

UNITED STATES OF AMERICA, Appellee, v. Edgar Jamal..., 2010 WL 5064927...

2010 WL 5064927 (C.A.11) (Appellate Brief)  
United States Court of Appeals, Eleventh Circuit.

UNITED STATES OF AMERICA, Appellee,  
v.  
Edgar Jamal GAMORY, Appellant.

No. 09-13929-DD.  
June, 2010.

United States District Court Northern District of Georgia, Case No.: 1:08-CR-153-TWT-RGV

**Reply Brief of Appellant Appellant Is Incarcerated**

R. Martin Adams, The Cochran Firm, Criminal Defense-Birmingham, LLC, 505 20th Street North, Suite 825, Birmingham, AL 35203, (205) 244-1920, (205) 244-1171 Fax, adams@parkmanlawfirm.com.

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**\*1 ISSUE I TRIAL COURT'S REFUSAL TO GRANT SUPPRESSION HEARING AND USE  
OF TESTIMONY AT HEARING AGAINST APPELLANT DOES REQUIRE REVERSAL.**

**A. DENIAL OF REQUEST FOR EVIDENTIARY HEARING:**

Appellant argued that he should receive a new trial based on the District Court's refusal to afford him an evidentiary hearing relative to his motion to suppress for three distinct reasons: (1) the affiant, the CS and other Government agents whose actions questioned the veracity of the information contained in the search warrant affidavit required a hearing pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978) (App.'s Br. at 22, Doc. 86 at 3-5); (2) the lack of information regarding the veracity, reliability and basis of knowledge of the sole informant (the CS) providing information to agents required a hearing pursuant to *Illinois v. Gates*, 462 U.S. 213 (1983) (App.'s Br. at 25, Doc. 86 at 11-14); and (3) disputed issues of material fact in the warrant affidavit required an evidentiary hearing. *Bischoff v. Osceola County*, 222 F.3d 874, 879 (11 Cir. 2000) (App.'s Br. at 22, Doc. 86 at 1-2, 4-5).

In responding, the Government only addressed whether Appellant had a right to a hearing pursuant to *Franks* but never addressed whether Appellant had a right to an evidentiary hearing pursuant to *Gates* and to a hearing in order to resolve disputed issues of fact. Accordingly, those arguments are unopposed. \*2 Therefore, Appellant will rely on the arguments espoused in his moving brief related to those grounds and will only reply to the Government's *Franks* opposition.

Appellant argued that the refusal of the District Court to afford him a *Franks* hearing on his motion to suppress requires reversal on three grounds.

With respects to **ground one** that the affiant failed to disclose the source of the probable cause information she placed in the search warrant affidavit, Appellant argued that this failure was contrary to *Franks* and required reversal. (App.'s Br. at 23-24, Doc. 86 at 8-10, Doc. 200 at 8). On appeal, however, this ground is unopposed.

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Nevertheless, Appellant will address it. The only statement given in the affidavit regarding the source of the affiant's information was that "DEA Atlanta began debriefing the CS." (Doc. 78, ¶ 20). The source of the information in the affidavit (i.e., the agent, agents or personnel of the Atlanta office of the DEA who conducted the debriefing of the CS) remains unknown.

Accordingly, the entire affidavit was based on hearsay, *Franks* required the affiant to disclose the source of her information.

 [Franks](#), 438 U.S. at 165;  [United States v. Ventresca](#), 380 U.S. 102, 110-11 (1965) and cases cited therein at 111 n. 4;  [United States v. Davis](#), 714 F.2d 896, 899-900 (9th Cir. 1983). Failure to do so required a *Franks* hearing in order that the defendant may explore and challenge \*3 the source and veracity of the information given. Therefore, the District Court's refusal to afford Appellant a *Franks* hearing under this ground requires reversal.

As to **ground two**, that the affiant made material statements in the warrant affidavit that were deliberately false, Appellant argued that: (1) the statement that Lakisha Parker gave consent to search her garage was deliberately false (App.'s Br. at 23, Doc. 86 at 3-5, Doc. 200 at 2-3); (2) the statement that the CS was a mere observer of drug transactions was deliberately false and misleading (App. Br. at 26); (3) the statement that the CS observed a hidden trap compartment in the stairs of Appellant's home was deliberately false and misleading (App.'s Br. at 26); (4) the statement that Appellant conducted drug transactions in Appellant's recording studio was deliberately false (App.'s Br. at 27); and (5) the statement that the CS arranged a drug purchase with Appellant on May 24, 2007, in which the CS wore a wire was deliberately false (App.'s Br. at 27).

The Government only responded to issues (1) and (5) supporting this ground. Therefore, issues (2), (3) and (4) are all unopposed. Nevertheless, the Government countered that the District Court was correct "that Gamory did not meet the strict standard for obtaining a *Franks* hearing," Gov.'s Br. at 26-27, reasoning that the affiant was given the information regarding Parker's consent by \*4 other agents who believed she consented. (Gov.'s Br. at 28).<sup>1</sup> Further, that in the absence of the consent statement, "there remains sufficient content in the affidavit to support a finding of probable cause." (Gov.'s Br. at 28-29).

