UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 99-366-CR-FAM

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DE#**588**
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99-366 CR-FAM

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 02-10464-EE

United States of America,

Appellee,

- versus -

Nathan Hall,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF FOR THE UNITED STATES

Marcos Daniel Jiménez
United States Attorney
Attorney for Appellee
99 N.E. 4th Street
Miami, Florida 33132-2111
(954) 356-7255 ext. 3600

Anne R. Schultz
Chief, Appellate Division

Kathleen M. Salyer
Assistant United States Attorney

Marc Fagelson
Assistant United States Attorney

Of Counsel

588

United States v. Nathan Hall, Case No. 02-10464-EE

Certificate of Interested Persons

Undersigned counsel for the United States of America hereby certifies that the following is a complete list of persons and entities who have an interest in the outcome of this case:

Amy J. Agnoli

Eric Cohen

Marc Fagelson

Richard Douglas Docobo

Juan Antonio Gonzalez

Nathan Hall

Honorable Paul Huck

Marcos Daniel Jiménez

Hon. Adalberto Jordan

Kenneth T. Lange

Guy A. Lewis

Stephen Howard Rosen

United States v. Nathan Hall, Case No. 02-10464-EE

Certificate of Interested Persons

(Continued)

Kathleen M. Salyer

Anne R. Schultz

Thomas E. Scott

Robert K. Senior

Marc Fagelson
Assistant United States Attorney

Statement Regarding Oral Argument

The United States of America respectfully suggests that the facts and legal arguments are adequately presented in the briefs and record before this Court and that the decisional process would not be significantly aided by oral argument.

Certificate of Type Size

The United States certifies that this brief uses 14-point Times Scalable type.

Table of Contents

Table of Contents

(Continued)

Page:

Table of Contents

(Continued)

Page:

Table of Citations

Table of Citations

(Continued)

Cases: **Page:**

Table of Citations

(Continued)

Table of Citations

(Continued)

Statutes & Other Authorities: **Page:**

United States Sentencing Guidelines: **Page:**

Statement of Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. § 1291.

Statement of the Issues

1. Whether sufficient evidence supported Hall's conviction on Count III of the indictment for interstate transportation of stolen property in violation of 18 U.S.C. §§ 2314 and 2.

2. Whether there was plain error during Suyapa Elmady's testimony if her comments about her guilty pleas did not constitute improper vouching for her credibility.

3. Whether the district court abused its discretion when it refused to allow Hall to cross-examine Suyapa Elmady about her alleged mental breakdown, and whether it refused to allow Hall to cross-examine Harris Sperber about his alleged cocaine addiction.

4. Whether this case should be remanded for a resentencing hearing because the district court committed plain error when it applied the base offense level of the most serious object of the charged conspiracy but did not, because it was not requested to, find beyond a reasonable doubt under USSG § 1B1.2(d) and comment. n.5 (1995 manual) that the multiple objects of the conspiracy had been proven beyond a reasonable doubt.

Statement of the Case

1. Course of Proceedings and Disposition in the Court Below

On May 26, 1999, a federal grand jury returned its initial multi-count

indictment, charging a variety of conspiracy, counterfeiting, interstate transportation of stolen property and money laundering offenses, against numerous individuals, including appellant Nathan Hall, a/k/a "Junior" or "J.R.," Marin Spariosu, a/k/a "Tony Marin," etc., Spariosu's wife Suyapa Elmady, Suyapa's brother Faiz Elmady, and three attorneys, Harris Sperber, Paul Haberman and Jonathan Kranzler (DE 1-3).[1] This indictment would be superseded twice (DE 193, 389). Spariosu, Suyapa Elmady, Sperber, Haberman and Kranzler, as well as several other defendants, would enter guilty pleas to various counts of the superseding indictments (PSI at pp. 2-3). Sperber and Suyapa would eventually testify at Hall's trial.

On July 10, 2001, the second superseding indictment, which is the subject of this appeal, was returned (DE 389). It charged Hall, Haberman, Kranzler and Faiz Elmady: Haberman and Kranzler were charged with conspiracy to conduct money laundering, in violation of 18 U.S.C. §§ 1956(h) (Count I) and interstate transportation of stolen property, in violation of 18 U.S.C. §§ 2314 and 2 (Count IV); Hall and Faiz Elmady were charged under 18 U.S.C. § 371 with conspiracy to: (a) possess counterfeit

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[1] We note for the Court's clarification that at trial the witnesses and the attorneys frequently refer to the various aliases or nicknames of the principals. For example, Marin Spariosu is often identified as "Tony" or "Marin," and Nathan Hall as "Junior," "J.R." or "Nathan." For the sake of clarity and consistency, we will refer to the appellant as Hall and to Marin as Spariosu. To distinguish between the Elmadys, we shall refer to "Suyapa" or "Faiz" as appropriate.

obligations of the United States with the intent to defraud, in violation of 18 U.S.C. § 472; (b) devise a scheme to defraud by false pretenses, and to induce individuals to travel in interstate commerce in the execution of that scheme, in violation of 18 U.S.C. § 2314; and (c) transport stolen property, in violation of 18 U.S.C. § 2314 (DE 389: Count II); [2] Count III charged Hall and Faiz Elmady with interstate transportation of stolen property in violation of 18 U.S.C. § 2314, "[i]n or about May of 1996" (DE 389); and, Hall was charged individually in Count V with interstate transportation of stolen property in violation of 18 U.S.C. § 2314 "[i]n or about July of 1996" (id.).

Both Haberman and Kranzler would plead guilty to Count IV of the indictment prior to trial (PSI at pp. 2-3). Faiz Elmady was never apprehended and the district court categorized him as a fugitive (DE 150).[3] Hall was the lone defendant to proceed to trial, which commenced on October 16, 2001 and concluded on October 30, 2001 (DE 430, 432-35, 440-41, 448-50, 453). The jury found Hall guilty as charged in Counts II, III and V of the indictment (DE 450).

Hall filed several post-trial motions, including a motion for a new trial (DE 451, 456, 461, 464, 471). All of Hall's motions were denied before or at sentencing (DE

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[2] The indictment described at length the "manner and means" of the conspiracy and the overt acts undertaken by the conspirators, including Hall.

[3] Suyapa testified at trial that Faiz became a fugitive in May or June, 1996 (DE 523:80-8).

459, 460, 470).

Hall filed numerous objections to the Presentence Investigation Report (PSI) and he also filed a motion for downward departure based on "aberrant behavior [and] extraordinary family responsibility" (DE 472, 475, 480, 481). At sentencing on January 10, 2002, the district court awarded Hall a three-point downward adjustment in his offense level based on his role in the offense, but it denied Hall's motion for a downward departure and also imposed a two-level upward adjustment for obstruction of justice (DE 537:54-59). Hall was sentenced to 60 months' imprisonment, to be followed by a three-year term of supervised release (DE 484; DE 537:61).

Hall is currently incarcerated pending this appeal.

2. Statement of the Facts

The Background and the Scheme

Nathan Hall had been a friend and associate of Tony Spariosu "for a long time," at least since the early 1990s (DE 522:60-61; DE 523:58-64, 97-104). Spariosu engaged in a variety of ventures - - legal, illegal and otherwise - - throughout the 1990s (e.g., DE 518:23-25;[4] DE 522:57-59; DE 523:58-61, 75-77, 97-

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[4] Following convention, we shall cite the transcripts in ascending order, e.g., DE 518 will be followed by DE 522, etc. But the Court should note that the numbering of the transcripts does not correspond to their actual chronological order, e.g., DE 518 was a session on October 17, 2001, whereas DE 530 was a session on (continued...)

104; DE 532:117-30, 142-50). Suyapa, who testified at trial, was aware of and involved in many of her husband's illegal schemes (DE 522:65; DE 523:8).[5] Likewise, Spariosu "always told everything to Nathan [Hall]," "[b]ecause they had a very close [relationship]" (DE 523:11). Hall, who frequently lived at Spariosu's house, usually acted under the direction and control of Spariosu in the execution of his various ventures (e.g., DE 523:12-13, 58-61, 63-64, 75-77, 97-104; DE 531:157-66; GX 66, 67). Hall left military service in the mid-1990s because he hoped to make at least $1 million working with Spariosu (DE 532:150-51).

In the latter part of 1995, Spariosu told Suyapa that he was involved in a plan to launder $25 million in drug proceeds for a Canadian drug trafficker, by exchanging the trafficker's illicit proceeds for gold or diamonds (DE 522:59-62, DE 523:82-83). Spariosu anticipated earning $5 million for his laundering activities (id.). Spariosu, acting as a broker, arranged for two groups - - attorneys Paul Haberman and Jonathan Kranzler in New York, and attorney Harris Sperber and his client George Vega in Miami - - to be involved in the transfer of gold coins for drug proceeds (DE 522:61-63;

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[4] (...continued)
October 16th.

[5] Suyapa Elmady testified with specific respect to the exchange of counterfeit currency for gold coins that is at the heart of this appeal, that "[a]ll of us [Spariosu and his associates] knew what was happening so there was not any secrets" (DE 523:8).

DE 518:24-27, 54-56). Sperber had represented Spariosu on a variety of matters beginning in the early 1990s, and Vega was the owner of Apollo Rare Coins, in southern Miami-Dade County (DE 518:24-27). The New York attorneys had likewise been connected with Spariosu for several years. Sperber had first met Hall at Spariosu's house in late 1994 or early 1995, shortly before Hall left the military (DE 518:28-32; DE 531:68-69).

The Miami group (Sperber and Vega) was to receive approximately $3 million in drug proceeds for slightly over $1.25 million in Krugerrand or other gold coins (DE 522:62-63; DE 518:54-60). Haberman and Kranzler originally planned to exchange $3 million in diamonds or gold coins for $5 million in drug proceeds (DE 522:63-65).

In late 1995 and early 1996, Spariosu realized that he would not be able to secure the Canadian drug trafficker's proceeds (DE 518:57-59; DE 522:65-66; DE 523:82-83). But since he already had the two groups ready to deal, Spariosu decided to counterfeit $25 million in currency in order to fraudulently obtain their valuable gold coins (DE 518:58-59; DE 522:65-66; DE 523:82-84). Spariosu's trusted assistant, Debbie Piedra, was given the task of researching and organizing the counterfeiting operation (DE 522:65-67; DE 523:83-85). Another Spariosu associate, Jon Tamas, was assigned to handle the cutting and the packaging of the phony currency (DE 522:67; DE 523:82-86). Hall lived in Virginia when the counterfeiting scheme was hatched, and was still

in the Army as far as Suyapa knew (DE 522:67-68). Spariosu made Hall responsible for obtaining the paper needed to produce the counterfeit currency (DE 522:68-69; DE 523:9-11, 91-92).

Spariosu and his cohorts rented a warehouse to print and store the currency (DE 522:69-70; DE 523:82-86). Hall encountered some difficulties in obtaining the paper, which delayed the exchange with both the New York and the Miami groups (DE 522:70-71; DE 523:11, 91-93). Nonetheless, in the spring of 1996, Spariosu and his associates had produced $25 million in phony bills (DE 522:71-74; GX 7). But Suyapa noticed a flaw in the way the stacks of bills had been cut (DE 522:72). Still, when Hall saw the counterfeit currency "he smiled" (DE 523:11-14).

The Sperber/Vega Rip Off

In the spring of 1996, Sperber was shown some of the money, which he thought was the originally-described proceeds of illicit activity, at the warehouse (DE 518:62-65; DE 522:74-75; DE 531:77-78; GX 6, 7). After Sperber was shown the currency, he and Vega finalized their deal with Spariosu: they would exchange $1.25 million in gold coins for $3 million of the supposed drug proceeds (DE 518:60-65; DE 531:70-81). In early May, 1996, Vega gave Sperber the gold coins (DE 518:61, 66-68).

In an elaborate ruse concocted by Spariosu, he told Sperber that the drug dealer wanted to conduct the transaction in Broward County (DE 518:67). On or about May

11, 1996, Sperber and Spariosu transported the gold coins to a hotel in Broward county in Sperber's car (DE 518:61, 67-68). An Italian-speaking man met them there, and Spariosu told Sperber that the man wanted to conduct the transaction without Sperber present; Spariosu assured Sperber that this method was trustworthy (DE 518:67-69; DE 531:81-82). Spariosu and the man drove away in Sperber's car with the gold coins (DE 518:68-69). The coins were delivered to Suyapa at an area shopping mall (DE 522:75-77; DE 523:82-87). Spariosu returned 45 minutes later with a suitcase full of currency that Sperber thought was drug proceeds but was actually counterfeit bills (DE 518:69-70, 72).

Sperber drove to Miami Beach to stash the currency in his mother's house, and thereafter he took Spariosu home (DE 518:70-71). Later that day, Vega and Sperber inspected the currency (DE 518:71-72). Vega tested some of the bills with a special pen used to identify counterfeit currency (DE 518:71-72). The first few bills in the stack selected by Vega were good, but then he became "white as a sheet" and told Sperber that the bills were "no good" (DE 518:72). Sperber was simultaneously incredulous and fearful that Vega was going to "have a heart attack" (DE 518:73). Sperber immediately contacted Spariosu, who was able to convince Sperber that if something was amiss with the currency it was not connected to anything Spariosu had done (DE 518:73-74).

From that point onward, Spariosu "never acknowledged that he had any part in

it. His attitude and demeanor was that somebody had done this to him and . . . he was going to get to the bottom of it and straighten out the situation" (DE 531:4-5). Spariosu repeatedly insisted that "he had no knowledge" of the rip off (DE 531:88-89). Sperber believed Spariosu because "he wanted to believe" his friend and client had not deceived him (DE 531:88-89). By never acknowledging his role in the rip off, Spariosu was able to maintain a working relationship with Sperber (DE 531:88-102). This would eventually work to Spariosu's advantage in his dealings with the New York attorneys.

Sperber saw Hall frequently at Spariosu's house in the weeks following the rip off (DE 531:4-6). Sperber and Hall embarked on a business venture in which Hall gave Sperber $25,000 in cash in exchange for a guaranteed monthly rate of return (DE 531:5-11, 109-10). Sperber found it "very odd" that Hall, who had never before engaged in any monetary transactions with him, had $25,000 in cash in a paper bag only a "couple of weeks" after the rip off (DE 531:9-10). Nevertheless, Sperber testified that he dutifully paid Hall the return on his investment, and when Hall was out of town Sperber would bring the payment to Spariosu's house (DE 531:10-12). But a wiretapped conversation between Hall and Spariosu in August, 1997, after the events at issue herein but before Hall was indicted, revealed that the $25,000 deal remained a sore point between Hall and Sperber (DE 531:151-66;GX 66, 67).

Spariosu retained the gold coins he had duplicitously obtained from Sperber for

a few days (DE 523:4). Spariosu decided that he should hide the coins, so he took them to a friend in Miami Beach, who held them for approximately two weeks (DE 523:4-5). Spariosu tried to sell the $1.25 million of coins in Miami, but was unable to do so "because everybody in the coins place[s] knew about the rip off" (DE 523:5-6). Spariosu arranged for Hall to rent a car so they could take the coins to New York City, through Virginia, to attempt to sell them in a "bigger market" (DE 523:6-9).

In late May, 1996, Spariosu and Hall went first to Virginia, where they sold some of the gold coins to Douglas Parent, a wealthy investor from Miami-Dade County (DE 522:8-10; DE 523:14-15).[6] Spariosu told Parent and his attorney Michael Cease that they had to travel to Virginia to inspect and pick up the coins if they wished to complete the transaction (DE 522:12-13). Parent and Cease negotiated the bulk purchase of Kruggerand and "Panda" gold coins from Spariosu at a plausible, favorable discount from market prices (DE 522:9-12). Parent and Cease flew to Virginia on May 31, 1996 (FE 522:13-15; GX 25, 28). When they arrived at their hotel, they received a call from Spariosu, who told them that he could not be present because he was in New York City, but that "J.R." [Hall] would be over with the coins (DE 522:14-15). Parent did not know Hall, but Cease did (DE 522:15).

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[6] Parent, who was a bona fide purchaser for value, testified at trial (DE 522:8-24).

Hall eventually arrived with the coins, and Parent inspected them in Hall's presence and found them to be satisfactory (DE 522:15-16; GX 30, 31). Parent and Cease flew back to Miami the next day (GX 28). On June 3, 1996, Parent drafted, and Cease delivered to Spariosu, a cashier's check in the amount of $282,535, drawn on Parent's account at Bank Atlantic, and payable to Faiz Elmady (DE 518:3-8; DE 522:16-18; DE 523:17-20; GX 26B, 29, 54A). Spariosu had identified Faiz Elmady to Parent as the actual seller (id.). On June 4, 1996, this check, and cash in the amount of $255,000, were deposited into an account maintained by Faiz Elmady at the International Bank of Miami (DE 518:4-8; DE 51A-E).

Hall went to New York and met with Spariosu (DE 523:14-16). They sold some more of the coins together, and Spariosu returned to Florida, leaving Hall up north to continue selling the coins (DE 523:15-16). Spariosu had $500,000 in cash when he returned to Miami, and he told Suyapa that he had already paid Hall $25,000 for his work (DE 523:16-17). Part of the $500,000 was used to pay Debbie Piedras, Jon Tamas and other cohorts for their work on the counterfeiting scheme (DE 523:17-19). In mid-June, 1996, additional proceeds from the sale of the Sperber/Vega coins, a total of $185,000 in cash, was deposited into Suyapa Elmady's account at the International Bank of Miami (DE 518:4-8; GX 55A-E).

The Haberman/Kranzler Rip Off

During June and early July of 1996, Sperber began assisting Spariosu in the ostensible money laundering transaction pending with the New York group (Haberman and Kranzler) (DE 531:11-13, 101-02). Haberman and Kranzler were unaware that Sperber and Vega had been ripped off, and they had continued negotiating with Spariosu for a proposed money laundering exchange of drug proceeds for gold coins (DE 531:11-13). Sperber's role was to assuage any concerns that Haberman and Kranzler had, and to assure them that his transaction with Spariosu had ended in a satisfactory manner (DE 531:13-14, 101-05).

Haberman and Kranzler agreed to come to Miami with approximately $400,000 in gold coins (DE 531:14-16). On July 11, 1996, Haberman arranged for the Republic National Bank of New York to have $410,000 in Kruggerands ready to be picked up on July 12, 1996, by his partner Jonathan Kranzler (DE 518:10-11). Spariosu, Sperber and Hall met several times to prepare for the arrival of the New York lawyers (DE 531:15-16). Haberman and Kranzler had met Hall, and had dealt with him on various Spariosu projects, several times in the past (DE 531:103; DE 532:122-25). Haberman and Kranzler arrived in Miami the evening of July 12, 1996 (DE 518:12-13; DE 531:16-17; GX 51). Spariosu told Sperber that he and Hall had gone to Haberman's and Kranzler's room at the Fontainebleau Hotel on Miami Beach "trying to talk them into giving him the money, and telling them that he would finish the deal and then see them later in the

afternoon" (DE 531:17). But Haberman and Kranzler balked at this proposal (DE 531:17-19). After a brief dispute, Spariosu and Hall left the hotel room, and Hall suggested that he would "just take the money from them" (DE 531:18, 21).

Also on July 12, 1996, Hall had received and cashed a $34,000 check payable to him and drawn on Suyapa's account at the International Bank of Miami, for his work on the gold coin/counterfeiting scheme (DE 518:12-13; DE 523:26-27; GX 11). Suyapa was in Jordan, and Spariosu would later tell her that he had given the check to Hall for his participation in the illegal project (DE 523:25-26). Hall used a military identification card to cash the $34,000 check; during Hall's testimony in the defense case, the government established that this i.d. card was phony (DE 522:34-38).[7] On June 12th and 13th, Spariosu met with Hall and Sperber. Spariosu showed Sperber a copy of a receipt that Haberman had given him, showing that Haberman and Kranzler had purchased $409,000 worth of gold coins shortly before they came to Miami Beach (DE 531:34-35; GX 10). In the presence of Hall and Sperber, Spariosu spoke with Haberman and Kranzler several times on his speaker phone (DE 531:18-20). Telephone records from the Fontainebleau Hotel showed a large volume of telephone calls, approximately 24, from Kranzler's room to Spariosu's telephone number on July 13, 1996 (DE 518:14-15; GX 51). Spariosu's verbal efforts to get Haberman and Kranzler

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[7] See infra at 26-27, 29.

to give him the coins without simultaneously being given the currency were unsuccessful (DE 531:19-20). Spariosu relented, and he agreed to allow one of the New York lawyers to accompany Hall to a meeting with the supposed drug trafficker whose funds they thought they were laundering (DE 531:19-20).

