**ORAL ARGUMENT REQUESTED**

**UNITED STATES COURT OF APPEALS**
**TENTH CIRCUIT**

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**NO. 07-2101**

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**UNITED STATES OF AMERICA**
**Plaintiff-Appellee,**

**v.**

**JOSEPH MILES DAVIS**
**Defendant-Appellant.**

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**A DIRECT APPEAL OF A CRIMINAL CASE**
**FROM THE UNITED STATES DISTRICT COURT FOR**
**NEW MEXICO, HONORABLE PAUL J. KELLY, JR. PRESIDING**

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# *CORRECTED*
# BRIEF OF APPELLANT

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**NO. 07-2101**

**UNITED STATES v. JOSEPH MILES DAVIS**

**CERTIFICATE OF INTERESTED PERSONS**

The following are parties to this litigation, including persons or other entities financially interested in the outcome of the litigation, but not revealed by the caption on appeal, see 10th Cir. R. 46.1(C), and attorneys not entering an appearance in this court who have appeared for any party in prior trial or administrative proceedings sought to be reviewed, or in related proceedings that preceded the subject action in this court:

1. Angela Arellanes - Trial counsel for Appellant/Defendant Davis
2. Joseph Miles Davis - Appellant/Defendant
3. Honorable Lorenzo Garcia - Chief Magistrate Judge
4. Robert Gorence - Initial District Court counsel for Davis
5. Honorable C. Leroy Hansen - Senior United States District Court Judge
6. Honorable Paul J. Kelly, Jr. - United States Circuit Court Judge
7. William Mallory Kent - Appellate Counsel for Davis
8. Honorable Richard Puglisi - United States Magistrate Judge
9. Honorable Robert H. Scott - United States Magistrate Judge
10. Reeve L. Swainston - Assistant United States Attorney - Trial Counsel

11. Richard Valdez - Sentencing Counsel for Davis

12. David N. Williams - Assistant United States Attorney - Appellate Counsel

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## STATEMENT OF RELATED CASES

Pursuant to 10th Circuit Rule 28.2(C)(1), there are no prior or related appeals.

## STATEMENT OF JURISDICTION

This Court has jurisdiction over the merits issue appeal in this cause under 28 U.S.C. § 1291, which provides for an appeal from a final order of a district court. This Court has jurisdiction over the sentencing appeal under the authority of 28 U.S.C. § 3742.

## STATEMENT OF THE ISSUES

**I. THE TRIAL COURT ERRED IN DENYING MR. DAVIS'S MOTION TO SUPPRESS, BECAUSE UNDER THE UNIQUELY COERCIVE SETTING OF A MAJOR INTERNATIONAL AIRPORT IN POST 9-11 AMERICA, A REASONABLE AIRLINE PASSENGER WOULD NOT FEEL FREE TO IGNORE POLICE QUESTIONING AND LEAVE THE AIRPORT AFTER AIRPORT POLICE OFFICERS INITIATE AN ENCOUNTER AND BEGIN QUESTIONING THE PASSENGER, NOR FREE TO REFUSE A REQUEST TO SEARCH THE PASSENGER'S BAG.**

**II. THE TRIAL COURT REVERSIBLY ERRED IN DENYING DAVIS'S TIMELY MOTION FOR MISTRIAL IN RESPONSE TO A LAW ENFORCEMENT OFFICER WITNESS'S IMPROPER VOLUNTEERING ON CROSS-EXAMINATION EVIDENCE OF DAVIS'S PRIOR CRIMINAL RECORD, WHEN THE COURT HAD RULED PRETRIAL IN RESPONSE TO THE GOVERNMENT'S 404(b) MOTION THAT SUCH EVIDENCE WAS NOT ADMISSIBLE.**

**III. THE TRIAL COURT REVERSIBLY ERRED IN FAILING TO GIVE TENTH CIRCUIT PATTERN CRIMINAL JURY INSTRUCTION 1.16, THE ADDICT INSTRUCTION, WHEN THE EVIDENCE SUPPORTED THE INSTRUCTION, THE REQUESTED INSTRUCTION WAS A CORRECT STATEMENT OF THE LAW, AND THE ADDICT WITNESS'S INCRIMINATING TESTIMONY WAS NOT CORROBORATED.**

**IV. THE TRIAL COURT'S APPLICATION OF THE SENTENCING GUIDELINES RESULTED IN A *DE FACTO* VIOLATION OF THE FIFTH AND SIXTH AMENDMENTS.**

## STATEMENT OF THE CASE

### OVERVIEW OF CASE

The case began when two Los Angeles ("LA") police officers encountered Joseph Miles Davis ("Davis" or the "Defendant") at Los Angeles International Airport in the baggage area after he had arrived on a flight from Las Vegas. According to the officers' version of events, which was accepted as credible by Judge Hansen, detective Anzallo accepted for and received consent to search a duffle bag Davis was carrying. [Aplt. App. at 107-110] The officers found $11,000 cash and a travel itinerary for both Davis and a person named Darlington Stewart. The travel itinerary for Stewart included an Amtrak ticket for travel February 4, 2006. [Aplt. App. at 110-114] The officers seized the contents of the bag for forfeiture as suspected drug related currency. [Aplt. App. at 112] This information led to a DEA agent being dispatched to question Stewart on board the Amtrak train on February 6, 2006. [Aplt. App. at 113-115] That encounter took place in Albuquerque, New Mexico. Stewart consented to a search of luggage he was carrying, which was found to contain a prune juice bottle containing a mixture or substance containing more than ten grams of actual PCP. [Aplt. App. 93-97] Stewart in turn agreed to cooperate with the federal authorities in exchange for a possible sentence reduction motion, and ended up testifying against Davis at Davis's trial. [Aplt. App. 176-178] The

Government's entire trial case against Davis rested on the evidence derived from the search and seizure that was the subject of the motion to suppress.[1]

**INDICTMENT AND SECTION 851 INFORMATION**

Davis was initially charged in the New Mexico federal district court by a criminal complaint February 7, 2006 with possession with intent to distribute phencyclidine (PCP) and thereafter by indictment on February 15, 2006 with conspiracy to possess with intent to distribute ten grams or more of PCP, in violation of 21 U.S.C. § 846.[2] [Aplt. App. at 18-19]. The Government filed an information under 21 U.S.C. § 851 on August 10, 2006 that it would seek an enhanced sentence based on Davis having a prior felony drug conviction from the Eastern District of Pennsylvania in 1997. [Aplt. App. at 20-27]

**MOTION TO SUPPRESS**

Davis filed a motion to suppress on October 9, 2006 challenging the search of

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[1] The motion to suppress was heard and decided by Senior United States District Judge C. LeRoy Hansen. [Aplt. App. at 53-54] United States Circuit Judge Paul J. Kelly, Jr. presided over the trial and sentencing. [Aplt. App. at 57; Aplt. App. at 84-88]

[2] The indictment was later superseded October 25, 2006 by the addition of a second count, a witness tampering conspiracy in violation of 18 U.S.C. § 1512(k) [Aplt. App. at 38-39], but after the District Court granted a defense motion to sever the two counts for trial [Aplt. App. at 89], the Government ultimately moved to dismiss the witness tampering charge [Aplt. App. at 58-59; Aplt. App. at 60].

and seizure from Davis that took place at the Los Angeles International Airport ("LAX")on February 2, 2006 by Los Angeles Police Department Detectives Anzallo and Alves. [Aplt. App. at 28-37]

