 52). A short time later the explorer was observed parking in a garage. (R1-52).At that point the officers went and searched the vehicle. (R1-52). She testified that the search led to the discovery of $630,000 that was located in a hidden compartment. (R1-52). The driver of the vehicle was later identified as Vaughn Green and another individual by the name Errol Moliere. (R1-52, 54,55). After seizing the money, a search warrant was obtained for Mr. Gamory's residence. (R1- 55). She testified that during the search of Gamory's residence, there

were no drugs found. (R1-55). Larsen went on to testify that money, five guns and other documents were seized from Gamory's residence. (R1-55,56). At a later date arrest warrants were obtained for Gamory, Vaughn Green, Victor Olivera, and Edmond Gamory. (R1-56).

Larsen went on to testify that there was no photographs or videos linking Gamory to the ford explorer, in which, Vaughn Green was driving with the money. (R1-88 and 89).

The next witness called by the United States was the **confidential informant**. He testified that he came to the country illegally and that he had been here eighteen years. (R2-130). He was apprehended by the United States border patrol and sent back to Mexico with a five year penalty. (R2-131). He stated that he does construction work and that he was cooperating with the DEA (R2- 132). He has a legal permit to be in the United States from the DEA for his cooperation. (R2-133). He stated he started working with the DEA after money was seized from Victor Olvera. (R2-134). He also did drug related transaction for Enrique Juangorena. He went back to Mexico for three months and when he returned the DEA was following him. (R2-135) Reid and Laci Larsen came to his house and asked him about the seized money. (R2-135) He has received $135,000 for his cooperation in the case and he started in April 2007. He was paid all in cash. (R2-137). He signed two

cooperation agreements with the DEA (R2-140). He was doing the translations with J.B. involving the narcotics. He identified the Appellant as J.B. (R2-142). He translated four or five deals between German and J.B. (R2-144). Victor Olvera was the driver and took the drugs to J.B. He stated that J.B. bought more than 2,000 kilos of cocaine. (R2-147). He used a vacuum sealer for the money transportation. (R2-151). He stated that people do not use their real names but go by nicknames. (R2-153). The CI's nickname was bleach hands. (R2-154). The first deal involved 65 kilos of cocaine. (R2-161). Pudge and Smooth were there at the house to receive the drugs. (R2-162-163). Those drugs were fronted on credit to J.B. The next load of cocaine was 142 kilos and it was delivered to J.B.'s house. (R2-164). The CI also testified that J.B. also purchased marijuana from Juangorena. (R2-167). The CI identified people in the conspiracy from a blown up exhibit. (R2-169). The CI said that some of the drugs were unloaded at a warehouse. (R2-172). He further testified that Smooth received the drugs for J.B. at J.B.'s house. (R2- 179). He testified that he installed a trap compartment in Appellant's residence. (R2- 180) There is testimony as to where the drugs were placed in J.B.'s house. (R2-183). He then describes the various amounts of money he received from J.B. (R2-184). The CI states that he never met with J.B. in an undercover capacity or while wearing a wire. (R2-187) The CI stated that JB got mid-grade marijuana three to four times. (R2-

188) The CI stated that he left for Mexico for three months. He returned and JB and Juangorena were still doing deals and he only helped them by phone one time. (R2-190, 235). The deal was for four hundred kilos of cocaine in November 2006. (2-. 191, 267) The CI testified that he started working with the DEA in April 2007. (R2-202) The second delivery of cocaine was for 142 kilos delivered to JB's house and placed in his kitchen. (R2-207) The third occasions 50 kilos of cocaine were delivered to JB's house and placed in the trap in the stairs. (R2-208) The CI admitted lying in attempting to cross the boarder in 2004. (R2-226) The CI received a special permit to remain in the United States as long as he kept cooperating with the government. (R2-230). The CI again states that there were no more drug deals after 2006. (R2-234, 239) The first two or three deals that took place were done with "smooth" and not JB. (R2-262)

The next witness called by the government was Special Agent **Laci Larsen**. (R5-849). Agent Larson testified that she discovered a video that was produced at Gamory's studio that talked about drugs, hush money and referred to J.B.. (R5-857). Defense counsel objected based on rule 403 that it was more prejudicial than probative. (R5-858). Specifically, the video refers to killing the police and fuck the police. (R5-859). Defense counsel's objection was overruled and the video was played for the jury. (R5-861).

The government rested and defense counsel made a motion for judgment of acquittal, which the judge subsequently denied. (R5-876, 881).

Keith Branch was the first witness called by the defense. (R6- 904). He testified that Gamory owns two Fish-and-chips restaurants in Brookland, New York, and that these restaurants do great business. (R6- 904,905).

The next witness called by the defense was **Rodney Brown**. (R6-910). He is a manger at the Fish-and-Chips restaurants and that in 2007, Gamory made over $200,000. (R6- 913-915). Further, he testified that the business was a cash business. (R6-914). Also, Brown stated that Gamory comes to the restaurant several times a month. (R6-913-914).

Melissa Phillipian, a music executive in Los Angeles, California, was the next witness called by the defense. (R6-924,925). She testified that people that are involved in the music business spend great amounts of money on jewelry and vehicles. (R6- 926,927). Also, Phillipian testified that the music industry is largely a cash business. (R. 928). Further, she testified that you don't have to be nationally known to be successful in the music industry. (R6- 927).

Shonari Greene, a recording artist, was the next witness called by the defense. (R6-932,933). He testified that he opened a recording studio with Gamory and that the studio has produced five albums since 2006. (R6- 937). Further, he testified that

the video that was played for the jury had nothing to do with selling drugs. (R6- 936).

At the charge conference defense counsel requested that the court charge the jury with defense charge 3, 8, 10, 16, of which, all were denied by the court. (R6-959).

STATEMENT OF RELATED CASES OR PROCEEDINGS

There is one related case to this matter. United States v. 4751 Riverwalk Trail, et. al., civ. No. 1: 07-cv-2546-MHS. That case is a civil forfeiture action that has been administratively dismissed.

STANDARD OF REVIEW

Appellant's arguments herein present questions of both fact and law. In an appeal of a denial of a motion to suppress with mixed questions of fact and law, this Court reviews findings of fact for clear error and the application of law to those facts de novo. United States v. Ramirez, 476 F.3d 1231, 1235 (11th Cir. 2007). All facts are construed in the light most favorable to the government. Id. at 1235-36.

This Court will review the District Court's conclusion on pure questions of law under a de novo standard. United States v. Pistone, 177 F.3d 957 (11th Cir. 1999); United States v. Williams, 340 F.3d 1231 (11th Cir. 2003). The standard to review the underlying factual findings of the District Court is clear error. United States v. Perez, 280 F.3d 318 (3rd Cir. 2002).

The district court's evidentiary rulings are reviewed for abuse of discretion. See United States v. Frazier, 387 F.3d 1244, 1258 (11th Cir. 2004) (en banc). Constitutional challenges to statute, being a pure question of law requires de novo review. See United States v. Reynolds, 215 F.3d 1210, 1212 (11th Cir. 2000). And,

the district court's denial of a motion for new trial is reviewed for an abuse of discretion. See United States v. Cox, 995 F.2d 1041, 1043 (11th Cir.1993).

In the absence of an objection, this Court will review issues not raised before the district court for plain error. See United States v. Vazquez, 271 F.3d 93, 99 (3d Cir. 2001) (en banc). An error is plain if it is contrary to law at the time the error was made. Johnson v. United States, 520 U.S. 461, 466-67 (1997).

SUMMARY OF THE ARGUMENT

Appellant's **First Argument** (Point I, infra.) proposes that the Appellant was entitled to an evidentiary hearing on his motion to suppress and that the District Court's refusal to grant one was an abuse of discretion. Appellant's grounds supporting an evidentiary hearing was that: (1) his co-defendant was afforded a full hearing on his motion to suppress (SHT[1] 26-202), while Appellant was not, contrary to due process; (2) there was material issues of fact regarding probable cause that were deliberately falsified by law enforcement contrary to Franks v. Delaware; and (3) there were disputed issues of fact regarding the existence of the CI's reliability, veracity and basis of knowledge, contrary to Illinois v. Gates. Appellant explained that the affidavit supporting the search warrant, which was almost entirely based on the CI's information, was completely devoid of any showing of the CI's reliability, veracity and basis of knowledge, requiring an evidentiary hearing.

