UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

DOCKET NO.: 03-15528-JJ

TERRENCE MATTHEWS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the United States District Court
for the Middle District of Florida
Jacksonville Division

INITIAL BRIEF OF APPELLANT

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UNITED STATES COURT OF APPEALS
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TERRENCE MATTHEWS,

Appellant,

vs.

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Appellee.

CERTIFICATE OF INTERESTED PERSONS

AND CORPORATE DISCLOSURE STATEMENT

Dale R. Campion, Esquire
Assistant United States Attorney

Terrence Matthews
Appellant

Honorable Thomas E. Morris
United States Magistrate Judge

Paul Perez, Esquire
United States Attorney, Middle District of Florida

Julie Savell, Esquire
Assistant United States Attorney

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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TERRENCE MATTHEWS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

CERTIFICATE OF INTERESTED PERSONS (Continued)

AND CORPORATE DISCLOSURE STATEMENT

Honorable Harvey E. Schlesinger
United States District Judge

Wm. J. Sheppard, Esquire
Counsel for Appellant

D. Gray Thomas, Esquire
Counsel for Appellant

Marcio W. Valladares, Esquire
Assistant United States Attorney

STATEMENT REGARDING ORAL ARGUMENT

BecauseBecause of the nature of the factual and legal issues presented, undersigned counselcounsel believes that oral argument wouldcounsel believes that oral argument would disposition of this appeal.

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ATTORNEY

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Statutes and Rules

STATEMENT OF JURISDICTION

TheThe jurisdiction of thisThe jurisdiction of this Court isThe jurisdiction of this Court is thisthis is an appealthis is an appeal of a final judgment of the United States District Court for the M DDiDistrictDistrict of Florida, which had jurisdiction in this criminal action pursuant to 18 U.S.C.U.S.C. §1623. U.S.C. §1623. Final judgment was entered on October 28,U.S.C. §1623. Fin Defendant filed a timely notice of appeal. [R. 156, 157].

STATEMENT OF THE ISSUES

I.

WHETHERWHETHER THE DIWHETHER THE DISTRICTWHETHER TH ADMIADMITTEDADMITTED FED.R.EVID. 404(b)TESADMITTED REGARDINGREGARDING STREETREGARDING STREET-L TRANSACTIONSTRANSACTIONS AND RELATED TRANSACTION FROM A 1991 ARREST OF THE APPELLANT.

II.

WHETHWHETHERWHETHER WHETHER THE DISTRICT ERRED IN TOTO SUPPRESS WIRETAP EVIDENTO SUPPRESS WIRETAP EVIDENCE WIRETAPWIRETAP RECORDINGS WEREWIRETAP RECORDINGS WE THETHE COURT IMMEDITHE COURT IMMEDIATETHE COURT IMM OF THE WIRE INTERCEPTS.

STATEMENT OF THE ISSUES (Continued)

III.

WHETHERWHETHER THE EVWHETHER THE EVIDEWHETHER TH SUSTSUSTAINSUSTAIN CONVICTIONS ON TWO COUNTS OF WITNESWITNESSWITNESS INTIMIDATION AND A SENTENCE ENHANCEMENTENHANCEMENT FOR OBSTRUENHANCEMEN JUSTICE.

IV.

WHETHERWHETHER THE DISTRICTWHETHER THE DISTRICT WI ADMITTEDADMITTED TESTIMOADMITTED TESTIMONY A EVIDENCEEVIDENCE OF A TELEPHONE CONVEVIDENCE OF A TEI TOTO WHICHTO WHICH THE APPELLANT WAS NOT ATO WHICH THI ANDAND AND WAND WHICH RELATED AND WHICH RELATED TOAND ININ WHICH TIN WHICH THEIN WHICH THE APPELLAN IMPLICATED.

STATEMENT OF THE CASE AND FACTS

A. Course of Proceedings and Dispositions Below.

TerrenceTerrence MatthewsTerrence Matthews was indicted on April 24, 2003 on one cour toto distribute five kilograms or more of cocaine, in violation of 21 U.S.C. §846. [R. 1].1]. He was released on an unsecured bond and entered1]. He was released on an unsecured b 11,11, 14]. Subsequently, he was charged by a superseding indictment with the same cocainecocaine offense and with two counts of intimidating witnesses in violation of 18 U.S.C.U.S.C. §1512(b), [R. 87], and he again entered a plea of not guilty. [R. 90]. The court denieddenied the Government s modenied the Government s motion todenied the Gove indictment. [R. 94].

MattheMatthewsMatthews movMatthews moved to exclude wiretap audio recording evi delaydelay bdelay by thedelay by the Government in sealing such recordings. [R. 63]. The denied Matthews denied Matthews motion to suppress the intercepted wiredenied Matthews m 76].76]. He also76]. He also moved to suppress evidence from two seizures and76]. He also m ofof whichof which had been noticed by theof which had been noticed by the Government as Fed 84,84, 92, 110]. The magistrate judge recommended tha84, 92, 110]. The magistrate judge r fruitsfruits of a 1997 seizure be granted, [R. 123],[1] but t but the but the district court subseq

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[1] The docket sheet reflects The docket sheet reflects th The docket sheet RecommendatiRecommendatioRecommendationRecommendation concerning the acceptance o

denieddenied the motion. [R. 135, 143; R.denied the motion. [R. 135, 143; R. 169 - 11-21] .[2] The motionmotion to suppressmotion to suppress the fruits of a 1991motion to suppress the fruits of a -- 11-21]. Matthews then moved in limin- 11-21]. Matthews then moved in limine t- 11-21 improperimproper under Fed.R.Evid. 404(b). [R. 133]. The distriimproper under Fed.R.Evid. rulingruling on that motion, [R. 169 - 2], later denied theruling on that motion, [R. 169 - 2], la finallyfinally overruled Matthews objectionfinally overruled Matthews objection to the 1991 ev 171 - 70-71].

MatthewsMatthews also filed aMatthews also filed a motion inMatthews also filed a motic conversation between two testifyingconversation between two testifying alleged co-conspirators party, in which the other twoparty, in which the other two individuals discussedparty, in which t thanthan was charged, ecstasy. [R.than was charged, ecstasy. [R. 130]. The district court g andand denied it in part. [R. 135and denied it in part. [R. 135; R. 168and denied it in part. [

RecommendationRecommendation actually relates to the Recommendation actually relates to seizure.

[2] Subsequently, Matthews filed motions in limine to exclude evidence Subsequently, Matth toto the 1997 seizure, [R. 136, 137, 138], which the distrito the 1997 seizure, [R. 136, 137, governmentgovernment announced that it had decided notgovernment announced that it had deci to that matter. [R. 170 - 4-5].

powerpower pellets, bythepower pellets, by the case agent further caused an additionalpower pell
mistrial, which the district court denied. [R. 168 - 91-93].

TheThe cause pThe cause proceeThe cause proceeded to trial commencing July 7, 20
conclusionconclusion of the trial, on July 11, 2003, the jury founconclusion of the trial, on Ju
counts.counts. [R. 149; R. 172-87]. counts. [R. 149; R. 172-87]. The district court sentenced him t
oneone and concurrone and concurrent sentenceone and concurrent sentences of 120 mon
$25,000.00$25,000.00 fine$25,000.00 fine and 10 years supervised release. [R. 155, 156; R. 173
Matthews is incarcerated. This appeal follows.

B. Statement of the Facts.

TheThe evidence inThe evidence in this case consisted of the testimony ofThe evidence i
dealersdealers who haddealers who had made dealers who had made plea agreements with the
sentences,sentences, and who also all had sentence reduction motions pendinsentences, and wh
trial,trial, as well trial, as well as the catrial, as well as the case agent and two police offi
MatthewsMatthews in 1991. Special Agent FranMatthews in 1991. Special Agent Fran
AdministrationAdministration testifieAdministration testified thaAdministration testified th
JacksonvilleJacksonville cocaine distriJacksonville cocaine distributiJacksonville cocaine distr
calls intercepted by wiretap. calls intercepted by wiretap. [R. 168 - 75-98; R. 169calls intercept
interceptedintercepted calls on one telephone line,intercepted calls on one telephone line,almost 1

almostalmost 1,500 almost 1,500 callalmost 1,500 calls intercepted on a third line, Orochena c
voice was on one call. [R. 169 - 12-14].