After this telephone conversation concluded, Hall told Spariosu and Sperber that he was just going to do "[w]hatever he had to do" to "get the coins" (DE 531:21). Sperber understood that Haberman and Kranzler were to be divested of their gold coins without receiving any currency, be it proceeds *or* counterfeit (DE 531:101-02). Hall and Spariosu told Sperber that Hall was going to consummate the rip off of the New York lawyers sometime after 6:30 p.m., and that Spariosu was going to leave the country around the same time (DE 531:22-23).

On July 13, 1996 (DE 518:13; GX 53), Spariosu "got on a plane and went to Europe because he didn't want to be around when what was going to happen was going to happen" (DE 531:31, 102). Hall met Haberman and Kranzler at the Fontainebleau Hotel that evening (DE 531:28-30). Both attorneys wanted to get into Hall's car, but Hall insisted that only one could accompany him to a supposed meeting with the source of the proceeds to be laundered (DE 531:29-30). Haberman got into Hall's car, carrying a suitcase (DE 531:30). On their way to I-95, Haberman told Hall to return to the hotel because he had forgotten the key to the suitcase (DE 531:31). But Haberman was

unable to use the cellular telephone he was carrying to call Kranzler, so when they returned to the hotel Haberman got out of the car to use a lobby telephone (DE 531:31-32). As soon as Haberman was out of sight, Hall took off with the suitcase in his possession (DE 531:32).[8]

Early the next morning, at approximately 1:00 a.m., Hall called Sperber (DE 531:23-25). Hall asked Sperber to meet him immediately in a residential neighborhood near a gas station (DE 531:23-24). Sperber was unfamiliar with the area, but he drove around for several minutes until "all of a sudden, here comes Nathan [Hall] out of the bushes" (DE 531:25-26). Hall jumped into the front seat of Hall's car with a "bowling bag" full of gold coins (DE 531:26). Hall, speaking with a great sense of urgency, implored Sperber to get him to Spariosu's house so he could get his clothes and figure out where to spend the night (DE 531:26-27). When they arrived at Spariosu's house, Hall got out of the car and jumped over the fence surrounding the house (DE 531:27). Hall reappeared at Sperber's car several minutes later, carrying several suitcases (DE 531:27-28). Hall asked Sperber to suggest a place where he could spend the night, and Sperber took him to a Holiday Inn "right off of [I-]95" (DE 531:28-29).

At the hotel, Hall displayed the contents of a bag containing from approximately

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[8] Haberman and Kranzler would check out of the Fontainebleau on July 14, 1996 (DE 518:12; GX 51).

$225,000 to $235,000 in gold coins (DE 531:34-35). Sperber asked Hall where the balance of the $409,000 in gold coins was located (DE 531:33-34). Hall told Sperber that the coins he was carrying were their share of the heist, and that he had already left the balance, representing Spariosu's share, with some mutual friends (DE 531:33-36). Hall told Sperber that his share would be $60,000 (DE 531:35-36). But Hall also told Sperber that he would be traveling to Virginia the next day, so he asked Sperber to hold his share of the coins and to advance him $10,000 for expenses (DE 531:36-37). Sperber received approximately $175,000 worth of gold coins (DE 531:104).

Sperber stashed the gold coins at his wife's house (DE 531:36-38). He returned to the hotel to give Hall $10,000 (DE 531:36). Hall took the money and told Sperber he would take a taxi to the airport for a flight to Virginia (DE 531:37-38). A "couple of months" after the rip off, Hall retrieved his share of the gold coins from Sperber (DE 531:44). Hall told Sperber that he thought he "could get a better price for them up North" (DE 531:44). Sperber eventually used his share of the gold coins from the Haberman/Kranzler rip off for his own benefit (DE 531:41). Sperber also eventually got into a dispute with Hall regarding the $25,000 that Hall had earlier invested with him (DE 531:41-43).

In late July, 1996, Spariosu joined Suyapa in Jordan; he told Suyapa that Hall had simply stolen the gold coins from Haberman without even exchanging the counterfeit

currency (DE 523:23-24). Spariosu also told Suyapa that the rip off had caused a great deal of trouble for Haberman and Kranzler (DE 523:24-25). In September, 1996, Spariosu contacted Michael Cease to inquire whether Douglas Parent wanted to buy some more gold coins (DE 522:18). Parent and Cease negotiated another purchase, and they went directly to Spariosu's house in southwest Miami-Dade County to inspect the coins (DE 522:19). On September 3, 1996, Cease had two cashiers checks drafted, one payable to Faiz Elmady in the amount of $100,000 and one payable to Suyapa Elmady in the amount of $91,260 (DE518:8; DE 522:20-21; GX 11A, C, 21A-B, 54A-D, 55A-E). These checks were cashed and deposited at the Elmadys's respective accounts at the International Bank of Miami (DE 518:7-8; GX 55A-E).

In the late summer of 1997, a wiretap was placed on Spariosu's home and cellular telephones as a result of a joint federal/state investigation into his various activities (DE 531:148-53; GX 65). A compact disk containing two fairly lengthy telephone conversations between Spariosu and Hall (totaling one hour and thirty-seven minutes) on August 31, 1997, was introduced into evidence (GX 65), as were the transcripts of the calls (DE 531:152-56: GX 66, 67). Portions of the conversations were played for the jury (DE 531:155-62, 165-66).

Hall related to Spariosu that he was unhappy because Harris Sperber had never paid off the balance of Hall's $25,000 investment (GX 66:2-14). At another point, Hall

said that he was unhappy because he had never made the millions with Spariosu as he had expected: "I was supposed to get something from you when I first got out of the military and I haven't got shit from you." (GX 66:18-24). In guarded terms, Hall reminded Spariosu about ". . . the job I pulled off for you. Went and got money . . .." (GX 66:29). Hall, who needed money, told Spariosu that "the old stuff you had, I can get rid of it for twenty-five percent" (GX 66:31). Even when Spariosu reminded Hall that "it's bad," Hall said he could "move it" for a reduced percentage (GX 66:31-33).

During the second conversation, Spariosu reminded Hall that "when there's money to be made or there's something around quickly . . . I call you and you know that" (GX 67:22). The government also played portions of a videotape made from a "pole camera" that had been placed outside of Spariosu's house at the same time that the wiretaps had been installed (DE 531:151-52, 166-67). This videotape showed that Spariosu's statements to Hall that his house was being heavily guarded by hired bodyguards were accurate (DE 531:167-72; GX 68).[9]

Defense Case

Hall testified that the first inkling he had that Spariosu might have been involved in criminal activity was in September, 1997, when the DEA had visited him in Virginia

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[9] Some of this material was introduced to blunt Hall's expected testimony, as described in his counsel's opening statement, that at the time of his arrest he had turned his life around and was not associating with Spariosu anymore.

Beach and had unsuccessfully tried to pressure him into infiltrating Spariosu's "organization" (DE 532:44-52). Hall had told the DEA he saw no reason to help them because he was innocent and had served his country in the Army, including a stint at the most-secret of top-secret locations, the "Underground Pentagon" (DE 532:52-59). Hall explained that the "Underground Pentagon" was a complex of underground facilities, housing agencies vital to the nation's survival, stretching from the White House to the Pentagon to Camp David and beyond (DE 532:52-59, 80-94).

Hall was a native Virginian who visited south Florida in June, 1991, when he was eighteen years old (DE 532:59-62). Hall met Spariosu at a gym, and was smitten by his seeming sophistication (DE 532:61-65). Hall became Spariosu's personal trainer as well as his friend (DE 532:61-62). Hall had wanted to join the Navy Seals special operations unit, but at Spariosu's urging he instead enlisted in the Army (DE 532:65). Spariosu disappointed Hall, however, because he did not enlist as Hall's "buddy" (DE 532:65-69). Spariosu "stuck . . . [Hall] in the military" (DE 532:95). Hall did not hear from Spariosu until one year later, when Spariosu attended Hall's graduation from basic training (DE 532:69). Hall was stationed in Korea, where he received several honors (DE 532:79-81). He returned stateside to serve in the Underground Pentagon and where, he testified, he was awarded the "Loyal Order of the Moles" (DE 532:79-94).

Hall's aunt died in the fall of 1994, and he was contacted by Spariosu (DE

532:94-97). Spariosu told Hall that he had married the daughter of Jordan's King Hussein, and he invited Hall to visit south Florida (DE 532:97-98). Hall came to Miami, where he discovered that Spariosu had even more "charisma" and a newfound "GQ" aura of sophistication (DE 532:98-99). Indeed, Spariosu visited an ATM machine with Hall and showed him that his account balance was $497,000 (DE 532:99-100).

Spariosu supposedly described an ambitious venture that he and his wife Suyapa were planning in the Central African Republic ("C.A.R.") (DE 532:105-09). Although Hall believed that he was on a fast pace to advance through the Army, he was intrigued that Spariosu was offering him, a corporal, the chance to be a "military advisor" who would play a key role in "[n]ation building" (DE 532:106-15). Hall expected to make at least $1 million in the venture (DE 532:150). Hall left the military in April, 1995, and became involved in the C.A.R. venture, including undertaking efforts to become a licensed exporter of firearms (DE 532:114-23; DE 533:5).

On cross-examination, however, Hall acknowledged that his application for early discharge from the Army stated that he was seeking discharge for hardship reasons, based on his mother's ill health (DE 533:5-; GX 74A). But Hall insisted he could have cared for his mother while traveling the globe at Spariosu's behest because he expected to make $1 million, and that wealth would have allowed him to enhance his mother's

health care (DE 533:6-9).

Hall learned from Haberman and Kranzler, who were Suyapa's lawyers, that the C.A.R. deal was stalled (DE 532:122-25). Spariosu had Hall travel to London, England, for what Hall was told was a surveillance assignment involving two Arabs who were Suyapa's cousins but who were mucking up the deal (DE 532:123-30). Hall did as ordered, and from London he went to Jordan for a visit, all at Spariosu's expense (DE 532:130, 143-46). By November, 1995, Hall had not received the $1 million he expected from the C.A.R. deal (DE 532:150, 157).

Back in south Florida, Hall met his future wife "C.C." at a nightclub (DE 532:149, 160-61). Spariosu sent Hall on another mission to London in December, 1995 (DE 532:154-57). Hall testified that the C.A.R. deal was unrelated to Spariosu's and Suyapa's separate dealings with Libya's leader Colonel Moammar Gadhafi (DE 532:159). Spariosu continued assuring Hall that big money was in his future (DE 523:158-59, 167-68).

When he was questioned about the specific charges in the indictment, Hall testified that he was totally unaware of any activities connected to the counterfeiting of $25 million of currency in early 1996 (DE 532:159-67). At the time of the Vega/Sperber rip off in May, 1996, Hall contended that he had just recently returned to south Florida after living for awhile with his step-daughter in California (DE

532:167-68). Spariosu asked Hall to drive him to New York City because he wanted to sell some gold coins he had acquired from a friend who had liquidated his coin business (DE 532:167-71). Spariosu told Hall that he had approximately $1 million in gold coins to sell, and that Hall's share for assisting him would be $30,000 (DE 532:170-71). Hall admitted that he drove Spariosu and the gold coins to the northeastern United States, where they first stopped in Virginia, at Hall's mother's house (DE 532:172). Spariosu left one of the two bags of gold coins with Hall's mother, and he and Hall proceeded to New York City (DE 532:172-73). Spariosu's brother Brana sold some of the gold coins in a piecemeal fashion, while Spariosu flew back to Miami and then returned to New York (DE 532:173-75). Upon his return to New York, Spariosu told Hall to go to Virginia because he had arranged for an attorney named Michael Steiz[10] to pick up the coins stashed at Hall's mother's house (id.).

Hall delivered the coins to a hotel (DE 532:175). Hall returned to Miami, where Spariosu gave him $5,000 in cash and then moments thereafter told him that he would give him $30,000 so he could invest some of it with Harris Sperber (DE 532:175-77). Hall testified that Sperber, coincidentally, arrived at Spariosu's house shortly thereafter (DE 532:177-78). Spariosu told Hall that he could trust Sperber, who was one of Spariosu's attorneys (DE 532:177). Hall and Sperber reached an agreement wherein

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[10] Spelled "Cease" elsewhere in the transcripts.

Hall would invest $25,000 which would yield a $500 monthly return from Sperber to Hall (DE 532:177-78). Hall testified that as of the time of the trial, he had not received the proper return of his investment from Sperber (DE 532:178).[11]

Hall acknowledged that he had received a $34,000 check from Suyapa Elmady on July 12, 1996, the day before Haberman and Kranzler were ripped off (DE 532:178-79). He testified that his receipt of this check was strictly for the convenience of Suyapa, because he cashed it and delivered the proceeds to her that same day (FE 532:180-81). Hall contended that although he had met Haberman and Kranzler on several occasions, he had no idea what business they were conducting with Spariosu in July, 1996 (DE 532:180-84). Hall drove Spariosu to the Fontainebleau Hotel, where Haberman and Kranzler had a discussion with Spariosu outside of Hall's earshot (DE 532:184). At the conclusion of the meeting, Spariosu told Hall that he would have to return later that evening to pick up Haberman and Kranzler (DE 532:184-85). Hall returned to the hotel at dusk, and Haberman and Kranzler were both waiting for him in the valet parking area (DE 532:184-85).

According to Hall, Kranzler could not go to Spariosu's house because it was his Sabbath, but Haberman got into Hall's car (DE 532:185). Hall and Haberman drove a

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[11] It would appear from Hall's testimony that he was suggesting that this dispute was the reason that Sperber had testified about Hall's criminal activities.

short distance, but they returned to the Fontainebleau when Haberman said he had forgotten his keys (DE 532:185–86). Haberman got out of Hall's car and said he would return in a "few minutes," but when he did not, Hall left and drove to Spariosu's house (DE 532:186). Hall testified that he was not part of any planned rip off and that he did not even know that there was a bag of gold coins in his car (DE 532:186).

Hall looked for Spariosu but he was not at home and could not be reached on the telephone (DE 532:187). Hall testified that he called Sperber at 1:00 a.m. because he "was always with Tony [Spariosu]" (id.). Sperber asked Hall if anything was in the car, and for the first time, Hall testified, he saw the bag in the car (DE 532:188). Hall explained that he never looked in the bag, and that Sperber had instructed him where to wait to be picked up (DE 532:188-89). Hall stated that he did not receive any money or gold coins from Sperber, and that he had no inkling that Haberman and Kranzler had been ripped off until after his arrest (DE 532:190). Hall believed it was not out of the ordinary for Sperber to take possession of the bag that Haberman had left in the car (DE 532:190).

Hall split his living time thereafter between Virginia and Florida (DE 532:190-91). Hall testified that he got involved in an international emerald deal with Spariosu (DE 532:191-217). According to Hall, the discussions he had with Spariosu that were captured on the wiretap and played for the jury were about the emerald deal and the

C.A.R. deal, not about the counterfeiting or the rip off of the Miami or New York groups (DE 230-35). Likewise, Hall testified that the $17,000 in cash that was seized from his car during a traffic stop in June, 1997, related to the emerald deal (DE 532:214-24). Hall stated that although Spariosu "can literally sell ice cream to Eskimos," he had nothing to do with any of Spariosu's criminal activities (DE 532:200, 236).

On cross-examination Hall disputed Suyapa Elmady's testimony that he had been involved in an effort to sell weapons to Libya (DE 533:9-12). Hall insisted he was an "unknowing" dupe with respect to the July 13, 1996, rip off of Haberman and Kranzler (DE : 533:12-14). He testified that he had no knowledge that Haberman had left a bag in his car containing $1.25 million worth of gold coins (DE 533:14-21). Hall denied that Spariosu, and not Suyapa Elmady, had actually given hin the $34,000 check the day before Haberman and Kranzler were ripped off (DE 533:21-24). Hall was questioned about the military identification card he had introduced into evidence and which he had used to cash the $34,000 check given to him by Suyapa Elmady; he was also questioned about the Currency Transaction Report prepared when he had cashed that check (DE 533:24-41; GX 73 A, B). Hall acknowledged that he had used Spariosu's address as his own when cashing the $34,000 check (DE 533:27-29). Hall insisted that the military i.d. card was not "a fake one" even though it contained false data because it contained

his actual picture and name and because the false information was designed to protect his safety by ensuring that "nobody could trace anything back to me" (DE 533:31-32, 35-36).

Hall conceded, however, that: the card was not created with the Army's permission and was "not an active duty military i.d." (DE 533:32-33); the card contained a false social security number "for the reasons of traveling back and forth, for the safety of my family" (DE 533:29-32, 36-37); the card falsely identified his rank as "CPT" (captain), as opposed to his last actual rank of corporal (DE 533:33-36); the card contained a false date of birth (DE 533:37-38); and Spariosu, who had never been in the armed forces, also had a false military i.d. card, listing him as a major, which had been created by the "same gentleman" who had fabricated Hall's card (DE 533:38-41; GX 76).

Hall testified that he had never cashed other checks for Spariosu, Suyapa or Faiz Elmady, but he conceded that his signature appeared on a $5,000 check for cash, drawn on Faiz's account, which was part of a government exhibit (DE 533:43-44; GX 54B).

When confronted with the wiretap tape, Hall denied that *any* of the subjects he was discussing with Spariosu were of a nefarious nature (DE 533:49-5). He specifically denied that the statements on the tape about "mov[ing]" the "stuff" for a percentage of its value was a reference to the counterfeit currency (DE 533:52-53). Hall endeavored

to explain why, after starting a new life, he was still having suspicious conversations with Spariosu in August, 1997: "As far as putting Tony behind me, Tony himself, but I still felt I lost and gave up my [Army] career and I still wanted what was promised to me. So, yes, that is the reason why I maintained contact with him" (DE 533:58). When Hall was confronted with a Florida driver's license obtained in 1999 and listing Spariosu's address as his address, he explained that this was the "quickest" address he could recall (DE 533:61-62).

Hall's wife Caroline ("CC") testified in his defense (DE 533:95). CC was a stripper at "Lipstik," a bar in Southern Miami-Dade County, when she met Hall in January, 1995 (DE 533:96-99). After one year of an "[o]n again, off [again]" relationship, In January, 1996, they entered into a mutual commitment to marry and move to Virginia to "start a new life" (DE 533: 99-100). In December, 1996, CC and Hall moved to Virginia (DE 533:135-36). CC had independently met Spariosu at Lipsticks (DE 533:100-01). CC believed that Hall told her "everything" about his relationship with Spariosu (DE 533:102-03). CC testified that during 1996 she supported Hall on the money she earned at the club, and that he did not appear to be earning much money (DE 533:105).

CC related that the $17,000 in cash that had been seized from her car in June, 1997, was intended for the purchase of emeralds and had been loaned to Hall and her

(DE 533:106-11, 135-39). Hall had told CC that he had training in the buying and selling of emeralds (DE 533:138-39). CC acknowledged that after the DEA had returned the $17,000, neither she nor Hall had deposited it into any account; they had given the money to the individual who had loaned it to them (DE 533:139-41).

Government's Rebuttal Case

Captain Robert England, a personnel officer attached to the United States Southern Command, reviewed Hall's military file prior to his testimony (DE 533:144-46, 150-51; GX 74). Captain England explained that Hall had been assigned to a position where he had access to personnel records and the creation of military i.d. cards (DE 533:146-48, 151-53). Captain England testified that a serviceman was not allowed to have one i.d. card with accurate information and another with an accurate picture but with an inaccurate i.d. number and rank (DE 533:152-54). England testified that Hall had never been a captain, as was stated on the phony i.d. he had used to cash the $34,000 check; his highest rank had been corporal (DE 533:154).

3. Standards of Review

Sufficiency of the evidence is a question of law subject to de novo review. See United States v. Keller, 916 F.2d 628, 632 (11th Cir. 1990). This Court views the evidence in the light most favorable to the government, with all reasonable inferences and credibility choices made in the government's favor. Id. The evidence need not

exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt. See United States v. Quilca-Carpio, 118 F.3d 719, 720 (11th Cir. 1997).

Absent a contemporaneous objection, a prosecutorial misconduct claim based on improper vouching is reviewed for plain error. See United States v. Newton, 44 F.3d 913, 920 (11th Cir. 1994).

The district court has wide latitude to impose reasonable limitations on cross-examination based upon concerns such as relevancy, and those restrictions are reviewed solely for abuse of discretion. See United States v. Frost, 61 F.3d 1518, 1525 (11th Cir. 1996) (citing United States v. Baptista-Rodriguez, 17 F.3d 1354, 1370-71 (11th Cir. 1994)), *modified in part on other grounds*, 77 F.3d 1319 (11th Cir. 1996); United States v. Diaz, 26 F.3d 1533, 1539 (11th Cir. 1995).