Although the disputed factual issues alone required an evidentiary hearing on the issue of suppression, the District Court held the hearing without Appellant and then used the evidentiary findings at the hearing to deny Appellant's motion to suppress without affording Appellant the opportunity to present facts supporting his claim or challenge the evidence used against him through cross examination. In

[1] SHT denotes Co-defendant Vaughn Greene's Suppression Hearing Transcript.

essence, the evidence presented at the hearing was assessed against Appellant and the witnesses who testified at the hearing on behalf of the Government became adverse witnesses against Appellant when the District Court utilized the findings of fact at the evidentiary hearing to deny Appellant's suppression motion contrary to the due process clause, the confrontation clause and the compulsory process clause of United States Constitution.

Ultimately, the District Court's decision rendered Appellant's counsel constitutionally ineffective on the suppression motion.

Appellant's **Second Argument**, (Point II, infra.) challenges the admission of a music video that was admitted, over defendant's objection. The music video featured the performance of a rap artist signed to Appellant's recording company. The government's proffer for admission of the video was that the video was relevant to the case against defendant in that the lyrical content of the song performed in the video, especially the hook "we getting that drug money", was proof of Appellant's involvement in drug distribution. (R5-858 to 861).

The music video was found on the internet website Youtube and allowed admission without authentication .

Nevertheless, in addition to the verse, stating "we getting that drug money", the video contained other highly prejudicial and inflammatory content, including

numerous threats and allegations of gun possession and murder, along with saturations of the words "shit" six (6) times, "Nigga" sixteen (16) times and "fuck" twenty-four (24) times. Among these repulsive references, was the invocation of the demoralization and sexual abuse of women, including the words "bitch", "pussy" and "dick."

The video was presented to the jury for the truth of the matter asserted. Its admission was, therefore, contrary to the Federal Rules of Evidence, the Confrontation Clause and the Due Process Clause of the United States Constitution, requiring reversal.

Appellant's **Third Argument** (Point III, infra.), challenges the Government's strike of several African American jurors and the District Court's conclusion that the Government successfully provided race neutral explanations for the strikes.

At least six African American jurors were struck from the pool by the Government. Two of those six, jurors number 18 and 29, were struck because the Government formed a belief that they had liberal views on drugs based on their past residency (having lived in France and the Virgin Islands respectively). Not only was the Government's reason pure speculation and conjecture but it was condemned as failing the Batson test by this Court in Bui v. Haley, 321 F.3d 1304 , 1316 (11th Cir.

2003)(explanation for striking juror indicating that juror is likely to acquit fails Baston test and requires reversal).

Appellant's **Fourth Argument** (Point IV, infra.), challenges the constitutionality of Section 846's conspiracy offense under the commerce clause. Congress enacted 21 USC § 846 without an overt act requirement. In fact, the Supreme Court has determined that the actus reus for the conspiracy is the agreement itself. Accordingly, a Section 846 offense constitutes a mental crime. While the objects of the charged conspiracy in this case (possession and possession with intent to distribute cocaine and marijuana) are acts well within congress's commerce clause power to proscribe, the offense at issue here is conspiracy and proof of the commission or attempt to commit the object of the conspiracy is not required.

Simply, congress has no power under the commerce clause to enact laws proscribing the sole and exclusive act of agreeing to commit an offense without a requirement that something overt be done in furtherance of the proscribed conspiracy.

Accordingly, Section 846 is unconstitutional.

Appellant's **fifth Argument** (Point V, infra.) posits that the trial court constructively amended the indictment by broadening the basis for a conviction under the conspiracy in his instructions to the jury. The Court instructed the jury that Appellant could be found guilty of the object of the conspiracy if the elements were

proven beyond a reasonable doubt. (R6-1021). The Court went on to define the elements of a Section 841 offense as well as the liability theories of actual possession, constructive possession, sole possession and joint possession. Id. at 1021-22.

The erroneous instructions mislead and confused the jury requiring reversal.

Appellant's **Sixth Argument** (Point VI, infra.) is that the tax records of himself, his wife, his mother and father were both irrelevant and highly prejudicial warranting a reversal. The Government was allowed, over Appellant's objection, to admit an array of tax records on the proffer that their admission was relevant to show that Appellant could not afford his lifestyle.

Appellant was charged with criminal conspiracy and money laundering. He was not charged with any tax or tax related offenses

Appellant's **Seventh Argument** (Point VII, infra.) is that the Trial Court erred in denying his motion for acquittal on the money laundering charges. The Government never presented any proof establishing two of the essential elements of the money laundering charges, i.e., "that the Defendant knew the transaction involved criminally derived property…[and] that the property was, in fact, derived from the distribution of illegal controlled substances." (R6-1023). The only person with personal knowledge that testified concerning the actual purchase of the subject cars was Wardell Strickland the car salesmen who sold Appellant all the subject vehicles.

When asked by the Government whether Strickland knew what Appellant did for a living, Strickland replied that Appellant had a "record label and fish business". (R4-697). The Government, therefore, failed to satisfy its burden of proof on the money laundering charges, requiring a reversal of the money laundering convictions and dismissal of the charges.

Appellant's **Eighth Argument** (Point VIII, infra.), is that the District Court's denial of his motion for a new trial was an abuse of discretion. In Appellant's motion for a new trial, Appellant raised several issues now covered in Points I-III and VI-VII, infra. While some of the arguments have different standards of review when addressing them individually, the standard of review under the new trial context is for abuse of discretion. Nevertheless, Appellant incorporates herein by reference the summary of the arguments enumerated in Points I-III and VI-VII, infra. An individual and collective consideration of the errors complained of in the aforementioned Points, infra., establishes that the District Court erred by refusing to grant Appellant a new trial. That refusal was tantamount to an abuse of discretion.

Appellant's **Ninth Argument** (Point IX, infra.) posits that if this Court does not find that the issues enumerated in Points I through VIII, infra., do not individually rise to the level warranting reversal of Appellant's convictions, then their cumulative effect warrants reversal.

Appellant's **Tenth Argument** (Point X, infra.) contends that while Apprendi v. New Jersey and the Sixth Amendment are no longer applicable to the advisory guidelines, they are applicable to a Section 841 offense because of the mandatory minimum sentencing schemes enumerated in Section 841(b). Section 841(b) enumerates a three-tier sentencing scheme starting sentencing ranges from 0 to 20 years for a violation of the statute involving at least a detectable amount of the controlled substance. Two of the three tiers require mandatory minimum sentences (i.e., 5 to 40 years and 10 to life) based on specific drug amounts.

Because, the jury in this case found that the amount of drugs involved in the conspiracy was 5 kilograms of cocaine and 1000 kilograms of marijuana respectfully, the District Court was required to sentence Appellant to at least 10 years on those convictions. The mandatory provisions left the District Court without discretion, therefore, triggering the holding in Apprendi as well as the protections of the Sixth Amendment.

When a District Court's sentencing is governed by mandatory sentencing provision, the Supreme Court has found that "the relevant 'statutory maximum,' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings." Blakely v. Washington, 542 U.S. 296, 303-04 (2004) (emphasis in original).

Therefore, the mandatory minimum sentence of 10 years was also the statutory maximum for Apprendi purposes and required any additional fact finding that would increase Appellant's sentence to be placed in the indictment and proven beyond a reasonable doubt. The District Court's finding of additional drug amounts beyond the 5 kilograms found by the jury that increased Appellant's sentence from 10 years to Life, based on a preponderance of the evidence was unconstitutional, requiring reversal.

Appellant's **Eleventh Argument** (Point XI, infra.) is that the District Court's instructions in conjunction with the jury verdict, directed a verdict on the "largest amount" of cocaine and marijuana against Appellant.

The District Court, instructed the jury that they had to pick the largest amount of drugs listed on the verdict sheet upon a finding of guilt on the conspiracy offense. (R6-1027-28). The Verdict Sheet also directed the jury to "Check the largest amount" of drugs listed on that sheet. (Doc. 175).

Both the Court's instruction and the verdict sheet infringed upon the province of the jury by taking away their choice and leaving them no option but to check the largest amount of drugs listed on the verdict sheet. Consequently, the jury did not have to check the largest amount of drugs but any amount that they found. The District Court's instructions and Verdict Sheet interrogatories to the contrary

constituted an impermissible infringement upon the jury's province, requiring Appellant's sentence to be vacated and the case remanded for resentencing pursuant to the rule of leniency.

ISSUE I

TRIAL COURT'S DENIAL OF DEFENDANT'S REQUEST FOR AN EVIDENTIARY HEARING ON HIS SUPPRESSION MOTION WAS AN ABUSE OF DISCRETION AND CONTRARY TO FRANKS v. DELAWARE, 438 U.S. 154 (1978), ILLINOIS v. GATES, 462 U.S. 213 (1983) AND DUE PROCESS; AND TRIAL COURT'S ASSESSMENT, AGAINST DEFENDANT, OF THE TESTIMONY AND CREDIBILITY OF WITNESSES AT SUPPRESSION HEARING OF CODEFENDANT VAUGHN GREEN, WAS ERRONEOUS AND IN CONTRAVENTION OF THE CONFRONTATION CLAUSE, COMPULSORY PROCESS CLAUSE AND THE RIGHT TO COUNSEL CLAUSE OF THE SIXTH AMENDMENT AS WELL AS THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT, REQUIRING A NEW TRIAL.