The flaw in the Government's reasoning is that it does not take into account, the effect of excising all five supporting statements from the search warrant affidavit,<sup>2</sup> nor the number of agents involved in debriefing the CS or reducing that debriefing to writing. Here, the statements made by the affiant in the affidavit were given to her by those other agents.

Therefore, the District Court was required not to just focus on the affiant, but "upon the conduct of *all... agents* involved."

 [United States v. Kirk](#), 781 F.2d 1498, 1503 (11 Cir. 1986). The District Court's focus should have also included the CS as both a Government Agent and material witness at the suppression hearing. (App.'s Br. at 25, Doc. 86 at 9 n. 3, 13). See  [Coolidge v. New Hampshire](#), 403 U.S. 443, 487 (1971)(when determining whether a private citizen has acted as a government agent, the question is "whether in light of all the circumstances of the case [the CS] must be regarded as having acted as an 'instrument' or agent of the state...").<sup>3</sup> (R2-132 to 140).  \*5 [United States v. Malbrough](#), 922 F.2d 458, 462 (8th Cir. 1990); and see generally [Depree v. Thomas](#), 846 F.2d 784, 793-94 (11th Cir. 1991).

Accordingly, regardless of the affiant's knowledge of the false statements in the warrant affidavit, it was "necessary to consider the objective reasonableness of...the [agents]...who provided information material to the probable cause determination," see  [United States v. Leon](#), 468 U.S. 897 (1984), at a *Franks* hearing so as to determine whether "one government agent deliberately or recklessly misrepresents information to a second agent, who then innocently includes the misrepresentations in an affidavit." [United States v. Pritchard](#), 745 F.2d 1112, 1119 (7th Cir. 1984).

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Finally, the Government takes great strides in opposing Appellant's position that the CS denied, on several occasions, that he set up a drug purchase meeting with Appellant on May 24, 2007.<sup>4</sup> In fact, the Government dared to argue that "the [CS] agreed that he set up the meeting with Gamory at law enforcement's direction." (Gov.'s Br. at 31). Frankly, the CS gave no such testimony. See R2-187, R2-233 to 234, R2-238 to 239, R2-267 to 268.

Clearly, the District Court's failure to allow a *Franks* hearing was erroneous requiring reversal. *Franks, supra*.

\*6 As to **ground three**, that the affiant deliberately omitted material facts relevant to the issue of probable cause, the Government counters that the omissions were not shown to be intentional and had no impact on probable cause. (Gov.'s Br. at 31-32).

Simply, the Government believes that the totality of the circumstances analysis, did not require revelation to the issuing judge of the twelve significant issues of material facts that were omitted. (App.'s Br. at 26-27). However, these omitted facts were within the knowledge of the Government and were, therefore, deliberately or recklessly omitted from the warrant affidavit. See

[Rivera v. United States, 928 F.2d 592, 604 \(2nd Cir. 1991\)](#)(recklessness may be inferred "where the omitted information was 'clearly critical' to the probable cause determination."); [Wilson v. Russo, 212 F.3d 781, 783 \(3rd Cir. 2000\)](#) ("Omissions are made with reckless disregard for the truth when an officer recklessly omits facts that any reasonable person would know that a judge would want to know" when deciding whether to issue a warrant.).

Settled law dictates that these omissions require reversal. *Parker v. Allen*, 2009 U.S.App. LEXIS 8275 at 78 (11th Cir. Ala. April 20, 2009)(citing *Gates*, 462 at 230) ("in determining probable cause based in part on confidential informant information, a court should consider not only the totality of the circumstances but \*7 also the 'closely intertwined issues' of the informant's basis of knowledge,<sup>5</sup> reliability and veracity."); *Dahl v. Holley*, 312 F.2d 1228, 1235 (11th Cir. 2002)(citing [Franks, 438 U.S. at 155-56](#)) (a search warrant may be voided if the warrant affidavit contains deliberate falsity or reckless disregard for the truth, including material omissions.); [United States v. Grey, 626 F.2d 494, 499 \(5th Cir. 1980\)](#)(when large fees are given to informers, such arrangements must be treated with suspicion.); and see generally [United States v. Williams, 954 F.2d 668 \(11th Cir. 1992\)](#).

The reason is simple. The omitted facts would have prevented even technically true statements in the affidavit from being misleading to the issuing judge. See [United State v. Lingenfelter, 997 F.2d 632, 637-39 \(9th Cir. 1993\)](#). Further, to include the omissions in the warrant affidavit as the affidavit reads now, would create such a conflicting and contradictory statement of facts, that no court would undertake to justify it as it relates to probable clause. See [United States v. Jenkins, 901 F.2d 1075, 1080 \(11th Cir. 1990\)](#) (intentional or reckless omissions will invalidate a warrant if inclusion of the omitted facts would have prevented a finding of probable cause.).