Judge Hansen orally denied the motion to suppress November 9, 2006, and put his findings on the record as follows:

> In this case, as I've already noted, the defendant had no reason to believe - - he's a very intelligent fellow. He had no reason to believe that there was anything incriminating in his backpack unless just the amount of money was incriminating, and that's not necessarily the case. Everybody can carry money in their backpack or briefcase.
>
> So I have to conclude that the defendant's testimony is not credible, and I have to conclude that the officer's testimony is credible . . .
>
> The testimony of the defendant was internally inconsistent, and logically not credible. His testimony about his not adjusting his clothes when he did, when he had other opportunities to do so, is part of that inconsistency in logical improbability, so that's part of that reason that I find him not credible. But I think, as I noted, an inference arises that he had no reason not to consent since he didn't have anything obviously incriminating in his backpack.
>
> I think the issue of whether he consented has to be decided at the time of the two or three minutes in the terminal, and I conclude that during that period of time he consented. I accept the police officers' testimony that he said "okay" or "go ahead." And nothing that he did or testified about yesterday leads me to conclude that he withdrew that consent at any point in time.
>
> There wasn't anything that he testified to that leads me to conclude that coercion occurred after that. I believe the officer's testimony that the defendant carried his backpack with him, had its control until it was placed on the table in the office across the street and the officers then

proceeded to search it.

So I conclude that I cannot suppress the contents of that bag. I find that the officers began a consensual encounter with the defendant. During that encounter, he consented to the search of his bag and he did not withdraw that consent. He was intelligent. I think he - - I conclude that he freely and voluntarily gave consent, and I conclude that the government offered clear and positive testimony that the consent was unequivocal and intelligently given.

I didn't see, even accepting the defendant's testimony as true, that there was any withdrawal of that consent or that there was any duress or coercion applied at the time of the consent or during the subsequent search of the bag. So I must consider whether there was any physical mistreatment, use of violence, promises or inducements, deception or trickery, and physical and mental condition and capacity of the defendant. All of that is negative. There wasn't anything, any of that present.

Of course, once he gives consent, and I conclude that he did, the scope was never in question . . . So I will deny the motion to suppress.

[Aplt. App. at 90-92]

**ORDER EXCLUDING EVIDENCE OF PRIOR CONVICTION**

The Government filed a notice of intent pursuant to Rule 404(b), Federal Rules of Evidence, to introduce at trial evidence of Davis's prior arrest for a similar PCP offense in 1996. [Aplt. App. at 40-52] Judge Kelly entered an order November 22, 2006 that preliminarily excluded evidence of Davis's prior PCP arrest:[3]

[3] This was separate from the question of introducing Davis's prior conviction for this offense if he chose to testify at trial. As to that Rule 609 issue, Judge Kelly conditionally granted the Government request to introduce the prior conviction, but

> The Government's Notice of Intent to Introduce Defendant's Other Criminal Activities Pursuant to Federal Rule of Evidence 404(b), filed November 4, 2006 (Doc. 103), is construed as a motion in limine seeking the admission of such evidence. The motion is denied; the government may not introduce this evidence. This does not constitute a definitive ruling, and counsel are reminded of the necessity to offer and object in accordance with Fed. R. Evid. 103(a).

[Aplt. App. at 55-56]

**TRIAL EVIDENCE**

The case proceeded to trial by jury with jury selection, opening statements and the first Government witnesses on November 27, 2006.

The first witness was DEA Agent David Smith, who testified that on February 6, 2006 he intercepted Darlington Stewart on an Amtrak train at the Albuquerque station. He did so based on information that came from LA police detectives following the search and seizure of Davis's duffel bag four days earlier. Stewart consented to a search of his luggage. The luggage contained a prune juice bottle that contained PCP. [Aplt. App. at 93-97]

Next DEA Agent Bradley Glenn Clemmer testified about the dangers of PCP [Aplt. App. at 98-103] and that the quantity in Stewart's possession was a distribution, not personal use, quantity. [Aplt. App. at 104-105]

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only if Davis chose to testify at trial. [Aplt. App. at 55-56] Davis did not testify at trial.

Agent Clemmer was followed by Los Angeles Police Department Detective Joseph Anzallo. [Aplt. App. at 106-107] He and his partner Detective Alves were engaged in routine drug interdiction patrol February 2, 2006 when they noticed Davis at the baggage area of LAX adjusting his pants. This seemed unusual enough that it drew their attention and Detective Anzallo approached him and started questioning Davis. [Aplt. App. at 107-110] According to Detective Anzallo he asked Davis if he it would be alright to search his bag and Davis said, "Sure, go ahead." He then asked Davis if he had any large amounts of currency in the bag, and Davis said he had $5,000 in the bag. At that point Detective Anzallo said he asked Davis to go back to his office with him across the street from the terminal so that they could check the money out of public view and to verify the amount and its origin. [Aplt. App. at 107-110] When they got to the office the bag was searched and it appeared to be more than $5,000. At that point Davis said it was $11,000. According to Detective Anzallo Davis first said that he had met a friend on the plane from Philadelphia to Las Vegas, put the friend up at the New York, New York hotel there and then gambled and won this money. The Detective said Davis later changed that statement and said he got the money from the sale of his house in Philadelphia, and that he was coming to Los Angeles to buy some clothing and furniture for his new home. [Aplt. App. at 110-112] At that point, the money Davis was told that the money was being seized

for federal forfeiture. [Aplt. App. at 112] Davis was detained approximately 20 minutes during this encounter. [Aplt. App. 127-128]

Detective Anzallo also found a travel itinerary in the bag for Darlington Stewart's flight from Philadelphia to Las Vegas as well as an Amtrak train itinerary for Darlington Stewart to go back to Philadelphia from Las Vegas by train February 6, 2006. [Aplt. App. at 113-114] Detective Anzallo then notified Amtrak police who directed him to a task force in Albuquerque who would encounter Darlington Stewart on the train. [Aplt. App. at 113-115] The travel documentation showed or led to evidence that showed that Davis had made and paid for the travel arrangements for Stewart. [Aplt. App. at 116-118]

Detective Anzallo's partner, Detective Joe Alves was the next witness. [Aplt. App. at 118] Detective Alves succinctly corroborated Detective Anzallo's testimony regarding the encounter with Davis and was used to describe am LAX surveillance video which showed the three men walking across the street from the baggage terminal with Davis carrying the bag in question. [Aplt. App. at 119-123]

**VIOLATION OF ORDER EXCLUDING EVIDENCE**

**MOTION FOR MISTRIAL**

During cross-examination Davis's court appointed counsel, Angela Arellanes, was questioning Detective Alves about the phone numbers found on Darlington

Stewart's cell phone, and in so doing engaged in the following colloquy with Detective Alves, which ended in her moving for a mistrial, after Detective Alves disclosed Davis's 1996 arrest:

> Q. Okay. Have you read the reports concerning *this particular case*?
>
> A. I have reviewed the report my partner wrote.
>
> Q. Okay. Other than the two or three-page report that your partner wrote, have you reviewed any other documents?
>
> A. I reviewed another report.
>
> Q. Okay. What other report?
>
> A. Concerning Mr. Davis's arrest in Philadelphia approximately 10 years ago.