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
> U.S. Const. Amend IV.

Thus, the Fourth Amendment to the United States Constitution requires that a search warrant be issued only upon a showing of probable cause "...supported

by oath or affirmation" and that the warrant itself "particularly describe the place to be searched, and the persons or things to be seized." Berger v. New York, 383 U.S. 41, 55 (1967); Texas v. Brown, 460 U.S.730, 747 (1983); Horton v. California, 496 U.S. 128, 143 (1990). The scope of the warrant "must be limited by the probable cause on which the warrant is based." Solid State Devices, Inc. v. U.S., 130 F.3d 853, 856 (9 Cir.1997). Probable cause to support a search warrant exists when the totality of the circumstances allow a conclusion that there is a fair probability of finding contraband or evidence at a particular location. Illinois v. Gates, 462 U.S. 213 (1983). See also United States v. Gonzalez, 940 F.2d 1413, 1419 (11th Cir.1991). "[P]robable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts[.]" Gates, 462 U.S. at 232.

To avoid "rigid" legal rules, Gates changed the "two-pronged test" of Aguilar v. Texas, 378 U.S. 108, 114 (1964), into a totality of the circumstances test. See Gates, 462 U.S. at 230-35. Under the Gates totality of the circumstances test, the "veracity" and "basis of knowledge" prongs of Aguilar, for assessing the usefulness of an informant's tips, are not independent. "[T]hey are better understood as relevant considerations in the totality of the circumstances analysis that traditionally has guided probable cause determinations: a deficiency in one may be compensated for ... by a strong showing as to the other[.]" Id. at 233.

In order to assess a finding of probable cause, a reviewing court must make factual findings. Thus, "the method used to ascertain facts must be as accurate as possible." United States v. Bergera, 512 F.2d 391, 392-93 (9th Cir.1975). When factual disputes arise, however, that are material to a reviewing court's determination of probable cause, an evidentiary hearing is necessary. Franks v. Delaware, 438 U.S. 154 (1978); Gates, supra.; Bischoff v. Osceola County, 222 F.3d 874, 879 (11 Cir. 2000) (District Court "cannot decide disputed factual questions or make findings of credibility…on the paper record alone but must hold an evidentiary hearing."); Sosa v. United States, 550 F.2d 244, 253 (5th Cir. 1977) ("[t]he function of an evidentiary hearing is to resolve contested issues of fact."); and see Sablan v. Department of Finance, 856 F.2d 1317, 1322 (9th Cir. 1988)("the purpose of an evidentiary hearing is to resolve disputed issues of fact."). Once factual disputes arise, material to the issue of probable cause, due process requires a "hearing appropriate to the nature of the case." Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950).

A. DENIAL OF REQUEST FOR EVIDENTIARY HEARING:

It is indisputable that the search of the Garage, the Ford Explorer and the affidavit supporting the search warrant for Appellant's home were all interdependent and interrelated to each other. For that reason alone, due process dictates that Appellant should have had an opportunity to participate in the suppression hearing

afforded his co-defendant, Greene. See id. Appellant, nevertheless, requested an evidentiary hearing pursuant to both Franks and Gates. In support of a hearing, Appellant pointed out that the information given in the affidavit came from a single confidential source ("CS")[1]. Appellant then set forth specific factual disputes pursuant to Franks and Gates concerning: (1) the truthfulness of the affidavit in support of the search warrant; (2) the source of the information given to the affiant; and (3) Confidential Source's (CS) "veracity", "reliability", and "basis of knowledge."

The Appellant argued in his motion to suppress that the affiant's sworn statement in the affidavit supporting the search of his home stating that a large sum of cash was located and seized as a result of a consensual search at another location was deliberately false. Appellant further questioned the following facts or absence thereof in his reply memorandum:

[1] The Informant was referred to in the affidavit as a Confidential Source ("CS"). This is particularly disturbing since the CS was heavily involved in drug dealing for many years which made him a confidential informant ("CI"). The term confidential source indicates that the individual is a source of information untainted by criminality, giving him an inherent credibility. In fact, the affidavit fails to disclose the CS's deep involvement in drug distribution and other criminality, as well as many other facts regarding the CS that were important to the issue of probable cause under the Gates totality of the circumstances analysis. Therefore, Confidential Source (CS) and Confidential Informant (CI) refers to the same person and will be used herein interchangeably.

Where did this information come from? Did it come from other Agents? Did it come from the affiant's personal knowledge? Did it come from the CI?[1] Did it come from another civilian source? Or, did it come from a combination of all or some of these sources? The failure of the affiant to disclose the source of her information was in and of itself is a Franks violation.

(Doc 200. at 8).

Appellant pointed out that, consistent with Franks, because the entire affidavit was based on hearsay, the absence of a statement informing the issuing judge of the source of the affiant's information was both required and necessary.

Appellant explained that the factual dispute regarding the truthfulness of the affidavit as well as the failure of the affiant to disclose the source of her information was in and of itself is a Franks violation and required an evidentiary hearing. Franks, 438 U.S. at 165, 171-172; United States v. Ventresca, 380 U.S. 102, 110-11 (1965) and cases cited therein at 111 n. 4; and see United States v. Davis, 714 F.2d 896, 899-900 (9th Cir. 1983).

The District Court, however, denied Appellant's request for an evidentiary hearing under Franks, finding that Appellant had not made a substantial preliminary showing warranting a Franks hearing. The District Court further reasoned that there remained sufficient content in the warrant affidavit to support a finding of probable cause even if the contested statement was omitted. (Doc. 132 at 43-44).

[1] This question is extremely important since the CI was a paid informant and can, therefore, be considered a Government agent.

The District Court also denied an evidentiary hearing to test and challenge the factual disputes concerning the CI's "veracity", "reliability", and "basis of knowledge" pursuant to Gates. No reasoning, however, was given. Nevertheless, all of the factual information which formed the basis of probable cause was given to law enforcement by a single CI. Thus, pursuant to Gates, Appellant pointed out to the District Court that there was "no indication in the affidavit of who this CI is in the scheme of things. Was he, himself, involved in drug distribution? Had he been arrested before and was working as an informant as a result thereof? What was his involvement in drug trafficking in order to be able to obtain such sensitive and intimate information? Was he paid for his work on the instant case? The Government never revealed the identity of the CI until trial even though the CI's status as a paid informant makes him a Government Agent, see generally Depree v. Thomas, 946 F.2d 784, 793-94 (11th Cir. 1991) and the information he provided makes him a material witness both at the suppression hearing as well as any trial that may come after." (Doc. 200 at 11).

The error in not granting Appellant an evidentiary hearing became more evident at trial when numerous factual issues arose for the first time relevant to a Gates analysis. The factual information was deliberately omitted or withheld by law enforcement. Accordingly, Franks precedent demands a hearing.

Specifically, it was revealed and admitted for the first time at trial that: (1) the CI was intimately and substantially involved in drug distribution for several years and not just an observer of drug transactions as sworn in the affidavit in support of the search warrant for defendant's home (R4-793, 797, 799, 805, 810, 813-14 (R5- 824, 829, 834, 843-44, 846); (2) the CI sold over 2000 kilograms of cocaine and profiting five hundred dollars a kilogram, allegedly making over a million dollars in the drug business (R2-146-47(R4- 841) ; (3) the CI was paid a percentage of the seizures in defendant's case, in access of $130,000.00 in cash (R2-137); (4) the CI was allowed to stay in this country as long as he remained an informant even though he was on a five year restriction for entering the country illegally multiple times (R2-133 226, 230); (5) the CI was promised assistance in receiving citizenship, id.; (6) the CI was never prosecuted for his involvement in illegal drug distribution; (7) the CI was never made to forfeit any money or property gained from his drug business; (8) the CI actually built the hidden compartment in the basement stairs of Defendant's home that was claimed by the affiant in the warrant affidavit to be only observed by the CI (R2- 179-80, 259-60); (9) the CI did renovation work in Defendant's home and built Defendant's recording studio, giving him personal knowledge of the layout of both locations (R2-256-61); (10) the CI arranged and orchestrated the illegal break-in of Defendant's home outside the knowledge and supervision of agents (R4-806-07,

809); (11) the affiant swore in affidavit that CI stated Appellant conducted drug transactions in Appellant's recording studio (Doc. 78 at 21) but CI denied that fact at trial (R2-262); and (12) the CI, contrary to the search warrant affidavit and police testimony at Greene's suppression hearing (SHT. 166-68), denied on three separate occasions in his trial testimony that he had arranged the drug purchase meeting on May 24, 2007, between defendant and Juangorena which became the catalyst for the search warrant (R2-187, 233-3, 238-39, 267-68). These revelations as well as the denials are paramount factual considerations under Gates and Franks that should have been a part of the District Court's analysis on Appellant's motion to suppress.