\*8 For the above reasons, this Court should be compelled to reverse.

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

Here, Appellant argued that his rights to confrontation, compulsory process, due process and to counsel were violated when the District Court denied Appellant a hearing on his suppression motion but used testimony from Greene's suppression hearing as

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part of the Court's findings of fact in denying Appellant's motion. The Government countered that "the magistrate judge did not rely on the testimony from Greene's hearing in recommending that Gamory's motion be denied." (Gov.'s Br. at 33).

Indeed, the Government's position is contradicted by the record. A review of the magistrate's recommendation shows, in pertinent part:

Agent Larsen was not on the scene at the garage, but remained at her office so that she could apply for a search warrant if agents developed probable cause. (Tr. <sup>6</sup> at 168)... While Parker claims that she did not consent to the search of the garage, the agents at the scene believed she had consented and relayed that information to Agent Larsen, who included it in her affidavit. (Tr. at 176) [(Doc. 132 at 44)(emphasis added).]

\* \* \* \*

Moreover, as discussed earlier, **after considering the testimony of Parker and the agents in connection with Greene's motion to suppress**, the Court finds that Parker did in fact consent to the search. [(Id at n, 23)(emphasis added).]

\* \* \* \*

**\*9** Two days before the date in which the prearranged transaction was to occur, the CI traveled with agents to Gamory's residence and saw a dark-colored Ford Explorer with a North Carolina plate, which was the same Ford Explorer Greene drove from Gamory's residence on May 24, 2007, and from which agents recovered approximately \$500,000 in cash after searching it...**(Tr. at 202, 214)**. [(Doc. 132 at 50)(emphasis added).]

\* \* \* \*

**Agent Larsen testified** that she was informed that agents had obtained consent from Parker to search her apartment and garage, and there is no indication that she had reason to doubt what she was told by her fellow agents... **However, the evidence presented at the evidentiary hearing on Greene's motion concerning the conduct of the officers and Parker on May 24, 2007, does not support a finding that the officers lied to Agent Larsen about gaining voluntary consent from Parker.**

(Doc. 132 at 56)(emphasis added).

The District Court, clearly used testimony at Greene's hearing against Appellant's request for suppression. As such, Appellant is entitled to a reversal.

## ISSUE II THE ERRONEOUS ADMISSION OF THE MUSIC VIDEO DOES REQUIRE REVERSAL.

Appellant argued previously that admission of a music video, purported to be made by Appellant's music production company was erroneous for several reasons: (1) the video was taken off the website Youtube that allows indiscriminate and unlimited placement of videos by the unknown public with little or no oversight; (2) the Government never authenticated the video by making any **\*10** substantial showing that Appellant's or his production company actually made the video; (3) the video was inadmissible hearsay; (4) the admission of the video was in violation of the confrontation clause; (5) the lyrical content of the video was unduly prejudicial; (6) the video was offered without limiting instructions; (7) the jury was never admonished not to explore the Youtube site in reference to this case; and (8) the jury was not provided with transcripts of the lyrical content of the video as a guide.

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The Government did not respond to grounds (1)-(2), (4) and (6)-(8). Therefore, those grounds are unopposed and Appellant relies on the arguments espoused in his moving brief in support of those grounds. Nevertheless, the Government agreed that “the music video contain[ed] out of court statements.” (Gov.’s Br. at 35). But, countered that the “statements were not offered to prove the truth of the contents of the video.” Id. Incredibly, the Government defies the truth by arguing that “the assertions in the video, whether express or implied, were not the reasons for admitting the video into evidence.” Id.

Indeed, the transcripts tell a different story:

MS. TAR VIN:...I believe the reference of **drug money** is **Hush Money**, **drug money** is **Hush Money** which is said repeatedly throughout the 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** [(R5-860)(emphasis added)]

(Video recording played in open court.)

\*11 THE COURT: All right. The objection is overruled. I think there's sufficient relevance in the video associating the **Hush Money Entertainment operation with drug money and with the Defendant** to outweigh any potential prejudice that the video might otherwise cause.

(R5-861)(emphasis added).

It is clear from the transcripts that the proffer of why the video was being offered (for the statements that “drug money is Hush Money”) and the District Court’s reason for admitting it (as relevant to associate “Hush Money...with drug money”) was for the truth of the matter asserted therein. In fact, the laundry list of reasons the Government uses in its brief to justify the admission of the music video can be found nowhere in the trial record.