In reviewing the curtailment of cross-examination or the admissibility of extrinsic evidence to attack the credibility of a witness, a reviewing court must determine whether the district court acted within the large measure of discretion accorded a trial judge by Fed. R. Evid. 403 and 608(b). See United States v. Van Dorn, 925 F.2d 1331, 1335 (11th Cir. 1991). The discretion afforded the district judge is especially broad in matters of impeachment. Id.

The district court's application of the law to the facts under the sentencing

guidelines is subject to de novo review. See United States v. Quinn, 123 F.3d 1415, 1424 (11th Cir. 1997).

Summary of the Argument

There was ample proof of Hall's mens rea on Count III. Suyapa Elmady's testimony, the reasonable inferences drawn therefrom, and the adverse inference from Hall's testimony established that he knew the gold coins he was transporting had been stolen or obtained by fraud.

There was no plain error from improper vouching during Suyapa's testimony. Hall attacked Suyapa's credibility during his opening statement. To defuse these attacks, the government was entitled to establish that Suyapa had pleaded guilty.

The district court did not abuse its discretion by precluding Hall from cross-examining Suyapa about her mental health. Despite Hall's assertion of a "rumored" breakdown, the record facts were simply that Suyapa suffered from depression and was taking Prozac. Hall never established that Suyapa's condition would have affected her ability to observe and recall the pertinent events. Suyapa's diagnosis of depression was not so severe as to warrant cross-examination.

Contrary to Hall's brief, the district court did not make a final ruling precluding Hall from cross-examining Harris Sperber about his alleged addiction to cocaine. The source of Hall's allegation was an undocumented interview of Spariosu. The district

court *provisionally* ruled against Hall, but it offered him a reasonable period of time to obtain an affidavit confirming Spariosu's claim, and it agreed to revisit the issue. Hall agreed to this procedure, but does not appear to have taken advantage of it. Regardless, Hall's cross-examination vigorously tested Sperber's credibility.

A re-sentencing hearing is required under United States v. Venske, 296 F.3d 1284, 1292-94 (11th Cir. 2002).

Argument

I. There Was Sufficient Evidence Supporting Hall's Conviction on Count III for the Interstate Transportation of Stolen Property in Violation of 18 U.S.C. §§ 2314 and 2.

Count III of the indictment charged Hall with the interstate transportation from "Florida, to the state of Virginia and elsewhere, stolen goods . . . that is, gold coins, of the value of $5,000 or more, knowing the same to have been stolen," in violation of 18 U.S.C. § 2314 and 2 (DE 389). This substantive charge pertained to the gold coins illicitly procured during the Sperber/Vega rip off and then driven to Virginia (and New York) by Hall and Spariosu, where a large quantity of them were sold to Douglas Parent and other unknown purchasers. Hall argues on appeal that there was insufficient evidence supporting his conviction on Count III of the indictment (Br. at 24-26).

The elements of a violation of 18 U.S.C. § 2314 are: (1) the interstate transportation of; (2) goods, merchandise, wares, money, or securities valued at $5,000

or more; (3) with knowledge that such items have been stolen, converted or taken by fraud. See Dowling v. United States, 473 U.S. 207, 214 (1985); United States v. Turner, 871 F.2d 1574, 1578 (11th Cir. 1989) (approving jury instruction for § 2314 charge equivalent to jury charge in appeal sub judice [DE 452 at p. 12], including principle that proof need not show who stole property, only that defendant knew at time of transportation that it had been stolen or taken by fraud); United States v. Deal, 678 F.2d 1062, 1067 (11th Cir. 1982) (defendant need not have participated in actual theft or fraudulent taking); United States v. McIntosh, 280 F.3d 479, 483 (5th Cir. 2002) (discussing elements of offense).

Hall's specific, narrow appellate argument is that the government failed to prove the third element (knowledge) stated above. His brief states: "[c]oncededly, the record below reflects that Mr. Hall transported the coins that Spariosu had stolen from Sperber and Vega in interstate commerce. It does not, however, indicate that he knew that those coins were illicitly acquired" (Br. at 25). Despite his concession, Hall misperceives the record and the applicable law.

For example, one component of his argument seems to be that the lack of direct evidence of his participation in the Sperber/Vega rip off (as opposed, for instance, to the proof of his hands-on involvement in the Haberman/Kranzler rip off) supports his appellate argument and demonstrates the absence of proof of mens rea (Br. at 25-26).

But as noted above, proof of participation in the theft or fraudulent taking is not an element of a § 2314 violation, e.g., Turner, 871 F.2d at 1578, Deal, 678 F.2d at 1067, and Hall should not be allowed to graft the need for such proof onto the knowledge element. Hall's argument is the functional equivalent of a mere presence argument, i.e., he admits driving the coins to Virginia, and being present when Parent inspected them for purchase, but he claims his guilty knowledge was not proved.

Hall's brief cites no decisions in support of his argument, and he clearly fails to properly evaluate the government's evidence under the applicable standard of review.

> Sufficiency of the evidence is a question of law that we review *de novo*. *United States v. Keller*, 916 F.2d 628, 632 (11th Cir. 1990). We view "the evidence in the light most favorable to the jury's verdict, and accept reasonable inferences and credibility choices by the fact-finder." *United States v. Mattos*, 74 F.3d 1197, 1199 (11th Cir.), *cert. denied*, 517 U.S. 1215, 116 S.Ct. 1839, 134 L.Ed.2d 942 (1996). We uphold the conviction if a reasonable trier of fact could find that the evidence establishes the defendant's guilt beyond a reasonable doubt. *Id.* The evidence need not, however, "exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt." *Id.* (internal quotation marks omitted).

United States v. Quilca-Carpio, 118 F.3d 719, 720 (11th Cir. 1997).

The government's proof of Hall's guilty knowledge was premised on a variety

of evidence, reasonable inferences to be drawn from that evidence and the devastating effects of Hall's own testimony. Before addressing these factors, we note this universal axiom, overlooked by Hall: "[b]ecause no one has a window to a man's mind, knowledge must often be proved by indirect evidence." United States v. Richards, 638 F.2d 765, 768-69 (5th Cir. 1981); see also United States v. Macko, 994 F.2d 1526, 1533 (11th Cir. 1993) ("circumstantial evidence may prove knowledge and intent"); United States v. Uriostegui-Estrada, 86 F.3d 87, 89 (7th Cir. 1996) (trier of fact entitled to infer knowledge from circumstantial evidence).

This was an historical case, and since Spariosu did not testify, the only smoking gun proof, in the form of a witness recalling some direct verbal admission of knowledge by Hall, could have come from Suyapa Elmady or Douglas Parent. But there is absolutely nothing in the record to suggest that Parent was anything but a bona fide purchaser for value, who received a beneficial but justifiable discount by purchasing the gold coins in bulk (e.g. DE 522:8-10). Hence, there is no reason for Hall to have made an incriminating statement, or to have acted other than innocently, in Parent's presence.

Hall grossly underestimates the entirety of Suyapa's testimony when he focuses (Br. at 26) on one answer she gave, that she was "not really sure" whether Hall had been present at any specific meeting when the conspirators discussed, as they did "all the

time," that the Sperber/Vega rip off had gone well (id. citing DE 523:20; for the entire context of Suyapa's answer, see DE 523:6-20). Hall seems to stake his entire appellate argument on this simple answer.

Hall ignores Suyapa's testimony that Hall was a knowing and important participant in the counterfeiting run-up to the initial Sperber/Vega rip off (DE 522:67-71; DE 523: 4-7, 9-11). Suyapa specifically testified that Hall was responsible for obtaining the proper paper for counterfeiting. This alone, considering the close proximity in time of the late-May, 1996 production of counterfeit bills, the Sperber/Vega rip off and the trip to the northeast, would support an inference that Hall knew the flight of the gold coins was a direct by-product of his work on the counterfeiting scheme.

Suyapa also testified that Hall was a direct participant in conversations about how his delay in obtaining the paper for the counterfeiting was jeopardizing the conspirator's plans to bilk the Miami and New York groups because both groups were ready to proceed and were pressuring Spariosu to complete the faux-proceeds-for-gold transactions (DE 522:70-71; DE 523:9-12). Moreover, Suyapa, *in anticipation of, and in contradiction to Hall's later testimony,* stated that she had not told Hall that the gold coins had come (legitimately) from one of her relatives (DE 523:7, 20). This testimony strongly negated any inference that Spariosu and Hall were traveling north with a car

full of legitimately obtained gold coins. Since Hall was proven to be a participant in creating the counterfeit bills that would be used to procure $1.25 million worth of gold coins from Sperber and Vega, the jury was entitled to infer that he knew the gold coins he was driving to Virginia had been fraudulently obtained.

Hall also ignores Suyapa's more general but equally damning testimony that the rip off and its aftermath were frequently discussed among the Spariosu group. Despite her inability to recall if Hall was present at any discrete discussion, Suyapa recalled that Spariosu had told her that he and Hall were going to drive to Virginia "to see if they can move it [the gold coins] there on the way and then go to New York and sell it because it's a bigger market . . .." (DE 513:7). Suyapa further stated that "I know that he [Spariosu] was telling Nathan [Hall] the truth" about the gold coins and the purpose of their trip to the northeast (DE 523:7, 20). Suyapa testified that the Spariosu group often discussed the Sperber/Vega rip off: "[u]sually everybody was talking in the open. All of us knew what was happening so there was not any secrets" (DE 523:8). Moreover, as a general matter the jury was made aware that since 1994 Hall had spent a considerable amount of time at Spariosu's house, especially when "something was going on in business"; "There was always some activities that Tony had to do a deal and he [Hall] used to be there [at the house]" (DE 523:12-13). Finally, Suyapa testified that "Tony always told everything to Nathan" "[b]ecause they had a very close [relationship]

and everything" (DE 523:11). Of course, Suyapa testified that Spariosu had given $25,000 in cash to Hall while they were still in New York selling the Sperber/Vega coins (DE 523:15-16).

The jury was also entitled to infer that Hall's comments on the wiretap about the old but bad "stuff" that he could move at a reduced percentage demonstrated his connection both to the counterfeiting itself and its purpose.

All of the proof addressed above provided the jury with ample building blocks, without more, to conclude that Hall knew, as he drove north to Virginia, that the $1.25 million in gold coins had been stolen or obtained by fraud. But there was more: Hall's own testimony. Hall's appellate argument, with the exception of a lone footnote claiming that "Spariosu had told him that he received the coins from a friend who was liquidating his personal collection" (Br. at 26, n.17), totally overlooks his own testimony.

In so doing, he also overlooks important precepts in sufficiency cases.

> As we have previously stated, "when a defendant chooses to testify, he runs the risk that if disbelieved the jury might conclude the opposite of his testimony is true." United States v. Brown, 53 F.3d 312, 314 (11th Cir.1995). Like the defendant in Brown, Tim [the appellant] testified that he had no knowledge of any illegal telemarketing activities and did not notice anything suspicious during his two encounters with White. We concluded in Brown that "the jury, hearing [the defendant's] words and seeing his demeanor, was entitled to disbelieve [his] testimony and, in fact, to believe

> the opposite of what [he] said" Id. Thus, Tim's testimony, combined with the other evidence of his involvement [constitutes sufficient evidence of knowledge].

United States v. Rudisill, 187 F.3d 1260, 1268 (11th Cir. 1999) (internal footnote omitted; punctuation in internal quotation as in original). See also United States v. Pendergraft, 297 F.3d 1198, 1211 (11th Cir. 2002) ("When a defendant testifies, the jury is allowed to disbelieve him and to infer that the opposite of his testimony is true."); United States v. Mejia, 82 F.3d 1032, 1038 (11th Cir. 1996) (defendant's innocent explanation during his testimony about his mere presence at scene of drug deal may be treated by the jury as substantive evidence of guilt).

Hall's testimony was a melange of a general denial of any criminal activity, a tale of being bound by Spariosu's charismatic spell, and an innocent explanation of what he claimed was a perfectly legal trip to sell gold coins in Virginia. The jury obviously disbelieved his testimony and believed the opposite. In addition to the government's proof about the May, 1996, interstate transportation of the gold coins, and the reasonable inferences that could be drawn therefrom, Hall's testimony provided the coup de grace.

Finally, we note that Hall was also charged and convicted in Count III under 18 U.S.C. § 2 with aiding and abetting the interstate transportation of stolen property (DE 389). Hall's brief does not contest or address this aspect of Count III. It is readily

apparent from the record that Hall willfully associated himself with Spariosu (and company) and that he willfully participated in the crime charged in Count III.

Hall's claim that his mens rea was not adequately proved at trial should be rejected by this Court.

II. There Was No Plain Error During Suyapa Elmady's Testimony Because Her Comments About Her Guilty Pleas Did Not Constitute Improper Vouching For Her Credibility.

Hall argues that there was plain error during Suyapa Elmady's testimony (Br. At 20-23). According to Hall, there was improper vouching when Suyapa testified about her plea agreements and about her sentence having been reduced in exchange for her cooperation with the government. Hall concedes that there was no objection to the contested portions of Suyapa's testimony. He concludes, without any substantial plain error analysis and without any reference to the established law in this Circuit, that plain error occurred and a new trial is necessary.

First, we note a slight degree of befuddlement about Hall's appeal. He argues that the *government* committed plain error, but he never identifies or even summarizes any statement or question by the prosecutor that constituted vouching. He does not argue that any improper vouching occurred during the government's closing argument. His appeal solely and directly attacks Suyapa's comments. But "[t]he proscription on bolstering seeks to control the prosecutor's conduct. [Citation omitted]. It is

inapplicable to witnesses, government agents or others." United States v. Williford, 764 F.2d 1493, 1502 (11th Cir. 1985).

Nevertheless, in connection with our contention that nothing untoward occurred during Suyapa's testimony, and because Hall's brief only summarizes her answers, we reproduce in an appendix hereto extracts from the pertinent portion of Suyapa's testimony (DE 523:28-35).[12] In her testimony, Suyapa explained that in 1997 she, Spariosu and several others were arrested on federal charges for possessing counterfeit Venezuelan bonds (DE 523:28-29). Suyapa stated that she pleaded guilty to those charges without agreeing to cooperate with the government, and received sixty months' imprisonment (DE 523:29-30). After being sentenced, Suyapa met with the government and cooperated by providing details about the gold coins for counterfeit scam (DE 523:31). Suyapa confirmed that two other indictments were returned as a result of her cooperation, and that she along with ten-to-twenty other people were named in those indictments (DE 523:31-32).

Suyapa explained that her appearance in Hall's case was the first time she had been asked to testify, and that she had not testified with respect to the other indictments

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[12] Hall's brief suggests that all of the offending material appears from DE 523:29-34 (Br. at 20-21). We include in Appendix A pages 28 and 35, which contain some pertinent material. We also note that Hall cross-examined Suyapa about her criminal misconduct and her status as a cooperating witness (DE 523:43-57, 80-82).

because "they plead guilty" (DE 523:31-32). Suyapa concluded this portion of her testimony by stating that she too had pleaded guilty to all of the new charges in the two other indictments (including Hall's indictment) and that she received a sixty month sentence that was reduced to approximately three years' imprisonment (DE 523:33-34). Lastly, Suyapa admitted that she had committed uncharged passport fraud and had told the government about this crime (DE 523:35).

There really is nothing remarkable about Suyapa's testimony, especially in the context of this lengthy and hotly-contested case. Perhaps this explains why defense counsel never asserted a vouching or bolstering objection during her testimony, although he did assert objections on other grounds (leading and argumentative). Suyapa's testimony shows the standard give-and-take between a prosecutor and a cooperating defendant, whereby the government seeks to "blunt the impact of attacks on her credibility," United States v. Dennis, 786 F.2d 1029, 1045-47 & nn.17 & 18 (11th Cir. 1986), by explaining what she has agreed to do in her plea agreement and describing what rewards she has received or hopes to receive in the future.

It is well established in this Circuit that the admission into evidence of a codefendant's plea agreement, or the admission of testimony concerning the contents of the plea agreement including provisions that the witness must testify truthfully, does not constitute improper vouching. See, e.g., United States v. Knowles, 66 F.3d 1146,

1161-62 & nn. 57-59 (11th Cir. 1995) (such evidence should be reserved for re-direct examination if necessitated by cross-examination, but is permitted to be elicited on direct "[w]hen the defense attacks the witness's credibility in its opening statement"); United States v. DeLoach, 34 F.3d 1001, 1004 (11th Cir. 1994) (co-defendant's guilty plea may be elicited by government to "blunt the impact of 'expected attacks on the witness's credibility'"; guilty plea also admissible because it "prevent[s] the jury from reaching the erroneous inference that a co-defendant whom the evidence shows was also culpable had escaped prosecution"); Dennis, 786 F.2d at 1045-47 & nn.17 & 18 (existence in plea agreement of provision "that required witness to testify truthfully in order to gain all benefits," and prosecutor's reference to this provision in closing argument by stating that the witness had "everything to lose" if he failed to comply with provision, were not impermissible vouching because they did not suggest that government had "by some non-record means ensured" truthfulness of witness's testimony); United States v. Sims, 719 F.2d 375, 377-78 (11th Cir. 1983) (cited in Dennis and other decisions; articulating applicable law on use of plea agreement by government and test for impermissible vouching).

As noted above, this rule operates with particular vigor where, as in the appeal at bar, the defendant attacks the cooperating co-defendant's credibility in opening statement. See, e.g., Knowles, 66 F.3d at 1161 & nn.58, 59. Hall's opening statement

was a blistering attack on Suyapa's credibility, including but not limited to her felony status as a result of her guilty pleas. Hall's counsel stated in his opening:

> Just very briefly, to close out, you are going to see a series of these gangster cooperators come in here. Remember, all these people are educated. Suyapa Elmady has an engineering degree from the University of Miami. . . . they are real con artists, and they are real sleaze, and they are real scum dressed up.
>
> . . . .
>
> Suyapa - - this is who you are going to hear. This is who you are being asked to believe. Suyapa Elmady, fourteen times a convicted felon, convicted of fourteen felonies, in [sic] including printing $25,000,000 in counterfeit money, including the related case of $400 million in phony Venezuelan government bonds. It had nothing to do with him [Hall], but in '97, that was another Spariosu scheme that they got going. . . .
>
> She's convicted fourteen times. She does a total after fourteen felony convictions, of 32 months, 32 months in jail. Did you hear me say 32 years? No. 32 months. She has - - she is not a United States citizen. She is walking around here like Queen Tut with a Honduran - - she is a Honduran and a Jordanian.
>
> Why is she floating around as a convicted felon here with fourteen felony convictions? She is not [in] INS custody. She is not in an Immigration jail. She's not deported. She is floating. Remember, she also hates J.R. [Hall] and C.C. [Hall's wife] because she found out that Jessie, the other stripper . . . was taking up with Tony [Spariosu].
>
> . . . she [Suyapa] hates them for that reason also. This

is one person you are asked to believe.

(DE 530:52-54).[13]

In view of this opening statement, Suyapa's brief, unobjected-to testimony was clearly admissible and was not improper vouching under the controlling law. Her testimony surely has not been shown to be plain error.

III. The District Court Did Not Abuse Its Discretion When It Refused To Allow Hall To Cross-Examine Suyapa Elmady About Her Alleged Mental Breakdown; The District Court Did Not Actually Preclude Hall From Cross-Examining Harris Sperber About His Alleged Addiction to Cocaine.

A. Suyapa Elmady

Hall argues on appeal that the district court abused its discretion by limiting his cross-examination of Suyapa Elmady (Br. at 11, 14-17). Hall claims that he learned from Spariosu, during an undocumented prison interview, that Suyapa had a "five and a half week mental breakdown" requiring hospitalization in 1995, and that she had been treated with Prozac on an out-patient basis thereafter until 1997 (Br. at 15 & n.7, citing DE 522:106-12). Hall misapprehends the precise ruling of the district court.

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[13] We stress that this was Hall's *opening* statement. It is interesting to compare Hall's opening with the far less vociferous opening statement in Knowles, which this Court held permitted the government to use the cooperator's plea agreement during its direct case and to refer to its provisions for telling the truth during closing argument. 66 F.3d at n.59.