HeHe testified that oneHe testified that one of the last to cooperate ofHe testified that one
investiginvestigation,investigation, Farrell Alston, was the person who identified Matthews as
onon that one call. [R. 169 - 15-16, 26, 28-29]. Despiton that one call. [R. 169 - 15-16, 26,
personallypersonally identified Matthews voice opersonally identified Matthews voice on th
arrest,arrest, [R. 169arrest, [R. 169 - 12-14], Orochena also concededarrest, [R. 169 - 12-14], Oroc
informationinformation that Matthews voinformation that Matthews voice was oninformation
[R.[R. 169[R. 169 - 30-31]. Additionally, neither Mathews name nor[R. 169 - 30-31]. Additional
toto him during the trial appeareto him during the trial appeared on law to him during the
reviews of intercepted conversations. [R. 169 - 29-30].

Alston,Alston, who had pledAlston, who had pled guilty to a cocaineAlston, who had pled
forfor cooperation withfor cooperation with a reduced sentence and a Fed.R.Crim.P. 35 sentence
motionmotion pending at the time of Matthews trial, testified that he was inmotion pendin
establishingestablishing a supply ofestablishing a supply of cocaine to a group of individualsesta
50-64]. 50-64]. He testified that he had obtained50-64]. He testified that he had obtained cocai
eighteight years andeight years and obtained cocaine from Matthews on a couple of occasions. ei
64-66].64-66]. He64-66]. He said that he had discussed cocaine with Matthews after being intro
toto him by one James Brown, who he claims hadto him by one James Brown, who he claims had

68].68]. 68]. Alston then testified that he obtained68]. Alston then testified that he obtained co
inin 1999 and 2000, always at Brown s house, and that the quantitin 1999 and 2000, always at
between fivebetween five and ten kilograms, but on one occasionsbetween five and ten kilogram
70-72].70-72]. He also testified that he once contacted Matthe70-72]. He also testified that h
himself,himself, but that thehimself, but that the one kilogram purchased each by him and Brow
[R. [R. 169 - 76-79]. Alston said he purchased [R. 169 - 76-79]. Alston said he purchased that coc
house,house, and that the quantity involved was three kilograms. house, and that the quantity invo
however,however, then testified that thehowever, then testified that the previously described oneh
transactionstransactions were actually two separate transactions.transactions were actually two se
hehe supplied cocaine to Matthewshe supplied cocaine to Matthews inhe supplied cocaine to Matth
aboutabout fiveabout five times during 2000 at the rate of one or two kilosabout five times during
for three kilos. [R. 169 - 89-92].

TheThe Government used Alston to introduce a recording and transThe Government u
interceptedintercepted telephone call between him and another cintercepted telephone call be
whwhichwhich they discussed dealing power pellets, a slang term fowhi
methalenedioxymethamphetaminemethalenedioxymethamphetamine (MDMA), also known as ec
12].[3] Alston Alston acknowl Alston acknowledged that the reference during his conversation

[3] This e This evidence was subject to a motion in limine and further objection Thi
becausebecause thebecause the statements contained on the tape were not in furtherance ofbecau

waswas to powerwas to power pellets, and not cocaine. was to power pellets, and not cocaine. Th calling Sa-Ous, who Alston testified he understood to mean Terrence Matthews.calling Sa-O [R.[R. 169 -[R. 169 - 111]. Alst[R. 169 - 111]. Alston also testified to an intercepted telephon Matthews,Matthews, whichMatthews, which the Government introduced, in which heMatthews, discusseddiscussed and agreed upondiscussed and agreed upon a per kilogram price of cocaine to [R. 169 - 114-20].

WhileWhile serving hisWhile serving his sentence, Alston received letters from Matthews 124-56].124-56]. He testified that o124-56]. He testified that one 124-56]. He testified that gestures gestures and that others communicated to him that he should gestures and that other thatthat Matthews wasthat Matthews was not involved in the conspiracy. that Matthews was no

---

conspiracyconspiracy and then, inconspiracy and then, in light of the district court s ruling thatco shouldshould be redacted, that the redacted conversation was misleading and outshould be redacte becausebecause because it mbecause it might appear related to the charged conspiracy rath pellets pellets conspiracy between Alston and Moore. [R. 168 - 60-73].pellets conspiracy b ruling,ruling, Maruling, Matthews then ruling, Matthews then requested that if any portion admitted,admitted, the entiretyadmitted, the entirety of it should be admitted. [R. 168 - 73; R. 1 districtdistrict court recognizeddistrict court recognized that Matthews continued his objection t anyany portion of that recording, but was stuck makingany portion of that recording, but w ruling that at least a portion of the recording would be admitted. [R. 168 - 73].

TheThe letters to Alston inquired whether he wasThe letters to Alston inquired whether he w
whetherwhether he was lying on anyonewhether he was lying on anyone to get timewhether he
in prison because of others lying. [R. 169 - 128-56; Gov t. Exh. 14, 15, 16, 17].

AlstonAlston possessed a gun atAlston possessed a gun at the tiAlston possessed a gun a
enhancementenhancement in calculation of his sentencingenhancement in calculation of his sente
oneone of the last in the caseone of the last in the case to cooperate with the Government. [R. 16
facedfaced a ten year minimum mandatory sentence and a maximum of life on eachfaced a ten ye
twotwo counts with which he was charged. [R. 1two counts with which he was charged.
furnishedfurnished Alston a Fed.R.Crim.P. 11 proffer letter, but at hifurnished Alston a Fed.R.
nevernever mentioned Matthews. [R. 169 - 179-80]. Anever mentioned Matthews. [R. 169 -
overover 400 kilograms ofover 400 kilograms of cocaine. [R. 169over 400 kilograms of cocaine.
months,months, months, [R. 169 - 53], following amonths, [R. 169 - 53], following a Government
himhim to be sentenced to less than the 235 months minimuhim to be sentenced to less than
under the sentencing guidelines. [R. 169 - 188-94].

AtAt the time ofMatthews trial, the Government had filedaAt the time ofMatthews trial, th
ofof hisof his sentence under Fed.R.Crim.P. 35 andof his sentence under Fed.R.Crim.P. 35 and o
sentencesentence reduction recommendation to thesentence reduction recommendation to the co
169169 - 194-98]. After being169 - 194-98]. After being transported from the Bureau of Priso
AlstonAlston wasAlston was housed atAlston was housed at the same small jail with the remaini

[R. 169 - 175-76]. Alston also admitted that his real name is Farrell Jackson, acknowledgedacknowledged inconsistencies with his grand acknowledged inconsistencies with his hehe met Matthews and admitted that he hadhe met Matthews and admitted that he had he Haitian cocaine source that he used. [R. 169 - 201-10].

JamesJames Brown, serving a 168-month sentenceJames Brown, serving a 168-month sent andand with aand with a Rule 35 motion pending atand with a Rule 35 motion pending at the time o metmet Matthews at a gambling house in Miami. [R. 169 - 236-43]. Brown temet Matthews a thatthat he obtained cocaine from Alston to sell to people from Jacksonville.that he obtained coc 244].244]. He testified that he and Alston got cocaine from Matth244]. He testified that he an fourfour times atfour times at Brown s house. [R. 169 - 248-50]. In contrast to Alston sfour tim BrownBrown said that the first cocaine transaction with Matthews was 10 to 15 orBrown said tha inin 1998 or 1999,in 1998 or 1999, that the remaining transactions were 10 kilograms eachin 1998 greatest amount involved was 18 or 22 kilograms. [R. 169 - 251-52].