Additionally, the Government contends that the music video’s admission was not unduly prejudicial since “Gamory held himself out to be a legitimate businessman” Gov.’s Br. at 37, and since it was admitted to corroborate the testimony of agents and witnesses “who bought, sold, and delivered narcotics on Gamory’s behalf.” Id. However, the video was admitted in the Government’s case in chief. Thus, Appellant had not yet presented any evidence of being a legitimate businessman--making the Government’s position incredible and unsupported in the record at the time the video was admitted. The Government further reasoned that the video was not unduly prejudicial because defense counsel suggested in his opening statement that the content of the video “would exonerate [Appellant].” *Id.* at 38.

\*12 The record is devoid of any suggestion by defense counsel that the contents of the music video or of any video would exonerate Appellant. The truth is that the music video was literally offered for the truth of the matter asserted therein--that drug money is Hush Money--an unadulterated, unconstitutional, hearsay offer of guilt. Indeed, the prosecutor’s closing statement sums this fact up:

MS. TAR VIN: I think the best way to sort of sum up this part of my closing is to remember the defense, number one, is going to try to distract you from the truth... And number three - and I don’t think I could say it any better - **it’s nothing but drug money and hush money**, and the Government believes that it has met its burden of proof and shown that the Defendant is guilty as charged. [(R6-981).]

... And one of the things we don’t agree on is that video. But **let me assure you the meaning of that video...** The Government has spent the last six days doing its job, putting up its case and proving to you beyond a reasonable doubt that **the Defendant is guilty. And with that let me tell you my spin of the video.** You know, it’s really - they were out there saying **Hush - drug**

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**money** or whatever, you know, with this beat going on. And the response was, **No, don't say it's drug money, just call it - shh, let it be Hush Money.** Thank you.

(R6-1012)(emphasis added).

Even in light of the Government's case, (which did not go uncontested, R6-886 to 952) the purpose for the music video's admission--that drug money is Hush Money, and the lack of limiting instructions was fatal, requiring reversal.

### \*13 ISSUE III GOVERNMENT'S REASONS FOR JURY STRIKES DID FAIL THE *BATSON* TEST.

Appellant argued that the Government failed to set forth a race neutral reason for its strike of six jurors 13, 18, 20, 25, 27 and 29, but in particular gave reasons for the strikes of jurors 18 and 29 that, standing alone, requires reversal. (App.'s Br. at 40). The Government countered that Appellant failed to "establish a prima facie *Batson* violation." Gov.'s Br. at 40. However, since the Government gave an explanation at trial and the District Court has already ruled, see R1-6 to 8, the Government's position "is no longer relevant." *Hernandez v. New York*, 500 U.S. 352, 358 (1991)(quoting *United States Postal Service Bd. Of Gofs v. Aikens*, 460 U.S. 711, 715 (1983)).

Thus, the only question for this Court to decide is whether the Government offered a race neutral explanation for its peremptory challenge. Indeed, the exclusion of even one juror for prohibited reasons invalidates the entire jury-selection process, so that a District Court's erroneous denial of a *Batson* challenge always requires a new trial. *Hernandez v. New York*, 500 U.S. 352, 359 (1991)(striking even a single juror for a discriminatory purpose is unconstitutional); e.g., *J.E.B. v. Alabama*, 511 U.S. 127, 142 n. 13 (1994)(a Batson violation can be based on the improper challenge of even one juror); *United States v. Vasquez-Lopez*, 22 F.3d 900, 902 (9th Cir. 1994)(“the constitution forbids the \*14 strike of even a single prospective juror for a discriminatory purpose”); *Jones v. Ryan*, 987 F.2d 960, 972 (3rd Cir. 1993) (holding that “the exclusion of even a single venire person on the basis of race is a violation of the Equal Protection Clause.”).

Thus, if only one impermissible strike is needed, Juror 29 is the poster child for reversal under *Batson*. That juror was never spoken to but was struck because the juror was “from the Virgin Islands,” <sup>7</sup> R1-7, Appellant’s “father is from the Virgin Islands,” *Id.*, and because “the Virgin Islands seems to have some liberal drug views.” *Id.*

The Government was prohibited by constitutional law from striking juror 29 because that juror was from the Virgin Islands--a representation of his ethnicity and national origin. *United States v. Martinez-Salazar*, 528 U.S. 304, 314-15 (2000)(the Equal Protection Clause Prohibits the exercise of peremptory challenges on the basis of gender, **ethnic origin**, or race); and see generally The Civil Rights Act of 1964 (prohibits the government and public agencies and facilities from discriminating based on national origin). While the Government argues that a white juror was struck because of her liberal views based on living in France, such example is of no force and effect. *Powers v. Ohio*, 499 U.S. 400, 415 (1991)(the defendant need not be from the same group of the excused potential juror). \*15 Moreover, the Government's position that the reason for its strike was “genuine and...race-neutral”, Gov.'s Br. at 44, is contradicted by settled law. *Martinez-Salazar*, 528 U.S. at 314-15. Indeed, striking a juror based on **ethnicity** or **national origin** violates the principles of *Batson* and requires reversal. See *Watson v. Ricks*, 05 Civ. 7288, 2008 WL 490610 (SDNY Feb. 22, 2008) and cases cited therein.