It is true that this "Court is not required to hold an evidentiary hearing on a pretrial motion." United States v. Beard, 761 F.2d 1477, 1480 (11th Cir. 1985). In fact, this Court "may refuse a defendant's request for a suppression hearing and motion to suppress if the defendant fails to allege facts that, if proved, would require the grant of relief." United States v. Richardson, 764 F.2d 1514, 1527 (11th Cir. 1985). Even when alleging such facts, a motion to suppress must in every critical respect be sufficiently definite, specific, detailed, and non-conjectural to enable the court to conclude that a substantial claim is presented. United States v. Smith, 546 F.2d 1275 (5th Cir. 1977); United States v. Poe, 462 F.2d 195, 197 (5th Cir. 1972).

However, as stated above, the Government failed to disclose the above facts to the issuing judge or the defense. These material facts not only go to the heart of an issuing judge's determination of a CI's veracity, reliability and basis of knowledge, but also to a finding of probable cause. Its deliberate concealment by the Government also goes to the heart of Defendant's Franks argument. This Court has recently found that "in determining probable cause based in part on confidential informant information, a court should consider not only the totality of the circumstances but also the **'closely intertwined issues' of the informant's basis for knowledge, reliability, and veracity**." Parker v. Allen, 2009 U.S.App. LEXIS 8275 at 78 (11th Cir. Ala. April 20, 2009)(citing Illinois v. Gates, 462 U.S. 213, 230 (1983), (Emphasis added).

For example, a search warrant may be voided if the affidavit supporting the warrant contains deliberate falsity or reckless disregard for the truth, **including material omissions**. See Dahl v. Holley, 312 F.3d 1228, 1235 (11th Cir. 2002)(citing Franks v. Delaware, 438 U.S. 154, 155-56 (1978), (Emphasis added).

The foregoing is especially true when large fees are given to informers, such arrangements must be treated with suspicion. United States v. Grey, 626 F.2d 494, 499 (5th Cir. 1980), Unites States v. Williams, 954 F.2d 668, (11th Cir. 1992). Thus, as with the other material omissions, the issuing judge as well as the District Court

at the hearing, was also without the benefit of the knowledge of the CI's exuberant fee arrangement in this case. Consequently, the District Court erred by denying his request for an evidentiary hearing pursuant to Franks and Gates.

B. **DENIAL OF MOTION TO SUPPRESS IN CONTRAVENTION OF CONFRONTATION, DUE PROCESS AND RIGHT TO COUNSEL:**

In denying Appellant's motion to suppress, the District Court found, based on the magistrate's recommendation, that: (1) a Franks hearing was not warranted and even if it was, an excise of the false information would not defeat the probable cause that remained in the warrant affidavit; (2) the affidavit on its face sufficiently alleged probable cause supporting the issuance of the warrant; (3) the information in the warrant affidavit was not stale; and (4) even if probable cause was lacking, the Leon "Good Faith Exception" validated the search.

Of course this Court will give "[g]reat deference" to a lower court judge's determination of probable cause. United States v. Gonzalez,940 F.2d 1413, 1419 (11th Cir.1991). However, here, the District Court's finding was not only erroneous but the magistrate's recommendation relied on evidence obtained both in the warrant affidavit and at Appellant's co-defendant, Greene's suppression hearing. In other words, the District Court's use of the evidence from the suppression hearing as a part of its findings of fact and conclusions of law in denying Appellant's suppression

motion effectively created witnesses against Appellant of which he had no opportunity to cross-examine. See Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965), Douglas v. Alabama, 380 U.S. 415, 418, 85 S.Ct. 1074, 1076, 13 L.Ed.2d 934 (1965) It also made Appellant a beneficiary of the suppression hearing's adversarial process without affording him the opportunity to call witness on his behalf and to explore, test or challenge the evidence that would eventually be used as a part of the factual findings that resulted in the denial of his suppression motion.

Thus, in light of the District Court's use of the evidence at Greene's suppression hearing as a part of its findings of fact, its decision to deny Appellant's suppression motion without allowing Appellant to participate in the suppression hearing was contrary to the confrontation clause, the due process clause and the right to counsel clause of the United States Constitution.

1. Violation of Confrontation

The Confrontation Clause of the U.S. Const. amend. VI, states, "[i]n all criminal prosecutions, the accused shall enjoy the right…to be confronted with the witnesses against him…" The Confrontation Clause provides two protections to criminal defendants: the right to physically face someone who testifies against them, and the right to cross examine. Crawford v. Washington. 541 U.S. 36 (2004). Several

courts, nonetheless, have specifically held that the confrontation right emanating from the Sixth Amendment described in Crawford applies only to trial and not to a pretrial suppression or evidentiary hearing. See Washburn v. United States, 2006 WL 3715393 (N.D. Ill. December 14, 2006) (unpublished opinion); United States v. Waldron, 2007 WL 2080520 (D.S.D. July 17, 2007) (unpublished opinion); and Akins v. Stowitsky, 2006 WL 3717394 (W.D. Pa. December 14, 2006) (unpublished opinion).

However, these cases are distinguishable in that they address the Confrontation Clause in the context of hearsay statements or hearsay testimony given during the suppression or evidentiary hearing. See Francischelli v. Potter, 2007 WL 776760 (E.D.N.Y. 2007) (citing Washburn v. United States, No. 3:05-cv-774, 2006 WL 3715393 (N.D. Ind. Dec. 14, 2006) ("[C]ases decided after Crawford v. Washington reaffirm the admissibility of hearsay statements at suppression hearings."). The Washburn court noted that the Supreme Court has previously determined that hearsay evidence is admissible at pretrial suppression hearings (citing United States v. Raddatz, 447 U.S. 667, 679 (1980)).

In the case at bar, Appellant is not challenging the admissibility of hearsay evidence or the right to challenge a hearsay statement under the Confrontation Clause. Appellant is asserting a right to be present at the suppression hearing, to

participate and to cross-examine adverse witnesses who actually testified at the suppression hearing. In this respect, the Confrontation Clause is applicable and settled law supports this proposition. United Status v. Rolle. 204 F.3d 133. 136 (4th Cir. 2000) (defendant has "'right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings'") (quoting Farelta v. California, 422 U.S. 806, 819 n. l 5 (1975)). The defendant has a right to be present in person not only at the actual trial but at all proceedings in which "substantial issues of fact are in dispute" if he could "contribution to the …opportunity to defend himself against the charges." Terry v. Cross, 112 F.Supp. 2d 543. 551 (E.D. Va. 2000) (citation and quotation omitted).

Indeed, because the Appellant didn't even know what evidence the Government presented to the Court during Greene's suppression hearing, he was precluded from effectively "test[ing]" that "adverse evidence." Yet, "[t]he main and essential purpose of confrontation is to secure for the [defendant] the opportunity of cross-examination… Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested." Dims v. Alaska, 415 U.S. 308, 315-16 (1974)(citation and quotation omitted).

Accordingly, when a witness is offered in a suppression hearing that is adverse to the defendant, the right of cross-examination cannot be eliminated. Jackson v.

United States, 336 F.2d 579, 580 (D.C.Cir.1964) (per curiam). The District Court's denial of Appellant's suppression motion based on evidence from adverse witnesses at a suppression hearing where Appellant was prohibited from cross examining those witnesses or otherwise participating was unconstitutional, requiring reversal.

2. Violation of Due Process and Right to Counsel

The suppression hearing is a critical stage of the prosecution which affects substantial rights of an accused person, including the right to counsel. cf. Wade v. United States, 388 U.S. 218, 224 (1967). The outcome of the hearing-the suppression vel non of evidence-may often determine the eventual outcome of conviction or acquittal. E.g., Olney v. United States, 433 F.2d 161, 163 (9th Cir. 1970). Here counsel was not allowed to participate in the "pretrial proceedings where the results might well settle the accused's fate and reduce the trial itself to a mere formality" Wade, 388 U.S. at 224.