InIn his plea agreement, Brown obtained a sIn his plea agreement, Brown obtain predicatedpredicated on his having been involved with betweenpredicated on his having been invo [R. 170 - 13-14]. Brown testified that during his proffer, [R. 170 - 13-14]. Brown testified that du hishis involvement inhundreds ofhis involvement inhundreds of kilos, that he actually had sold tho of cocaine and thatof cocaine and that the Government could have proved aof cocaine and that forfor whichfor which hefor which he was charged and sentenced. [R. 170 - 15-17, 20, 22]. He ac

thatthat he scored at thethat he scored at the highest criminal historythat he scored at the highest cr
mandatorymandatory sentence of 20 yearmandatory sentence of 20 years, mandatory sente
classifiedclassified as a career offender, but that he was insteadclassified as a career offender, bu
hadhad a Rule 35 sentence reduction motion pendinghad a Rule 35 sentence reduction motion pe
26].26]. Brown acknowledged that in the absence of a U.S.S.G. §5K1.126]. Brown acknowl
minimumminimum sentence under the guidelines would have been 262 months. [R. 170 -
45-46].45-46]. He also acknowledged that he had been housed prior to Matthews trial45-46]. He
with Alston, Moore and another testifying conspirator. [R. 170 - 47-48].

YetYet another conspiratorYet another conspirator,Yet another conspirator, Antonio A
agreementagreement with the Government for conspiring to disagreement with the Govern
cocaine,cocaine, and was sentenced to a term of 188 months but, at the ticocaine, and was sen
RuleRule 35 sentence reduction motion pending. [R. 170 - 63Rule 35 sentence reduction mo
thatthat during pretrial release he had tested positive forthat during pretrial release he had tested
failedfailed to appear for a required urinalysis. failed to appear for a required urinalysis. [R. 1
soldsold crack cocainesold crack cocaine and powder cocaine, which he had gotten fromsold crac
James Brown, from 1998 until his arrest in 2001. [R. 170 - 69-71].

AustinAustin said that Austin said that Brown hadAustin said that Brown had
transactionstransactions withtransactions with Matthews intransactions with Matthews in the amo
thatthat hethat he observed Matthews furnishthat he observed Matthews furnish Jason Moore abo

gamblinggambling house. [R. 170 -gambling house. [R. 170 - 76-79, 81-82]. gambling ho priorprior prior to anprior to and during Matthews trial with other testifying conspirators and h housedhoused at the federal courthouse lock-up with some of them. housed at the federal courtho saidsaid that he knewsaid that he knew Matthews by the nickname Say Jack andsaid that he knew informedinformed him that Say Jack s real name was Terrenceinformed him that Say Jack s real JasonJason Moore, another testifying conspirator, admitted tJason Moore, another testifying sosomesome of his associates but before his arrest, he was concerned that othersome of his cooperatecooperate against himcooperate against him and so arranged forcooperate against him an of those indicted and free on bond, Shawn Richardson, resultingof those indicted and free on bo wifewife and his daughter beiwife and his daughter being woundedwife and his daughter b receivedreceived an enhancement ofreceived an enhancement of his sentencing guidelines for obs 170170 - 125-26],170 - 125-26], he was never prosecuted on state charges regarding the170 - 125- 170170 -170 - 128, 201-02]. He170 - 128, 201-02]. He was charged with conspiracy to distribu mormoremore of cocaine, [R. 170 - 120-21], pled guilty to conspiracy to distribute cocainmore andand MDMA and ultimately was sentenced onand MDMA and ultimately was sentenced on the 1515 to 50 kilograms of cocaine. [R. 170 - 120-21, 124, 125-26]. Moore was one of the lastlast inlast in the investigation to cooperate and had made a plea agreement for alast in the inves totto 50 kilograms ofto 50 kilograms of cocaine, despite having dealt somewhere between 200 an kilogramskilograms.kilograms. [R. 170 kilograms. [R. 170 - 204-06]. Despite his obstructi

downwarddownward adjustment for acceptance of responsibility,[4] and at the time of Matthews trial,trial, the Government hadtrial, the Government had filed a Rule 35 sentence reduction moti remainedremained pending. remained pending. [R. 170 - 127, 129-30]. At the time of trial, his s months. [R. 170 - 128].

MooMooreMoore said that he met the Defendant, who he knew as Say JackMoore said Ough, Ough, in 1999. [R. 170 -Ough, in 1999. [R. 170 - 133-34]. He testified that he obta cocaine from Matthews in early 2000, another two kilograms from Matthews a few monthsmonths later and anothermonths later and another two or threemonths later and another tw [R. 170 - 139, 133-34, 147]. Moore testified that he had re [R. 170 - 139, 133-34, 147]. MaMatthMatthewsMatthews while in prison, which he interpreted to be Matthews trying to whetherwhether Moorewhether Moore was cooperating and makingwhether Moore was cooperat he could get killed. [R. 170 - 159-61, 165-66, 169-73].

AnotherAnother conspirator, Rodney Cannon, made a Another conspirator, Rodney GovernmentGovernment based on a conspiracyGovernment based on a conspiracy to distribute o 150150 to 500 grams of crack cocaine and, 150 to 500 grams of crack cocaine and, a

[4] Conduct resul Conduct resulti Conduct resulting in an enhancement under § ImpedingImpeding the Administration of Justice) ordinarily indicaImpeding the Administratio notnot accepted responsibility for his criminalnot accepted responsibility for his criminal conduc 4.

responsibilityresponsibility andresponsibility and a minor role in the offense, faced a minimumre
ofof 120 months but received a sentence of 78 months on the basis of a Government
motionmotion under U.S.S.G. §5K1.1. [Rmotion under U.S.S.G. §5K1.1. [R. 170 motic
GovernmentGovernment had filed a Rule 35 sentence reduction motion,Government had filed a Ru
[R.[R. 170 - 216-17]. He testified that he knew Mat[R. 170 - 216-17]. He testified that h
obtained two kilograms of cocaine from him inobtained two kilograms of cocaine from him in t
HeHe acknowledged that he wasHe acknowledged that he was among He acknowledged that h
together while awaiting the commencement of Matthews trial. [R. 170 - 238-39].

RichardsonRichardson testified thatRichardson testified that he knew Matthews as Say Ja
hishis drugshis drugs from Moore and Linwood Smith. his drugs from Moore and Linwood Smith.
tototo conspiracy to sell crack and powder cocaineto conspiracy to sell crack and powder cocaine an
receivedreceived an eight-level reductreceived an eight-level reduction in hisreceived an eig
U.S.S.G.U.S.S.G. §5K1.1 motion filed by the Govemment and ultU.S.S.G. §5K1.1 motion fil
monthmonth sentemonth sentence. [month sentence. [R. 171 - 6-10]. He testified that he sav
househouse in Miami, and that Moore and Matthewshouse in Miami, and that Moore and Matthew
andand subsequently left together in aand subsequently left together in a rental car in which Rich
twotwo kilogramstwo kilograms of apparetwo kilograms of apparent cocaine in the trunk. [
RichardsonRichardson was supposed to drive the car back to Jacksonville, he was concerned
aboutabout being pulled over by law enforcement because of too many blackabout being pulled o

car,car, and cocainecar, and cocaine being found, acknowledging the phenomenon of being stop lawlaw enforcement forlaw enforcement for driving while black. [R. 171 - 23-25, 29].law enfo those with him flew back to Jacksonville. [R. 171 - 25].

RichardsonRichardson alsRichardson also recounteRichardson also recounted his exper beingbeing wounded along with his wife and daughter while out on bond being wounded alon arrest.arrest. [R. 171 - 26]. Althougharrest. [R. 171 - 26]. Although Moore had testified that he a eveneven after the shootings, [R. even after the shootings, [R. 170 - 120]even after the s communicatecommunicate with Moore becacommunicate with Moore because of the scommun acknowledgedacknowledged that the testifying conspirators wereacknowledged that the testifyin awaiting the Matthews trial. [R. 171 - 29-30].