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Even in the absence of clear discrimination, the Government's additional reason that juror 29 came from a Territory with liberal drug views, is not only fatally vague but is akin to a view that the juror is "favorable to acquit." This Court has already condemned such a reason as failing to satisfy the *Batson* test and requiring reversal.  [Bui v. Haley](#), 321 F.3d 1304, 1316 (11th Cir. 2003). See also  [United States v. Horsley](#), 864 F.2d 1543, 1544 (11th Cir. 1989) (explanations based on mere feelings, intuition or that are vague fails the *Batson* test);  [Barfield v. Orange County](#), 911 F.2d 644, 648 (11th Cir. 1990) (feelings about potential jurors are not adequate race-neutral explanations unless supported by facts that are subject to observation and proof); and  [United States v. Chalan](#), 812 F.2d 1302, 1312, 1314 (10th Cir. 1987) (striking a juror "based upon his background and other things in his questionnaire" fails the *Batson* test as inadequate).

Finally, the Government's attempt to distinguish *Bui* fails. This Court's analysis and holding in *Bui* was based on the reasons given by the prosecutor who \*16 actually tried that case. Id. Thus, since it is the trial prosecutor whose reasoning is at issue here, *Bui* is not dissimilar.

Accordingly, Appellant's conviction should be reversed.

**ISSUE IV THE ENACTMENT OF 21 USC § 846, WITHOUT REQUIRING PROOF OF AN OVERT ACT IS AN UNCONSTITUTIONAL EXERCISE OF CONGRESSIONAL POWER UNDER THE COMMERCE CLAUSE.**

Appellant argued that Congress's commerce clause powers did not give it the constitutional authority to enact [Section 846](#)'s conspiracy. (App.'s Br. at 42-44). Appellant reasoned that because [21 U.S.C. § 846](#) criminalizes only the agreement (or meeting of the minds) between two or more people, see  [United States v. Shabani](#), 513 U.S. 10, 16 (1994), that mental meeting, without more, does not move beyond the confines of the parties' minds. Therefore, it is impossible for an agreement, standing alone, to have the kind of effect on interstate commerce that would give congress the power to criminalize it.<sup>8</sup>

The Government countered that [United States v. Lopez](#), 459 F.2d 949 (5th Cir. 1972) "rejected the argument that the regulation of intrastate commerce drug activities exceeds the reach of the federal power." (Gov.'s Br. at 45-46).

\*17 First, Appellant's argument is not about "intrastate commerce," it is about "interstate commerce." Second, *Lopez* had absolutely nothing to do with whether the regulation of "intrastate commerce" exceeded the reach of Congress. In *Lopez* the Defendant contended that [Section 846](#) was "invalid because it includes no provision for an independent inquiry in each case regarding the effect on interstate commerce of the particular activity involved." *Id.* at 951-52. The discussion in *Lopez* regarding "intrastate commerce" was mere dicta, having very little, if no bearing on that Court's conclusion that the commerce clause did not require that "the activity in controlled substances be shown to have an effect on interstate commerce" by special findings of Congress before such activity could be criminalized. See *Id* at 953.

In the case at bar, Appellant's argument is distinct--that Congress has no power at all under the commerce clause to criminalize solely the actus reas of conspiracy (i.e., the agreement itself), regardless whether they have made commerce clause findings. Further, the Government seems to believe that *Shabani* represents binding precedence against Appellant's position. A simple reading of *Shabani*, however, reveals otherwise.

Indeed, *Shabani* is not a case dealing with congressional power under the commerce clause at all but whether an overt act is an essential element of a [Section 846](#) conspiracy. *Id*. Thus, the *Shabani* Court did not have before it and, therefore, \*18 did not decide whether Congress had the power under the commerce clause to enact such a law.

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Accordingly, since the Government's opposition is unsupported by applicable, mandatory authority, [Section 846](#) should be ruled invalid as an enactment that constitutes an unconstitutional exercise of congressional power under the commerce clause.

**ISSUE V THE DISTRICT COURT DID CONSTRUCTIVELY AMENDED THE INDICTMENT BY  
BROADENING THE BASES UPON WHICH DEFENDANT COULD BE FOUND GUILTY OF CONSPIRACY.**

Appellant argued that the District Court constructively amended the indictment to include uncharged crimes under [Title 21 U.S.C. § 841](#) that allowed the jury to convict Appellant on the conspiracy charge based on a finding that Appellant was guilty on those uncharged crimes. (App.'s Br. at 44-47).