The Appellant's participation in the suppression hearing would not only have given him the opportunity to present evidence and call witnesses on his behalf but also the opportunity to change the course of both the hearing and the pending trial. It is an essential component of procedural fairness to allow the defendant to be heard. In re Oliver, 333 U. S. 257, 333 U. S. 273 (1948); Grannis v. Ordean, 234 U. S. 385, 234 U. S. 394 (1914). The opportunity is an empty one when, as here, a defendant is

deprived of the basic right to have the Government's case encounter and "survive the crucible of meaningful adversarial testing." United States v. Cronic, 466 U. S. 656 (1984). See also Washington v. Texas, 388 U. S. 14, 22-23 (1967)

Consequently, deciding Appellant's suppression motion based on facts given by adverse witnesses and unchallenged evidence, denied Appellant an opportunity to be heard at the hearing and rendered Appellant's counsel ineffective on the suppression motion and at trial. cf. Strickland v. Washington, 466 U. S. 668, 466 U. S. 684-685 (1984)

The District Court's denial of Appellant's suppression motion without affording him an opportunity to participate in the hearing upon which the denial was based was unconstitutional requiring reversal.

ISSUE II

THE ADMISSION, OVER DEFENDANT'S OBJECTION AND WITHOUT LIMITED INSTRUCTIONS, OF IRRELEVANT MUSIC VIDEO CONTAINING UNCENSORED, RACIALLY, VIOLENTLY AND SEXUALLY CHARGED LYRICS, INCLUDING RANTS OF DRUG DEALING AND MURDER CONSTITUTED INADMISSIBLE HEARSAY, WAS CONTRARY TO THE CONFRONTATION CLAUSE AND WAS FATALLY PREJUDICIAL, REQUIRING A NEW TRIAL.

Determinations of admissibility of evidence rest largely within the discretion of the trial judge. United States v. Russell, 703 F.2d 1243, 1249 (11th Cir. 1983). "All

relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by [the rules of evidence], or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible." F.R.E. 402. The trial court is granted broad discretion both in determining the relevance and materiality of the evidence to be admitted and in determining whether the probative value of such evidence outweighs any inherent prejudice to the defendant. United States v. Hernandez-Cuartas, 717 F.2d 552, 554 (11th Cir. 1983); see also F.R.E. 403, Unites States v. Brown, 5 Cir., 1977, 547 F.2d 1264.

The Government sought and the Court allowed, over Appellant's objection, the admission into evidence of a Music Video purported to be produced by Appellant's production company. (R. 858-59). Appellant argued that the music video was irrelevant and highly prejudicial to no avail. Id.

The Government proffered that the Video was relevant because it tended to directly address the source of the defendant's income. (Doc. 190 at 8). At trial the prosecutor proffered as grounds for the video's admission, in pertinent part:

> I believe that the reference of drug money is Hush Money, drug money is Hush Money which is said repeatedly throughout that video is very relevant to the issues for which are being tried here today, that being that the Government contends that Mr. Gamory is a drug dealer. Mr. Gamory is trying to through his defense paint a picture that he is a legitimate businessman who

> has a rap studio, recording studio. And based upon that, we think its probative value is not substantially outweighed by the danger of prejudice. It's his production.

(R5- 860).

The Government's proffer clearly indicates that it was requesting admission of the music video as proof of the matter asserted therein (i.e., that "drug money is Hush Money.")[1], rendering the video inadmissible as hearsay under the Federal Rules of Evidence. FRE 801(c), 802.

As a backdrop, the video was found by the Government during the course of trial on the internet website called Youtube. Further, instead of copying the video and playing it for the jury, the Government chose to play the video right from the Youtube.[2]

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[1] Hush Money is not only the name of Appellant's recording studio and record label but it is a phrase with multiple meanings including; (1) money used to keep someone quite; (2) money hidden from others; (3) money derived from questionable or criminal sources; (4) money made in secret; (5) money given to another in confidence, etc. Because the phrase has multiple meanings, it is an intriguing phrase that is merely being used as a double metaphor by the artist in the music video in order to keep the listener guessing and create controversy and street credibility, which sells records. It was an artistic expression, the kind you will find in 99% of rap songs and rap videos that is grounded in fiction but expressed as fact for the sole and exclusive purpose of selling records. Unfortunately, as with the jury, most people believe what they see and hear in a rap video. It is that naivety that the rap industry depends on to develop artists and sell records—the same naivety that the Government depended on when introducing the music video in order to obtain a conviction.

[2] A simple search of the Youtube site will reveal other music videos purported to be produced by Appellant's company that are extremely inflammatory.

Additionally, the lyrical content of the video was hearsay in its entirety, constituting an out of court statement, offered to prove the truth of the matter asserted (i.e., that defendant was making money selling drugs). See the transcribed incorporated herein and made a part hereof as (Aa 1).[1]

The use, by the Government, of the music video in which the words "fuck wit us, we getting that drug money," is repeated continually throughout the song and introduced for the truth of the matter asserted, converted the video against Appellant of which he could not cross-examine. This was an outright abolition of the right to physically face someone who testifies against you, and the right to cross examine, Pennsylvania v. Ritchie, 480 U.S. 39, 51 (1987), Crawford v. Washington. 541 U.S. 36 (2004).

In addition to its hearsay status, the video contained numerous threats and allegations of gun possession and murder, along with saturations of the words "shit" six (6) times, "Nigga" sixteen (16) times and "fuck" twenty-four (24) times. Among these repulsive references was the invocation of the demoralization and sexual abuse of women, including the words "bitch", "pussy" and "dick."

[1] Aa denotes Appellant Appendix. The lyrics, "Fuck wit us, we getting that drug money" is a chorus repeated throughout the video. It is the sentence the Government relied on as relevant to prove that Defendant's income came from drug dealing. Accordingly, the video, consisting entirely of out of court statements, was offered for the truth of the matter asserted, that defendant was "getting that drug money."

In light of the fact that the Government had already introduced several co-conspirator witnesses who testified that defendant made money selling drugs, the admission of the music video was cumulative and had no purpose other than to prejudice defendant by misleading the jury, inciting the jury into engaging out of court internet inquiry and inflaming the jury against him. See United States v. McRae, 593 F.2d 700, 707 (5th Cir. 1979)(Rule 403's "major function is limited to excluding…cumulative probative [evidence], dragged in by the heels for the sake of a prejudicial effect. As to such, Rule 403 is meant to relax the iron rule of relevance, to permit the trial judge to preserve the fairness of the proceedings by exclusion despite its relevance…").

Finally, the failure to give limiting instructions and to redact irrelevant, immaterial and prejudicial portions of the video and to provide a transcript to the jury as a guide, increased the potential for prejudice by leaving the jury without the necessary implements to reach and form an unbiased determination as to the interpretation of the video's applicable and relevant lyrical content and its significance to the case against Appellant.

Accordingly, Appellant's conviction should be vacated.

ISSUE III

GOVERNMENT'S REASONS INDICATING THAT BLACK JURORS WERE STRICKENED BECAUSE THEY WERE FAVORABLE TO ACQUIT FAILS THAT BATSON TEST AND REQUIRES REVERSAL PURSUANT TO BUI V. HALEY, 321 F.3D 1304 , 1316 (11TH CIR. 2003).

The United States Supreme Court held that "purposeful racial discrimination in selection of the venire violates a defendant's right to equal protection." Batson v. Kentucky, 476 U.S. 79, 86 (1986). In evaluating a Batson claim, Courts must engage in a three-step analysis.

First, the defendant must establish a prima facie case of discriminatory intent on the part of the prosecution. A prima facie case is constructed by a showing by a defendant that "'he is a member of a cognizable racial group' and that the 'relevant circumstances raise an inference' that [the prosecution] has 'exercised peremptory challenges to remove from the venire members of [his] race.'" Fludd v. Dykes, 863 F.2d 822, 829 (11th Cir. 1989)(quoting Batson, 476 U.S. at 96).

Once a court has determined that a prima facie case of discrimination against black jurors has been established, "the burden shifts to the Government to come forward with a neutral explanation for challenging black jurors." Batson, 476 U.S. at 97. If the Government clears this hurdle, the trial court then has the responsibility to

determine whether the defendant has established purposeful discrimination. See Purkett v. Elem, 514 U.S. 765, 767-68 (1995).

During jury selections, the Government struck six African American jurors, jurors 13, 18, 20, 25, 27 and 29. After making a prima facie case of race discrimination (R. 6), the Government, explain its reasons for the strikes (R. 6-7). The Government's reasons were generally vague. However, reasons given for striking at least two of the jurors were quite troubling, jurors number 18 and 29 respectively. The Prosecutor reasoned that juror 18 was "[s]tricken for liberal views on drugs based on having lived in France." (Doc. 190 at 10). While explaining the reason for striking juror number 29, the prosecutor stated in pertinent part:

> Oh, Mr. Abraham. I don't even think we heard from him, but he is from the Virgin Islands. The Defendant, I believe his father is from the Virgin Islands if that were to come out. Plus, the Virgin Islands seems to have some liberal drug views. And based upon that, the Government struck him.