[Aplt. App. at 124-126; emphasis supplied]

Counsel for Davis immediately moved for mistrial on the basis that the answer violated the court's ruling on the Government's 404(b) motion. [Aplt. App. at 125-127] The Court denied the motion for mistrial stating that defense counsel had invited the error by her question. The Court instructed the jury to disregard the comment about the prior arrest. [Aplt. App. at 126-127]

**BALANCE OF TRIAL EVIDENCE**

The next witness was DEA Agent Michael Rosenthal. [Aplt. App. at 129] Agent Rosenthal arrested Davis at the Las Vegas airport on the evening of February

6, 2006, based on a federal arrest warrant. [Aplt. App. at 129-131] In a search incident to the arrest Agent Rosenthal recovered a laptop computer and some personal documents. [Aplt. App. at 130-133] Included among the documents were a real estate settlement form for a sale of a house on December 14, 2005 showing a settlement amount of $32,000, a Western Union receipt, a Bank of America check card, and a deposit slip for a bank deposit of $41,665 on the same date, December 14, 2005. [Aplt. App. at 130-138]

Next Amtrak Detective John Clayborne testified about the reservation records for Darlington Stewart. [Aplt. App. at 138-143] The records included email communications via an email address that would later be connected to Davis through the laptop computer taken from him at the time of his arrest. [Aplt. App. at 142-143]

The following day the first witness was FBI Agent Julia Victoria Bales, a computer forensic examiner. [Aplt. App. at 144-146] Agent Bales had examined the laptop taken from Davis. There was an email account on this laptop for Adero Miwo. Adero Miwo was said to be Davis's girlfriend. [Aplt. App. at 147-149] There were two emails concerning Amtrak reservations in her email outbox, addressed to the email address found on the Amtrak itinerary documents in Davis's bag. [Aplt. App. at 147-151]

Agent Bales was followed by DEA forensic chemist Joanne Katz. [Aplt. App.

at 152-153] She testified that she tested a sample of the liquid taken from the prune juice bottle in Stewart's luggage, that it was PCP, and she estimated the drug quantity to be 41 grams. [Aplt. App. at 154-155]

Chemist Katz was followed by Darlington Stewart. [Aplt. App. at 156-158] Stewart testified that he knew Davis from having been the DJ of a hip hop group Davis had. [Aplt. App. at 158-159] The musical group had done numerous tours mostly in Europe. [Aplt. App. at 158-159] Davis was a vocalist and emcee for his group. [Aplt. App. at 159] Stewart testified that he met up with Davis in Philadelphia on January 29, 2006 trying to borrow money from Davis. Stewart had gotten his girlfriend pregnant and was wanting money to pay for an abortion. [Aplt. App. at 160] Stewart testified that Davis told him he was going to make a drug run out to LA to pick up a package and he could go with him to do that. [Aplt. App. at 161-162] Although they never agreed on an amount, he understood he would be paid for doing this. [Aplt. App. at 161-162] Davis made and paid for the travel arrangements. [Aplt. App. at 162-163] They flew out to Las Vegas and once there Davis flew on to Los Angeles and told Stewart he would be in contact to let him know how everything was going. [Aplt. App. at 164-165] Davis called Stewart from LA and told him he had run into a bump in the road. [Aplt. App. at 165-166] Davis called and told him he would be late coming back so Stewart had to change the train reservation for a later

train. [Aplt. App. at 166-168] He met up with Davis again in the New York New York hotel lobby in Las Vegas and Davis told him the police had taken his bag and $11,000. [Aplt. App. at 168-169] They went up to his room and Davis gave him a prune juice bottle with what he assumed was drugs in it. [Aplt. App. at 170-171] Davis told him to wrap it up and scent it with a product called Febreeze. [Aplt. App. at 170-171] Davis told Stewart he was going back to LA for a super bowl party. [Aplt. App. at 171-173] Stewart took the train and was arrested in Albuquerque on February 6, 2006 on the train. [Aplt. App. at 174-175]

Stewart agreed to plead guilty to conspiracy to distribute 10 grams and more of PCP and possession with intent to distribute PCP. [Aplt. App. at 176] Stewart entered into a "cooperation" plea agreement to testify against Davis. [Aplt. App. at 177-178] On cross-examination Stewart admitted that he was hoping to get probation based on his cooperation against Davis. [Aplt. App. at 179-180]

The final Government witness was DEA Agent Smith who served as a summary witness to summarize the documentary evidence, which related to phone records, Western Union records, bank records, and travel records. [Aplt. App. at 181-210] The Government then announced that it rested its case. [Aplt. App. at 211-212]

**EVIDENCE OF DRUG ADDICTION OF GOVERNMENT WITNESS DEFENSE REQUESTED JURY INSTRUCTION DENIED**

The Defense put on two witnesses starting with Chenjerai Kumanyika. [Aplt. App. at 213-214] Kumanyika testified that he was a music instructor and entertainer. [Aplt. App. at 213-214] He knew Darlington Stewart because they both had been in Davis's musical group. [Aplt. App. at 214-215]

Kumanyika testified about Stewart's drug abuse:

> Q. And then while the group was on tour, what would Mr. Stewart do on his free time?
>
> A. He was like very sort of antisocial. I mean, you know, he wasn't like an unpleasant person, but he would like stay basically and drink *and just get high in his hotel, you know, with marijuana*, I'm talking about, primarily, which is a big thing, but nobody in our group did that. He wouldn't go out. He would just be in the hotel all the time which was noteworthy to me because he had opportunity to make these connections, *and he would be in his room getting high.*

[Aplt. App. at 216-217; emphasis supplied]

On cross-examination the Government had Kumanyika repeat his assertion that Stewart "smoked marijuana the whole time . . . " [Aplt. App. at 218]

The only other defense witness was Maurice L. Moya, a private investigator.

[Aplt. App. at 219-220] Mr. Moya brought out the fact that the lobby of the New York New York hotel in Las Vegas is covered by video surveillance cameras. [Aplt. App. at 221-222] The significance of this was the failure of the Government to produce any surveillance video confirming Darlington Stewart's testimony that Davis came back from LA after the police seized his money at LAX and brought Stewart the PCP he was caught with on the train. At this point the defense rested. [Aplt. App. at 223-224]

Based on the evidence of Darlington Stewart's drug use, counsel for Davis requested the Pattern Jury Instruction 1.16, use of addictive drugs. [Aplt. App. at 225] Counsel read the requested instruction to the Court:

> The testimony of a drug abuser must be examined and weighed by the jury with greater caution than the testimony of a witness who does not abuse drugs. . . . Darlington Stewart may be considered an abuser of drugs. You must determine whether the testimony of that witness has been affected by the use of drugs or the need for drugs.

[Aplt. App. at 226]

The Government objected. [Aplt. App. at 226] The Government stated that there was no evidence that Stewart was a drug user, then stated that the evidence of his drug use was from 2004 [and the testimony in question related to events alleged to have occurred in January and February 2006]. [Aplt. App. at 227] The Court took the matter under advisement and stated it would rule before instructing the jury.

[Aplt. App. at 228]

The Court did not give the Defense requested jury instruction. The Court stated that:

> I have declined to give that requested instruction on substance abuser because I don't believe the evidence reflects anything other than an isolated comment that the individual had been observed on one occasion smoking pot. There is no evidence that he is a substance abuser.