TheThe final testifying conspirator, Anthony Wells,The final testifying conspirator, Anthon totto Miami with Cannonto Miami with Cannon and saidto Miami with Cannon and said that he ha CannonCannon gave the money to Moore, and that subsequently, he and Richardson found cocainecocaine in the trunk of the car, cocaine in the trunk of the car, whicocaine in the trunk returnreturn to Jacksonville by air. [R. 171 - 46-48, 52-57]. Wells previously pledreturn to Jack totto conspiracy to distribute cocaine and crack cocaineto conspiracy to distribute cocaine and cra yearyear minimum mandatory sentence, received a sentence of 72 months afyear minimum GovernmentGovernment filed Government filed a U.S.S.GGovernment filed a U.S.S.G. acknowledged that,acknowledged that, at the time of Matthews acknowledged that, at the time

3535 sentence reduction motion, which remained pending. 35 sentence reduction motion, which that Moore obtained cocaine from Matthews, Brown and Alston. [R. 171 - 43-44].

TheThe Government concluded its case by presenting the testimony ofThe Government co DadDadeDade Dade police officers who were involved in arresting Matthews on December 1991,1991, over Matthews renewed objection under1991, over Matthews renewed objection und 73-85,73-85, 88-102].73-85, 88-102]. The officers testified that they observed a black male remov fromfrom the trunk of a car and making exchanges with others.from the trunk of a car and maki testifiedtestified that they found 250 grams of cocaine,testified that they found 250 grams of coca individualindividual baggies, as weindividual baggies, as wellindividual baggies, as well as $1,500.00$1,500.00 in the trunk of the car. [R. 171 - 81-$1,500.00 in the trunk of the car. testifiedtestified that Matthews,testified that Matthews, after being arrested andtestified that Matt he was just a worker, and not a lieutenant. [R. 171 - 102].

C. Standards of Review.

TrialTrial court determinations of the admissiTrial court determinations of the admi reviewedreviewed for abuse of discreviewed for abuse of discrereviewed for abuse of discreti evidenceevidence of uncevidence of uncharged offevidence of uncharged offenses, the court m relevantrelevant to an issue in the case otrelevant to an issue in the case other trelevant to an i supportedsupported bsupported by proof ansupported by proof and has probative value that is n

thethe danger of unfair prejudice. *SeSee, e.g., USee, e.g., United States v. Mills*, 138 F. 3d 928, (11th Cir. 1998). Abuse Cir. 1998). Abuse of discretio Cir. 1998). Abuse of discretion iincorrectincorrect legal standard, commits other error of law or ignores or misunderincorrect relevantrelevant facts. *See,See, e.g., United States v. Sigma International, Inc.,* 244 F.3d 244 F.3d (11th Cir. 2001). A heightened abuse of discretion s Cir. 2001). A heightened abuse of discreti admissionadmission of Fed.R.Evid. 404(b)admission of Fed.R.Evid. 404(b) evidence. *United St* 354 (5th Cir. 2003).

WhetherWhether the district courtWhether the district court properly construedWhether tl toto immediate sealing by the court of wiretap tapes, is an issue of law reviewed *de novo*. *See United States v. Ojeda-Rios,* 495 U.S. 257 (1990).

SufficieSufficiencySufficiency of the evidence to support a criminal conviction is reviev *novo,* viewing the evidence in the light most viewing the evidence in the light most favorable to th *e.g., United States v. Pendergraft,* 297 F.3d 1198, 1204, 1210 (11th Cir. 2002).

SUMMARY OF THE ARGUMENT

TheThe judgment and convictions beThe judgment and convictions below shThe judgm
court scourt s improper submission of evidence ofcourt s improper submission of evidence o
committedcommitted incommitted in 1991. Testimony by the police officers of Matthews 1991 c
nono relevance other than to seek to establish bad propenno relevance other than to seek to est
was substantially outweighed bywas substantially outweighed by the danger of unfair prejudicev
19919911991 conduct1991 conduct was dissimilar to the charged offenses, including with resp
issueissue of intent,issue of intent, the evidence lackedissue of intent, the evidence lacked probativ
evidenceevidence of intent, theevidence of intent, the conduct was excessivelyevidence of intent
ofof the evidence was to create a tof the evidence was to create a tendencyof the evidenc
evidenceevidence of the charged offenses. Additionally, thevidence of the charged offenses.
likely to believelikely to believe the impeached testifying drug dealers. Accordingly, thelikely
and convictions below should be reversed.

Evidence orEvidence or recorded, wiretapped telephone conversations should haveEvide
excludedexcluded due to the Government s failure to excluded due to the Government s failu
immediatelyimmediately upon conclusion of the interceptions.immediately upon conclusion of th
evidenceevidence of the reason for the delay or why the delayevidence of the reason for the delay
bearsbears no burden of proof or persuasion on this issue. Accordinglbears no burden of proo

erroneouserroneous admerroneous admission erroneous admission of the recordings and purpo

convictions below should be reversed.

TheThe evidence is insufficient to The evidence is insufficient to sustaiThe evidence

intimidation.intimidation. His lettersintimidation. His letters to two witnessesintimidation. His l

sentencesentence reductions, but rather tell thesentence reductions, but rather tell the truth to Ma

toto tell the truth and not to lie is notto tell the truth and not to lie is not witness intimidation. Acc

andand convictions on counts two and threeand convictions on counts two and three should be r

remandedremanded for resentencing because of these counts increasing Matthews sentencing guidelines.

TheThe district court shouThe district court should nThe district court should r

conversconversationconversation in which two conspirators discussed an unrelated conspi

distributedistribute a different drug than distribute a different drug than charged, adistribut

conversation.conversation. The evidence was irrelconversation. The evidence was irrel

conversationconversation was notconversation was not in furconversation was not in furthera

charged. Accordingly, the judgment and conviction should be reversed.

ARGUMENT

I.

THTHETHE THE DISTRITHE DISTRICTTHE DISTRICT THE DISTRICT C

FEFED.R.EVID.FED.R.EVID. 40FED.R.EVID. 404(b)TESTIMONY RE

STREET-LEVELSTREET-LEVEL COCAINESTREET-LEVEL COCAINE T

RELATEDRELATED EVIDENCE FROM A RELATED EVIDENCE FROM

THE APPELLANT.

TTheThe judgment below should be reversed because of the erroneous admission ofof other crimes evidence thaof other crimes evidence that preof other crimes evidence that p dissimilardissimilar to adissimilar to and remotedissimilar to and remote in time from the c establishestablish Matthews intent and was unfairly preestablish Matthews intent a Government sGovernment s other evidence, testimonyGovernment s other evidence, testimony toto please the Government to obtain reduced sentences. Accordingly, Matthews judgment and conviction should be reversed.

ThisThis Court has formulated a 3-part test to deterThis Court has formulated a 3-p extrinsicextrinsic evidence. *See United States See United States v. Breitweiser,* ___ F.3d ___, 112810,112810, *3, (11th Cir. January Cir. January 26, 2004);*United States v. Lampley*, 68 F.3d 12 Cir.Cir. 1995); *United States v. Miller,* 959 F.2d 1535 (11th Cir. 1992); *HuddlesHuddleston vH UnitedUnited States,* 485 U.S. 681, 689 (1988). To be 485 U.S. 681, 689 (1988). To be admissib

relevantrelevant to an issue other thanrelevant to an issue other than the defendant s character; (
bebe established by sufficient proof to permitbe established by sufficient proof to permit
committedcommitted them; and (3) the probative valuecommitted them; and (3) the probative valu
outweighedoutweighed by its undue prejudice andoutweighed by its undue prejudice and theoutwe
ofof Fed.R.Evid.of Fed.R.Evid. 403. *See, e.g., Breitweiser,* 2004 W.L.2004 W.L. 112810 at *3,
aandand *Huddleston, supra.* Although Matthews not guilty plea placed the element of
intentintent at issue, *see United States v. Zapata,* 139 F.3d 1355, 1358 (11th Cir. 1988), he
diddid not challenge the issue ofdid not challenge the issue of intent. *See United States v. Carde*
1342 (11th Cir. 1990). Rather, Cir. 1990). Rather, his Cir. 1990). Rather, his defense to the coc
thethe convicted conspirators who testified were simply lyingthe convicted conspirators who testif
in cocaine deals and conspiracy at all.