(R1- 7).

First and foremost, there was no basis in fact whatsoever for the statement that the Virgin Islands have liberal drug laws. Further, there was no indication, by the failure of the juror to respond, that they in fact embraced this liberal view in any way. Simply, the Government's reasoning for striking jurors 18 and 29 indicates a belief that those jurors were favorable to acquit—a reason that has been condemned by this

Court as failing the Batson test and requiring reversal in Bui v. Haley, 321 F.3d 1304 , 1316 (11th Cir. 2003).

It is settled that the Government's reason for striking an African American juror need not be "persuasive, or even plausible; so long as the reason is not inherently discriminatory, it suffices." Rice v. Collis, 546 U.S. 333, 338 (2006). However, this Court in Bui, has held that although a non-discriminatory reason need not be persuasive or plausible, it must not be vague either. Bui, supra. The Bui Court further held that "good faith" words indicating that a preemptory strike of even one juror was motivated by no more than the Government's belief that a juror is favorable to acquit does not constitute a race neutral explanation and, therefore, fails the Batson test. Id. at 1316.

Accordingly, "[w]ith nothing but these good faith assertions, [this court] must conclude that the [Government] failed to satisfy its Batson burden of coming forward with a race-neutral explanation." Id. This Court must, therefore, reverse Appellant's conviction.

ISSUE IV

THE ENACTMENT OF 21 USC § 846, WITHOUT REQUIRING PROOF OF AN OVERT ACT MAKES THE CONSPIRACY A MENTAL CRIMINAL OFFENSE—AN ACT THAT DOES NOT SUBSTANTIALLY INTERFERE WITH INTERSTATE COMMERCE AND, THEREFORE, CONSTITUTES AN UNCONSTITUTIONAL EXERCISE OF CONGRESSIONAL POWER UNDER THE COMMERCE CLAUSE, REQUIRING REVERSAL OF THE CONSPIRACY CONVICTION AND A DISMISSAL OF THAT COUNT

The Constitution grants Congress the power "to regulate Commerce with foreign Nations, and among the several states, and with the

Indian Tribes." U.S. Const. Art. I, sec. 8, cl. 3. There are three general categories of regulation in which Congress is authorized to engage under its commerce power. First, Congress can regulate the channels of interstate commerce. Perez v. United States, 402 U.S. 146 (1971). Second, Congress has authority to regulate and protect the instrumentalities of interstate commerce, and persons or things in interstate commerce. Third, Congress has the power to regulate activities that substantially affect interstate commerce. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937). Only the third category is implicated in the case at hand.

The Conspiracy statute at issue here currently provides in pertinent part:

> Any person who…conspires to commit any offense defined in this sub-chapter shall be subject to the same penalties as those prescribed

> for the offense, the commission of which was the object of the attempt or conspiracy.
> 21 U.S.C. § 846.

In the case at bar, the object of the conspiracy was the Section 841 offense of possession and possession with intent of cocaine and marijuana. (Doc. 34). As the basis for the exercise of its power under the Commerce Clause to regulate certain activities in controlled substances, Congress made certain findings and declarations which are set forth in 21 U.S.C. Sec. 801 with regard to the actual trafficking in controlled substances. Principal among these were the findings that incidents of the traffic in controlled substances, such as manufacture, distribution and possession, had a substantial and direct effect on interstate commerce. See id.

It is clear that Congress' commerce clause power extends to prohibit a Section 841 offense. However, the fact that Congress has made this determination in passing the sections of the Controlled Substance Act under which Appellant has been convicted does not preclude further inquiry into the validity of the conspiracy legislation.

In order to establish a violation of a conspiracy offense under 21 U.S.C. § 846, the Government need not prove the commission of any overt acts in furtherance of the conspiracy. United States v. Shabani, 513 U.S. 10 (1994). Thus, a Section 846 conspiracy does not require any act that substantially interferes with interstate

commerce. In fact, under a Section 846 conspiracy, "the criminal agreement itself is the actus reus." Id. Yet, an agreement with nothing more is merely a meeting of the minds—a mental act which is without substance absent any required attempt to carry out the terms of the agreement.

Simply, Section 846's conspiracy is purely a mental offense, prescribing an act (the agreement) that has absolutely no effect on interstate commerce. Without a requirement that a Section 846 conspiracy involve more than just the proscription of an agreement, Congress has no power under the commerce clause to enact it because the act of agreeing alone has no substantial effect on interstate commerce.

Section 846's conspiracy proscription is, therefore, unconstitutional requiring a reversal and dismissal of the conspiracy charge against Appellant.

ISSUE V

TRIAL COURT'S INSTRUCTIONS IMPERMISSIBLY BROADENED THE BASES UPON WHICH DEFENDANT COULD BE FOUND GUILTY OF CONSPIRACY BY CONSTRUCTIVELY AMENDING THE INDICTMENT TO INCLUDE SECTION 841AS A CRIMINAL OFFENSE, REQUIRING REVERSAL

A constructive amendment to an indictment "occurs when the essential elements of the offense contained in the indictment are altered to broaden the possible bases for conviction beyond what is contained in the indictment." United States v.

Keller, 916 F.2d 628, 634 (11th Cir. 1990); United States v. Tampas, 493 F.3d 1291 (11th Cir. 2007) (citing United States v. Narog, 372 F.3d 1243, 1247 (11th Cir. 2004); see also United States v. Ward, 486 F.3d 1212, 1227 (11th Cir. 2007) and United States v. Poarch, 878 F.2d 1355, 1358 (11th Cir. 1989). "When a defendant is convicted of charges not included in the indictment, an amendment of the indictment has occurred." Id. at 633.

Nevertheless, District courts have a great deal of discretion in how they choose to phrase jury instructions, assuming the instructions accurately represent the law. See United States v. Starke, 62 F.3d 1374, 1380 (11th Cir. 1995). This Court will evaluate challenges to jury instructions in context, focusing on whether "the entire charge as a whole…is an accurate statement of the issues and the law." United States v. Weissman, 899 F.2d 1111, 1113 (11th Cir. 1990). This Court will not reverse a conviction unless it finds that "the issues of law were presented inaccurately, the charge included crimes not contained in the indictment, or the charge improperly guided the jury in such a substantial way as to violate due process." Id. at 1114 (citation omitted). Even if an instruction was incorrect, reversal of a conviction is only merited when there is "a substantial and ineradicable doubt as to whether the jury was properly guided in its deliberations." Id. at 1114 n.1.

However, when a jury instruction includes elements of uncharged crimes indicating that a defendant could be found guilty if those elements are proven beyond a reasonable doubt, such an amendment "***constitutes per se reversible error***," since it "violates a defendant's constitutional right to be tried only on charges presented in a grand jury indictment." Id. (emphasis added). See also United States v. Olano, 507 U.S. 725 (1993); United States v. Tampas, 493 F.3d 1291 (11th Cir. 2007) (Weissman, 899 F.2d at 1114.

In the case at bar, the District Court instructed the jury on the law of conspiracy (R6- 1018-21) and then instructed in pertinent part:

> Ladies and Gentlemen, Title 21, United States Code, Section 841(A)(1), makes it a federal crime or offense for anyone to possess a controlled substance with intent to distribute it. Cocaine and marijuana are controlled substances within the meaning of the law. The **Defendant can be found guilty of that offense** only if all of the following facts are proved beyond a reasonable doubt:
>
> First, that the Defendant knowingly and willfully possessed cocaine and marijuana **as charged**; and, second, that the Defendant possessed the substance with the intent to distribute it. To possess with intent to distribute simply means to possess with intent to deliver or transfer possession of a controlled substance to another person with or without any financial interest in the transaction.

(R6- 1021-22)(emphasis added).

The District Court went on to instruct on the law of possession which included Actual Possession and liability theories of Constructive Possession, Joint Possession and Sole Possession. (R6-1022).

It is settled, however, that the objective of the charged conspiracy and "the overt acts did not establish an agreement" United States v. Shabani, 513 U.S. 10, 16 (1994)(citing United States v. Felix, 503 U.S. 378, 392 (1992)(STEVENS.J, concurring in part, concurring in judgment)). In fact, "the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses." Pinkerton v. United States, 328 U.S. 640, 643 (1946); Garrett v. United States, 471 U.S. 773, 778 (1985) ("[C]onspiracy is a distinct offense from the completed object of the conspiracy").

Accordingly, the instructions that included the elements of Section 841 offenses along with direction that Appellant could be found guilty of those offenses if proven beyond a reasonable doubt were confusing and ambiguous, inferring to the jury that if they found possession and possession with intent beyond a reasonable doubt that Appellant could be found guilty of the conspiracy count.

The instructions prejudiced Appellant and were error per se, requiring reversal.