[Aplt. App. at 230]

**VERDICT AND SENTENCING**

The jury returned a guilty verdict on the count that went to trial conspiracy to possess with intent to distribute 10 grams or more of PCP and returned a special verdict that the amount was 10 grams or more of PCP. [Aplt. App. at 231]

The presentence investigation report ("PSR") scored Davis as a Career Offender under U.S.S.G. § 4B1.1. The Career Offender provision requires as a predicate:

> "two prior felony convictions for either a crime of violence or a serious drug offense."

For the two prior felony convictions the PSR relied upon the 1997 federal felony conviction for possession with intent to distribute PCP (a controlled substance offense), and a State of Pennsylvania second degree misdemeanor conviction for simple assault. [Sealed App. PSR, ¶ 37, ¶ 42]

The Defense objected to scoring Davis as a Career Offender on the basis of this conviction arguing that it overstated the seriousness of the criminal record [Aplt. App. at 232], but the Government cited in response *United States v. Dorsey*, 174 F.3d 331 (3rd Cir. 1999), which had upheld the use of the same Pennsylvania statutory misdemeanor offense as a predicate offense for the Career Offender guideline. [Aplt. App. at 233]

The District Court enhanced Davis based on the Government's § 851 notice of prior drug offense and also found Davis to be a Career Offender and to have a guideline range as a Career Offender of 360 months to life imprisonment, but "varied" downward to a sentence of 210 months. [Aplt. App. at 234]

This appeal followed in a timely manner.

## STANDARDS OF REVIEW

### I. DENIAL OF MOTION TO SUPPRESS.

When reviewing a district court's denial of a motion to suppress, the Court of Appeals accepts the district court's factual findings unless clearly erroneous, and views the evidence in the light most favorable to the government. However, "[w]e review de novo the district court's conclusion of law whether a seizure occurred." *United States v. Glass*, 128 F.3d 1398, 1405 (10th Cir.1997).

### II. DENIAL OF MISTRIAL WHEN WITNESS DISCLOSED PRIOR CRIMINAL RECORD OF DEFENDANT.

A new trial is required because it is not possible to "say with reasonable certainty that the reference to prior records 'had but very slight effect on the verdict of the jury.' " *Sumrall v. United States*, 360 F.2d 311, 314 (10th Cir.1966); see also *United States v. Walton*, 552 F.2d 1354, 1366 (10th Cir.), cert. denied, 431 U.S. 959, 97 S.Ct. 2685, 53 L.Ed.2d 277 (1977) (standard is whether the statement could "have had any appreciable effect on the action of the jury"); *United States v. Woodring*, 446 F.2d 733, 737 (10th Cir.1971) (same); *United States v. Sands*, 899 F.2d 912, 914 (10th Cir. 1990) (same).

### III. DENIAL OF REQUESTED JURY INSTRUCTION.

Review of challenged jury instructions requires this Court to determine, after examining the record as a whole, whether the requested instructions "correctly state

the applicable law and provide the jury with ample understanding of the issues and standards of the case." *Lamon v. City of Shawnee, Kansas*, 972 F.2d 1145, 1153 (10th Cir.1992) (citations omitted). Reversal is mandated if an error in the jury instructions "is determined to have been prejudicial, based on a review of the record as a whole." *Street v. Parham*, 929 F.2d 537, 539-40 (10th Cir.1991) (citations omitted), cited in *Denbo v. United States*, 988 F.2d 1029, 1034 (10th Cir. 1993).

## IV. *DE FACTO* SIXTH AMENDMENT VIOLATION

This issue is presented for preservation only and is foreclosed by current binding precedent.

## SUMMARY OF ARGUMENTS

### I. THE TRIAL COURT ERRED IN DENYING MR. DAVIS'S MOTION TO SUPPRESS, BECAUSE UNDER THE UNIQUELY COERCIVE SETTING OF A MAJOR INTERNATIONAL AIRPORT IN POST 9-11 AMERICA, A REASONABLE AIRLINE PASSENGER WOULD NOT FEEL FREE TO IGNORE POLICE QUESTIONING AND LEAVE THE AIRPORT AFTER AIRPORT POLICE OFFICERS INITIATE AN ENCOUNTER AND BEGIN QUESTIONING THE PASSENGER, NOR FREE TO REFUSE A REQUEST TO SEARCH THE PASSENGER'S BAG.

The encounter between Mr. Davis and Detectives Anzallo and Alves on February 2, 2006 amounted to a seizure of Mr. Davis that implicated the Fourth Amendment. A reasonable person in Mr. Davis's position would not "feel free to decline the officers' requests or otherwise terminate the encounter." *Florida v. Bostick*, 501 U.S. 429, 436 (1991). The ensuing consent to search granted by Mr. Davis was tainted by the illegality of the seizure. Therefore, the evidence and statements obtained directly and indirectly as a result of this search and seizure should have been suppressed.

## II. THE TRIAL COURT REVERSIBLY ERRED IN DENYING DAVIS'S TIMELY MOTION FOR MISTRIAL IN RESPONSE TO A LAW ENFORCEMENT OFFICER WITNESS'S IMPROPER VOLUNTEERING ON CROSS-EXAMINATION EVIDENCE OF DAVIS'S PRIOR CRIMINAL RECORD, WHEN THE COURT HAD RULED PRETRIAL IN RESPONSE TO THE GOVERNMENT'S 404(b) MOTION THAT SUCH EVIDENCE WAS NOT ADMISSIBLE.

The trial Court had ruled in advance of trial that evidence of Mr. Davis's prior arrest and conviction was not admissible unless he chose to testify. Despite this ruling, during cross examination Detective Alves (who we argue can be presumed to have been instructed by the United States Attorney about the trial Court's evidentiary order) improperly, and we argue on this record, intentionally violated that order and volunteered evidence of Mr. Davis's prior record. In context Detective Alves's answer was not responsive to the question posed. Defense counsel did not open the door to the evidence by the question she asked. Defense counsel immediately moved for mistrial which was denied. Because this Court cannot be confident that the introduction of evidence of Mr. Davis's prior record did not affect the verdict, the judgment must be vacated.

## III. THE TRIAL COURT REVERSIBLY ERRED IN FAILING TO GIVE TENTH CIRCUIT PATTERN CRIMINAL JURY INSTRUCTION 1.16, THE ADDICT INSTRUCTION, WHEN THE EVIDENCE SUPPORTED THE INSTRUCTION, THE REQUESTED INSTRUCTION WAS A CORRECT STATEMENT OF THE LAW, AND THE ADDICT WITNESS'S INCRIMINATING TESTIMONY WAS NOT CORROBORATED.

The Defense presented unrebutted evidence of years of drug abuse by the Government's key witness, Darlington Stewart. The Defense then made a timely request for the Tenth Circuit Pattern Jury Instruction on drug addicted witnesses, Instruction 1.16. The trial Court denied the request. This was reversible error because the evidence supported the requested instruction, the requested instruction was a correct statement of the law, and the witness at issue was the foundation of the Government's case and his testimony as to other than innocent details, was not corroborated by any other co-conspirators.

## IV. THE COURT'S APPLICATION OF THE SENTENCING GUIDELINES RESULTED IN A *DE FACTO* VIOLATION OF THE FIFTH AND SIXTH AMENDMENTS.

This argument is presented solely to preserve the issue for either *en banc* review or subsequent review at the Supreme Court. Counsel recognizes that it appears foreclosed by current precedent.