Determini Determining Determining whether the prejudice of Matthew s
unfairlyunfairly outweighed its probative value dependsunfairly outweighed its probative value de
thethe introduction of thethe introduction of the extrinsic offense. *See United StatesSee United St*
10611061 (11th Cir. 1987). Cir. 1987). Thi Cir. 1987). This Court has identified several f
strengthstrength of the government s case onstrength of the government s case on thestrength of
extrinsicextrinsic and charged offenses, the amount of extrinsic and charged offenses, the a
charchargechargedcharged offenses, and whether it appeared at the commencement of trial th

defendantdefendant would contest thedefendant would contest the issue of intent. *United States v.* 1390 (11th Cir.), *cert. denied*, 457 U.S. 1124 (1982).

A. TheThe Extrinsic Evidence Is Substantially Different The Extrinsic Evidence Is Offenses.

First, in considering the similarity of the extrinsic and First, in considering the shouldshould be noted that relevancy is not determined by tshould be noted that relevancy is priorprior bad act andprior bad act and the charged offense, but rather by the similarity of statepr the perpetration of the two offenses. *United States v. Beechum*, 582 F. 2d 898, 913 (5th Cir. 1978) (Cir. 1978) (en banc).[5] Only if the extrinsic evidence is very similar to th chargedcharged offense ascharged offense as to their overall purposes may the extrinsic evide probative.probative. *United States v. Delgado*, 56 F.2d 1357, 1366 (11th Cir. 1995), *cert. denied*,, 516 U.S. 1049 (1996). In *Dorsey*, this Court affi, this Court affirmed the, this Court admissionadmission ofadmission of the appellant s involvement in severaladmission of the appe becausebecause they showed a willingnessbecause they showed a willingness specificbecau identical to the offenses charged in the indictment. 819 F.2d at 1060.

---

[5] In *Bonner v. City of Prichard*, 661 F.2d 1, 661 F.2d 1206, 1207 (, 661 F.2d 1206, 1207 (thisthis cthis circuit adopted as precedent decisions of the former Fifth Circuit renderthis c prior to October 1, 1981.

In 1991, In 1991, the Miami Dade County Drug Task Force arrested Mat armedarmed armed carmed cocaine trafficking for dealing small-quantity, individual doses fr parkedparked on a street. In this case, the government accused Matthews of intentparked on a s joiningjoining a criminal agreementjoining a criminal agreement to distributejoining a criminal ag thatthat cocaine, athat cocaine, and that cocaine, and sending intimidating letters to witnesse conducconductconduct than sconduct than selling so-called dime-bags to users on the street. case is not controlled by *Dorsey*.

In *Dorsey,* the Government charged conspiracies to import the Government charged co thethe ithe intent to distribute marijuana. 819 F.2d at 1060. *Dorsey* challenged t challe admissionadmission oadmission of a admission of a cooperating witness s testimony of his inv importation schemes not charged in the indictment, butimportation schemes not charged in the i the periodthe period of time charged in the indictment. *Id.* The court The court held that the tr diddid not abuse its discretiondid not abuse its discretion in admitting the extrinsic evidence beca offenses were similar inoffenses were similar in nature . . . since both offensesoffenses were sim largelarge scale drug activity and both occurred withinlarge scale drug activity and both occurred *Id.* at 1061, *citing United States v. Terebecki*, 692 F.2d 1345 (11th Cir. 1982).

In the instant case, while both the extrinsic evidence and In the instant case, while bo involvedinvolved cocaine, the actsinvolved cocaine, the acts associated with the 1991 conviction differentdifferent statedifferent state of mind than that associated with the charged offenses. *See*

582582 F. 2d at 913 (citation omitted). The activity in582 F. 2d at 913 (citation omitted). The ac notnot sufficnot sufficiently similar in kind. Street sale of narcotics is not the same thing ano largelarge scale conspiracy. *See UnitedSee United States v. Mejia-Uribe*, 75 F. 3d 395, 398 (8th C 1996).1996). Cocaine sale is the only similarity between the charged offense and1996). Cocaine badbad act evidence that the government introduced. The indictment charged a large scalescale agreement and ongoing, multi-kilogram operation that Matthews allegedly enteredentered into with the cooperating witnesses. While the Eleventh Circuit Circuit has uphe thethe usthe use of prior bad acts where the prior bad act exhibited the same the use of p willingnesswillingness as the charged offense, *see Dorsey*, 819 F.2d at 1, 819 F.2d at 1060, 81 badbad act doesbad act does not exhibit the same intent as the charged offense, the 1991bad act do thethe charged offense are not similar in kinthe charged offense are not similar in kind, athe associated with the 1991 conduct. *See Mejia-Uribe*, 75 F.3d at 398.

ThisThis case parallels *United States v. Lynn*, 856 F.2d 430 (1st Cir. Cir. 1988). In Cir. 1988) thethe defendant stood trialthe defendant stood trial on charges of conspiring tothe defendant stood totto dto distrito distribute marijuana and hashish, and importation and possession of marijuana DuringDuring During the trial, the court admitted evidence, pursuant to Rule 404(b), of t defendant sdefendant s arrest defendant s arrest for possession of marijuana with intent to dist occurredoccurred eleven years prior to theoccurred eleven years prior to the trial. 856 F.2d at 43 extrinsicextrinsic act evidence should have been excextrinsic act evidence should have been ex

notednoted that the state of mind of someone who consummatenoted that the state of mi undercoverundercover agent and one who participated inundercover agent and one who par primarilyprimarily by the fact that both engaged in criminal enterprises involving drugs. *Id.* atat 436. The court did not take the inference the prior street crimeat 436. The court did n lightly.lightly. lightly. The court stated that the ordinary inference herelightly. The court state thethe inference *thethe Rthe Rule was designed to avoid. Id.* (*emphasis added*). Further, the courtcourt reasoned that the probative value of the evidence to any issue otcourt reasoned charactercharacter was weakened by the fact the extrinsic crime tookcharacter was weakened by th charged offenses and involved different participants. *See id.*

TheThe same result obtains in this case.The same result obtains in this case. Selling dime- street,street, on one occasionstreet, on one occasion simply is not similarstreet, on one occasion sim kkilogramskilograms upkilograms up the eastern coast of Florida a decade later. Accordingly court abused its discretion in admitting evidence of Matthews 1991 conduct.

B. TheThe ExThe ExtrinsThe Extrinsic Offense Evidence Lacked Probative Value in

Government s Other Evidence and the Theory of Defense.

The 1991 evidence lacked probative value because (1) the Gover The 1991 evide alreadyalready pralready presentalready presented ample evidence of intent if the jury belie witnesseswitnesses and (2) the defense was thatwitnesses and (2) the defense was that Matthews

atat all, not that he was an ignorant participant in the oat all, not that he was an ignorant

Beechum,Beechum, 582 F.2d 738 (5th Cir.582 F.2d 738 (5th Cir. 1978) is the touchstone case on t

found that while

> extrinsicextrinsic eviextrinsic evidence extrinsic evidence may be used to det
> defendantdefendant possessed the samedefendant possessed the same state of mind
> committedcommitted thecommitted the extrinsic offense as he allegedlycommitted
> whenwhen he committed the charged offense . . . its probative
> valuevalue muvalue must bevalue must be determined with regard to the exter
> whichwhich the defendant s unlawful intent is established by
> other evidence, stipulation, or inference.

IfIf thIf the GovernmeIf the Government presented substantial evidence on the issue of inten

extrinsic evidence is of little or no value. *See id.* at 914.