ISSUE VI

THE TAX RECORDS OF DEFENDANT AND HIS FAMILY HAD NO RELEVANCE TO THE CHARGES AGAINST HIM AND ANY PROBATIVE VALUE THE TAX RECORDS MAY HAVE HAD WAS SUBSTANTIALLY OUTWEIGHED BY CONFUSION AND UNDUE PREJUDICE, THUS, ITS ADMISSION WITHOUT LIMITED INSTRUCTIONS, REQUIRES REVERSAL

Admission of the tax records of Appellant and his family was an abuse of discretion. See generally, United States v. Jiminez, 224 F.3d 1243, 1249 (11th Cir. 2000). "The abuse of discretion standard has been described as allowing a range of choice for the district court, so long as that choice does not constitute a clear error of judgment." United States v. Kelly, 888 F.2d 732, 745 (11th Cir. 1989). Put another way, this Court "will only reverse an evidentiary ruling when it has affected a defendant's substantial rights." United States v. Wright, 392 F.3d 1269, 1276 (11th Cir. 2004).

During trial, the District Court allowed, over Appellant's objection, tax records of Appellant, his mother, father and wife. (R. 349, 400). The Government proffered that the tax documents were relevant to show that Appellant nor his family could afford his lifestyle (R2- 350). In fact, Appellant's tax records revealed that he did not pay taxes at all. Extrinsically, the Government's position and the tax records indicates

that Appellant had knowingly failed to file taxes and had possibly committed serious tax crimes. The introduction of the tax records were, therefore, governed by Rule 404(b) and Rule 403.

Federal Rule of Evidence 404(b) provides that evidence of "other crimes, wrongs, or acts, is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Fed.R.Evid. 404(b).

In determining whether extrinsic offense evidence is admissible under rule 404(b), the following two-step test must be applied: First, it must be determined that the extrinsic offense evidence is relevant to an issue other than the defendant's character. Second, the evidence must possess probative value that is not substantially outweighed by the undue prejudice and must meet the other requirements of Rule 403. United States v. Beechum, 582 F.2d 898, 911 (5th Cir.1978) (en banc).

The relevancy of the extrinsic offense evidence is measured by the similarity of the extrinsic offense to the offense charged. United States v. Kopituk, 690 F.2d 1289, 1334 (11th Cir. 1982); Beechum, 582 F.2d at 911. In the case at bar, Appellant was charged with drug offenses and money laundering. There is absolutely no similarity between drug crimes and tax crimes or failure to pay taxes or report

income. In fact, because a person does not pay his taxes or fully disclose his income does not prove or even indicate that he is selling drugs.

While there may be some remote relevance between the tax returns and the money laundering charges[1], that relevance, whatever it may be, was outweighed by its prejudicial effect under Rule 403.

Here, the Government's reason for requesting admission of the tax records were to show that Appellant could not afford his lifestyle. As indicated above, because a person does not file and pay tax returns or report income does not mean he is selling drugs or cant afford his lifestyle. It means merely that he did not file or pay taxes. In fact, most prosecutions for failure to file and pay taxes arise out of incidents related to legitimate income. It was overtly clear from the evidence adduced at trial that Appellant obtained legitimate income from three restaurants in New York City, a recording studio and his entertainment companies in Atlanta. (R6-904-05, 913-15, 937).

The only affect admission of the tax records could possibly have had is confusion by the jury of what the absence of tax records or the income of family members truly meant relative to the drug case against Appellant. The other probable

[1] It could be said the tax records were similar or relevant to the money laundering charges if Appellant was laundering money to keep from paying taxes but Appellant was not charged with tax crimes and there was no evidence that the Appellant engaged in money laundering to keep from paying taxes.

reality is that the jury would develop a bias against Appellant for not paying taxes. This facts is especially true since the paying of taxes is something that the jurors all hav done every year of their income producing lives.

The tax records had no place in appellant's trial and had no relevance to whether Appellant was distributing drugs, especially since Appellant was not charged with tax crimes and all of Appellant's income whether legal or illegal is subject to being reported. See generally United States v. Smith, 145 F.3d 458 (1st Cir. 1998).

The tax records were irrelevant and Appellant was prejudiced, requiring reversal.

ISSUE VII

THE TRIAL COURT'S DENIAL OF DEFENDANT'S MOTION FOR ACQUITTAL AS TO THE MONEY LAUNDERING CHARGES WAS ERRONEOUS, REQUIRING REVERSAL

When deciding a motion for a judgment of acquittal, the District Court views the "'evidence in the light most favorable to the government, [and decides whether] a rational trier of fact could have found the defendant guilty beyond a reasonable doubt.'" Id. at 1094. (quoting United States v. Alston, 974 F.2d 1206, 1210 (9th Cir. 1992)).

Thus, to uphold the denial of a motion for judgment of acquittal, this Court "need only determine that a reasonable fact-finder could conclude that the evidence established the defendant's guilt beyond a reasonable doubt." Id. When considering the sufficiency of the evidence, this Court "view the facts and draw all reasonable inferences therefrom in the light most favorable to the government." United States v. Slocum, 708 F.2d 587, 594 (11th Cir. 1983).

At trial, Appellant argued that he was entitled to a judgment of acquittal on the money laundering charges as a matter of law. (R5-881). Appellant argued that the Government failed to prove each element of the money laundering charges beyond a reasonable doubt. Id.

Pursuant to 18 U.S.C. § 1957(a), "the government must show that [Defendant] (1) knowingly engaged or attempted to engage in a monetary transaction (2) in criminally derived property (3) of a value greater than $ 10,000, and (4) derived from specified unlawful activity." United States v. Richard, 234 F.3d 763, 767 (1st Cir. 2000); see also, United States v. Nolan, 223 F.3d 1211, 1315 (11th Cir. 2000).

Evidence was adduced at trial showing that Defendant derived substantial income from his restaurants and entertainment businesses—all in cash. (R6-904-05, 913-15, 937). The Government never presented any proof establishing two of the essential elements of the money laundering charges. Particularly, the United States

never proved "that the Defendant knew the transaction involved criminally derived property…[and] that the property was, in fact, derived from the distribution of illegal controlled substances." (R6-1023). The only person with personal knowledge that testified concerning the actual purchase of the subject cars was Wardell Strickland the car salesmen who sold Appellant all the subject vehicles. When asked by the Government whether Strickland knew what Appellant did for a living, Strickland replied that Appellant had a "record label and fish business". (R4- 697).

There was absolutely no evidence that the subject vehicles were purchased using drug proceed or that Appellant knew that the purchase of the cars involved criminally derived property. Proof of this is the jury's acquittal on Counts 2 and 3 of the money laundering charges without any indication in the record that the proofs supporting the counts for conviction were distinct or distinguishable from the proofs supporting the counts for acquittal.

The Government, therefore, failed to satisfy its burden of proof on the money laundering charges, requiring a reversal of the money laundering convictions and dismissal of those charges.

ISSUE VIII

THE DISTRICT COURT'S DENIAL OF APPELLANT'S NEW TRIAL MOTION WAS AN ABUSE OF DISCRETION

The District "[C]ourt may vacate any judgment and grant a new trial if the interest of justice so requires," Fed. R. Crim. P. 33(a). The denial of a motion for a new trial is reviewed by this Court for abuse of discretion. See United States v. Campa, 459 F.3d 1121, 1151 (11th Cir. 2006).

In Appellant's motion for a new trial, Appellant raised several issues now covered in Points I-III, VI-VII infra. While some of the arguments have different standards of review when addressing them individually, the standard of review under the new trial context is for abuse of discretion. Id. Appellant incorporates herein by reference the summary of the arguments and arguments themselves enumerated in Points I-III, VI-VII infra. An individual and collective consideration of the errors complained of in the aforementioned Points, infra., establishes that the District Court erred by refusing to grant Appellant a new trial. That refusal was tantamount to an abuse of discretion. See Campa, supra.

Appellant's convictions must, therefore, be reversed.

ISSUE IX

IF THIS COURT FINDS THAT THE ERRORS COMPLAINED OF IN POINTS I THROUGH VIII, INFRA., TAKEN INDIVIDUALLY, DO NOT REQUIRE A NEW TRIAL, THE CUMULATIVE EFFECT OF THESE ERRORS REQUIRES SUCH A RESULT

Cumulative error is present when the "cumulative effect of two or more individually harmless errors has the potential to prejudice a defendant to the same extent as a single reversible error." Duckett v. Mullin, 306 F. 3d 982, 992 (10 Cir.2002) (quoting United States v. Riviera, 900 F.2d 1462, 1469 (10 Cir.1990), United States v. Calderon, 127 F.3d 1314, 1333 (11Cir 1997). "A cumulative error analysis merely aggregates all the errors that individually have been found to be harmless, and therefore not reversible, and it analyzes whether their cumulative effect on the outcome of the trial is such that collectively they can no longer be determined to be harmless." Id.