A review of the entire pre-trial and trial record shows that Hall's brief does a serious injustice to the district court's conscientious effort to balance his right to cross-examine Suyapa with its interest in keeping that cross-examination free from irrelevant and improper impeachment. Prior to trial, Hall indicated through "Brady" demands and other pleadings, including demands for disclosure of Suyapa's PSI, that he had a laundry-list of relatively outré subjects he wanted to cover during Suyapa's cross-examination (e.g., DE 266, 269, 351, 354, 355, 356, 358, 390, 405). Hall's requests were the subject of pre-trial practice, resulted in the district court's decision to review the PSIs of witnesses in camera (e.g., DE 358; DE 522:109-10) and were resolved during Suyapa's testimony in an extensive conference outside of the jury's presence.[14]

As the Court will recognize, and as we will highlight infra, most of the district court's pre-inquiry rulings were in Hall's favor and were fair (DE 522:93-116). The decision on appeal (DE 522:106-13), although it did not favor Hall's request, was also fair. From the surfeit of motions, the following appears to be the genesis of the request to cross-examine Suyapa on her alleged mental breakdown:

> ***It is rumored*** that in 1995, she [Suyapa] began to act out bizarrely after she and her husband Marin (Tony) Spariosu were said to have lost $6.5 million. ***Supposedly***, Suyapa Elmady began having seizures, her eyes rolling back into her

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[14] Attached as Appendix B is the transcript of the entire discussion about Hall's cross-examination requests (DE 522:91-117).

> head, with blackouts. ***It is said*** she started baby-talking in Arabic, not knowing what she was saying or doing and had to be baby-sat day and night. ***She is rumored*** to have frequently gone off wandering aimlessly on the streets, with her family having to track her down.

(DE 252:¶ 4C) (emphasis added).

These rumors were not substantiated prior to trial, although Hall finally identified Spariosu, who was by then divorced from Suyapa and in federal prison, as the source (DE 522:98-99). In response to this and other issues raised by Hall, the district court had reviewed Suyapa's PSI prior to trial. The district court wondered whether the allegations of a "disgruntled ex-husband" (DE 522:102) provided a sufficient good-faith factual basis for impeachment under Fed. R. Evid. 608(b) (DE 522:98-104). Nevertheless, the district court explained its decision to review Suyapa's PSI, and then disclosed the PSI's recitation of her mental health history (DE 522:108-11). The PSI revealed that Suyapa "does have an indication of suffering of depression and undergoing out patient therapy" (DE 522:110). The district court elaborated:

> According to the pre-sentence investigation report, which I will disclose here, in case there's an issue on appeal, it says the defendant first sought treatment for her depression in Jordan during 1987 and was treated with Proza[c]. In 1993 she was treated for approximately one month at the Carter Hospital located in Miami. Florida, again, due to her depression. She used Proza[c] on and off up to 1997 when she underwent out patient therapy.

(DE 522:112).

Defense counsel protested that the PSI did not reveal the rumored "five week mental breakdown in the summer of 1995" (DE 522:112). The district court observed that it "need[ed] more" documentation that such a breakdown had occurred if Hall truly wanted to press his argument, because "[s]he [Suyapa] was candid enough to disclose this. It would be to her benefit to mention [in connection with sentencing] how much she suffered" (DE 522:112). The district court therefore ruled that although "there is a ***little bit*** of a factual basis to ask whether someone has used Proza[c]," under Rule 608(b) it would not allow Hall to question Suyapa about her mental health (DE 522:112-113) (emphasis added).[15] The district court stated that "being depressed is not an act of misconduct" under 608(b) (DE 522:111).

As noted in our standards of review, the district court has "wide latitude" to impose reasonable limitations on cross-examination based upon concerns such as relevancy, and to curtail under Fed. R. Evid. 608(b) the use of extrinsic evidence to attack credibility, and those restrictions are reviewed solely for abuse of discretion. See, e.g., Frost, 61 F.3d at 1525; Diaz, 26 F.3d at 1539-40 ("the right to cross-examine

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[15] The district court's ruling was also informed to a lesser degree by its observation that if it allowed Hall to attack Suyapa's mental health, he would be asserting "inconsistent" (DE 522:113) positions, i.e., that Suyapa was a manipulative liar who was fabricating her testimony to save her hide, and that she was so impaired by her mental illness that "she doesn't know what she is talking about so we can't accept her testimony" (DE 522:111-12).

is not absolute"); Van Dorn, 925 F.2d at 1335 (court's discretion "especially broad").

Subject to this discretion, a defendant "has 'the right to attempt to challenge [a witness's] credibility with ***competent or relevant evidence of any medical defect or treatment at a time probatively related to the time period about which he was attempting to testify***.'" United States v. Jimenez, 256 F.3d 330, 343 (5th Cir. 2001) (emphasis added; quoting United States v. Partin, 493 F.2d 750, 763 (5th Cir. 1974)), cert. denied, 122 S. Ct. 1090 (2002). "To be relevant, the mental health records must evince an 'impairment' of the witness's 'ability to comprehend, know, and correctly relate the truth.'" Id. (quoting Partin at 762). Moreover, those "mental health records must be relevant, and their probative value must not be substantially outweighed by the dangers of unfair prejudice." Id. at 343 & n.14. Finally, for a mental illness to be relevant for impeachment, there must have been a diagnosis of a severe condition or a "psychosis" that is not too remote in time from the events alleged in the indictment. See United States v. Lindstrom, 698 F.2d 1154, 1164-67 (11th Cir. 1983) (diagnosis of paranoia and schizophrenia during time-frame of indictment); see also Jimenez, 256 F.3d at 343-44 (diagnosis of a "psychosis" or other severe condition necessary; citing cases, including binding decisions of the Former Fifth Circuit).

Measured against these standards, Hall has clearly failed to establish an abuse of discretion. First, despite the statements in Hall's brief about Suyapa's "five week

mental breakdown," for purposes of this appeal the facts are those stated in Suyapa's PSI as summarized by the district court: Suyapa was first treated for depression with Prozac in 1987; she received in-patient treatment for depression in 1993; and she received out-patient treatment including Prozac through 1997. Despite raising the specter of Suyapa's "rumored" breakdown over one year before trial (DE 252:¶ 4C, filed August 4, 2000), Hall never offered the district court a shred of proof, let alone an *offer* of proof, that the rumor had any basis in fact.

Hence, Hall's appeal concerns impeachment by rumor, not record. Hall offered no facts tending to support an inference that Suyapa's ability to observe and recall the pertinent events was impaired, or that her credibility was suspect on medical grounds. Suyapa's 1993 hospitalization, reported in the PSI, occurred three years before the counterfeit-for-coins scheme was hatched and was too remote to be relevant. Finally, an apparent diagnosis of depression does not encompass the type of serious mental illness relevant to impeachment on cross-examination.

> For witnesses whose mental history is less severe, district courts are permitted greater latitude in excluding records and limiting cross- examination. See United States v. Sasso, 59 F.3d 341, 347-48 (2d Cir. 1995) (affirming limit on cross-examination of witness who was depressed and took Prozac and Elovil shortly before the time of the defendants' firearms smuggling conspiracy); United States v. Butt, 955 F.2d 77, 83 (1st Cir. 1992) (affirming exclusion of records and expert testimony, and limit on cross-examination of a witness who once attempted suicide, but was never

> diagnosed with a mental illness); United States v. Moore, 923 F.2d 910, 913 (1st Cir. 1991) (affirming limit on cross-examination of witness who saw a therapist after the death of her child, and ten years prior to the embezzlement conspiracy).

Jimenez, 256 F.3d at 344.

Suyapa suffered from depression during the time-frame of the indictment, and was taking the commonly prescribed drug Prozac. Hall never endeavored to establish that depression was a proper subject of impeachment, or that Prozac could have affected her perception, memory or credibility. See United States v. Plescia, 48 F.3d 1452, 1464 (7th Cir. 1995) (affirming district court's decision to preclude cross-examination of government's chief witness about taking Prozac at the time of trial and when the pertinent events had occurred; appellant failed to establish effect of Prozac).

Finally, a review of Hall's cross-examination of Suyapa (DE 523:43-65, 74-97) demonstrates that the district court afforded him ample opportunity to challenge Suyapa's credibility. See, e.g., Diaz, 26 F.3d at 1539-40 ("test for the Confrontation Clause is whether the jury would have received a significantly different impression of the witness' credibility had counsel pursued the proposed line of cross-examination"); United States v. Baptista-Rodriguez, 17 F.3d 1354, 1371 (11th Cir. 1994) ("The Constitution is offended only when the defendant is denied the opportunity effectively to attack the credibility of the prosecution's witnesses"). At the same time that the

district court disallowed cross-examination on Suyapa's mental health, it *allowed* Hall to cross-examine her about her links with, and the sale of "heavy weapons" to Moammar Gadhafi, Libya's dictator (DE 522:93-95, 106). In the immediate aftermath of the 9/11/01 terrorist attacks, Hall was nevertheless allowed to pursue the Gadhafi/arms dealing line of questioning (e.g., DE 523:52-56, 75-80).[16] Hall was thus enabled to obtain Suyapa's admission that she had sought to sell arms to Gadhafi, that she seemingly approved of the Libyan leader (DE 523:53, 55-56) and that she believed that weapons sales to Libya were perfectly legal and proper for her because she was not an American (DE 523:75-79).

Also, at that same in-trial conference, the district court allowed Hall to cross-examine Suyapa: (1) about the fabrication and sale of phony United States and Honduran passports in 1992, 1994 and 1995 (including their sale to Libyan officials and operatives) (DE 523:92, 104, 51-54); (2) being involved in drug dealing in the early 1990s (DE 523:97-98); (3) committing marriage fraud (DE 523:97); (4) being involved in credit card fraud (DE 523:92, 104, 58); and, (5) uncharged counterfeiting offenses

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[16] Indeed, aside from Suyapa's mental health, the *only* area of inquiry precluded by the district court was whether Suyapa was directly or indirectly linked to the 9/11/01 destruction of the World Trade Center (DE 523:113-16). Hall's request to cross-examine Suyapa about committing insurance fraud in connection with Hurricane Andrew was deferred subject to the production of paperwork from the Federal Emergency Management Agency (DE 523:105-06). Hall never produced such documentation.

as far back as 1992 (DE 523:104, 56-57). Of course, Suyapa was also questioned about her immigration status and her commission of the numerous felonies to which she had pleaded guilty. Hall was allowed to effectively present the issue of Suyapa's credibility to the jury.

B. Harris Sperber

Hall argues that the district court abused its discretion when it declined to allow cross-examination of Harris Sperber on a "very, very serious ongoing cocaine and alcohol addiction" (Br. at 17, citing DE 518:85). Superficially, this issue seems similar to the Suyapa cross-examination issue. For example, Sperber's alleged addiction was revealed by Spariosu to Hall's trial counsel during an undocumented prison interview (DE 518:83). *But it appears from the record that the district court did not preclude the cross-examination requested by Hall; it merely made a provisional ruling against Hall's request, subject to re-argument if Hall produced some support for Spariosu's undocumented and unsworn information* (DE 518:86-102). It does not appear from the record that Hall substantiated Spariosu's claims, even though he agreed with the district court's proposal that he seek an affidavit from Spariosu.

Prior to its provisional ruling, the district court noted that Sperber had been in prison for approximately thirteen months prior to his testimony, so there could be no issue of current addiction being subject to cross-examination (DE 518:84-86). With

respect to Sperber's alleged addiction during the time frame of the indictment, the parties and the district court focused on whether his ability to observe and recall the events at issue had been affected (DE 518:84-93). But what made the issue unique was that Sperber was a well known lawyer in South Florida who had practiced before the district court during the time-frame of the indictment, when he was obviously also living a secret criminal life (e.g., DE 518:85, 99). Moreover, the district court had accepted Sperber's change of plea in the Hall indictment, concluding that Sperber was not under the influence of drugs at that time, over one year prior to his testimony (id.).

As the parties and the district court discussed the matter, it became clear that the district court was going to hold that there was an insufficient good faith basis for Hall to pursue the requested line of questioning, and that such impeachment would be contrary to Fed. R. Evid. 608(b) (DE 518:87-88). Hall then sought an alternative from the district court:

> So what I'm asking is, that Your Honor, if you are concerned about factual basis, allow me to bring Spariosu from his facility. We'll have a little evidentiary hearing outside the presence of the jury and we can explore this issue of Sperber's alleged cocaine and alcohol addiction.

(DE 518:88).

Hall's counsel assured the district court that he had sought a timely pre-trial writ to secure Spariosu's presence in the district (DE 518:88-91). Hall's counsel said that

he had done so, and stated that he would use Spariosu if he could get him to the trial (id.). The district court offered Hall a recess or even a mistrial, if he so desired, in order to ensure adequate time to secure Spariosu's presence (DE 518:91-92).

But the district court stated that it needed more than counsel's "hope" that Spariosu would state under oath that Sperber was addicted during the time frame of the indictment (DE 518:92). Counsel satisfied the district court that he had "no problem bringing him here and putting him under oath outside the presence of the jury" to confirm Sperber's addiction (id.). The district court noted that counsel had a pre-existing working relationship with Spariosu's counsel (id.).

The district court thus, on Wednesday, October 17, 2001, gave Hall's counsel until October 23, 2001, to provide it with an affidavit from Spariosu (DE 518:92-93). Hall's counsel agreed that this proposal was "[f]air enough" (DE 523:93). The district court then ruled that Hall could not cross-examine Sperber about his alleged cocaine addiction pending the submission of an affidavit and its final ruling on the subject (id.). The district court later reaffirmed its provisional ruling, and Hall's counsel again affirmed that he agreed with the suggested procedure (DE 518:99-100).

There is nothing in the record thereafter on this subject. It does not appear that Hall obtained the affidavit, explained why he had not obtained the affidavit, or asked the district court to revisit the issue. There is nothing in the record suggesting that Hall

made *any* effort to obtain an affidavit or other corroborative material, after agreeing to do so.

Yet Hall argues on appeal as if the district court's made a final ruling at DE 518:87, where it *initially* indicated it would deny the request *before* Hall urged it to consider entertaining Spariosu's in-court confirmation of his jailhouse allegations. Hall's brief does not address the continuation of the discussion among the parties and the court addressed above. Hall's brief covers the Suyapa Elmady and Harris Sperber issues under the same umbrella.

In this posture, it is extremely difficult for the government to respond to the issue as framed by Hall, because the district court did not actually, or finally, deny him the right to cross-examine Sperber about drug use. If this Court rejects the government's recitation of the record and concludes that there was a clear preclusion of cross-examination on drug addiction, we submit that the district court did not abuse its discretion. Hall's cross-examination would have been based on a rank rumor, without any showing that the drug use had affected Sperber's ability to observe or recall the events. Moreover, as with Suyapa, notwithstanding the district court's one adverse ruling, Hall liberally cross-examined Sperber (DE 531:44-120). Hall effectively presented the jury with a portrait of a disgraced and debased attorney. Finally, Hall did not object to the provisional solution proposed by the district court. But if this Court

chooses to construe Hall's appeal as a challenge to the district court's provisional ruling and proposed solution, we submit that the district court's actions reflected a conscientious exercise of discretion. It certainly was not plain error.

IV. This Case Should be Remanded for a Re-sentencing Hearing Because The District Court Committed Plain Error When it Applied The Base Offense Level of the Most Serious Object of the Charged Conspiracy But Did Not, Because it Was Not Requested to, Find Beyond a Reasonable Doubt Under USSG §1B1.2(d) And Comment N.5 (1995 Manual) That The Multiple Objects of the Conspiracy Had Been Proven Beyond a Reasonable Doubt

Acknowledgment of Plain Error

We hereby acknowledge that there was plain error at sentencing, and we request that this case be remanded for re-sentencing. See United States v. Venske, 296 F.3d 1284, 1292-94 (11th Cir. 2002).

The plain error was that the PSI and the district court ignored USSG § 1B1.2(d) (1995 manual) and its commentary, particularly Application Note 5 [numbered 4 in current manual]. Hall's sentence was based on the application of the counterfeiting guideline, which had the most severe penalty of all of the objects of the conspiracy in

Count II.[17] But the district court was not asked to, and thus did not find that object had been proved beyond a reasonable doubt. In Venske, this Court held that the sentencing court's failure to make a beyond a reasonable doubt finding under USSG § 1B1.2(d) and commentary, ***even in the absence of an objection, was plain error***. 296 F.3d at 1292-94.

The purpose of the re-sentencing will be allow the district court to determine whether the counterfeiting object of the conspiracy was proved beyond a reasonable doubt. We believe that at re-sentencing we can establish that this object of the conspiracy was proved beyond a reasonable doubt.

Finally, notwithstanding the above, we take issue with the impression artfully created by Hall's brief that he objected on the grounds asserted in his brief. He did not. The plain error which occurred was not the fault of either party or the district court. The error was simply overlooked, and was not the subject of any objection or dialogue.

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[17] For a thorough description of Hall's sentencing, see Appendix C hereto.

whether the counterfeiting object of the conspiracy was proved beyond a reasonable doubt. We believe that at re-sentencing we can establish that this object of the conspiracy was proved beyond a reasonable doubt.

Finally, notwithstanding the above, we take issue with the impression artfully created by Hall's brief that he objected on the grounds asserted in his brief. He did not. The plain error which occurred was not the fault of either party or the district court. The error was simply overlooked, and was not the subject of any objection or dialogue.

Conclusion

For the foregoing reasons, the district court's decision should be affirmed.

Respectfully submitted,

Marcos Daniel Jiménez
United States Attorney

By: _____
Marc Fagelson
Assistant United States Attorney

Anne R. Schultz
Chief, Appellate Division

Lisa Tobin Rubio
Assistant United States Attorney

Of Counsel

Certificate of Compliance

I certify that this brief complies with the type-volume limitation set forth in Fed. R. App. P. 32(a)(7)(B). This brief contains 13, 989 words.

Certificate of Service

I hereby certify that a true and correct copy of the foregoing Brief for the United States was mailed this 18th day of October, 2002, to: Eric M. Cohen, Two Datran Center - Suite 1200, 9130 South Dade Boulevard, Miami, Florida 33156.

Marc Fagelson
Assistant United States Attorney

APPENDIX A

APPENDIX A

and Kranzler rip off?

A. I saw him on and off. I know that he had a problem with Harris. I always see him coming to Miami because he had some investment with Harris. He invested some money with him. Harris didn't pay him his interest, and Tony tried to interfere there.

Q. Do you know at what point in time this investment was made with Harris Sperber by Nathan Hall?

A. Yes, this was after Tony came back from Jordan.

Q. Let's talk a little bit about what happened after the deposits were made of the second rip off. We're going now into the later part of 1996.

Did you become involved with trying to purchase emeralds at that point in time?

A. Yes, sir.

Q. Did you do that with Tony Spariosu?

A. Yes, sir.

Q. At some point in time, moving into 1997, did you start to possess or have in your name counterfeit bonds from the country of Venezuela?

A. Yes.

Q. Without going into all the details of that, did you eventually, along with Tony and a lot of people, get arrested with those charges?

A. Yes, sir.

Q. When was that arrest?
A. In October 1997.
Q. You were charged for possessing those counterfeit bonds, correct?
A. Yes, sir.
Q. And conspiring to do so?
A. Yes, sir.
Q. How many other people, if you recall, were charged in that case?
A. Like nine of them. A lot of people.
Q. Did you plead guilty or go to trial?
A. I plead guilty.
Q. Did you have any agreement with the government when you plead guilty in that case?
A. No.
Q. What sentence did you get from that case?
A. Five years.
Q. Sixty months?
A. Yes.
Q. This concerned approximately $400 million or so worth of counterfeit bonds, correct?
A. Yes, sir.
Q. So you were sentenced to sixty months by the Court and there was no reduction --
MR. LANGE: Objection, leading.

THE COURT: Overruled.
BY MR. SENIOR:
Q. Was there any reduction in your sentence whatsoever aside from the standard acceptance of responsibility?
A. No, not at all.
Q. So there was no recommendation by the government --
MR. LANGE: Objection, leading.
THE COURT: Overruled.
BY MR. SENIOR:
Q. You plead guilty to every count in that indictment, and you were not cooperating with the government at that time?
A. No, I wasn't.
Q. And you got no reduction --
MR. LANGE: Judge, can I continue that objection?
THE COURT: What objection?
MR. LANGE: The objection is leading, argumentative.
THE COURT: Overruled.
BY MR. SENIOR:
Q. Sixty months, correct?
MR. LANGE: Repetitive.
THE COURT: That one will be sustained.
BY MR. SENIOR:
Q. After, after you got the sixty months sentence by the Court, did you try to cooperate with the government?
A. Yes, sir.