TheThe use of the Defendant sThe use of the Defendant s The use of the Defendant s

meaningfulmeaningful evidence.meaningful evidence. The Government calledmeaningful evide

toto the issue of the Defendant s allegedto the issue of the Defendant s alleged conduct, knowledg

examinationexamination of the cooperating witnesses the government presexamination of t

telephonetelephone call with Matthews intelephone call with Matthews in conversation with one

thethe record a series of letters written by Matthews.the record a series of letters written by Matth

thethe letters. [R.the letters. [R. 78]. The Government had a substantial case on the issue ofthe lett

thethe defense did not challenge that element, but ratherthe defense did not challenge that eleme

thethe testimony that Matthews engaged in the charged conspiracy at all. Tthe testimo

Government would have succeeded inGovernment would have succeeded in proving intentGov

thethe testimony of the cooperating witnesses, rendering nethe testimony of the cooperating w
intentintent by the prior bad acts. *SeeSee United StaSee United States v. Lynn*, 856 F.2d 430, 4
1988).1988). The seven cooperating government wi1988). The seven cooperating goverr
stipulationstipulation to the letters,stipulation to the letters, substantially reduced the probative val
street-level drug sale.

ThisThis case presents precisely the same issue in this regard as *UniteUnitedUnited State*
Jackson, 339 339 F.3d 349 339 F.3d 349 (5th Cir. 2003). Jackson was charged with aiding and abe
interstateinterstate transportation of stolen jewelry and conspiracy to do so,interstate transportatio
admissionadmission of evidenadmission of evidence of a pradmission of evidence of a prior st
TheThe *Jackson* court applied the court applied the standards of court applied the standards of *U*
911911 (5th Cir. Cir. 1978) *(en banc),* and and focused on the probative value of the Rule 404(b)
evidenceevidence in comparison to its undue prejudice. *Jackson,* 339 F.3d 339 F.3d at 356. [
governmentgovernment has agovernment has a strong case on the intent issue, thegovernment ha
andand consequently willand consequently will be excluded more readily. *Id.*, *quoting,quoting*
atat 914. at 914. In *Jackson,* a member of the conspiracy, Jabby Lawson, a member of the conspira
hadhad participated in the charged conspiracy. 339 F.had participated in the charged conspira
thatthat a jurthat a jury wthat a jury would be hard-pressed to conclude that Jackson did not
intointo an agreement to ship stolen property ifinto an agreement to ship stolen property if it b
convictionconviction could not haveconviction could not have added much to a jury sconviction c

thethe jury more likely to credit Lawson s assertion that Jackson was the fourth burglar becausebecause of Jackson s prior criminal conduct. This is exactly wbecause of Jackson s forbids. *Id.*

TTheThe court also observed that Jackson did not claim to have been an iThe court also participant,participant, but rather claimedparticipant, but rather claimed thatparticipant, but rat naturenature of the defense even further lessened the probative value of the Rule 404(b) evidenceevidence inevidence in the case. *Id.* The Fifth Circuit concluded that unfair prejudice h establishedestablished because of the tenestablished because of the tendency of the establish improperimproper basis. *Id.* The court also noted that when intent is The court also noted that wh ofof the defendant s commission of a crime not charged in the indictment goes more to thethe inadmissible purpose of proving that the defendant is a bthe inadmissible purpose of admissibleadmissible purposeadmissible purpose of proving intent. admissible purpose of provi F.2dF.2d 1057, 1060-61F.2d 1057, 1060-61 (5th Cir. 1976). The court found Cir. 1976). The court convictionconviction wasconviction was a aconviction was a abuse of discretion. *Jackson,* becausebecause the case rested otherwise on the testimony of the impeached testifying participantparticipant in the offense, the courtparticipant in the offense, the court concluded that conviction was not harmless, and reversed his conviction. *Id.* at 358-59.

MatthewsMatthews did not contest Matthews did not contest theMatthews did not co presence.presence. He simply asserted that the testifying convicted dpresence. He simply asse

aboutabout his very participationabout his very participation in the chargedabout his very participa ofof the trial it was clear Mr.of the trial it was clear Mr. Matthews was not contesting the issue of i attemptedattempted to persuadeattempted to persuade the jury that he participated in the conspirac state of mind.

TheThe district courtThe district court abused its discretion by allowing theThe district co Mr.Mr. Matthews prior bad acts when Mr. Matthews prior bad acts when MMr. Matthews pr intentintent and the Government had already presented amply other evidence which, if believedbelieved by thebelieved by the jury, would clearly establish intent. As a result,believed by waswas not probative of any issuewas not probative of any issue not fully addressed bywas not pr ininin nothing other than uninin nothing other than unfair in nothing other than unfair prejudic could could have convinced the could have convinced the jury to could have convinced the jury F.3d at 359. Accordingly, the judgment below should be reversed.

C. TheThe Defendant s 1991The Defendant s 1991 Conduct The Defendant s 1991 Co the Charged Offenses.

TheThe courtThe court should have barred the government from presentingThe court shou priorprior bprior bad acts becaprior bad acts because of the temporal remoteness of the 12-year *Beechum,Beechum,* 582 F.582 F. 2d at 915, *citing United States v. Carter*, 516 F.2d 431, 434-435, Cir.Cir. 1975). Cir. 1975). The Eleventh Circuit has judged probative value by considering theCi

betweenbetween the extrinsic offense and the charged offense. *See Beechum,* 58582 582 F.2d 915;915; *see also Unitedsee also United States v. Dorsey*, 819 F.2d at 1061; *United States v. Wyc* F.2dF.2d 908, 911 (11th Cir. Cir. 1985), *cert. denied*, 475, 475 U.S. 1047 (1986). *Carter* held a ten yearyear gap sinceyear gap since defendant syear gap since defendant s last liquor law infractions relationrelation to prejudice that evidence of them ougrelation to prejudice that evidence of t *StatesStates v. Pollock*, 926 F.2d 1044, 1048, 926 F.2d 1044, 1048 (11 Cir. 1991). , 926 F.2d 1044 *Martin*,, 505 F.2d 918, 505 F.2d 918 (5th Cir. 1974) (convictions for interfering Cir. 1974) (convic that were nine and ten years old were too remote to be probative).

Additionally,Additionally, *Carter* looked to the age oflooked to the age of the looked to the extrinsicextrinsic offense. *Carter* suggested that youth should be taken into consideration whenwhen deciding whether towhen deciding whether to admit extrinsic evidence against awhen 516516 F.2d at 435. 516 F.2d at 435. The immature judgement [when the defendant was 17516 F oold]old] was clearly a factor in concluding the earlier offenses lacked probativeold] was clea regardingregarding the defenregarding the defendant s iregarding the defendant s intent in con was 20 years old when the prior bad acts took place.

D. TheThe 1991 Evidence Should Have Been Excluded Because ofThe 1991 Ev Cumulative Reasons To Do So. and Fed.R.Evid. 403.

TheThe district court should have barred the 1991 evidenceThe district court should have valuevalue hadvalue had been eliminated by: 1) the difference in the 1991 conductvalue had beer offenses; 2) the temporal remoteness between the currentoffenses; 2) the temporal remoteness b acts;acts; 3) the strength of theacts; 3) the strength of the government sacts; 3) the strength of the g stepssteps taken by Matthews insteps taken by Matthews in not challenging thesteps taken by Ma atat the time of the 1991 conduct. As a result, the evidenceat the time of the 1991 conduct. As prejudiceprejudice the jury unfairly against him and render the juryprejudice the jury unfairly aga testifying drug dealers.

FederalFederal Rule of Evidence 403 exists to provide a checkFederal Rule of Evidence 40 404(b)404(b) evidence. *See, e.See, e.g., BreitweiSee, e.g., Breitweiser,* ___ F.3d at 2004 W.L. courtcourt must weigh the probatcourt must weigh the probative value ocourt must weigh the Fed.R.Evid.Fed.R.Evid. 403. Probity is determined with refeFed.R.Evid. 403. Probity i evidentiaryevidentiary alternatives, in a case.evidentiary alternatives, in a case. *See United State* (1997).(1997). Unfair prejudice(1997). Unfair prejudice i(1997). Unfair prejudice is created suggestsuggest decision on an improper bassuggest decision on an improper basis. suggest Notes).Notes). In this case, the GoNotes). In this case, the GovernmentNotes). In this case, Matthews Matthews defense rendered the probative value of tMatthews defense rendered the

best, leaving its sole effect as one of influencing the jury tobest, leaving its sole effect as one of thethe impeached conspirators because of Matthews the impeached conspirators because of Matth basis for decision. Accordingly, the judgment below should be reversed.