The Government responded that “[t]he district court did not constructively amend the indictment,” (Gov.'s Br. at 47), cited the law governing amendments to the indictment, recited the conspiracy statute as well as the indictment itself but never explained why there was no constructive amendment to the indictment in this case, except to explain that the jury followed the Court's instructions and didn't appear to be confused. (Gov. Br. at 48-50). The Government then argues \*19 that “[t]rial counsel for Gamory failed to make any objection,” id at 49, label's Appellant's position as a “misperceived discrepancy,” id, and then concludes that the “issue is reviewed for plain error.” Id (citing [United States v. Andrews](#), 850 F.2d 1557, 1559 (11th Cir. 1988)).

Clearly, the Government has ignored this Court's precedence that “the rule in the Eleventh Circuit is that a jury instruction which results in the constructive amendment of a grand jury indictment is reversible error per se,” [United States v. Peel](#) 837 F.2d 975, 979 (11 Cir. 1988), even though “Appellant did not object to the above instruction at trial.” Id at 976.

Thus, this Court's task is not to search the record for jury confusion or to determine whether the jury followed the Court's instruction, “[T]he first task here must be to ascertain whether in fact the district court's jury instructions constructively amended count[I]...of the indictment.” Id With that being said, let's go to the transcripts. After charging conspiracy, the Court stated:

THE COURT:...Ladies and Gentlemen, [Title 21, United States Code, Section 841\(A\)\(1\) \[\(sic\)\]](#), 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 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.

(R6-1021 to 1022).

\*20 Explicitly, the Court not only instructed the jury that Appellant could be found guilty of the [Section 841](#) offense but also that Appellant was charged with a [Section 841](#) offense. These instructions were transcribed and given to the jury to take with them as a guide during their deliberations. (R6-1013). Clearly, Appellant was only charged with a [Section 846](#) offense--the same offense that was listed in the verdict sheet. However, the Government offered evidence against Appellant of [Section 841](#) offenses during trial. Thus, the instructions may have mistakenly but erroneously allowed a finding of guilt on the uncharged [Section 841](#) offense as grounds for a finding of guilt on the [Section 846](#) offense.

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The Government's position that it was "a proper instruction," Gov. Br. at 50, to charge the jury that Appellant was charged with and could be found guilty of a [Section 841](#) offense, defies this Court's settled precedence that "[a] constructive amendment to the indictment occurs where the jury instructions 'so modif[y] the elements of the offense charged that the defendant may have been convicted on a ground not alleged by the indictment.'" [Peel](#), 837 F.2d at 979, quoting [United States v. Lignarolo](#), 770 F.2d 971, 981 il 15 (11 Cir. 1995); see also [United States v. Poarch](#), 878 F.2d 1355, 1358 (11th Cir. 1989).

The Government further reasons that "[t]he district court explained [Section 841](#) in the jury charge because it was the 'offense defined in this subchapter' contemplated by [Section 846](#), the statute Gamory was accused of violating." (Gov. \*21 Br. at 49-50). Unfortunately, the District Court did not just explained [Section 841](#) in the context of a conspiracy charge but mistakenly gave a [Section 841](#) instruction to the jury designed for a defendant who is actually charged with a [Section 841](#) offense.

This mistake was fatal and requires reversal. [Strrone v. United States](#), 361 U.S. 212, 217 (1960); [United States v. Figueroa](#), 666 F.2d 1375 (11th Cir. 1982); [Peel, supra](#).

**ISSUE VI THE TAX RECORDS OF DEFENDANT AND THAT  
OF HIS FAMILY WAS ERRONEOUS, REQUIRING REVERSAL.**

Appellant argued that the failure of the Court to properly consider the admission of the tax records pursuant to Rule 404(b) and 403 and failure to give the jury limiting instructions on the tax record's consideration require reversal. (App.'s Br. at 48-51).

The Government, however, failed to address Appellant's Rule 404(b) argument. The Government's position is non-responsive. Therefore, Appellant will rely in the argument espoused in his moving brief.<sup>9</sup>

\*22 Appellant's conviction should be reversed accordingly.

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

Appellant argued in his moving brief that the Government failed to prove all of the essential elements of the money laundering charges, specifically Counts 4 and 5.<sup>10</sup> (App.'s Br. at 51-53). In particular, Appellant argued that the Government did not prove " 'that the [Appellant] knew the transaction involved criminally derived property...[and] that the property was, in fact, derived from the distribution of illegal controlled substances.' " (App.'s Br. at 53, quoting R6-1023).

The Government countered that it "presented ample evidence that Gamory earned his money through the drug business." (Gov.'s Br. at 54). The Government then referenced the witnesses that testified regarding Appellant's drug activities, the admission of tax records of Appellant's family and the lack of tax records for appellant as well as Appellant's "lavish life style." *Id.* at 54-55. The Government reasoned that this evidence was enough to satisfy that Appellant knew the transaction involved criminally derived property; and that the property was derived from the distribution of illegal controlled substances. *Id.* The Government never \*23 addressed, however, Appellant's supporting position that he had made significant income from his restaurants and recording studio. The Government also never addressed the fact that its own witness--the only witness involved in the purchase of the cars that are the subject of the disputed money laundering charges and convictions--the salesman, himself, testified that Appellant's income derived from his " 'record label and fish business.' " (App.'s Br. at 53, quoting R4-697).