## ARGUMENTS

### I. THE TRIAL COURT ERRED IN DENYING MR. DAVIS'S MOTION TO SUPPRESS, BECAUSE UNDER THE UNIQUELY COERCIVE SETTING OF A MAJOR INTERNATIONAL AIRPORT IN POST 9-11 AMERICA, A REASONABLE AIRLINE PASSENGER WOULD NOT FEEL FREE TO IGNORE POLICE QUESTIONING AND LEAVE THE AIRPORT AFTER AIRPORT POLICE OFFICERS INITIATE AN ENCOUNTER AND BEGIN QUESTIONING THE PASSENGER, NOR FREE TO REFUSE A REQUEST TO SEARCH THE PASSENGER'S BAG.

On February 2, 2006, Los Angeles Police Department Detectives Anzallo and Alves were patrolling the Los Angeles International Airport Terminal, not as advance troops in the War on Terror on the hunt for terrorists or saboteurs, but as foot soldiers in the War on Drugs, now in its fourth decade.[4] Without probable cause or an arrest warrant and without reasonable suspicion, they approached Mr. Davis and identified themselves. They showed their badges. They were armed. Mr. Davis was an arriving passenger on a Southwest Airlines shuttle from Las Vegas.

Mr. Davis acquiesced in the officer's show of authority and involuntarily consented to a search of his bag. He was escorted by the two officers out of the baggage terminal across the busy airport terminal road to the on-site police station. The two Detectives quizzed Mr. Davis repeatedly and rapid fire about his travel, his

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[4] See *Thirty Years of America's Drug War,* PBS Frontline, http://www.pbs.org/wgbh/pages/frontline/shows/drugs/cron/

plans, his money, his life. They searched his bag and found $11,000 cash, which they seized, without counting, giving Mr. Davis a blank receipt, and let him go on his way. The "encounter" lasted twenty minutes.

Neither Detective ever advised Mr. Davis that he had a right to refuse to answer their questions or refuse to consent to any search; neither Detective advised Mr. Davis that they had absolutely no legal right to detain him, to question him, to search his bag if he were to decline their requests.

The Fourth Amendment to the Constitution of the United States requires this Court to suppress from evidence in this case the evidence derived from this encounter. The Fourth Amendment provides:

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

An individual is "seized" within the meaning of the Fourth Amendment whenever a police officer, "by means of physical force or show of authority, has in some way restrained [his] liberty." *Terry v. Ohio*, 392 U.S. 1, 20 n. 16 (1968). In assessing whether a particular individual's liberty has been restricted in an encounter

with the police, the Court inquires whether, in view of all of the surrounding circumstances, "a reasonable person would have believed he was not free to leave if he had not responded" to the officer's inquiries. *INS v. Delgado*, 466 U.S. 210, 216 (1984); see also *Florida v. Royer*, 460 U.S. 491, 502 (1983) (plurality opinion); Id. at 511-12 (opinion of Brennan, J.).

A reasonable disembarking airline passenger would not have felt free to leave the airline terminal in Los Angeles after having been confronted by the two police officers. Indeed everything that one is taught by public education and example in our society today is that one surrenders his liberty upon entry upon an airport terminal and that the only choice when confronted by official requests or directions in the airport environment is to obey, and obey without question or dispute, lest you be arrested for merely questioning authority. In this instance, the officers made a visible "show of authority" as they confronted Mr. Davis by flashing their badges and carrying of what appeared to be (and, in fact, were) guns. They made no announcement of the routine character of their inquiries, nor did they inform Mr. Davis that he was free to leave or to decline to answer any questions, or not consent to any search. Having been arrested in similar circumstances before, and having been to federal prison and subjected to five years of federal supervised release, Mr. Davis, much more than the average citizen, had been taught to obey and acquiesce to

authority. A reasonable person, much less a person with Mr. Davis's history, who found himself in such a position, confronted by two police officers, would not have felt free to walk away and terminate the interview. See *Florida v. Royer*, 460 U.S. at 502-03. Mr. Davis was therefore seized within the meaning of the Fourth Amendment.

The Government cannot dispute that the officers had no reason to suspect Mr. Davis of any wrongdoing until he had been walked out of the baggage terminal and across the street and into the police station and had his bag searched. Nor has the Government attempted to justify the officers' actions on the basis of a special law-enforcement necessity that outweighs the intrusiveness of the detention it entailed. This is not a War on Terror search. It therefore follows that Mr. Davis was unreasonably seized in violation of the Fourth Amendment.

Assuming that Mr. Davis was illegally seized, the $11,000 cash and travel itinerary found during the search of his bag and the evidence thereafter derived therefrom, must be suppressed as "fruit of the poisonous tree," as must any incriminating statements. There was no intervening "independent act of free will," *Florida v. Royer*, 460 U.S. at 501, that even arguably separated Mr. Davis's seizure from his alleged consent to the search of his bag. The connection between these two events therefore cannot be considered "so attenuated as to dissipate the taint" of the

illegal detention. *Wong Sun v. United States*, 371 U.S. 471, 491 (1963) (quoting *Nardone v. United States*, 308 U.S. 338, 341 (1939)).

This case presents a particularly aggravated instance of a scenario that has unfolded with increasing frequency in recent years in Los Angeles and around this once free country: unprovoked police encounters at airports, bus stations, on trains and highways, by armed law-enforcement officers, to question and search the persons and possessions of passengers or travelers as to whom they have no pre-existing information of criminal conduct or reason for suspicion. This practice is highly intrusive, especially on the particular facts before the Court, because it instills in travelers the sense that they have no reasonable option but to acquiesce in the officers' requests. Under the circumstances here present, the confrontation constituted a seizure, which was unreasonable because not predicated on any articulable suspicion or any plausible basis in law-enforcement necessity or practice.

**A. Mr. Davis Was Seized Because a Reasonable Person in His Position Would Not Have Felt Free to Terminate the Encounter and Walk Away.**

If the Fourth Amendment is to protect that most basic of individual rights -- the "right to be let alone," *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) -- its prohibition against unreasonable seizures must reach not only the obvious, but also the more subtle ways that one can be intentionally confined by law-enforcement action. In its "totality of the circumstances" approach

to identifying seizures, see *United States v. Mendenhall*, 446 U.S. 544, 557 (1980) (opinion of Stewart, J.); *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973), the Supreme Court has recognized that liberty may be constrained by official displays of authority lacking either a direct and unambiguous physical restraint or a verbal directive explicitly curtailing liberty. The test is not whether the police have expressly effected an arrest or detention, either by word or deed, but whether "a reasonable person would have believed he was not free to leave." *INS v. Delgado*, 466 U.S. at 216; see also *Florida v. Royer*, 460 U.S. at 502 (plurality opinion); Id. at 511-512 (opinion of Brennan, J.); *United States v. Mendenhall*, 446 U.S. at 554 (1980) (opinion of Stewart, J.).