This Court has granted new trials because of the cumulative effect of errors that would not, standing alone, necessarily warrant a new trial. See, e.g. United States v. Blakely, 14 F.3d 1557, 1561 (11th Cir.1994); United States v. Gaskell, 985 F.2d 1056, 1065 (11 Cir. 1993); and United States v. Pearson, 746 F.2d 787, 796 (11th Cir.1984).

The strength of Appellant's errors complained of and the need for reversal is supported by the trial record . In fact, in order for this Court to find that the cumulative affect of the errors do not require a new trial, the Court must first find that no errors exist, see United States v. Barshov, 733 F.2d 842, 852 (11th Cir. 1984), an endeavor no Court would undertake to justify in light of the clear and concise record reflecting the complained of errors.

This Court should vacate Appellant's conviction and remand for a new trial.

ISSUE X

APPRENDI V. NEW JERSEY AND THE SIXTH AMENDMENT IS APPLICABLE TO THE MANDATORY SENTENCING SCHEMES OF 21 U.S.C. § 841(b), RENDERING, UNCONSTITUTIONAL, THE COURT'S FACT FINDING BY THE PERPONDERENCE OF THE EVIDENCE IN ORDER TO INCREASE APPELLANT'S SENTENCE BEYOND THE MANDATORY MINIMUM

"[U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." Jones v. United States, 526 U.S. 227, 243, n. 6 (1999). This rule was indicated in Supreme Court law since 1998, almost ten years before defendant was tried and convicted, see Almendarez-Torres v. United States, 523 U.S. 224 (1998), See Apprendi v. New Jersey, 530 U.S.

466 (2000) Ring v. Arizona, 536 U.S. 583 (2002), Blakely v. Washington, 542 U.S. 296 (2004), and United States v. Booker, 543 U.S. 220 (2005).

The application of the Six Amendment in these cases applied to unrelated sentencing statutes and finally to the United States Sentencing Guidelines (U.S.S.G.), Booker, 543 U.S., but no Court has ever addressed the application of the Sixth Amendment to Section 841(b) pursuant to an Apprendi/Booker analysis. Appellant believes that Apprendi applies to Section 841's sentencing scheme.

The Supreme Court in Booker applied Apprendi to the U.S.S.G., finding that the mandatory provisions of the guidelines implicated the Sixth Amendment. Booker, 543 U.S. at 233. The Supreme Court unanimously concluded that the U.S.S.G., would not implicate the Sixth Amendment if the guidelines were advisory. Id. The Court, therefore, excised the mandatory provisions from the guidelines sentencing scheme rendering it as advisory only. Id. at 245-46.

However, as it is here, Booker was a case involving a violation of the Control Substance Act ("CSA"). Thus, Booker's sentence was also dependent upon the three-tier mandatory sentencing scheme of 21 U.S.C. § 841(b). With or without the guidelines, Section 841(b) enumerates mandatory minimum sentences that, if supported by a jury finding, cannot be decreased by the sentencing court. Further, the mandatory minimum sentence cannot be increased without additional fact finding by

the Court under U.S.S.G. guidance. The question of Apprendi's applicability to Section 841(b) was not before the Supreme Court and was, therefore, never decided. Nevertheless, the question comes now before this Court for resolution.

The jury found that Appellant's conduct in the charged conspiracy offense involved 5 kilograms of cocaine and 1000 kilograms of marijuana. As a result, Appellant was subjected to a mandatory term of ten (10) years in prison under Section 841(b).

Section 841(b)'s mandatory provisions leaves the sentencing Court without discretion upon which to impose sentence when certain drug amounts are implicated. See i.e., 21 U.S.C. § 841(b)(1)(A)(iii) & § 841(b)(1)(B)(iii). Thus, in this case, the District Court was without discretion and, therefore, was compelled by Section 841(b) to impose a term of ten (10) years based on the jury's finding that the drugs involved in the charged offense was 5 kilograms of cocaine and 1000 kilograms of marijuana. See id. Therefore, in order for the District Court to impose a sentence of Life imprisonment, in light of the jury's finding on drug amounts, the District Court had to find facts in addition to and beyond what was specifically charged in the indictment and found by the jury. The question then becomes, does this additional fact finding and increased sentence violate the Sixth Amendment and the holding in Apprendi v. New Jersey, 530 U.S. 466 (2000)? Appellant believes it does.

The Supreme Court made it clear that, the "statutory maximum" for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. In other words, for Apprendi purposes, "**the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional facts.**" Blakley, 542 U.S. at 303-04. (emphasis added).

In the case at bar, ten (10) years was the maximum sentence the District Court could impose on Appellant without finding additional facts through relevant conduct. Accordingly, the relevant statutory maximum for Apprendi purposes was not the Life sentence provided for in Section 841(b) and of which Appellant received, but the mandatory minimum of 10 years—a sentence that could not be increased without the finding of additional facts. See Blakley, supra.

Consistent with settled precedence, mandatory sentencing schemes invoke the Sixth Amendment holding of Apprendi. See Booker, supra. Therefore, because of Section 841(b)'s mandatory sentencing scheme, that statute is subject to Sixth Amendment considerations under the principles established in Apprendi and its protégé cases.

Thus, as here, when a judge inflicts punishment that the jury's verdict alone does not allow under the mandatory sentencing provisions of Section 841(b), the jury has not found all the facts "which the law makes essential to the punishment." Id.

Consequently, Appellant's sentence must be vacated and the case remanded with instructions for a retrial on the issue of sentence or resentencing consistent with the rule of leniency.

ISSUE XI

BOTH THE TRIAL COURT'S AND VERDICT SHEET'S INSTRUCTIONS DIRECTING THE JURY TO "CHECK THE LARGEST AMOUNT" OF COCAINE AND MARIJUANA LISTED ON THE VERDICT SHEET IMPERMISSIBLY DIRECTED A VERDICT ON "THE LARGEST AMOUNT" OF THOSE DRUGS AGAINST DEFENDANT, REQUIRING DEFENDANT'S SENTENCED TO BE VACATED AND DEFENDANT RESENTENCED UNDER PURSUANT TO THE RULE OF LENIENCY.

A trial judge is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict regardless of how overwhelmingly the evidence may point in support of guilt. Rose v. Clark, 478 U.S. 570, 578 (1986); Standefer v. United States, 447 U.S. 10, 22 (1980); United States v. Martin Linen Supply Co., 430 U.S. 564, 572-73 (1977); United States v. Goetz, 746 F.2d 705, 708 (11th Cir.1984).

In the case at bar, the District Court's instructions in conjunction with the jury verdict sheet, directed a verdict on the "largest amount" of cocaine and marijuana against Appellant.

The District Court, instructed the jury that they had to pick the largest amount of drugs listed on the verdict sheet upon a finding of guilt on the conspiracy offense. (R6- 1027-28). The Verdict Sheet also directed the jury to "Check the largest amount" of drugs listed on that sheet. (Doc. 175).

Both the Court's instruction and the verdict sheet infringed upon the province of the jury by taking away their choice and leaving them no option but to "check the largest amount" of drugs listed on the verdict sheet. At the very least, the Court's instructions, along with the verdict sheet, were very confusing and ambiguous. The truth is that the jury did not have to check the largest amount of drugs but could check any amount that they found.

Thus, as a matter of law, instructing the jury to check the largest amount of drugs listed on the verdict sheet resulted in a denial of Appellant's Sixth Amendment guarantee to a jury trial and resulted in the wrong entity judging the defendant guilty on "the largest amount" of drugs. See Rose, 478 U.S. at 578.

Accordingly, the District Court's instructions and Verdict Sheet interrogatories constituted an impermissible infringement upon the jury's province, requiring

Appellant's sentence to be vacated and the case remanded for retrial related to sentencing or resentencing pursuant to the rule of leniency.

CONCLUSION

The Appellant respectfully requests that this Court to review the foregoing arguments, and to vacate the judgment of Conviction and Remand this case to the United States District Court for the Northern District of Georgia for a retrial, consistent with the requests made herein.

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CORRECTED CERTIFICATE OF SERVICE

I hereby certify that I have on this the 4th day of February, 2010, filed the foregoing Appellant's brief using the CM/ECF filing system, which will forward a copy to the Assistant United States Attorney, Lisa Tarvin, and a copy of the Appellant Brief and Record Excerpts will be sent to her by Fedex to:

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CERTIFICATE OF COMPLIANCE

I certify that this brief does not comply with the type-volume limitation set forth in FRAP 32 (a)(7)(B). This brief contains 13,933 words.

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