Q. Did you cooperate with the government after you got the sixty month sentence by the Court?
A. Yes, I did.
Q. That cooperation involved -- what did it involve? What did you do in your cooperation?
A. What did I do? I told you about what happened with the coins deal.
Q. Okay. When you say told us, who did you sit down and have interviews with?
A. I sat with my lawyer, Mr. Bob Senior, Mr. Barry Wilson and Mr. Martinez and Gonzalez I spoke with.
Q. As a result of your cooperation in part, were other indictments returned in this investigation?
A. Yes, sir.
Q. Were you named in those other indictments that came down as a result of your cooperation after you got the sixty months from the judge?
A. I was.
Q. How many other times were you named in indictments after you cooperated and gave us the information to return those indictments?
A. In two more indictments.
Q. How many people were named in those two additional indictments?
A. In another one it was almost ten people too, there were a

lot of them.
Q. That was in one of the other ones. How about the other one?
A. The other one was another ten people.
Q. After you got sixty months from the judge in your case where you got no break at all, you cooperated with the government and in part helped provide some evidence with regards to the indictment of twenty more individuals?
A. Exactly.
Q. Have you ever testified before?
A. No, my first time.
Q. Is that in part because the other individuals plead guilty?
A. What do you mean, sir?
THE COURT: How about why did you do so and it wouldn't be leading.
BY MR. SENIOR:
Q. Why did you not testify?
A. Why?
Q. Correct. In the subsequent cases which you had given information about that led to the indictment of all of these twenty people, why was it not necessary for you to testify?
A. They plead guilty.
Q. Now, you are not telling us today, you are not telling us that --

THE COURT: I am going to sustain the objection. That's leading. I let you lead in the exercise of my discretion, but that's not an invitation to do it forever.

MR. SENIOR: Yes, Your Honor.

BY MR. SENIOR:

Q. Are you a perfect person by any stretch of the imagination?

A. I am a perfect person?

Q. Are you a perfect person since you have been in the United States?

A. No.

Q. Aside from what you have talked about in the counterfeit bonds cases, you are also involved in the subsequent cases -- well, what were the other charges that you were charged with?

A. I was charged in the counterfeit case.

Q. Which counterfeit case?

A. The one we are here.

Q. This case?

A. Yes, this case.

Q. What did you do with regards to those charges?

A. I plead guilty, sir.

Q. What else were you charged with in the matters we were talking about?

A. It was money laundering, too.

Q. What did you do with regards to the money laundering

charges? Did you go to trial or plead guilty?
A. I plead guilty.
Q. As a result of your pleas of guilty in the subsequent cases, this case and the money laundering case, did you receive a sentence?
A. Yes, sir.
Q. Do you recall what the sentences were?
A. Actually, no, I don't recall it. They were like five years ago, something like that. Four years.
Q. At some point in time was your sentence, these collective sentences at some point in time, were they reduced?
A. Yes.
Q. Do you recall when that was?
A. That was last year around May or June last year.
Q. You said that you had a sixty month sentence?
A. Yes, sir.
Q. What was that ultimately reduced to by the Court?
A. By the Court to three years I did.
Q. Those three years that you did -- let me ask you this, how long were you in prison?
A. Three years.
Q. So you were in prison for three years from the date of your arrest on October 9, 1997 all the way for three years after that, correct?
A. Yes, sir.

Q. Instead of doing -- but you were sentenced to sixty months?
A. Yes.
Q. And then you cooperated in the manner you described and your sentence was reduced?
A. Yes.
Q. You have done some other things -- let me put it this way. You were involved in obtaining a false passport?
A. Yes, sir.
Q. You helped someone else obtain a false passport at some time?
A. Yes, sir.
Q. Is that something that you told the United States about?
A. Yes, sir, I did.
Q. Let's talk about -- you have gone through this matter through the two rip offs, you have taken us into the deposit of the money from the Haberman and Kranzler rip off. Let's talk about late '96 and all the way up to the point of your arrest in 1997. Where was the counterfeit money?
A. Debbie Piedra's house.
Q. Incidentally, these passports, when did you procure these passports?
A. When did I what?
Q. When did you get the passports that we were just talking about?

APPENDIX B

APPENDIX B

THE COURT: I suppose the government will tell me.

MR. LANGE: We aren't sure yet.

MR. GONZALEZ: Very perceptive, and quite frankly, leaning on the side of not calling him.

THE COURT: Let me think about it. Let me have the transcript. 14B is the same as 14A except it's clear?

MR. GONZALEZ: Yes.

THE COURT: I need a transcript of 14.

MR. GONZALEZ: So the court realizes, even though it's one cassette, there was a series of various telephone calls. We can give the Court specifically the one we are going to play or intend to play or all of them.

THE COURT: That you want to introduce?

MR. GONZALEZ: Yes.

THE COURT: That's all I want.

MR. GONZALEZ: We only intend to play portions of three of the calls.

THE COURT: Point out which three calls, and that's all I read, then I will decide tomorrow.

The next issue is you are going to ask, Mr. Senior, Ms. Elmady to talk about what. You say you have twenty-five more minutes. What's the area, then I am going to ask Mr. Lange what is the scope of his cross-examination.

MR. LANGE: The issue are the Brady points of

Ms. Elmady. He is not going to cover those.

THE COURT: Let me find out what he is going to say. Then I will know what the scope of your cross will be. See, you get a little bit of a head start.

MR. LANGE: Okay, I'm listening.

MR. SENIOR: With regards to the remainder of her testimony, I have taken her up to just framing how the conspiracy was worked.

THE COURT: This has been a lot of hearsay and leading. Since there is no objection, I've allowed it. It moves the case faster. It doesn't affect the defendant's right based upon the defense strategy here.

MR. SENIOR: I am going to talk to her a little bit more about the counterfeiting process, take her through the fact that there was a trip up to Virginia by Mr. Hall and Marin Spariosu to sell the coins from the first rip off; that Mr. Hall, of course, sold some of the coins to Douglas Parent, that the cash was returned by Tony Spariosu, that it was deposited.

I am going to set up the second rip off and what she was told with regards to the co-conspirator statement with regards to that, the deposits that were made after that. I am going to talk a little bit about the fact that she has plead guilty and go through that spiel, the cases, and what she plead guilty to and what she was sentenced to,

and then I am going to basically close up with the notion of the continuing discussions and negotiations concerning the counterfeit that remained after they had done the two ripoffs and just take her through the end of the time.

THE COURT: The only question I have of you, Mr. Lange, is do you intend in your cross-examination to ask anything of Ms. Suyapa Elmady about any suspected links to terrorism in view of the fact that the government has told you that the prosecutors in this case know of none.

MR. LANGE: They didn't make any good faith inquiry as far as I am concerned. I raised a motion. Based upon all the facts -- her family associates and the business about the phony passports to the Libyans and the phony travel documents to the Libyans. I specifically asked for them to reach out to the intelligence agencies to see --

THE COURT: What did you say about Suyapa Elmady? I have your motion. Next to Suyapa Elmady, you don't have anything. You have a lot for Da Ab Ashrab and Hakime Aloui, [phonetic]

MR. LANGE: This is an intimate group, Judge.

THE COURT: She is the only witness so far. Adjudged by your brother, sisters or cousins.

MR. LANGE: This is not I am not my brothers keeper idea. These people co-conspirator criminals

gangsters together.

THE COURT: I don't know. I wouldn't do that if the government wanted to bring up statements attributed to your client's relatives. I wouldn't let them in unless there's proof of wrong doing, a conspiracy among the speakers.

MR. LANGE: Ms. Elmady responds to one of the prosecutors questions on direct, Scott Carl, the guy that got all the paper for the counterfeiting and printing, had a deal cooking with Libya.

THE COURT: I heard that.

MR. LANGE: That really kind of opens the door on some level to discuss the relationship with Ms. Elmady to anything to Colonel Kadafi and the Libyan terrorizes.

THE COURT: Okay, I will let you do that, because you asked about Libya.

MR. SENIOR: Just so counsel knows, his client was involved in that Libyan arms deals. That's why I'm staying away from it. But if he wants to go there.

THE COURT: Open the door. If it's a two car garage door, you will see Senior and Gonzalez come out with a Cadillacs.

MR. SENIOR: If you want to talk about Libyan guns, that's fine. We're trying to streamline.

MR. LANGE: Judge, I'm looking forward to those

pink Cadillacs coming out of the garage.

THE COURT: I didn't say pink.

MR. LANGE: Well, I did. I am guessing that they would have pink Cadillacs.

THE COURT: Libya you can ask.

MR. LANGE: The other stuff, specifically, what I call the Brady motion, 1992, Elmady delivered a kilo of cocaine --

THE COURT: Which Elmady?

MR. LANGE: Suyapa Elmady, Judge. I'm sorry, Judge.

THE COURT: The motion that I have doesn't have anything --

MR. LANGE: There's a whole laundry list of nineteen items. It's a different motion.

THE COURT: Okay.

MR. LANGE: That was the terrorist motion.

THE COURT: All right.

MR. LANGE: There's another one.

THE COURT: What's the other area? I don't have that one in front of me.

MR. SENIOR: I responded in the government's motion in limine in request for good faith basis proffer, Your Honor.

THE COURT: I got that.

MR. SENIOR: I have a foot note in the title. In the title it makes note of the fact of a summary list of pre-trial matters that defense counsel filed on February 6, 2001. The format that we adopted to do this is we addressed them, and then we put in parenthesis our response.

THE COURT: I have that. Is that a good way to start? Do you have it?

MR. LANGE: I have what I filed. You can cross reference it with his responses.

THE COURT: It's easier if we use the government's. I have two copies.

MR. LANGE: I filed on February 12 is defendant Hall's explanatory extended summary list of pre-trial matters still in need of resolution.

THE COURT: I am going to give you a government's copy.

MR. LANGE: We can find mine, my points and his points.

THE COURT: They are the same.

MR. LANGE: He took them in different order.

THE COURT: Follow what I got. The first one, it's number 6 of the government's response.

MR. LANGE: That wasn't the one I was starting with.

THE COURT: Okay. Can we start with that? It's easier.

MR. LANGE: We can start with that. Suyapa Elmady committing marriage fraud is how he summarizes it. I say in my points, Suyapa Elmady married George Oreo for a green card while she was still married to Ethan.

THE COURT: I will let you ask that.

MR. LANGE: Second is in 1992 -- the conspiracy is 1995 to 1997 so it's reasonably proximate. In 1992, Elmady delivered a kilo of cocaine on a plane taped to her leg from Miami to Philadelphia giving it to a man named Richie.

THE COURT: Where does that come from?

MR. LANGE: The source of it?

THE COURT: Yes.

MR. LANGE: Tony Spariosu.

THE COURT: From a tape?

MR. LANGE: No, to me. Permission to talk to him through his lawyer. Spariosu debriefed by Lange. Spariosu saying in 1992 Elmady delivered a kilo of cocaine on a plane taped to her leg from Miami to Philadelphia giving it to a man named Richie he knows because he was involved in it. He was there in '92 as part of that deal.

THE COURT: What do we do with that according to the government?

MR. SENIOR: Well, she indicates that she denied taping any cocaine to her leg and that Tony Spariosu had, in fact, done that. She was on the plane at the time.

THE COURT: I will let you ask the question. She gives her version and the jury decides.

MR. LANGE: Elmady and Sperber, but Elmady involved in two separate cocaine deals. One for 200 kilos and the other for 35 kilos.

THE COURT: With her husband?

MR. LANGE: Exactly. I didn't put that in, Spariosu is the source of all of this.

THE COURT: I will let you ask that.

MR. LANGE: In 1992 Elmady was involved in a credit card fraud with Vilma Trujillo, Elmady's best friend since she was sixteen.

THE COURT: Have you spoken with Ms. Elmady regarding this issue?

MR. SENIOR: No, I have not. That was the one matter when I sat down with her I forgot to address.

THE COURT: Where did you get that information?

MR. LANGE: Spariosu. He was on the scene in 1992. He was her guy. He was there.

THE COURT: You know, I always wonder whether it's a sufficient factual basis to ask these questions, I guess under 608, right, when the basis of the information

is a man whom you have said is a manipulator and a liar in the first place. It seems like you are relying on him to give you the information attributing bad conduct to Suyapa Elmady, but at the same time, you are saying he is a liar, can't be trusted. That's why the government is not calling him, but I am suppose to rely on his word to you about this prior bad conduct.

MR. LANGE: The difference is he puts himself in the middle of it. He inculpates himself.

THE COURT: And he does in this case through Vilma Trujillo.

MR. LANGE: All of it. Anything from '92 on, he was involved with her.

THE COURT: Why would he tell you all of that?

MR. LANGE: I am a nice guy. I am persuasive. I don't know why. I didn't promise him anything. I have nothing to promise.

THE COURT: He didn't manipulate you?

MR. LANGE: Possibly he did. He was saying, "I am knee deep in all of this also. This is the truth as to my wife."

THE COURT: He is not mad at his ex-wife, right?

MR. SENIOR: They got a divorce.

MR. LANGE: I can't think of anything more compelling to say I was involved in this criminal

enterprise.

THE COURT: If someone said that under oath, I would agree with you that it would be credible and admissible. If we brought in Mr. Spariosu and he denied making those statements to you and then your position would be you could not use them to cross-examine Ms. Elmady; is that right?

MR. LANGE: Right.

MR. SENIOR: If she denies it, he takes the answer as given.

MR. LANGE: No, no, no. I would bring Spariosu in as a defense witness.

THE COURT: Well, where is Spariosu?

MR. LANGE: He is in Coleman outside of Orlando.

THE COURT: It takes a little while. Marshals have been kind of busy in the last month or so. I can't snap my fingers and tell him get off a plane and bring in Spariosu.

MR. LANGE: It is Monday or Tuesday.

THE COURT: It seems like it's Wednesday.

MR. LANGE: We got a break Friday, Saturday, Sunday, Monday. We are not going to deal with Spariosu until Tuesday. There's certainly enough time for a marshal to go to Coleman and bring back the body.

THE COURT: It's not that easy.

MR. LANGE: It was under seal with Judge Huck. Ex parte and I know you don't like it hear.

THE COURT: I like to hear from both sides and make a decision.

MR. LANGE: I don't like give away defense strategy. I had a motion to keep him here. Judge Huck signed the order to keep him here. The marshal somehow moved him. Then another motion ex parte to bring him back.

THE COURT: What happened after that?

MR. LANGE: He is staying there. Nobody moved on it. We have, obviously, made some attempts to bring him in advance. I still think he is produceable. I have no reason to think that he is going to deny what he said.

THE COURT: Because he is very truthful in your view.

MR. LANGE: Only because he implicated himself telling me that.

THE COURT: I don't know. He comes into a court and is sworn before a Judge, sometimes, believe it or not, even people who have not told the truth before sometimes are kind of at awe when they raise their right hand and sometimes the fear of God or the Judge gets to them or the prosecutor.

MR. LANGE: There's no reason to believe that he wouldn't say what he told me. These facts are not Ken

Lange facts.

THE COURT: I am not saying that you made it up. My concern is, however, how I rule in a particular case affects me how I rule in another case. I am thinking, would I allow cross-examination of a witness based exclusively on the wrong doing alleged by a disgruntled ex-husband? Almost all ex-husbands are disgruntled. Almost.

MR. LANGE: Probably not unless they implicated themselves along with the person they are implicating. Then that's very powerful information. It says to me at least as to these points being somewhat stand up about the whole process. He is not saying I didn't do it. He is saying I did it with her.

MR. SENIOR: If I may speak.

THE COURT: Sure.

MR. SENIOR: Your Honor, I think if we could just maybe focus this more so, I got into narcotics trafficking to a small degree to explain how the house was purchased. I can see if counsel wants to start talking in detail about narcotics trafficking. I understand the Court's ruling. When you are talking about the claim based on the word of Tony Spariosu, who has been characterized by defense counsel in his opening statement as nothing short of a liar. The claim in number six that Suyapa Elmady committed

marriage fraud, which she has denied, does not seem to be supported in good faith by solely the word of her former husband.

THE COURT: Well, she has been married three times.

MR. LANGE: She would have told Spariosu this. He is not making it up. According to him, he is getting it directly from her.

THE COURT: My focus is Rule 608(b). You all can direct me to another rule of evidence if you think I am in left field. Specific instances of a conduct of a witness for the purpose of attacking or supporting the witness's credibility other than conviction of crime, as posed in rule 609, may not be proved by extrinsic evidence. You could not prove it by Spariosu testifying.

They may, however, in the discretion of the Court if probative of truthfulness or untruthfulness being inquired into on cross-examination of the witness concerning the witness's character for truthfulness or untruthfulness or concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified. Therefore, anything dealing with fraud or truth telling is fair game generally under 608(b).

What I can't have is open season and ask someone;

isn't it true that you murdered a Cosnostra guy in New York. You can't come up with different things like that.

MR. LANGE: Mine is not anywhere near that.

THE COURT: I didn't say that. That's why I mentioned something as outrageous as that. Therefore, the commit marriage fraud and delivery of two cocaine deals and the credit card fraud as well will be allowed and, of course, she can explain and say that has nothing to do with that. That's my husband. Wherever he got that information, you are trying to pin it on me, and that's what Spariosu has done all of his life. She can say whatever she thinks is the truth.

MR. LANGE: There's a few more than Spariosu.

THE COURT: I know.

MR. LANGE: Elmady sold American passports in 1992 Elmady selling counterfeit money in 1994 --

THE COURT: Hold on. Hold on. I will allow the questions.

MR. LANGE: '94, '95 Elmady sold Honduran passports --

THE COURT: I will allow that. I will allow that.

MR. LANGE: Elmady commit fraud -- the Federal Small Business Administration in 1992. She had lost her clothing store before Hurricane Andrew.

THE COURT: Do you have the paperwork on that?

MR. LANGE: I have Spariosu telling me that.

THE COURT: She was the owner of what business?

MR. LANGE: I forget the name. A clothing business. She lost it all somehow prior to Hurricane Andrew and claimed FIMA and losses of $80,000.

THE COURT: Isn't that something that can be obtained? A claim made, there's a piece of paper?

MR. LANGE: There are other ways I could substantiate it.

THE COURT: No, I would want some verification as easily as verifiable as that. A claim with FIMA, you write something up and you claim it. Did they pay?

MR. LANGE: I am not sure the paperwork is so clear or easily to obtain. Otherwise, she wouldn't be able to rip FIMA off. I am not sure how it would work.

THE COURT: Find out from FIMA.

MR. LANGE: You make a claim after Hurricane Andrew that FIMA and the SBA investigate the claim. They found it was credible based upon whatever false documentation she gave them according to Spariosu.

THE COURT: That's something you could obtain. They were husband and wife at the time. Spariosu, at the time that he gave you that statement, he could have given you authority to obtain information from FIMA. He

implicated himself as well?

MR. LANGE: It was her clothing business.

THE COURT: He did not implicate himself.

MR. LANGE: No. He was knowledgeable of the fraud.

THE COURT: This is something that perhaps I shouldn't accept based upon the theory I was using.

MR. LANGE: He was knowledgeable about the fraud so he says.

THE COURT: I won't allow it unless you have some documentation. Her claim. A lot of people made claims with FIMA that were legitimate including perhaps jurors. I need some more information before I allow you to ask that.

Selling heavy weapons to Colon Kadafi in Libya.

MR. LANGE: She already opened the door with that.

THE COURT: I will allow it at your own risk.

MR. LANGE: Absolutely.

THE COURT: Suyapa Elmady's five week mental breakdown.

MR. LANGE: Her mental health history. In Central African Republic deal they lost four and a half million dollars according to Spariosu. This was in '95 during the middle of the conspiracy. She had a five and a half week mental breakdown where she is babbling in Arabic

and wondering the street and had to be hospitalized.

THE COURT: When was that?

MR. LANGE: 95.

THE COURT: How does that help you?

MR. LANGE: Her mental state -- according to Spariosu, she has a lengthy history of mental health hospitalizations and treatment. So since it includes time during the course of the conspiracy, what I was seeking is that information from the government. Of course, they never provided it.

MR. SENIOR: Which it is not within the conspiracy. October of '95, I believe he indicated earlier.

MR. LANGE: It's certainly close enough. If it's not -- the dates are approximate even in the government's indictment. If we are a few months off it's approximated enough to the conspiracy that a complete mental breakdown that she is babbling in Arabic and wondering the streets and people have to go find her on the street tells me that her testimony, the mental health problems, were extensive up until then.

I ask the government to find out what the mental health situation was. I think the jury ought to know that she has this lengthy ongoing mental health history problem instead of this thing about her ulcer or whatever the heck

she was saying, her tumor or whatever she attributing to her healthwise either for sympathy or other reasons trying to establish she had a health problem. How about a mental problem? According to Spariosu, this is a serious health problem that has been ongoing. I filed a request with the government to seek this information out with the cooperator.

THE COURT: The beauty of it is that I have a pre-sentence investigation report which talks about her physical and mental condition.