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The question in the analysis, however, IS NOT whether Appellant made money selling drugs as the government believes. The question IS whether Appellant knew the specific transactions that are the subject of the money laundering charges involved criminally derived property; and whether the property that was the subject of the transactions was derived from the distribution of illegal drugs.

The Government's attempt to utilize its evidence of drug distribution, to counter the lack of evidence supporting the money laundering convictions must fail. Appellant's conviction should be reversed.

**\*24 ISSUE VIII THE DISTRICT COURT'S DENIAL OF APPELLANT'S NEW TRIAL MOTION WAS AN ABUSE OF DISCRETION**

Appellant argued that the District Court's denial of his request for a new trial was an abuse of discretion. (App.'s Br. at 54). The Government countered that Appellant's brief did not raise any errors, Gov.'s Br. at 56, and that no miscarriage of justice had taken place.

Appellant will rely on his argument in his moving brief and requests reversal of his conviction.

**ISSUE IX THE CUMULATIVE EFFECT OF THE ERRORS IN POINTS I THROUGH VIII, INFRA REQUIRES REVERSAL**

Appellant argued that the cumulative effect of the errors espoused in his moving brief required reversal. (App.'s Br. at 55-56). The Government responded that Appellant "has failed to demonstrate that the district court actually erred in any of its rulings." Gov.'s Br. at 57, and that the evidence of "guilt was overwhelming." *Id.*

However, in a cumulative error analysis, the overwhelming evidence doctrine has already been used against individual errors to defeat reversal under the harmless or plain error analysis.  *Duckett v. Mullin*, 306 F.3d 982, 992 (10th Cir. 2002) (quoting  *United States v. Riviera*, 900 F.2d 1462, 1469 (10th Cir. 1990).

**\*25** Thus, cumulative effect analysis is made in light of the evidence and, here, requires reversal.

**ISSUE X APPRENDI V. NEW JERSEY APPLIES TO  21 U.S.C. § 841(b), RENDERING THE COURT'S FACT FINDING IN ORDER TO IMPOSE A SENTENCE OF LIFE WAS UNCONSTITUTIONAL**

Although Appellant was found guilty of a [Section 846](#) offense, he was sentenced pursuant to  [Section 841\(b\)](#). Appellant argued that  [Section 841\(b\)](#)'s three-tier sentencing scheme is subject the United States Supreme Court holding in  *Apprendi v. New Jersey*, 530 U.S. 466 (2000) pursuant to an *Apprendi/Booker*<sup>11</sup> analysis because the mandatory nature of  [Section 841\(b\)](#) implicates the Sixth Amendment. *Booker*, 543 U.S. at 220 (mandatory sentencing schemes that impose binding requirements on judges where the increase of a sentence comes from the finding of additional facts, implicates the Sixth Amendment). (App.'s Br. at 56-58). Appellant, therefore, reasoned that when imposing sentence pursuant to  [Section 841\(b\)](#), "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 at 490. <sup>12</sup> (App.'s Br. at 56).

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After noting that “the relevant statutory maximum is not the maximum sentence a judge may impose after finding additional facts, but the maximum he \*26 may impose without any additional facts,”  *Blakely v. Washington*, 542 U.S. 296, 303-04 (2004), Appellant concluded that the imposition of a sentence upon him that was higher than the statutory mandatory minimum of ten years was contrary to *Apprendi*, *Blakely* and constitutionally impermissible, requiring Appellant's sentence be vacated. (App.'s Br. at 59-60).<sup>13</sup>

Quoting   *U.S. v. Tinoco*, 304 F.3d 1088, 1100 (11th Cir. 2002), the Government countered that “the types of drugs and the minimum quantities necessary to trigger enhanced statutory maximum sentences were both charged in the indictment and presented to the jury.” (Gov.'s Br. at 58). The Government would be correct in its proposition today if *Tinoco*'s definition of “statutory maximum” was still good law. *Tinoco* addressed an *Apprendi* violation as follows:

[T]here is constitutional error under *Apprendi* in a  21 U.S.C. § 841 case only when the sentencing judge's factual finding actually increased the defendant's sentence above the statutory maximum found in  § 841(b)(1)(C)

...

*Id.*

Consequently, the United States Supreme Court overruled the *Tinoco* “statutory maximum” interpretation. In fact, in its frustration with the lack of adherence to *Apprendi* jurisprudence, the Supreme Court stated:

“our precedents make clear...that the ‘statutory maximum’ for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of facts reflected in the jury verdict or admitted by the defendant...in other words, the relevant ‘statutory maximum’ is not the \*27 maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts ‘which the law makes essential to the punishment,’ and the judge exceeds his proper authority.’ *Id.*, at 303 (emphasis in original)(quoting 1 J. Bishop, *Criminal Procedures* §87, p. 55 (2d ed. 1872)).”