Even apart from the specific circumstances of this case, the basic police practice of approaching passengers in an airline terminal in mid-journey to engage in *ad hoc* questioning is highly coercive. *See e.g. United States v. Madison*, 744 F. Supp. 490 (S.D.N.Y. 1990); *United States v. Chandler*, 744 F Supp. 333 (D.D.C. 1990); *United States v. Alston*, 742 F. Supp. 13 (D.D.C. 1990); *United States v. Felder*, 732 F. Supp. 204 (D.D.C. 1990); *United States v. Cothran*, 729 F. Supp. 153 (D.D.C. 1990); *United States v. Lewis*, 728 F.Supp. 784 (D.D.C. 1990); *United States v. Grant*, 734 F. Supp. 797 (E.D.Mich. 1990). While officers may approach an individual on the street and ask if he is willing to answer some questions, *Florida v.*

*Rodriguez*, 469 U.S. 1, 5-6 (1984); *Dunaway v. New York*, 442 U.S. 200, 210 n. 12 (1979), when carried out within the confines of an airport terminal subject to the security rules currently in place in all major United States airports, this practice has the quality of a dragnet. Travelers feel compelled - - are compelled - - to cooperate with the police, even if they might rather not, in order to avoid the risk of unhappy consequences.

The approach will often be made in a city unfamiliar to the passenger, usually a city where, because it is an intermediate stop on his journey, he had not intended presently to spend time. The passenger knows only that under the new rules in place to fight the War on Terror, he has generally been deemed to have surrendered substantial Fourth Amendment protections simply by being a traveler in 21st Century America. The average traveler is not a lawyer and is not versed in the intricacies of where the Fourth Amendment starts and where it stops, where exactly the shadow of authority has blocked the light of liberty, within an airport. He only knows that within an airport he generally must do as he is told or risk ending up becoming the subject of the nightly news in an unflattering and decidedly unwanted way.

While a person's mere refusal to respond to police inquiries cannot "without more" provide reasonable suspicion of wrongdoing, *Florida v. Royer*, 460 U.S. at 498, a person's engaging in actions contrary to his own apparent self-interest (e.g.,

leaving a baggage terminal without cooperating with interrogating officers) might provide some or all of the objective basis necessary for an investigative detention. A reasonable person could thus conclude that some response to police inquiries will ultimately be necessary, regardless of whether he initially agrees to talk or seeks to avoid the encounter. In that sense, the current airport context differs from confrontations on the street, *Michigan v. Chesternut*, 108 S.Ct. 1975 (1988), and differs from airport concourse inquires pre-9-11, *United States v. Mendenhall*, 446 U.S. 544, or in a factory, *INS v. Delgado*, 466 U.S. 210, where "the location provided ample opportunities for the individuals to leave the presence of the officers without engaging in an act which would be contrary to their interests or raise a reasonable suspicion." *United States v. Madison,* 744 F. Supp. 490, 494 (S.D.N.Y. 1990).

Current security conditions and the current security regime in effect at major international airports like LAX present a factor of major importance, because airport terminal visitors and passengers today are no longer afforded the privilege or right of unrestricted movement or unrestricted liberty to disregard questions posed to them by security personnel and simply go on one's way. Dorothy, this isn't Kansas anymore. The current environment at an international airport in the United States contrasts sharply with the workplace setting in *INS v. Delgado*, 466 U.S. at 213, where the Supreme Court noted that employees were free to walk around the entire

factory to avoid the INS agents.

In any event the bag was not searched in Mr. Davis's case until after he had been escorted by the two armed officers out of the baggage terminal and into the confines of the terminal police station. The record does not reflect any renewed inquiry whether the officer could search the bag at that point. Clearly at that point if not sooner, Mr. Davis knew he was no longer free to go. This is very similar to the setting of the small, confined office in which the subject was detained in *Florida v. Royer*, 460 U.S. at 502.

These circumstances, which are typically present in 21st Century American airport police encounters, are aggravated by additional facts present here that would clearly have discouraged a reasonable person from attempting to leave or break off the encounter. The officers made a visible show of official authority, *Terry v. Ohio*, 392 U.S. at 20 n.16, and of their ability to use force if necessary to control the situation. Both officers were armed. See *United States v. Mendenhall*, 446 U.S. at 554. The police questioning here was not introduced by a statement that the procedure was routine and not based on any particular information. The questioning thus could be expected to cause a passenger concern or even alarm at the prospect that he was suspected of criminality, particularly a passenger with Mr. Davis's background and experience. See *Michigan Dep't of State Police v. Sitz*, 110 S.Ct.

2481, 2486-87 (1990); *United States v. Martinez-Fuerte*, 428 U.S. 543, 558-59 (1976).

Further, as in *Royer*, Mr. Davis "was never informed that he was free to [depart] if he so chose." *Florida v. Royer*, 460 U.S. at 503; see also id. at 501. The officers thus failed to take a simple precaution that, as the Supreme Court has previously indicated, "may have obviated any claim that the encounter was anything but a consensual matter from start to finish." Id. at 504; cf. *Schneckloth v. Bustamonte*, 412 U.S. at 227 (a person's "knowledge of the right to refuse consent is one factor to be taken into account" in determining whether his consent was voluntary); see also *United States v. Little*, 18 F.3d 1499, 1505 (10th Cir. 1994) (factors to be considered include whether the officers advised the defendant that he did not need to cooperate) and *United States v. Griffin*, 7 F.3d 1512, 1518 (10th Cir.1993) (that he was free to leave).

The officers' conduct under the circumstances of the anti-terror security regime of the international airport conveyed to the reasonable passenger -- indeed, it appears to have been calculated to convey -- the message that he would not necessarily be allowed "to disregard the questions and walk away." *United States v. Mendenhall*, 446 U.S. at 554. A reasonable person would not have felt free to simply stonewall the officers' inquiries, because the setting and officers' conduct gave substantial

reason for question about how the officers would respond.

A refusal to cooperate voluntarily might reasonably be viewed as likely to provoke continuing inquiries by the officers, resulting at least in significant embarrassment and perhaps culminating in forcible detention. The officers gave no reason to believe that the Mr. Davis would not be held, briefly or indefinitely, pending resolution of their curiosity. The officers' free rein demonstrated their apparent authority to detain, which by itself gave them substantial coercive power over Mr. Davis.

These were real possibilities and real fears, not just to a person with an overactive imagination or a guilty conscience, but to anyone, because of the way things are today in major airports, and the way police are allowed to conduct themselves in this setting. The officers' show of authority, interrupting Mr. Davis's attempt to leave the airport, with an unqualified request for information and documents, conveyed their determination to secure compliance. The context and the officers' physical interposition of themselves between Mr. Davis and the exit, made the option of removing oneself from the encounter at best a highly speculative gauntlet that a reasonable person would not even consider running.

**B. Mr. Davis's Detention Was Unreasonable.**

A seizure violates the Fourth Amendment only if it is determined to be "unreasonable." The facts of this case strike a familiar chord with most freedom-loving Americans, not necessarily because they have personally experienced this scenario, but they have now seen or heard of it happening to others. The image of police officers asking passengers for their "papers," and subjecting them to *ad hoc* inquiries, is one that until September 11, we have been fortunate to regard as an abhorrent creature of authoritarian regimes.

These encounters are unreasonable, most fundamentally, because they do not fit with most Americans' sense of how they are supposed to be dealt with by their Government.

More specifically, "the reasonableness standard usually requires, at a minimum, that the facts upon which an intrusion is based be capable of measurement against 'an objective standard,' whether this be probable cause or a less stringent test." *Delaware v. Prouse*, 440 U.S. 648, 654 (1979) (citations omitted). In the case of relatively brief investigative detentions of the sort presented here, the test recognized by the Supreme Court is whether the officer "has a reasonable suspicion supported by articulable facts that criminal activity 'may be afoot.'" *United States v. Sokolow*, 109 S.Ct. 1581, 1585 (1989) (citing *Terry v. Ohio*, 392 U.S. at 30). No such reasonable, articulable

suspicion existed in this case prior to the officers' completion of their search of Mr. Davis's bag, if then. The detention was therefore unreasonable under the objective standard articulated by the Supreme Court.