THE COURT: So the issue would be assuming there was some mental health problems such as depression or therapy. What is the relevance of that? That's not instances of conduct that are related to truthfulness or untruthfulness.

MR. LANGE: I am not talking about depression or therapy where she may have lied. I am saying what Spariosu says about her complete mental breakdowns that go for five weeks at a time.

Hospitalization, I don't know what the PSI said, because I moved to have those unsealed along with the pre-trial services report and given up. But that motion was originally granted by Judge Huck. But Your Honor reserved that.

THE COURT: Because I wait until the time of

trial. This is what I am going to do regarding that. We know, of course, that the pre-sentence investigation report are in the public records but rather can have substantial reports to the trial Judge to use in his effort to arrive at a fair sentence. Requiring disclosure of a pre-sentence investigation report is contrary to the public interest as it may adversely affect the sentencing Court's ability to obtain data on a confidential basis from the accused and some sources of the accused for use in the sentencing process. That is what *United States v. Martinello* at 556 F.2nd 1215, that's what the Fifth Circuit said back in 1977 thus binding on 11th Circuit because of the age of that case and was reiterated by the Fifth Circuit in *United States v. Jackson* at 978 F.2nd 903, Fifth Circuit 1993 where pre-sentence investigation reports are not statements that the prosecution is required to produce under Jencks. That was also reiterated in 1994 by *United States v. Wallace* at 32 F.3d 921 where a pre-sentence investigation report prepared for government witness co-conspirator is not considered a statement of the defendant required to be disclosed under 18 U.S.C. Section 3500. In the *Wallace* case the Court used the document in camera and found that versions of the events set forth in the report and at trial were not materially different and thus were not disclosed.

What I am going to do in this case as I've

announced before is review the pre-sentence investigation report of every witness who was called to testify. I have reviewed the pre-sentence investigation report of Suyapa Elmady. I have done that because the Supreme Court in the *Juliann* case noted that Courts have typically required some showing of a special need before they will allow a third party to obtain a copy of the pre-sentence investigation report.

The Second Circuit in 1993 in the *Charmer* case found that the appropriate rule is when a co-defendant requests a pre-sentence investigation report of an accomplice witness the District Court should examine the report in camera to determine if there are any statements made by the witness that contain exculpatory or impeachment material. If there is any such material, the Judge should not release it unless there is a compelling need for disclosure to meet the ends of justice.

That's the language from *United States v. Moore* Second Circuit case in 1981. That's what I am doing.

In looking at Ms. Elmady's pre-sentence investigation report, I have read the physical condition on page 22, and it is consistent with what she has said about her physical condition. The mental and emotional health portion does have an indication of suffering of depression and undergoing out patient therapy. Therefore, there is a

factual basis for asking the question. The question still remains though whether it's a proper question because 608(b) talks about specific acts misconduct. Taking prescribed drugs, receiving out patient therapy, being depressed is not an act of misconduct.

MR. LANGE: If Spariosu is correct about the major mental breakdowns and mental health hospitalizations that go through the time of the conspiracy or close to the time of the conspiracy and can well be have continued through and beyond the conspiracy that would be important for the jury to know in weighing, in terms of the weight of her testimony, in terms of the competency of her testimony.

THE COURT: So your position is she doesn't know what she is talking about because she is too crazy?

MR. LANGE: There is a potential competency issue.

THE COURT: You are not saying she is lying in order to receive a better sentence?

MR. LANGE: That is another issue.

THE COURT: You are going to argue both, she suffers from depression or other mental illnesses to the extent that she doesn't know what she is talking about so we can't accept her testimony but alternatively she is so shrewd that she'll walk in and out of the courtroom and try to obtain a reduced sentence because she is the sharp

manipulative wife of three men.

MR. LANGE: A lot of seriously mentally ill people are very shrewd and manipulative. Even a schizophrenic will be highly manipulative.

THE COURT: I will find by reading the pre-sentence investigation report there would be a factual basis for asking that question, but I am going to sustain the government's objection to a question dealing with mental health. According to the pre-sentence investigation report, which I will disclose here, in case there's an issue on appeal, it says the defendant first sought treatment for her depression in Jordan during 1987 and was treated with Prozak. In 1993 she was treated for approximately one month at the Carter Hospital located in Miami, Florida, again, due to her depression. She used Prozak on and off up to 1997 when she underwent out patient therapy.

MR. LANGE: She doesn't mention the five week mental breakdown in the summer of 1995.

THE COURT: I know. I am going to need more. She was candid enough to disclose this. It would be to her benefit to mention how much she suffered. On that basis, I am going to sustain the objection.

MR. LANGE: May I say one other thing? On that particular issue that information -- all the other Brady

stuff came -- this one also came if Mr. Hall because she was involved in baby sitting. She would testify about the five week mental breakdown in the summer of '95.

THE COURT: He won't because it's irrelevant.

MR. LANGE: I am just giving you the full factual picture.

THE COURT: I find it irrelevant because I have set up a possible issue on appeal by saying there is a little bit of a factual basis to ask whether someone has used Prozak. Our past governor, God rest his soul, used Prozak, but whether you are a democrat or republican, it certainly didn't affect him. That's an issue that should not be raised. Particularly in your opening statement you mentioned her as one of the lucky ones who hasn't been sentenced sufficiently harshly so she is out. It's inconsistent. No question will be asked regarding that.

Then the terrorist bombing of the World Trade Center, there will be no questions regarding that, crashing of airliners et cetera. September 11 questions, there is absolutely no foundation and basis other than her father is Jordanian and her mother is Honduran. That's not a sufficient basis.

MR. LANGE: They were selling passports to the Libyans and arms to the Libyans. I am taking the next jump to force the government to reach out --

THE COURT: They did reach out.

MR. LANGE: They never asked those questions at all. That's when I suggested that perhaps because it's confidential and classified information that the prosecutor couldn't get it. He could ask Your Honor if that's the case. It seems that he couldn't get it. To inform Your Honor in camera --

THE COURT: I think the Court could take judicial notice that around 500 individuals have been detained and not even arrested, but detained, for investigative purposes and for immigration purposes and other purposes because of possible knowledge and links to the horrible September 11 incident. Miss Suyapa Elmady has not been. She walked in and out of the courtroom, as you will surely mention in your closing argument, and that's an indication that FBI and the CIA and all the agents who have the task of protecting our country are not interested in Suyapa Elmady when they have detained hundreds of Arabs and other Muslims just on the suspicion that they may have some information, yet, she wasn't, which supports my conclusion that just because she is half Jordanian doesn't mean that she is involved in the World Trade Center bombing.

MR. LANGE: It's involving the other issues. That was the basis to then leap to the connections with Kadafi in Libya.

THE COURT: That's not a leap. That's a jump of so many miles. I just read in the paper that the President of Venezuela, about whom I will not speak, is in Libya. If I have a Venezuelan defendant we are going to ask him isn't it true that you are involved with Kadafi?

MR. LANGE: I know you are worried about the impact of a ruling in another case. That's certainly reasonable. My request was not that we immediately interrogate Suyapa on it. Based on the activity of Suyapa and the family with the Libyans, with the passports and the arms, that that was enough to force the government to proactively, in the Brady, reach out to intelligence agents and say she is allegedly selling arms to the Libyans to Colonel Kadafi, a known terrorist.

THE COURT: What has the government done with inquiry about the September 11 incident?

MR. SENIOR: We have asked her about that. She indicated she has no involvement and has no knowledge of her family's involvement.

THE COURT: Most people would say that. Have you asked FBI?

MR. SENIOR: No, I have not, Your Honor.

THE COURT: Why don't you do that some time before the cross-examination ends because by providing the information that there's some allegation of prior Libyan

connections and then they have computers. They apparently have done just from reading the paper, an incredible job immediately in finding out so much information. There's probably no harm. That information can be disclosed to you a government prosecutor without any problem. If the information is positive and needs to be provided ex parte, w will deal with that. If the answer is as I expect it to be, no, if not, we would have detained her. That takes care of any appellate issue.

MR. LANGE: What if the answer is we refuse to tell you because you are not classified to receive the information. What if that's the answer? Then what's that information?

THE COURT: Are you classified?

MR. SENIOR: Me personally, Your Honor?

THE COURT: You know what I mean.

MR. SENIOR: I have top secret cases.

THE COURT: You have SIPA clearance?

MR. SENIOR: I have top secret clearance. Let me correct for the record. I did ask some individuals to do some work with regards to this. They got back to me. I forgot. We did check the list of 250 suspects with the FBI concerning the World Trade Center bombings, and her name, nor the other names that were in defense counsel's list, are not on that list.

THE COURT: Do another update just in case more names have been added. You can report to me before the end of the cross-examination, whenever that is. We mind as well be clear about that. There will be no questions until that time. That takes care of Suyapa Elmady, right?

MR. LANGE: That ends Suyapa Elmady.

MR. SENIOR: I have a few other matters.

THE COURT: Sure.

MR. SENIOR: I think it will save us time, Your Honor. First of all, I would ask the Court to inquire as an officer of the Court since he sat down with Tony Spariosu for so long to whether or not he inquired of Mr. Spariosu about the tapes for which he was protesting, 14A and B, and as to whether or not Mr. Spariosu had doctored the tapes.

MR. LANGE: No, I never got into that with him. I was looking for Brady. This goes back a year and a half ago. That led me to file twenty motions. That was when I had the debriefing. Not more recently.

MR. SENIOR: Next, Your Honor, I would just remind counsel, and I am sure he is going to produce it, we have got the defense discovery deadline this afternoon.

MR. LANGE: I don't have all of that together. I can tell you there's going to be an exhibit. Especially after our good case agent said there was no such thing as

APPENDIX C

APPENDIX C

Appendix C to Brief in No. 02-10464-EE

In order to fully explain the various pertinent calculations at Hall's sentencing at greater length, we attach this Appendix to our brief.

Summary

Under United States v. Vallejo, 297 F.3d 1154, 1169-71 (11th Cir. 2002); United States v. Venske, 296 F.3d 1284, 1292-94 (11th Cir. 2002) and United States v. McKinley, 995 F.2d 1020, 1025-26 (11th Cir. 1993), there was plain error at Hall's sentencing on a multi-object conspiracy. The district court, through no one's fault, did not find beyond a reasonable doubt that the government had proven each of the three objects of the conspiracy beyond a reasonable doubt, and Hall's sentence was calculated based on the offense guidelines for counterfeiting violations, which was the most serious of the objects of the conspiracy (having the most severe sentence).

Discussion

Count II of the indictment charged Hall with conspiring in violation of 18 U.S.C. § 371 to: (1) possess counterfeit obligations of the United States with the intent to defraud, in violation of 18 U.S.C. § 472; (2) devise a scheme to defraud by false pretenses, and to induce individuals to travel in interstate commerce in the execution of that scheme, in violation of 18 U.S.C. § 2314; and (c) transport stolen

property, in violation of 18 U.S.C. § 2314 (DE 389). The jury was not asked to return a special verdict on the conspiracy count or any other count.

The Probation Office, without objection, used the 1995 Guidelines Manual (i.e., the manual in effect when the crimes were committed). The PSI prepared in anticipation of Hall's sentencing correctly noted that the conspiracy charged in Count II encompassed three distinct criminal objects (PSI ¶ 37). The PSI correctly performed the various "grouping" processes mandated in USSG §§ 3D1.2, especially at comment. n.9 (note 8 in current USSG manual) (PSI ¶¶37-40).

The PSI followed USSG § 3D1.3(a), which requires the use of the offense level for the "most serious of the counts comprising the Group, i.e., the highest offense level of the counts in the Group" (PSI ¶ 41). That **offense level of 9** was found at USSG § 2B5.1(b)(1), which covers counterfeiting offenses where the counterfeit items exceeded $2,000. That guideline also provided for a **16 point increase** via the use of the table found at § 2F1.1(Q), as a "specific offense characteristic," where the value of the items was more than $20 million but less than $40 million (PSI ¶¶ 41-43). The proof at trial had been that Hall was involved in the counterfeiting of $25 million in currency. (That counterfeit currency, in turn, was used to fraudulently obtain gold coins in Florida which Hall took to the northeastern United States for re-sale - - hence the interstate transportation charges). The PSI recommended no further

adjustments, and **Hall's final offense level was level 25**. With his criminal history at category I, his presumptive guideline **sentencing range was 57-71 months'** imprisonment.

[***Had*** the PSI used USSG § 2B1.1(a), applicable to interstate transportation violations under 18 U.S.C. § 2314 such as those committed by Hall, his **base offense level would have been level 4**. Assuming that the $25 million figure would have been used under § 2B1.1(b)(1)(S), that level would have been **increased by 18 points**, for a **final offense level of 22**, three-points less than the level applied in the PSI and at sentencing. Hence, **Hall's range would have been 41-51 months'** imprisonment].

Hall raised various objections to the PSI. He asked for a three-point minor role reduction; he challenged the conclusion that he should be held accountable for the specific offense characteristic of $25 million, based on his argument that the proof of his involvement in the counterfeiting scheme was marginal; and he sought a downward departure on a variety of grounds. *But he did not object to the use of base offense level 9, resulting from the use of the "most serious" offense i.e., counterfeiting (at § 2B5.1 and the table at § 2F1.1) instead of interstate transportation (at § 2B1.1). He never objected that there had to be a finding that in the absence of a special verdict, the district court had to make a finding that the*

counterfeiting object of the multi-object conspiracy had been proven beyond a reasonable doubt.

At sentencing, Hall challenged the finding that he was to be held responsible for $25 million in counterfeit. The district court adhered to the $25 million figure. It stated that for sentencing purposes "the government's proof need only be by a preponderance of the evidence" (DE 537:55-56). The court awarded Hall a three-point role adjustment for his minor role in the substantive counterfeiting offense. Finally, the court increased the offense level two-points for obstruction of justice by giving perjurious testimony at trial.

As a result of these adjustments at sentencing, Hall's final offense level was level 24, with a guideline range of 51 to 63 months' imprisonment. The court imposed a term of 60 months' imprisonment. [Assuming all other adjustments and offense-characteristic findings remaining the same, **had Hall been sentenced under the interstate transportation of stolen property guidelines, instead of the counterfeiting guidelines, his final offense level would have been level 21, with a range of 37 to 46 months].**

The PSI and the district court ignored USSG § 1B1.2(d), which states: "A conviction on a count charging a conspiracy to commit more than one offense shall be treated as if the defendant had been convicted on a separate count of conspiracy

for each offense that the defendant conspired to commit." More pertinently, the PSI and later the district court ignored Application Note 5 [now numbered 4 in current manual] to § 1B1.2(d), which cautions:

> Particular care must be taken in applying subsection (d) because there are cases in which the verdict or plea does not establish which offense(s) was the object of the conspiracy. In such cases, subsection (d) should only be applied with respect to an object offense alleged in the conspiracy count if the court, were it sitting as a trier of fact, would convict the defendant of conspiring to commit that object offense.

It is well established in this Circuit that the words "were it sitting as trier of fact" mean that "the court must find beyond a reasonable doubt that the defendant conspired to commit the particular object offense," and that without such a finding the sentencing court cannot apply the corresponding offense level as found in the Sentencing Guidelines. See, e.g., United States v. Vallejo, 297 F.3d 1154, 1169-71 (11th Cir. 2002); United States v. Venske, 296 F.3d 1284, 1292-94 (11th Cir. 2002); United States v. McKinley, 995 F.2d 1020, 1025-26 (11th Cir. 1993).

Hall neither raised nor preserved any objection regarding the issue addressed herein. The mistake below was simply overlooked, and was not the subject of any objection or dialogue. Nevertheless, the vigor of the requirement that the district court must make a beyond a reasonable doubt finding in order to use the most serious

aspect of a multi-object conspiracy at sentencing was recently reinforced and extended in Vallejo and Venske. In Vallejo, the Court remanded for re-sentencing where the requisite finding was absent, even though the defendant had been convicted on the multi-object conspiracy at a bench trial handled by the sentencing judge. 297 F.3d at 1170-71. The Court stated that the objected-to error "compelled" remand.

In Venske, the Court extensively explained that the sentencing court's failure to make a beyond a reasonable doubt finding under USSG § 1B1.2(d) and commentary, ***even in the absence of an objection, was plain error***. 296 F.3d at 1292-94. The Court found that the third and fourth prongs of the plain error test (affects substantial rights and affects the fairness and integrity of judicial proceedings) had been satisfied because, assuming all other adjustments stayed the same, the use of the most severe object/guideline resulted in an offense level that was three-levels higher than the less serious object of the conspiracy. Id. at 1293-94.

On remand the government will argue that the counterfeiting object was proven beyond a reasonable doubt and that its guideline is applicable. We anticipate Hall taking the opposite position.

8/29

FILED

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

CASE NO. 02-10464-EE

UNITED STATES OF AMERICA,

Appellee,

vs.

NATHAN HALL,

Appellant.

_____/

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF OF APPELLANT

no juris pending

ERIC M. COHEN
TWO DATRAN CENTER
SUITE 1200
9130 SOUTH DADELAND BLVD.
MIAMI, FL 33156
TEL. (305) 670-0230
FAX. (305) 670-7003
FLA. BAR NO.: 328-065

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

CASE NO. 02-10464-EE

UNITED STATES OF AMERICA V. NATHAN HALL

CERTIFICATE OF INTERESTED PERSONS

Undersigned counsel for NATHAN HALL hereby certifies that to the best of his knowledge and belief the following is a complete list of persons who have an interest in this case:

Cohen, Eric

Gonzalez, Anthony

Hall, Nathan

Huck, Honorable Paul

Lange, Kenneth

Mendez, Marisa Tinkler

Moreno, Honorable Federico

Schultz, Anne

Senior, Robert

ERIC M. COHEN

STATEMENT REGARDING ORAL ARGUMENT

Defendant Nathan Hall's conviction resulted almost exclusively from the testimony of two government witnesses. Accordingly, oral argument is warranted here to determine whether the district court erroneously limited cross examination of them and whether one's credibility was improperly vouched for by the government. Additionally, the district court's application of the incorrect standard at sentencing resulted in a more severe sentence then otherwise applicable.

CERTIFICATE OF TYPE SIZE AND STYLE

The Defendant certifies that this brief uses Times New Roman 14 point base font.

TABLE OF CONTENTS

PAGE

TABLE OF CITATIONS

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked pursuant to Title 28 of the United States Code, section 1291.

STATEMENT OF THE ISSUES

I

WHETHER THE DISTRICT COURT IMPROPERLY LIMITED THE DEFENDANT'S CROSS-EXAMINATION OF THE GOVERNMENT'S TWO PRINCIPAL WITNESSES CONCERNING ONE'S MENTAL HEALTH AND THE OTHER'S DRUG USE.

II

WHETHER THE GOVERNMENT COMMITTED PLAIN ERROR BY SUGGESTING TO THE JURY DURING ITS DIRECT EXAMINATION OF A PRINCIPAL WITNESS THAT IT HAD CONFIRMED THAT WITNESS'S CREDIBILITY.

III

WHETHER THE GOVERNMENT FAILED TO PROVE THE MENS REA NECESSARY TO SUPPORT A CONVICTION ON COUNT 3 OF THE INSTANT INDICTMENT.

IV

WHETHER THE DISTRICT COURT IMPROPERLY IGNORED THE PROVISIONS OF USSG §1B1.2 BY APPLYING THE PREPONDERANCE OF EVIDENCE STANDARD IN FINDING AT SENTENCING THAT THE DEFENDANT HAD CONSPIRED TO COUNTERFEIT MONEY.

STATEMENT OF THE CASE

On July 10th, 2001, a Second Superceding Indictment was returned in the Southern District of Florida charging Defendant Nathan Hall with conspiring to commit offenses against the United States (Count 2), transporting in interstate commerce gold coins that he knew to be stolen (Count 3), and inducing others to travel in interstate commerce in execution of a scheme and artifice to defraud (Count 5). (R1:389) The objects of the conspiracy charged in Count 2 were possession of counterfeit obligations with intent to defraud and the substantive offenses charged in Counts 3 and 5.

Mr. Hall proceeded to trail before the Honorable Federico Moreno and a jury on October 16th, 2001. After the government rested and again at the close of all the evidence, the Defendant moved for a judgment of acquittal on all of the counts with which he was charged. (R1:531:176;1:533:55) As to Count 3, he argued specifically that the government had failed to prove that he knew that the coins in question were stolen. Those requests were denied. (R1:531:183;1:533:55) The jury ultimately returned a verdict convicting Mr. Hall of each charge. (R1:450)

The Defendant was sentenced by Judge Moreno on January 10th, 2002. Previously, he had filed two pleadings objecting to the Probation Office's recommendation in the Presentence Investigation Report (PSI) that he be held accountable for $25 million in counterfeit currency. (R1:472:2,1:480:3) The court below, applying the preponderance of evidence standard, rejected that argument.