 *Cunningham v. California*, 549 U.S. 270, 281 (2007), quoting *Blakely*, *supra*.

In as much as the jury found that the quantity of drugs involved in the charged conspiracy was 5 kilograms of cocaine and 1000 kilograms of marijuana, the District Court could not impose a sentence of Life imprisonment upon Appellant without the finding of additional facts by the preponderance of the evidence.

Therefore, Appellant's sentence of Life must be vacated with instructions to present Appellant's sentencing to a jury for resolution or resentencing Appellant to the statutory maximum sentence for *Apprendi* purposes (mandatory minimum term of 10 years imprisonment).

**\*28 ISSUE XI THE DISTRICT COURT DID DIRECT A VERDICT ON “THE LARGEST AMOUNT” COCAINE AND MARIJUANA AGAINST APPELLANT.**

Appellant argued in his moving brief that the District Court directed a verdict against Appellant on the largest amount of cocaine and marijuana listed on the verdict sheet by both including directions on the verdict sheet to check the largest amount of those drugs and by instructing them to “check the largest amount” of the cocaine and marijuana. (App.'s Br. at 60-61).

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The Government Countered that the District Court was required to present a special verdict form since it sought a term of imprisonment in excess of 20 years pursuant to “the ‘catchall’ provision of [21 U.S.C. § 841\(b\)\(1\)\(C\)](#),” Gov.’s Br. at 59, and that Appellant failed to make an objection.

However, a directed verdict is a poor candidate for affirmation under the plain error rule, [Rose v. Clark, 478 U.S. 570, 578 \(1986\)](#)(it is plain error to direct a verdict against a criminal defendant; prejudice is assumed).

As such, Appellant’s sentence should be vacated with instructions to retry him for purposes of sentencing or to resentence Appellant consistent with the rule of leniency.

**\*29 CONCLUSION**

The Appellant respectfully requests that this Court to review the foregoing Arguments espoused in his moving and reply briefs, 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.

**Footnotes**

- <sup>1</sup> The District Court determined at Vaughn Greene’s suppression hearing that the Lakisha Parker gave consent. (Doc. 132 at 44 n, 23).
- <sup>2</sup> The District Court’s findings of fact and conclusions of law did not have the benefit of the other false statements since they were not revealed until trial.
- <sup>3</sup> The Government infers that the CS is not subject to scrutiny under *Franks* because he was not acting as a Government agent. (Gov.’s Br. at 29-30). However, as cited, well settled law defines the CS’s conduct and relationship with the Government as one of an agent.
- <sup>4</sup> This meeting served as the factual lynchpin supporting probable cause in the search warrant affidavit because it tended to show, not only that Appellant was the same person that the CS referred to as “JB” but also that Appellant was currently and actively involved in drug distribution. The removal of the statements relative to that May 24, 2007 meeting alone would eliminate the probable cause necessary in entering Appellant’s home and cast doubt on the veracity and reliability of the CS’s other statements to Government agents.
- <sup>5</sup> In Countering Appellant’s position that the affiant did not disclose the CS’s basis of knowledge, the Government argues that “the information that the CS provided to agent Larsen about Gamory contained sufficient detail to show that it was based on the CS’s personal knowledge.” (Gov.’s Br. at 32). However, the CS did not provide agent Larcen with any information about Appellant. That information was prepared and disseminated to Larcen by person or persons unknown who purportedly debrief the CS on a previous occasion. Thus, the information she received as the affiant to the warrant affidavit, although detailed in some respects, was hearsay in totality, incapable of providing a basis of knowledge for the CS.
- <sup>6</sup> Tr.: denotes the transcripts of Vaughn Greene’s suppression hearing.
- <sup>7</sup> The fact that Juror 29 was from the Virgin Islands must have come from his questionnaire since that juror was never verbally engaged during voir dire.

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- 8 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). Thus, the Government need not prove the commission of any overt acts in furtherance of the conspiracy,  *Shabani*, 513 U.S. at 16.
- 9 The cases the Government cites supporting the admission of tax records in drug trials are distinguishable. In those cases, the defendants actually filed tax returns and the income in their returns were admitted for the limited purpose of showing the discrepancy between income reported and income made. Here, Appellant never filed tax returns. Thus, the question of how the jury was to consider Appellant's failure to file tax returns was fundamental, especially when such failure is prejudicial and can constitute a crime.
- 10 Appellant was acquitted on the money laundering charges in Counts 4 and 5. In his moving brief, Appellant inadvertently states that Appellant was acquitted “on Counts 2 and 3.” (App.'s Br. at 53).
- 11 *United States v. Booker*, 543 U.S. 200 (2005).
- 12 A prior conviction is exempt from this holding. *Apprendi, supra*.
- 13 It is important to note that Appellant received a Sentence of Life imprisonment.

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