II.

THETHE DISTRICT ERRED IN FAILING TOTHE DISTRICT ERRED IN FA

WIRETAPWIRETAP EVIDWIRETAP EVIDEWIRETAP EVIDENCE W

RECORDINGSRECORDINGS WERE NOT SEALED BYRECORDING

COURTCOURT IMCOURT IMMEDIATELY AFTER TH

CONCLUSION OF THE WIRETAP.

TTheThe The distriThe district court should have suppressed the intercepted wire communic

becausebecause they were not sealed immediatelybecause they were not sealed immediately upon

byby 18 U.S.C. §2518(8)(a). At trial, two ofby 18 U.S.C. §2518(8)(a). At trial, two of

admittedadmitted in evidence. The district courtadmitted in evidence. The district court issuedad

RecordingsRecordings of Intercepted Wire CommunicationsRecordings of Intercepted Wire C

ExhibitExhibit A]. According to that order, the wire interceptions ceased on April 10, 2001,

andand the sealingand the sealing order was entered by the district court on Apriland the sealing

Id. April 10, 2001 fell on a Tuesday and April 12, 2001 April 10, 2001 fell on a Tuesd

weekendweekend or holiday fell onweekend or holiday fell on either date or intervened between th

presentedpresented no evidence of any reaspresented no evidence of any reason for present

communicationscommunications were not presented to and sealed by communications w

immediately uponimmediately upon the expiration of the authorized period of interception,imm

suppression. Accordingly, the judgment should be reversed.

IInIn denying Matthews motion to suppress these wire intercepts, the distIn denying M
court,court, withoutcourt, without citing any evidentiary or legal basis, merely concludedcourt, v
ininin the sealing was not unwarranted because of otherin the sealing was not unwarranted beca
thethe packaging of the tapes. [R. 75]. the packaging of the tapes. [R. 75]. However,the pa
evidence of the reason for the delay or the excusability of the delay.

TheThe plain lanThe plain language oThe plain language of 18 U.S.C. 2518(8)(a) req
communicationscommunications be presented to the authorizing judge and be sealed bcc
authorizingauthorizing judgeauthorizing judge immediately upon the conclusion of the period
InIn *United States v. Ojeda-Rios*, 495 U.S. 257, 495 U.S. 257 (1990), the, 495 U.S. 257 (1990), the
asas requiring immediate sealing of intercepted communications.as requiring immediate sealing
thethe Government s argument thatthe Government s argument that proof of an absence ofthe Go
aa satisfactory explanation of a delay in sealing. *Id.* at 264-65. The at 264-65. The Court held
wherewhere sealing does not occur immediately, thewhere sealing does not occur immediately,
demonstratedemonstrate the actual reasondemonstrate the actual reason for the delay and to explai
SeeSee id. at 265. *See also JonesSee also Jones v. United States*, 224 F.3d 1251, 1258, 224 F.3d 1
TheThe defenseThe defense bears no burden ofThe defense bears no burden of establishing an ab
ororor proving tampering,or proving tampering, and the defense also bears no burden of showing ar
prejudice. *Ojeda-Rios,* 495 U.S. at 265; *Jones,* 244 F.2d at 1258.

TheThe Government providedThe Government provided no evidentiary explanation forTh
presentingpresenting the recordings to the court for sealing.presenting the recordings to the cou
possiblepossible reason for the delaypossible reason for the delay may have been the district ju
itsits representation regarding a detective s recollection,its representation regarding a detect
totto the court as evidence.to the court as evidence. [R. 71 -2]. Even assuming this was the actualto
delay, and thatdelay, and that the reason for the delay can be deemed sufficientlydelay, and that
inin the absence ofin the absence of evidence, only the Eight and Ninth Circuits have indicated th
unavailability of the issuing judge may constitute excusable delay inunavailability of the issuing
Rios.. *See United States v. Quintero,* 38 F. 3d 1317, 1330 (3rd Cir Cir. 1994)(citations
omitted).omitted). The courtomitted). The court in *Quintero* specifically specifically rejected th
Pedroni,, 958 F.2d 262, 265 (9th Cir. 1992), that unavailability Cir. 1992), that unavailability c
constitutesconstitutes excusableconstitutes excusable delay because another districtconstitutes ex
tapes.tapes. *Quintero*, 38 F. , 38 F. 3d at 133, 38 F. 3d at 1330. The Second and Third Circu
unavailabilityunavailability of the issuing judge as a basiunavailability of the issuing judge as
F.3dF.3d at 1330, citing UnF.3d at 1330, citing United States v.F.3d at 1330, citing United St
1979),1979), a1979), and *United States v. Rodriguez*, 786 F. 2d 472, 476 (2nd Cir. 1986). T
EleventhEleventh Circuit has not addressed the issue, at leastEleventh Circuit has not addressed
UnitedUnited States,United States, 224224 F. 3d 1251, 1259 (11th Cir. 2000)(remanding for deter

whetherwhether wiretap evidence necessary to suswhether wiretap evidence necessary to susta in sealing was excusable under *Ojeda-Rios*).

Even the Eighth and Ninth Circuit cases standing for the proposition that the unavailabilityunavailability ofthe issuingunavailability of the issuing judge constitutesunavailabi thethe circumstancthe circumstancethe circumstances of this case. In *United States v. Maxwell* 1994),1994), the period of delay was sev1994), the period of delay was seven days1994), the holidays,holidays, and the sealing date was set in advance by the isholidays, and the sealing da InIn *United States v. McGuire*, 307 F. 3d 1192 (9th Cir. 2002), no district Cir. 2002), no distri immediatelyimmediately available under the highly unusual circumstances immediately availab bebeingbeing from another district because of the recusal of all judges in the district ofbeing fr interception from the entire investigation and case.

TheThe delay The delay in sealing The delay in sealing the fruits of the wire intercep evidence.evidence. The proffer by the Goverevidence. The proffer by the Governmentevi establishestablish a reasonestablish a reason forestablish a reason for the delay and an explanati TheThe defense bears noThe defense bears no burden of proof orThe defense bears no burden of toto show prejudice resulting from thto show prejudice resulting from the delay. to show pr court scourt s error in denying suppression of the wicourt s error in denying suppression o should be reversed.

III.

THETHE EVIDENCE IS INSUFFICIENT THE EVIDENCE IS INSUFFIC CONVICTIONSCONVICTIONS ONCONVICTIONS ON CONVICTIONS ININTIMIDATIONINTIMIDATION AND AINTIMIDAT ENHANCEMENHANCEMENTENHANCEMENT FOR OBSTRUCT JUSTICE.

TheThe evidenceThe evidence isThe evidence is insufficient to support Matthews convicti andand corruptly persuadingand corruptly persuading witnesses in violation of 18 U.S.C. §1512(b stipulatedstipulated thatstipulated that he wrote the letters at issue to Farrell Alstonstipulated that h However,However, the letters themselves did not constitute intimidation orHowever, the letters th of,of, or an attemptof, or an attempt toof, or an attempt to intimidate or corruptly persuade, Alston aaffectaffect their testimony other than by urging them to tell the truth, rather than to affect th aboutabout Matthews inabout Matthews in order to obtain sentenceabout Matthews in order to c notnot not to lie does not constitute intimidation or corrupt persuasion as a matter of law. Accordingly,Accordingly, the judgment as to counts twoAccordingly, the judgment as to counts should be reversed.

InIn considering this issue, the Court must review thIn considering this issue, the evidence.evidence. *SSee* Gov t. E Gov t. Exh. H. 13, 14, 15, 16, 17. On their face, th communicatedcommunicated to Alston and Moore to be truthful about Matthews, rather than to l

aboutabout him in order to oabout him in order to obtain about him in order to obtain redu
indicindictedindicted indicted defendant to communicate with potential Government witnesse
wiwitnesseswitnesses not to lie to the Government or the court in order to obtain sentence
reductions simply cannot constitute intimidation or corrupt persuasion. *See United States v. Lowrey,* 135 F.3d 967, 958-59 (5th Cir. 1998).