(R1:537:55-6) It then sentenced Mr. Hall to a term of sixty months incarceration. (R1:484) A three year period of supervised release and a $300 assessment were also imposed.

A Notice of Appeal was filed on the Defendant's behalf on January 17th, 2002. (R1:485) Pending the resolution of the instant proceedings, Mr. Hall remains in the custody of the Bureau of Prisons.

STATEMENT OF THE FACTS

Suyapa Elmady testified below that in the latter part of 1995, her then -husband (and eventual codefendant) Marin Spariosu advised her that a person he identified only as Sal had $25 million in "old" United States currency that he needed to "launder". (R1:522:59) Specifically, Sal wanted to exchange the currency for gold or diamonds. Id. Spariosu was to receive $5 million for assisting Sal in this endeavor. Id.

Eventually, Sal returned to Canada with the currency. Id. at 61. Spariosu, however, had already procured two sets of clients who had agreed to trade gold coins for cash. He therefore devised a plan in which he would print $25 million in counterfeit currency which he would then exchange for the coins. Id. at 61-2.

In furtherance of this plan, Debbie Piedra, who was Spariosu's "right hand person," id. at 66, rented a warehouse and purchased a printing machine. Id. at 70. Scott Carle provided the paper on which the counterfeit was to be printed. Id. at 66. Jon Tomas cut the paper into individual bills. Id. at 67. Carle was introduced to Spariosu and Elmady by Defendant Nathan Hall. Id.[1]

Elmady further testified that in May of 1996, Spariosu delivered a portion of the

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[1]. Elmady claimed that she had been told by Spariosu and Piedra that they had asked Mr. Hall to provide the paper. Id. at 68. Later, she testified that Spariosu had contacted the Defendant about a delay in the delivery of the paper. (R1:523:11)

counterfeit funds to Harris Sperber in exchange for gold coins. Id. at 75-6. Sperber also described this incident at trial.

Sperber claimed that in 1995, Spariosu informed him that a Canadian businessman named Sal wanted to trade $25 million in United States currency for checks. (R1:518:54-5) Later, Spariosu said that Sal would accept any "lawful commodity". Id. at 55. Spariosu also said that he was negotiating with two New York lawyers, Jonathan Kranzler and Paul Haberman. Id. at 56

In April of 1996, an agreement was reached in which George Vega, an associate of Sperber, would provide $1 million in gold coins to Spariosu each month. Id. at 60. Accordingly, on or about May 12th, 1996, Vega delivered $1.25 million in coins to Sperber. Id. at 61. Vega expected to receive $3 million in currency in return. Vega would then be obligated to "fill the remainder" by the beginning of June. Id. at 62. Sperber and Spariosu drove with the coins to a hotel in Broward County, where they met a person who Spariosu introduced to Sperber as Phil. Id. at 67-8. After Spariosu and Phil conversed in Italian, they left the hotel, leaving Sperber behind. Id. at 69. Spariosu ultimately returned and gave Sperber a suitcase containing currency. Sperber and Vega later determined that that money was counterfeit. Id. at 72.

Elmady explained at trial that shortly after this theft, Spariosu advised her and Piedra that he and Mr. Hall were traveling to New York to sell the coins that he had received from Sperber. (R1:523:8) Spariosu also told Elmady that his brother would

help him "move" the coins. Id. at 9. The Defendant was not present during either of those conversations. Additionally, Elmady admitted at trial that Spariosu did not tell her what he had said to Mr. Hall about the origin of the coins. Id.

After leaving Miami-Dade County, Spariosu telephoned Elmady at least twice, including once from Virginia and once from New York.[2] Upon his return, he told Elmady that he had left $25,000[3] with the Defendant and $15,000 with his brother. Id. at 16. He also claimed that Mr. Hall had traveled to Virginia to deliver a portion of the coins there. Id. Those coins were delivered to Douglas Parent and Parent's attorney by the Defendant. (R1:522:15)

Sperber testified that in July of 1996, he helped Spariosu convince Kranzler and Haberman to continue their negotiations with Spariosu. (R1:531:12-3) Later, after the New York lawyers arrived in Miami Beach, Sperber met with Spariosu and the Defendant at Spariosu's house. Id. at 17. At that time, he was told that Spariosu and Mr. Hall had earlier gone to the Fountainebleu Hotel to visit with Kranzler and Haberman. While there, the lawyers had refused to deliver to Spariosu the coins that

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[2]. Elmady testified that before traveling to New York, the Defendant had been shown the counterfeit currency at the house that she shared with Spariosu. (R1:523 :12-4)

[3]. Sperber testified that within two weeks after Spariosu had delivered to him the counterfeit money, the Defendant had given him $25,000 to invest. (R1:531:5-6)

they had bought with them. Id. at 17-8.

Spariosu then called the lawyers twice at their hotel. Again, he tried to persuade them to give him the coins. Again, they refused. Finally, Spariosu said that he would arrange a meeting and that the Defendant would transport the lawyers to that meeting. Id. at 19-20. After the second telephone call, Mr. Hall supposedly said that he would "get the coins." Id. at 21.

Sperber then claimed that at approximately 12:30 to 1:00 the following morning, the Defendant telephoned him and asked to meet at a residential complex. Id. at 22. According to Sperber, Mr. Hall delivered a bag of coins to him there. Id. at 26. Sperber then drove the Defendant to a hotel near I-95.

While driving to the hotel, Mr. Hall purportedly told Sperber that he had gone to the Fountainebleu on the previous evening. Id. at 29. When the lawyers approached his car, the Defendant said that only one of them could accompany him. Haberman then entered the car. Id. at 30. At some point, however, Haberman said that he needed to return to the hotel because he had forgotten the key to the suitcase containing the coins. Id. at 31. Upon returning to the hotel, Haberman exited the car. Sperber testified that Mr. Hall admitted to him that he then drove away with the coins. Id. at 32.

Finally, Sperber stated that when he returned the next morning to the hotel where he had left the Defendant, he gave Mr. Hall $10,000. Id. at 37. Notably, although

Sperber claimed that the Defendant ultimately asked for -and received- the coins that he had delivered to Sperber, id. at 44, Elmady suggested that Spariosu and Sperber divided those coins between them. (R1:523:27)

In addition to Elmady and Sperber's testimony, the government introduced evidence concerning a $34,000 check payable to the Defendant from Elmady's bank account.[4] Elmady testified at trial that Spariosu had told her that he had given that check to Mr. Hall. (R1:523:26) Spariosu did not say why he had done so. The Defendant cashed the check on the same day that Kranzler and Haberman arrived in Miami Beach.[5] (R1:518:12-3)

Prior to cross-examination of both Elmady and Sperber, the district court asked counsel for the Defendant to proffer outside of the jury's presence what he intended to ask the witnesses. Counsel responded that he would question Elmady about a mental breakdown that she had experienced in 1995. (R1:522:106) Counsel claimed that during that time, the witness would "babbl[e] in Arabic" and roam the streets. Id. at 106-7. As a result, she was hospitalized.

Upon reviewing Elmady's Presentence Investigation Report (PSI), the court

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[4]. The government also introduced a tape-recorded telephone conversation between Spariosu and the Defendant and redacted transcripts of telephone conversations that Spariosu had recorded with Kranzler and Haberman.

[5]. Mr. Hall used military identification to cash the check. (R1:522:37)

below noted that she had in fact suffered from depression and had been treated with Prozac. Id. at 112. Although it thus found that a factual basis for the proposed questions existed, it precluded counsel from asking them. Id. at 110-3.

Counsel also indicated that he intended to question Sperber about his use of cocaine and alcohol during the period charged in the Indictment. (R1:518:85) The district court similarly prohibited that examination. Id. at 87.

While Elmady was not asked about her mental health problems, she did testify on direct examination that after she was sentenced in another matter, she began to cooperate with the government. (R1:523:31) That cooperation resulted in two indictments. She claimed that she had not testified against the persons charged in those cases because they all pleaded guilty. Id. at 31-2. She further stated that due to her assistance to the government, her sentences in the original case in which she had pleaded guilty and two more recent cases had been reduced from sixty months imprisonment to the three years that she had already served. Id. at 34.[6]

Mr. Hall testified on his own behalf at trial. He said that in 1994, he met with Spariosu in Miami-Dade County. While there, Spariosu offered the Defendant a job as a bodyguard and as a military advisor for a project that Spariosu was developing in the Central Africa Republic. (R1:532:106-8) When Spariosu guaranteed him $1

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[6]. No objection was raised to this testimony.

million for his efforts, id. at 114-6, Mr. Hall naturally accepted.[7]

Although conceding that he worked for Spariosu, the Defendant denied any involvement in Spariosu's counterfeiting activities. Id. at 160, 209. He did admit, however, driving with Spariosu to New York with approximately $1 million in gold coins. Id. at 170. Spariosu had earlier explained that he had obtained those coins from a friend who was liquidating his personal collection. Id. at 170. Spariosu had further stated that his brother would help sell the coins in New York. Id. at 168. Spariosu also said that he would utilize a portion of the proceeds from the sale of the coins to pay the Defendant part of the money that had been guaranteed to him. Id. at 171.

From New York, Spariosu directed Mr. Hall to travel to Virginia and retrieve some coins that had been left with the Defendant's mother there. Id. at 173. Those coins were then delivered in Norfolk. Id. at 174. During his travels with -and on behalf of- Spariosu, "[e]verything appeared to be straight up" to the Defendant. Id. at 175.

After returning to South Florida, Spariosu paid Mr. Hall $30,000 for his assistance in transporting and delivering the coins. Id. at 175-6. The Defendant invested $25,000 of those funds with Sperber. Id. at 177.

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[7]. Before accepting Spariosu's offer, the Defendant consulted with his immediate supervisor in the Army who advised him to do so. Id. at 111.

Mr. Hall also admitted driving Spariosu to the Fountainebleu Hotel to meet with Kranzler and Haberman. Id. at 182. At the conclusion of that meeting, Spariosu told the lawyers that the Defendant would return that evening to get them. Id. at 183.

Upon Mr. Hall's return to the hotel that evening, Kranzler said that he could not go with the Defendant due to his religious beliefs. Id. at 185. Haberman, however, entered the car. After driving a short while, Haberman indicated that he needed to return to the hotel because he had forgotten his keys. Id. When Haberman did not return to the car for approximately thirty minutes, Mr. Hall left. Id. at 187. He did not realize that Haberman had left a bag of coins in the car until later. Id. at 186,188.[8]

Mr. Hall also related an incident in which he was confronted by two agents of the Drug Enforcement Administration (DEA) in September of 1997. Those agents questioned him about Spariosu and Elmady. Id. at 47. They also asked the Defendant to work undercover for them. Id. at 48. The next day, Mr. Hall declined that request. Id. at 50. The agents then informed him that he would likely be indicted because of that refusal.

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[8]. Mr. Hall also explained that he had cashed the $34,000 check at Elmady's request. Id. at 179-81.

STANDARD OF REVIEW

The improper limitation on cross-examination (Argument I) is reviewed for abuse of discretion.

As the Defendant did not object below to the government's improper vouching for one of its witnesses (Argument II), that issue is reviewed for plain error.

A challenge to the sufficiency of the evidence (Argument III) should be denied if, viewing the evidence in the light most favorable to the government, any reasonable construction of the evidence supports a finding of guilt beyond a reasonable doubt.

The district court's application of the Sentencing Guidelines (Argument IV) is reviewed de novo.

SUMMARY OF ARGUMENT

At the trial below, the district court precluded Defendant Nathan Hall from cross-examining the two principal government witnesses concerning issues that could have created substantial doubt about their credibility. First, the court, although it found that a factual basis for the questions existed, prohibited Mr. Hall from questioning Suyapa Elmady about her mental deficiencies during the time period charged in the instant Indictment. The court then denied the Defendant's request to ask Harris Sperber about his abuse of cocaine and alcohol during the same period. This restriction on Mr. Hall's right to confrontation warrants a new trial.

A new trial is also justified because the government, during its direct examination of Elmady, improperly vouched for her credibility. Specifically, that questioning implied that the government, by requesting a reduction of her sentence, and the court below, by granting that request, had found Elmady to be credible.

Additionally, Mr. Hall was improperly convicted of Count 3 of the instant Indictment because the government failed to prove that he knew that the gold coins that he admittedly transported from Florida to Virginia had been stolen.

Finally, in determining the Defendant's base offense level, the court below improperly applied the preponderance of evidence standard -rather than the more demanding reasonable doubt standard -in finding that Mr. Hall had conspired to possess counterfeit currency. The court's utilization of the erroneous standard mandates

resentencing here.

ARGUMENTS

I

THE DISTRICT COURT IMPROPERLY LIMITED THE DEFENDANT'S CROSS-EXAMINATION OF THE GOVERNMENT'S TWO PRINCIPAL WITNESSES CONCERNING ONE'S MENTAL HEALTH AND THE OTHER'S DRUG USE.

As this Court recognized in United States v. Lindstrom, 698 F.2d 1154 (11th Cir. 1983), "[t]he right of cross-examination is an essential safeguard of fact-finding accuracy in an adversary system of justice and 'the principal means by which the believability of a witness and the truth of his testimony are tested [.]'" Id. at 1160, quoting Davis v. Alaska, 415 U.S. 308, 316 (1974). In the instant case, however, the district court limited Defendant Nathan Hall's cross-examination of the two principal government witnesses, Suyapa Elmady and Harris Sperber, concerning issues that could have significantly impeached their credibility. A new trial is thus required here.

Suyapa Elmady

Elmady testified at trial after agreeing to cooperate with the government. (R1:523:30-2) Prior to cross-examination, counsel for Mr. Hall advised the court below that he intended to question Elmady about her "mental health history." (R1:522

:106) Counsel claimed that in 1995, Elmady "had a five and a half week mental breakdown where she [was] babbling in Arabic and wondering [sic] the street and had to be hospitalized." Id. at 106-7. Counsel further indicated that the information of Elmady's breakdown was provided to him by codefendant Marin Spariosu, who was married to her at the time. Id. at 108.

After reviewing Elmady's Presentence Investigation Report (PSI), the court noted that the witness had suffered from depression and had received out patient treatment.[9] Id. at 110. It therefore recognized that a factual basis existed for the questions counsel proposed. Id. at 110-1. Despite this conclusion, however, the court precluded that examination, finding that it was irrelevant and "inconsistent." Id. at 113. This limitation on cross-examination warrants a new trial here.

To reverse Mr. Hall's conviction, this Court need look no further than the former Fifth Circuit's decision in Greene v. Wainwright, 634 F.2d 272 (5th Cir. 1981).[10]

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[9]. The PSI reflected that Elmady sought treatment for depression and was prescribed Prozac while in Jordan in 1987. In 1993, she was treated for depression at a hospital in Miami. She was again treated with Prozac "on and off" until 1997 while she received out-patient therapy. Id. at 112. Significantly, this latter period overlaps with the time period charged in the instant Indictment.

[10]. That decision is binding here. See Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981) (en banc).

At his trial in a Florida state court, Greene was prohibited from questioning a prosecution witness (Kennerly) about his mental condition. Specifically, the trial court there ruled that Kennerly, who was undoubtedly the State's key witness, could not be asked about "certain bizarre criminal actions" in which he was purportedly involved. Id. at 274. Because of this limitation on cross-examination, Greene's conviction was vacated.

The Court in Greene found that the defendant's confrontation rights were violated in part because evidence of Kennerly's conduct "might have cast doubt on his mental stability."[11] Id. at 276. It recognized that:

> It is just as reasonable that a jury be informed of a witness's mental incapacity at a time about which he proposes to testify as it would be for the jury to know that he then suffered an impairment of sight or hearing. Id., quoting United States v. Pantin, 493 F.2d 750, 762 (5th Cir. 1974).

Therefore, as Kennerly's odd behavior occurred at approximately the same time as the offense charged there, the trial court's "absolute prohibition" against cross-examination concerning the witness's "mental instability" -as reflected by that behavior- "exceed[ed] any possible trial court discretion."[12] Id.

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[11]. It also noted that Greene was entitled to explore whether the witness was testifying to avoid criminal prosecution for those other acts. Id.

[12]. This finding was particularly warranted due to the significance of

In most material respects, the instant case is virtually identical to Greene. In each, the witness displayed bizarre behavior at a time proximate to the incident for which the defendant was charged. In each, that behavior was indicative of "mental instability." In each, the defendant was "absolute[ly] prohibit[ed]" from exploring the extent of the mental deficiency during cross-examination. In Greene, the Court found a constitutional violation warranting a new trial. This Court should reach the same conclusion.[13]

Harris Sperber

Sperber, like Elmady, was an essential government witness below. Accordingly, counsel for Mr. Hall sought to cross-examine him about his "very, very serious on-going cocaine and alcohol addiction." (R1:518:85) This information was also provided by Spariosu.[14] The court below, citing this Court's decision in United States

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Kennery's testimony. Id. at 275.

[13]. Of particular note, the Court in Greene did not require the defendant to show that cross-examination of Kennerly would have revealed damaging testimony or, if it had, that that testimony would have persuaded the jury to disbelieve him.

[14]. Specifically, Spariosu had advised counsel that Sperber was "in essentially a constant stuperous state of cocaine addiction, cocaine use and alcohol use." Id. at 86.

v. Sellers, 906 F.2d 597 (11th Cir. 1990), denied that request, ruling that "prior instances of drug abuse are not relevant to truthfulness" pursuant to Fed.R.Evid. 608(b). Id. at 87. The court further found that the Defendant's factual proffer was insufficient.

In United States v. Di Paolo, 804 F.2d 225,229 (2d Cir. 1986), the court recognized that "[i]t is, of course, within the proper scope of cross-examination to determine whether a witness was under the influence of drugs or narcotics or alcohol at the time of observation of events in dispute[.]" For this proposition, the court there relied on United States v. Fowler, 465 F.2d 664 (D.C.Cir. 1972). In Fowler, the defendant had sought to cross-examine the government's key witness, a former undercover law enforcement officer, about his "possible use of narcotics" at the time of the charged offense. The witness had been dismissed from the police department when he refused to submit to a third urine test.[15] The trial court denied the defendant's request absent a more substantial factual basis. The appellate court reversed.

The court in Fowler recognized that "[a] reasonable amount of exploratory questioning should be allowed, based on slight suspicion, especially when the [g]overnment's principal witness is involved." Id. at 666 (emphasis supplied). As

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[15]. Although one of the two previous tests was negative, the other was inconclusive.

Fowler had made the requisite showing, the court further held that the trial court had "unduly restricted his right of cross-examination." Id. at 668.

Fowler clearly defeats both of the district court's bases for prohibiting cross-examination concerning Sperber's drug use. First, the court there found that a defendant may question a witness about the witness's drug use during the time period about which he or she is testifying. Significantly, the case on which the court below relied reached the identical conclusion. In Sellers, this Court noted that evidence of drug use during "the transaction charged in the indictment" is permissible. Id. at 602 (citation and internal quotation marks omitted). As Mr. Hall's proffer alleged that Sperber's drug use extended "through the period of the conspiracy," (R1:518:85), the proposed cross-examination was thus appropriate.

Additionally, that proffer was based on more than the "slight suspicion" required by Fowler. Again, Spariosu, who was an intimate associate of Sperber's, (R1:531:70), informed counsel for the Defendant of Sperber's extensive abuse of both cocaine and alcohol. This representation was therefore sufficient to justify exploration of this issue even without Spariosu's appearance at trial. Accordingly, as in Fowler, the court below "unduly restricted" Mr. Hall's cross-examination of a key government witness. This error, whether considered alone or in conjunction with the improper limitation on the cross-examination of Elmady, warrants a new trial here.

II

THE GOVERNMENT COMMITTED PLAIN ERROR BY SUGGESTING TO THE JURY DURING ITS DIRECT EXAMINATION OF A PRINCIPAL WITNESS THAT IT HAD CONFIRMED THAT WITNESS'S CREDIBILITY.

Undeniably, "the government cannot argue the credibility of a witness based on the government's reputation or allude to evidence not formally before the jury." United States v. Eyster, 948 F.2d 1196, 1206 (11th Cir. 1991) (citation omitted). In the instant case, however, the government vouched for the credibility of Suyapa Elmady by suggesting -during her direct examination- that it had determined that she was testifying truthfully. As this improper questioning "prejudicially affect[ed] the substantial rights," Eyster at 1206, of Defendant Nathan Hall, a new trial is mandated here.