There can be no justification in these circumstances for allowing the detention of Mr. Davis in the absence of reasonable suspicion. This is not an instance where, in the presence of a "special governmental need[], beyond the normal need for law-enforcement," an intrusion may be approved without any predicate of individualized suspicion, upon a balancing of "the individual's privacy expectations against the Government's interests." *National Treasury Employees Union v. Von Raab*, 109 S.Ct. 1384, 1390 (1989). To be sure, "the public has a compelling interest in identifying by all lawful means those who traffic in illicit drugs for personal profit." *Florida v. Royer*, 460 U.S. at 508 (Powell, J., concurring). But this interest does not justify subjecting individuals to suspicionless searches and seizures except in rare instances, and then only "pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers." *Brown v. Texas*, 443 U.S. 47, 51 (1979); see *Michigan Dep't of State Police v. Sitz*, 110 S.Ct. at 2487 (upholding highway sobriety checkpoint program where "checkpoints are selected pursuant to the guidelines, and uniformed police officers stop every approaching vehicle"); *National Treasury Employees Union v. Von Raab*, 109 S.Ct. at 1390 (upholding drug

tests required of "every employee who seeks a transfer to a covered position" where "the permissible limits of such intrusions are defined narrowly and specifically").

The requirement that law-enforcement officers act in accordance with pre-existing standards is designed to prevent individuals from being subjected to detentions or other intrusions at the unbridled discretion of law-enforcement officials." *Delaware v. Prouse*, 440 U.S. at 661; see also *National Treasury Employees Union v. Von Raab*, 109 S.Ct. at 1390; *United States v. Brignoni-Ponce*, 422 U.S. 873, 882-83 (1975). The Supreme Court has recognized the "grave danger that such unreviewable discretion would be abused by some officers in the field." *United States v. Martinez-Fuerte*, 428 U.S. 543, 559 (1976) (citing *United States v. Brignoni-Ponce*, 422 U.S. at 882- 83). To allow police officers to engage in random standardless searches and seizures "would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches." *Delaware v. Prouse*, 440 U.S. at 661 (quoting *Terry v. Ohio*, 392 U.S. at 22).

Further, the appearance that individual police officers are permitted to exercise such unbridled discretion may "generat[e] ... concern or even fright on the part of lawful travelers." *United States v. Martinez-Fuerte*, 428 U.S. at 558; see also *United States v. Villamonte-Marquez*, 462 U.S. 579, 589 (1983) (awe); *Delaware v. Prouse*, 440 U.S. at 657 (anxiety); W. LaFave, "Factualization" in Search and Seizure, 85

Mich. L. Rev. 427, 448 (1986) (noting that a standardized-procedures rationale is most acceptable when the intrusion "(i) is not perceived by the individual affected or by others as accusatory in nature, and (ii) is not open to the possibility that it was either a consequence of arbitrary selection or the manifestation of some ulterior motive").

There is no evidence that the officers were acting pursuant to any plan or under the limitation of any guidelines or standards when they approached Mr. Davis at the baggage area of LAX. *Alderman v. United States*, 394 U.S. 165 (1969); *Brown v. Illinois*, 422 U.S. 590 (1974) For all that appears from the record, the law enforcement agency involved allowed these officers in the field to exercise "unbridled discretion" in singling out passengers to be subjected to interrogation. Nor is there any indication that the Los Angeles Police Department imposed any restrictions on, for example, what the officers should say to the passengers, whether the officers should display their firearms, or where the officers should position themselves while conducting interviews.

Accordingly, the practical restriction of Mr. Davis's liberty while he was questioned at the airport baggage area then at the airport police station must be deemed to have been unreasonable under the Fourth Amendment.

Neither *Florida v. Bostick*, supra, nor *Ohio v. Robinette*, 117 S.Ct. 417 (1996),

nor *United States v. Drayton*,122 S.Ct. 2105 (2002), hold otherwise. In *Bostick* the Court merely held that the Florida Supreme Court had erred in adopting a *per se* rule that every encounter on a bus is a seizure, and remanded so that the Florida courts could evaluate the seizure question under the correct legal standard, i.e., the totality of the circumstances. *Bostick*, 501 U.S. at 437. In so holding, however, the Court found two facts in Bostick's case to be particularly worth noting, one of which was that "the police specifically advised Bostick that he had the right to refuse consent." Id. at 432 (emphasis supplied). Likewise in *Drayton*, the Supreme Court reversed the Eleventh Circuit for making what it saw as a *per se* rule out of the failure to advise the right to refuse to consent. The failure to advise the citizen of the right to refuse is an important factor, it simply cannot be converted into a *per se* rule of exclusion.

This failure to advise Mr. Davis's that he had the right to refuse consent cannot be coincidental; it was, on the contrary, clearly a purposeful and conscious decision on the part of the Detectives not to do so because they feared it would decrease the effectiveness of the operating procedure they used in the implicitly coercive environment of the airport. This, after the highest court in the land had made it clear that taking this simple precaution "[might] have obviated any claim that the encounter was anything but a consensual matter from start to finish," *Royer*, 460 U.S. at 504, is unreasonable.

The approach and setting chosen by the Detectives, done so with a wink and a nod to the courts -- no mention of the word detained was permitted - - is nonetheless presented in an environment and in a manner so that no reasonable passenger will feel that he is free to decline the "request." The conditional nature of the "request" -- if you show us your ID, if you identify your bags, if you answer our questions, if you consent to all searches, we'll be out of your way, with the implicit understanding that if not, not -- is necessarily coercive.

*Ohio v. Robinette*, supra, in which the Supreme Court held that a lawfully detained motorist need not be informed that he is free to go before his consent to search can be deemed voluntary, is also distinguishable. Mr. Robinette had been lawfully seized pursuant to a traffic stop, and thus it was not required that he be informed of his right to refuse consent before his consent could be recognized as voluntary under the Fourth Amendment. It is Mr. Davis's position that he was unlawfully seized, hence *Robinette* is inapplicable.

**C. Mr. Davis's Consent to the Search of His Bag Was Tainted by the Illegality of His Detention.**

A consent to search given during an illegal detention is ineffective if the consent was the result of the detention rather than "an independent act of free will." *Florida v. Royer*, 460 U.S. at 501, 507-08 (citing *Wong Sun v. United States*, 371 U.S. 471). In that instance, any evidence obtained in the course of the search must be

suppressed as "fruit of the poisonous tree," regardless of whether the consent was voluntarily given. Id. at 501; *Brown v. Illinois*, 422 U.S. 590, 602 (1974); cf. *Dunaway v. New York,* 442 U.S. at 217 (statements that are deemed voluntary under the Fifth Amendment although made during an illegal arrest must nonetheless be suppressed under the Fourth Amendment if obtained by exploitation of the illegality of the arrest). In assessing whether a statement made after an illegal detention is the product of "an independent act of free will," courts are to consider such factors as the "temporal proximity" of the two events and "the presence of intervening circumstances." *Brown v. Illinois*, 422 U S. at 603.