AlstonAlston testified that a letter might have been making threatening gestures, andand Moore saand Moore said that Matthews was trying to learn if he was cooperating and t
referencereference toreference to one person s death implied that a snitch could be killedreferen
[R.[R. 169 - 131; R. 170- 169-73]. The letters, however, spoke of[R. 169 - 131; R. 170- 169-7
hishis [Matthews] attorney despite the heat on thhis [Matthews] attorney despite the heat or
[sic][sic] like[sic] like that like they are trying to put it; the folks[sic] like that like they are try
somethingsomething man you know that man didn t have anything tosomething man you know tha
likelike I mlike I m losing every one I love from niggers lying on them; asked if you arelike I m
onon anyoon anyone to get time cut off you; and questioned Don t you think there is on anyo
[sic][sic] brothers in there for nothing on the count of another brother[sic] brothers in there f
them. [*See* R. 78; Gov t. Exh. 13, 14, 15, 16, 17].

TheThe letters urged Alston and Moore not The letters urged Alston and Moore not t
obtainobtain reduced sentences, but ratherobtain reduced sentences, but rather to tell the truth to M
unlawful,unlawful, andunlawful, and what is contained in the letters isunlawful, and what is con

themthem bythem by Alston andthem by Alston and Moore. Accordingly, the judgment as to c should be reversed.

Furthermore,Furthermore, resentencing is required onFurthermore, resentencing is requir levlevellevel enhancement for obstruction of justice, and the district court must reclevel enhanc suchsuch enhancement in lightsuch enhancement in light of the insufficiency of the evidencesuch on counts two and three. Accordingly, the judgment below should be reversed.

IV.

THETHE THE DISTRICTTHE DISTRICT THE DISTRICT COURTTHE DIS

TESTIMONYTESTIMONY ATESTIMONY AND WTESTIMONY AND

TELEPHOTELEPHONETELEPHONE TELEPHONE CONVERSATION T

APPAPPELLAPPELLANTAPPELLANT WAS NOT A PARTY AND WHI

RELATEDRELATED TO A DRUG CONSPIRACY IN WHICH

THE APPELLANT WAS NOT IMPLICATED.

TheThe judgment below shouldThe judgment below should be reversed because the distri

anan intercan intercepted telephone between Jason Moore and Farrell Alston, in whican

MatthewsMatthews did not participate and which relatedMatthews did not participate and which re

Alston and Moore. Federal Rule of Evidence 401 states:

> Relevant Relevant evidence Relevant evidence means evidence Relevant evide
> toto make the existence of any fact that is ofto make the existence of any fact that is
> thethe determination of the action more probable or less
> probable than it would be without the evidence.

Mr.Mr. Matthews was not aMr. Matthews was not a participantMr. Matthews was not a participar

power power pellets, power pellets, a slang term for MDMA, power pellets, a slang term for

toto Fed.R.Evid. 401.to Fed.R.Evid. 401. The conversation between Moore and Alston does no

moremore or less probable that Matthews participated in a conspiracy more or less probable that Ma

TheThe iThe interThe intercepted telephone conversation between Moore and Alston involv

exchangeexchange of dialogue pertaining to ecstasy pills, alsoexchange of dialogue pertaining t

conversationconversation between two iconversation between two individuals,conversation betwe
toto ecsto ecstasy rto ecstasy rather than cocaine, is irrelevant to the charges against Matthe
conspiring to distribute cocaine and so is admissible. Fed.R.Evid. 402.

AnyAny aAny arguaAny arguable relevancy of the intercepted telephone conversation
MoMooreMoore and Alston is substantially outweighed by the danger of unfair prejudiMoor
confusionconfusion of theconfusion of the issues, and misleading the jury. confusion of the issues
should be excluded, pursuant to Fed.R.Evid. 403.

TheThe intercepted telephone conversation between MooreThe intercepted telephone conv
atat best, negligibleat best, negligible probative at best, negligible probative value relating to
arguable probative valuearguable probative value of the intercepted telephone conversationargu
andand Alstonand Alston is substantially outweighed by the dangerand Alston is substantially o
oofof the issues,of the issues, and misleading the jury as to the relevant facts at issue by tain
MatthewsMatthews with a drug conspiracy in Matthews with a drug conspiracy in whichMatt
charged.

TheThe coThe conversation between Moore and Alston also constitutes hearsay,The
defineddefined by Fed.R.Evid. 801, and, therefore, is also inadmissidefined by Fed.R.Ev
Fed.R.Evid. 802. Federal Rule of Evidence 801 defines hearsay as:

> aa statement other than one made by the decla statement other than one made b
> tetestifyingtestifying at the trial or hearing offered in evidencetestifying at the
> prove the truth of the matter asserted.

TheThe intercepted telephone conversation The intercepted telephone conversation betThe i
statementstatement which was being offered tostatement which was being offered to prove the tr
Mr. Matthews was a willing participant in a conspiracy to distribute cocaine.

TheThe oThe only aThe only arguably related exception to the hearsay rule, admiss
statementsstatements made by co-conspirators, is inastatements made by co-conspirators, is
Evidence 801(d)(2)(E) states in part:

> AA statement ofone co-conspiratoris admissible against the
> otheothersothers as aothers as admission of a party opponent in both civil and
> criminalcriminal cases if made during the coursif made during the course
> furtherance of the common objective of the conspiracy.

(Emphasis(Emphasis ad(Emphasis adde(Emphasis added) However, Matthews was not a part
whichwhich pertains to ecstasy, rather than cocaine.which pertains to ecstasy, rather than cocaine.
bebe drawn that statements made by Moore and Alstonbe drawn that statements made by Moore an
conversation,conversation, and involving ecstasy, were made during thconversation, and
furtherance of a conspiracy to distribute cocaine as charged against Matthews.

Any dialogue applicableAny dialogue applicable under the co-conspirator exception An
rulerule must pertain to the common objective. rule must pertain to the common objective.
toto charges against Matthews, would be the conspiracy to distribute to charges against Mat
interceptedintercepted telephone conversation between Moore andintercepted telephone conversa
betweenbetween the two ofbetween the two of tbetween the two of them to distribute ecstasy,
Mr.Mr. Matthews and theMr. Matthews and the chMr. Matthews and the charges against hin

conversation betweenconversation between Moore and Alston isconversation between Moore ar exception to the hearsay rule.

FinallyFinally,Finally, the Government used other evidence in the form of cooperatin witnesseswitnesses to attempt to prove the elementwitnesses to attempt to prove the elem Matthews.Matthews. Matthews. *SeeSee Old Chief v. United States,* 519 U.S. 172, 182-83 (1997) (ififalternative evidence were fifalternative evidence were foundifalternative evidence were fou valuevalue but a lower danger of unfair prejudice, sound judicial discretion would discount thethe value of the item first offered and exclude itthe value of the item first offered and exclude it i substantiallysubstantially outweighesubstantially outweighedsubstantially outweighed substantial F.2dF.2d 513, 521F.2d 513, 521 (11th Cir. 1990) (stating: if the government has a strong case Cir withoutwithout the extrinsic offense...then the prejudice to the defendant will outweigh the marginalmarginal value of themarginal value of the extrinsic omarginal value of the extrinsic districtdistrict court tangibly prejudiceddistrict court tangibly prejudiced Matthews defense by ad conversationconversation between Alston and Mconversation between Alston and Moorecon reversed.

CONCLUSION

ForFor the foregoing reasons, the judgment and convictions below should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

UndersignedUndersigned counsel certifies, pursuant to Fed.R.App.P. 32(a)(7), tUnders foregoing brief contains 10,227 words.

CERTIFICATE OF SERVICE

II HEREBYI HEREBY CERTIFY that two copies of the foregoing have been furnishedI H

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