Elmady testified on direct examination that she had pleaded guilty and had been sentenced to five years imprisonment in another case without an agreement with the government. (R1:523:29) After being sentenced there, however, she agreed to cooperate. Id. at 31. Her cooperation resulted in two indictments in which twenty defendants were charged. Id. at 31-2. She explained that she had not testified against

those individuals because they had all pleaded guilty. Id. at 32.

The inescapable inference to be drawn from this testimony was that the government had believed Elmady and had thus presented the information that she had provided to at least one grand jury. Additionally, the jury would have necessarily surmised that Elmady's information was correct as the defendants in the resulting cases had pleaded guilty. This evidence alone constituted improper vouching warranting a new trial. But, unfortunately, the government's vouching was not yet complete.

Elmady further related during direct examination that she had pleaded guilty in two other cases, including the instant one. Id. at 33-4. She then revealed that the sentences in all three cases had ultimately been reduced by the district court to the three years that she had already served in custody. Id. at 34.

Clearly, the jury could have drawn but one conclusion from this testimony. If: 1) Elmady was obligated to testify truthfully to obtain a sentence reduction[16]; 2) the government requested such a reduction; and 3) the district court granted that reduction, the jury must have deduced that the court and the government had found Elmady to be credible. One can hardly imagine a more blatant example of vouching.

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[16]. Harris Sperber, an experienced criminal defense attorney, explained in detail the process leading to a reduction of sentence based on a defendant's substantial assistance to the government. (R1:531:39)

Compelling support for the Defendant's position is found in United States v. Rudberg, 122 F.3d 1199 (9th Cir. 1997). Several cooperating witnesses testified for the government there. One of those witnesses -Jodie Maese- testified that her sentence had been reduced based on her substantial assistance. Id. at 1202. Another -Jimmy Maese- admitted that his sentence had been reduced pursuant to a motion by the government. Id. Yet another -Kym Humphrey- claimed that she anticipated a sentence reduction due to her testimony against Rudberg. Id. Finally, Greg Hruska testified that he had earlier been denied a sentence reduction because he had withheld information from the government. Id. at 1203. He expected, however, that his present testimony would merit consideration. Earlier, an agent with the Federal Bureau of Investigation (FBI) had explained the procedure for obtaining a reduction of sentence. No objection was raised to any of this testimony.

In reversing Rudberg's conviction, the court noted that the "prosecutor's statements and the testimony that he elicited implied that the government possessed extra-record knowledge and the capacity to monitor the truthfulness of the testimony given by all of the witnesses who had received or hoped to receive a benefit under [Fed.R.Crim.P.] 35." Id. at 1204. Further, as the district court had already reduced the Maeses's sentences, the evidence suggested that the court similarly "monitor[ed] a witness' veracity." Id. Because: 1) the witnesses's testimony was "critical to the

government's case," id. at 1205; and 2) the improprieties "infected the trial from the outset," id., the court found that the testimony there constituted "plain error."

The evidence challenged here is virtually identical to that found to be infirm in Rudberg. Like the Maeses, Elmady testified that her sentence had already been reduced based on her cooperation. As in Rudberg, the "obvious inference" from this testimony was that Elmady's testimony "had been investigated and verified so that the judge could 'go down' from the guidelines, because [s]he told the truth." Id. at 1202. Undeniably, Elmady's credibility was "critical" to the success of the government's case. Therefore, evidence that the court had reduced her sentence -presumably because it found her to be credible- "affect[ed] both the fairness and integrity of judicial proceedings." Id. at 1206. This "plain error" mandates a new trial here.

III

THE GOVERNMENT FAILED TO PROVE THE MENS REA NECESSARY TO SUPPORT A CONVICTION ON COUNT 3 OF THE INSTANT INDICTMENT.

Count 3 of the instant Indictment alleges that Defendant Nathan Hall transported gold coins that he knew to be stolen from Florida to Virginia. (R1:389) At trial, however, the government proved only the act of transportation without the requisite mens rea. Mr. Hall's conviction on that count must thus fail.

In May of 1996, Harris Sperber and George Vega provided Marin Spariosu with $1.25 million dollars in gold coins. Sperber and Vega believed that in return, they would receive $3 million in United States currency. (R1:518:62) Unfortunately for them, the money given to them by Spariosu was counterfeit.

Several weeks after this exchange, Mr. Hall delivered a portion of the coins that Spariosu had received from Sperber and Vega to Douglas Parent in Virginia. (R1:522:15) Parent did not pay for the coins at the time. Id. at 15-6.

Suyapa Elmady was the sole government witness to explain how the coins were transported from Florida to Virginia. She testified that Spariosu advised her and Debbie Piedra that he and this Defendant were traveling to New York to "move the

coins" because he (Spariosu) could not sell them in Miami. (R1:523:8) During another conversation, Spariosu told Elmady alone that his brother would help him "move" the coins in New York. Id. at 9. Significantly, in neither of these discussions did Spariosu indicate what he had told Mr. Hall about the source of the coins. Id.

After leaving Florida with the Defendant, Spariosu telephoned Elmady at least twice. In one call, Spariosu, who was in Virginia, explained that he had sold some coins there because he "needed cash." Id. at 14. Because Virginia was a "small place," however, he intended to proceed to New York.

Spariosu also called Elmady upon his and Mr. Hall's arrival in New York. He then again indicated his expectation that his brother would assist in locating purchasers for the coins. Id. at 15.

Spariosu returned to Florida alone approximately five days after departing. Id. at 16. Upon his arrival, he told Elmady that he had left $25,000 with Mr. Hall and $15,000 with his (Spariosu's) brother. Id. He further claimed that the Defendant had stayed behind to deliver coins to an individual in Virginia. Id.

Concededly, the record below reflects that Mr. Hall transported the coins that Spariosu had stolen from Sperber and Vega in interstate commerce. It does not, however, indicate that he knew that those coins were illicitly acquired.

Clearly, the government cannot claim that this Defendant actively participated

in the "rip off" of the coins. Nor can it argue that Mr. Hall at any time admitted his knowledge of how Spariosu actually obtained the coins.[17] The government must therefore rely on what the Defendant was told about their source. But Elmady did not testify that Mr. Hall participated in -or even overheard- any of her conversations with Spariosu about the theft of the coins. In fact, when asked on direct examination, Elmady admitted that she was "not really sure" if the "rip off" was discussed in the Defendant's presence. Id. at 20. Proof of knowledge is therefore lacking.

The government may argue that Mr. Hall's receipt of $25,000 from Spariosu is indicative of his knowledge that the coins were illegally derived. But that amount reflects just two percent of the total value of the coins. Surely, if the Defendant was aware of the risk that he was taking by transporting stolen property, he would have demanded -and likely received- a significantly greater share of the proceeds.

The statute that the Defendant is alleged to have violated -18 U.S.C. §2314- requires the government to prove that the accused knew that the property being transported in interstate commerce had been stolen. Again, the government here has failed in that burden. The conviction on Count 3 must thus be reversed.

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[17]. At trial, the Defendant testified that Spariosu had told him that he received the coins from a friend who was liquidating his personal collection. (R1:532:170)

IV

THE DISTRICT COURT IMPROPERLY IGNORED THE PROVISIONS OF USSG §1B1.2 BY APPLYING THE PREPONDERANCE OF EVIDENCE STANDARD IN FINDING AT SENTENCING THAT THE DEFENDANT HAD CONSPIRED TO COUNTERFEIT MONEY.

Section 1B1.2 (d) of the United States Sentencing Guidelines provides that "[a] conviction on a count charging a conspiracy to commit more than one offense shall be treated as if the defendant had been convicted on a separate count of conspiracy for each offense that the defendant conspired to commit." The Commentary to that section further cautions that if the jury's verdict does not establish which of the offenses charged in the indictment were objects of the conspiracy, the sentencing court must make that determination as if it was "sitting as a trier of fact [.]" USSG §1B1.2, comment. (n.4). This Court has interpreted this provision as requiring a finding beyond a reasonable doubt. See United States v. McKinley, 995 F.2d 1020 (11th Cir. 1993). In the instant case, however, the district court improperly applied the preponderance of evidence standard in determining Defendant Nathan Hall's base offense level. Mr.

Hall's sentence must thus be reversed.

Count 2 of the instant Indictment charged Mr. Hall with conspiring to: 1) possess counterfeit obligations with intent to defraud; 2) induce others to travel in interstate commerce in execution of a scheme and artifice to defraud; and 3) transport gold coins that he knew to be stolen in interstate commerce.[18] Although the Defendant was convicted of this offense, the jury's verdict did not specify which objects of the conspiracy Mr. Hall had committed.

Despite the ambiguity in the verdict, the Defendant's Presentence Investigation Report (PSI) recommended that his sentence be calculated pursuant to the guideline for counterfeiting.[19],[20] PSI at ¶ 41. It then calculated Mr. Hall's total offense level to be 25 with a corresponding sentencing range of 57 to 71 months imprisonment.[21] PSI at ¶¶ 49,90.

Prior to sentencing, the Defendant objected to this recommendation, arguing that the "evidence [at trial] of defendant Hall's involvement in any counterfeiting or

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[18]. The latter two objectives were also charged as substantive offenses.

[19]. USSG §2B5.1.

[20]. Notably, the Probation Office made no mention of note 4 to §1B1.2.

[21]. At sentencing, the court ultimately found that the base offense level was 24.

counterfeit money was, at best, extremely marginal." (R1:472:2) This objection was renewed in a subsequent pleading filed before sentencing. (R1:480:3)

At sentencing, both parties addressed the trial evidence concerning Mr. Hall's involvement in the alleged counterfeiting scheme. The government claimed that that evidence revealed that the Defendant "had the ability to get someone to get the paper for the counterfeiting." (R1:537:20) It also argued that an intercepted telephone conversation between Mr. Hall and Marin Spariosu reflected the Defendant's knowledge of Spariosu's counterfeiting activities. Id. at 21-2. In response, counsel for Mr. Hall argued that the Defendant simply provided Spariosu with a telephone number for Scott Carle, who later admitted to a Secret Service agent that he -and not Mr. Hall- had supplied the paper on which the counterfeit money was printed. Id. at 29.

In resolving this issue, the court below noted that the government's proof of the Defendant's involvement in Spariosu's counterfeiting activities presented a "closer question" than its proof concerning the other two objects of the conspiracy.[22] It rejected Mr. Hall's argument, however, because "the government's proof need only be

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[22]. The court had similarly questioned the sufficiency of the government's evidence when it considered the Defendant's motion for judgment of acquittal at the conclusion of the government's case. (R1:531:179)

by preponderance of the evidence, and I think the government, through the testimony at trial, circumstantially as well as in some parts directly, has sufficiently proven that ...."[23] Id. at 55-6. The court's use of the preponderance of evidence standard directly contravenes this Court's holding in McKinley.

The defendants in McKinley were convicted in part of conspiring to: 1) receive and transport a Stinger missile with the intent that it be used to harm people and property; and 2) exporting that missile and other weapons without obtaining the necessary licenses. Their request for a special verdict form specifying the objects of the conspiracy was denied. Their sentences were then calculated using the more serious of the underlying offenses -the unlicensed exportation of weapons. Those sentences were ultimately vacated.

In remanding for resentencing, the Court remarked that although §1B1.2 and its commentary were clearly applicable, neither the PSI nor the district court cited to it. It then noted that the jury's verdict had not identified which of the underlying offenses were objects of the charged conspiracy. Accordingly, the district court, sitting as the trier of fact, was obligated to "find beyond a reasonably doubt that the defendant conspired to commit the particular object offense." Id. at 1026 (citation omitted). Its

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[23]. The court ultimately imposed a sentence of 60 months imprisonment. (R1:484)

failure to do so -either explicitly or implicitly- required resentencing.

This Court addressed a similar issue in United States v. Farese, 248 F.3d 1056 (11th Cir. 2001). The defendants there pleaded guilty to a racketeering (RICO) conspiracy. The objects of that conspiracy were: 1) money laundering; 2) mail fraud; and 3) obstruction of justice. Pursuant to their plea, the defendants had reserved their right to challenge the money laundering allegation. The district court, however, rejected that challenge and applied the money laundering guideline at sentencing. In doing so, it utilized the preponderance of evidence standard. This Court reversed, finding that the "district court's failure to apply the proper standard of proof at sentencing compels us to vacate the appellants' sentences and remand this case to the district court for resentencing." Id. at 1064 (citations omitted).[24]

Undoubtedly, application of McKinley, Farese and Venske to the instant case mandates that Mr. Hall's sentence be vacated. Again, McKinley requires a sentencing court to find beyond a reasonable doubt that the defendant conspired to commit an

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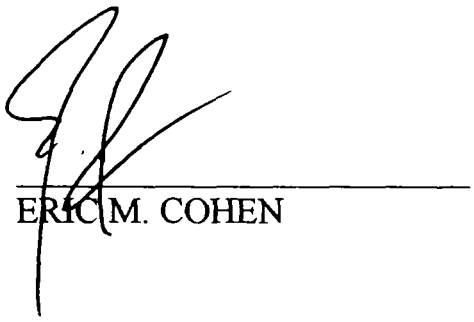
[24]. More recently, in United States v. Venske, No. 99-2214 (11th Cir. July 12, 2002), the Court, citing McKinley, held that the district's failure to "determine beyond a reasonable doubt which offense the defendant conspired to commit [,]" constituted plain error. See also United States v. Smith, 267 F.3d 1154 (D.C. Cir. 2001) (same).

object offense before that offense can be used to determine the appropriate offense level. The court below, of course, used a significantly less demanding standard. Therefore, the application of the improper standard warrants resentencing.

CONCLUSION

Based on the preceding arguments and the authorities cited therein, the Defendant requests that this matter be remanded for new trial. Additionally, Count 3 of the instant Indictment should be discharged. At a minimum, Mr. Hall must be resentenced.



ERIC M. COHEN

CERTIFICATE OF COMPLIANCE

Pursuant to Fed.R.App.P. 32(a)(7)(C), undersigned counsel certifies that the Defendant's initial brief contains 7239 words. This information was derived from the word count contained within Corel Word Perfect 8 for Windows 98.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed to Anne Schultz, Assistant U.S. Attorney, 99 N.E. 4th Street, Miami, FL 33132, on July 30th, 2002.

ERIC M. COHEN

MP
1999R01075
Fagelson

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

CASE NO. 02-10464-EE

UNITED STATES OF AMERICA,

Appellee,

vs.

NATHAN HALL,

Appellant.

_____/

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

REPLY BRIEF

ERIC M. COHEN
TWO DATRAN CENTER
SUITE 1200
9130 SOUTH DADELAND BLVD.
MIAMI, FL 33156
TEL. (305) 670-0230
FAX. (305) 670-7003
FLA. BAR NO.: 328-065

CERTIFICATE OF TYPE SIZE AND STYLE

The Defendant certifies that this brief uses Times New Roman 14 pt base font.

TABLE OF CONTENTS

TABLE OF CITATIONS

ARGUMENTS

I

THE DISTRICT COURT IMPROPERLY LIMITED THE DEFENDANT'S CROSS-EXAMINATION OF THE GOVERNMENT'S TWO PRINCIPAL WITNESSES CONCERNING ONE'S MENTAL HEALTH AND THE OTHER'S DRUG USE.

Suyapa Elmady

Defendant Nathan Hall has argued that the district court improperly limited his cross-examination of Suyapa Elmady concerning her mental instability. In response, the government suggests that "despite the statements in Hall's brief about Suyapa's 'five week mental breakdown,' for purposes of this appeal the facts are those stated in Suyapa's PSI as summarized by the district court [.]" Appellee's Brief at p.49. Not surprisingly, the government cites no support for this claim. That omission is understandable as counsel for Mr. Hall clearly apprised the court below of his good faith basis for questioning Elmady about her "mental breakdown."[1]

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[1]. The government's argument that Mr. Hall did not provide the district court with an "offer of proof" similarly fails as the court was sufficiently informed by

As recognized in United States v. Fowler, 465 F.2d 664 (D.C. Cir. 1972), before seeking to "incriminate or degrade" a witness on cross-examination, "the general rule is that the questioner must be in possession of some facts which support a genuine belief that the witness committed the offense or the degrading act to which the questioning relates." Id. at 666 (emphasis supplied). In the instant case, defense counsel certainly possessed the requisite factual basis to delve into Elmady's episodes of mental instability based on his conversations with Marin Spariosu, who was Elmady's husband when those episodes occurred. Counsel should have thus been "allowed a reasonable latitude," id., to inquire about those incidents.[2]

The Defendant recognizes that the weight of authority would have justified a prohibition of cross-examination concerning Elmady's depression or use of Prozac. Elmady's "mental breakdown," however, was more akin to the "bizarre" behavior

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defense counsel of what information he sought to elicit and the legal basis for his request. See United States v. Jimenez, 256 F.3d 330,343 (5th Cir. 2001).

[2]. The court below denied cross-examination about Elmady's mental breakdown in part because the witness had not mentioned it to the Probation Officer preparing her Presentence Investigation Report (PSI). Conceivably, Elmady did not disclose that information because she was unsure whether that information would be viewed favorably by the court.

exhibited by the prosecution witness in Greene v. Wainwright, 634 F.2d 272 (5th Cir. 1981). That decision must therefore control the Court's consideration of this issue. Mr. Hall is thus entitled to a new trial.[3]

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[3]. To the extent that the government relies on Fed.R.Evid. 608 to support its position, this Court's decision in United States v. Lindstrom, 698 F.2d 1154,1162 (11th Cir. 1983) (n.6), suggests that that reliance is misplaced.

II

THE GOVERNMENT COMMITTED PLAIN ERROR BY SUGGESTING TO THE JURY DURING ITS DIRECT EXAMINATION OF A PRINCIPAL WITNESS THAT IT HAD CONFIRMED THAT WITNESS'S CREDIBILITY.

The government's response to Defendant Nathan Hall's claim that the prosecutor below improperly vouched for the credibility of one of its witnesses ignores a crucial distinction between the instant case and the cases on which it relies.[4] Those cases concern a witness's expectation that the government will prospectively seek a sentence reduction based on his or her testimony. This case instead addresses a situation in which a benefit was conferred on a key government witness prior to her trial testimony. In this latter scenario, the jury inevitably infers that the government has certified that

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[4]. The government confesses "a slight degree of befuddlement" that the Defendant is claiming that the "government committed plain error." Appellee's Brief at p.40. To alleviate its puzzlement, the government need only consider that portion of the transcript in which the prosecutor below asked Elmady on direct examination if her sentence had been reduced as a result of her cooperation. (R1:523:34-5)

the witness previously provided truthful information and -more importantly- that the sentencing court has agreed. A reasonable juror will hardly ignore these determinations when assessing that witness's credibility.

Although none of the cases cited by the government addresses this precise issue, the Ninth Circuit's decision in United States v. Rudberg, 122 F.3d 1199 (9th Cir. 1997), does. As here, witnesses in Rudberg testified that their sentences had been previously reduced pursuant to their substantial assistance to the government. The court there found that the "obvious inference" to be drawn from this testimony was that the government had investigated and verified those witnesses's credibility. Id. at 1202. That inference constituted improper vouching. Accordingly, Rudberg compels the relief requested here.

the inference suggested by the government strains the "power to infer" far beyond any acceptable limit.

The government's argument fails in several other respects. For example, it claims that Elmady, "in anticipation of, and in contradiction to Hall's later testimony," Appellee's Brief at p.36 (emphasis omitted), denied having told the Defendant that the coins were obtained from a relative of hers. While this claim might well have been "in anticipation of" Mr. Hall's testimony, it clearly did not contradict it as the Defendant testified instead that Spariosu had advised him that he had received the coins from a friend who was liquidating his personal collection. (R1:532:170)

The government further argues that "the rip off and its aftermath were frequently discussed among the Spariosu group." Appellee's Brief at p. 36. But again, this claim ignores Elmady's testimony that she was not certain whether this Defendant was part of the "group" engaged in that discussion.

Finally, the government argues that "Hall's testimony provided the coup de grace," Appellee's Brief at p.39, as the jury obviously disbelieved it. Although that argument cites to several of this Court's recent discussions, it fails to mention McCarrick, supra. That omission is understandable because in McCarrick, the Court held that a "jury's purported disbelief of [a defendant's] testimony" cannot, absent other probative evidence, be "the sole basis to support a conviction beyond a

reasonable doubt [.]" Id. at 1293. Of course, the government here introduced no probative evidence that Mr. Hall knew that the coins were illicitly obtained. Therefore, the jury's apparent rejection of his testimony cannot alone support his conviction on Count 3. That conviction must thus be reversed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed to Marc Fagelson, Assistant U.S. Attorney, 299 East Broward Boulevard, Miami, FL 33301, on October 31st, 2002.

ERIC M. COHEN