Here, the police officers allege that they obtained Mr. Davis's consent to the search of his bag in the course of what we have shown was an unreasonable seizure. The officers' foray into the airport baggage area was a purposeful quest for evidence, with the coercive environment that they utilized and furthered as their principal tool. See *Dunaway v. New York,* 442 U.S. at 218. There were no intervening events -- e.g., a termination of the detention and the lapse of several hours or days, see *Wong Sun v. United States*, 371 U.S. at 491 -- separating Mr. Davis's seizure from his consent and later the search. The connection between these two events therefore cannot be considered "so attenuated as to dissipate the taint" of the illegal detention. Id. at 491 (quoting *Nardone v. United States*, 308 U.S. at 341).

This Court has enumerated a non-exhaustive list of circumstances to be considered in determining whether a police-citizen encounter amounts to a seizure: the location of the encounter, particularly whether the defendant is in an open public place where he is within the view of persons other than law enforcement officers; whether the officers touch or physically restrain the defendant; whether the officers are uniformed or in plain clothes; whether their weapons are displayed; the number, demeanor and tone of voice of the officers; whether and for how long the officers retain the defendant's personal effects such as tickets or identification; and whether or not they have specifically advised defendant at any time that he had the right to terminate the encounter or refuse consent. *United States v. Spence*, 397 F.3d 1280, 1283 (10th Cir. 2005) (quotation omitted). Although no single factor is dispositive, the "strong presence of two or three factors" may be sufficient to support the conclusion a seizure occurred. *Fuerschbach v. Southwest Airlines Co.*, 439 F.3d 1197, 1203 (10th Cir. 2006) (quotation omitted).

At least three such factors are present in Mr. Davis's case (1) he was not told he had a right to refuse consent to the requested search, (2) he was not told he was free to leave, and (3) the search took place in the closed confines of the police station. The consent which resulted in the discovery of the cash and travel itinerary, cannot be considered voluntary. No reasonable freedom loving citizen would knowingly and

voluntarily, i.e., in the absence of coercion or legal requirement, agree to have their private bags searched. Accordingly, Mr. Davis respectfully submits that the trial Court erred in denying his motion to suppress.

## II. THE TRIAL COURT REVERSIBLY ERRED IN DENYING DAVIS'S TIMELY MOTION FOR MISTRIAL IN RESPONSE TO A LAW ENFORCEMENT OFFICER WITNESS'S IMPROPER VOLUNTEERING ON CROSS-EXAMINATION EVIDENCE OF DAVIS'S PRIOR CRIMINAL RECORD, WHEN THE COURT HAD RULED PRETRIAL IN RESPONSE TO THE GOVERNMENT'S 404(b) MOTION THAT SUCH EVIDENCE WAS NOT ADMISSIBLE.

The Government filed a notice of intent pursuant to Rule 404(b), Federal Rules of Evidence, to introduce at trial evidence of Davis's prior arrest and conviction for a PCP offense in 1996. [Aplt. App. at 40-52] Two business days before trial began Judge Kelly entered an order that preliminarily excluded evidence of Davis's prior PCP arrest:

> The Government's Notice of Intent to Introduce Defendant's Other Criminal Activities Pursuant to Federal Rule of Evidence 404(b), filed November 4, 2006 (Doc. 103),is construed as a motion in limine seeking the admission of such evidence. The motion is denied; the government may not introduce this evidence. This does not constitute a definitive ruling, and counsel are reminded of the necessity to offer and object in accordance with Fed. R. Evid. 103(a).

[Aplt. App. at 55-56]

Very early in the first day of trial in Davis's case Davis defense counsel was cross-examining Detective Alves, who was not an important witness in the case from

either the Government or Defense point of view. He was the silent partner to Detective Anzallo, who had conducted the encounter with Davis at LAX. In a line of cross examination that related to what names or numbers had been retrieved off Davis's cell phone while Detective Anzallo and Detective Alves searched Davis's effects. Detective Alves was having trouble remembering what names or numbers had been retrieved from the cell phone.

It was in response to Detective Alves's inability to remember the numbers retrieved from Davis's cell phone, that Davis's defense counsel sought to bring up police reports that Detective Alves might have seen to refresh his recollection. In so doing Davis's attorney engaged in the following colloquy with Detective Alves:

> Q. Okay. Have you read the *reports concerning this particular case*?
>
> A. I have reviewed the report my partner wrote.
>
> Q. Okay. Other than the two or three-page report that your partner wrote, have you reviewed any other documents?
>
> A. I reviewed another report.
>
> Q. Okay. What other report?
>
> A. *Concerning Mr. Davis's arrest in Philadelphia approximately 10 years ago.*

[Aplt. App. at 124-126; emphasis supplied]

Counsel for Davis immediately moved for mistrial on the basis that the answer

violated the court's ruling on the Government's 404(b) motion. [Aplt. App. at 125-127] The Court denied the motion for mistrial stating that defense counsel had opened the door to the answer by her question.

Clearly the Government had a duty to inform its witnesses, particularly the law enforcement witnesses who had knowledge of Davis's prior arrest and conviction, of the trial Court's ruling on this important matter. *See e.g. United States v. Sands*, 899 F.2d 912, 194 (10th Cir. 1990) ("The court's initial response to the statement was one of shock: . . . [H]ad you talked with ... your witnesses and told them they could not ever mention the fact that the defendant had been in penitentiary? . . . Sands made a motion for a mistrial. The court asked Mr. Sperling whether he had told the witness not to refer to any prior criminal convictions. Mr. Sperling responded that he had, but that he could not recall exactly when he did so."); *United States v. Walters*, 28 Fed. Appx. 902, 909 (10th Cir. 2001) ("the district court first noted the prosecutor 'should have informed the witness not to ... answer in that way as to the marijuana.'").

We must assume that the prosecutor fulfilled his ethical responsibility to inform his witnesses of the Court's ruling. Therefore what this case presents is a *law enforcement officer witness*, who we can also assume is well aware of the prejudicial effect of and caution to be exercised in disclosing evidence of a prior arrest to a jury in a criminal trial, particularly when the record of the prior arrest is that of the

defendant on trial. Putting two and two together we have a Government law enforcement witness who was on notice of the Court's order prohibiting the disclosure of this information, who knows the prejudicial impact of such evidence, and who volunteers the information in response to a question which did not invite the response given.

Defense counsel carefully introduced the questions about reports the officer had read by limiting the field of inquiry to reports "concerning this particular case." [Aplt. App. at 124-126] In any event, the context of the question was an attempt to lay a foundation to refresh the witness's recollection about the telephone numbers and names the witness and his partner had taken off of Davis's cell phone when his bag was being searched. The question in no way suggested any need to respond by referring to an arrest report for an unrelated offense ten years earlier.

Viewed objectively, Los Angeles Police Detective Alves's response was a knowing and intentional violation of the Court's order denying the Government's motion seeking permission to admit this very evidence, done with the sole purpose of denying Davis his right to a fair trial. Any police officer, much less an experienced Detective who presumably has been told (and if he had not been told, the Government should have told him, and the result is the same) that this evidence is not admissible, would not have answered this question this way, not if he wanted to abide by the

Court's order and not if he wanted to permit Davis a fair trial. In context given the totality of circumstances, it is not correct to say that the Detective's answer was invited by Defense counsel's question.

The question is whether this intentional violation of the Defendant's right to a fair trial and the Court's order denying admission of this extremely prejudicial evidence requires a new trial. Under the law of this Circuit, a new trial is required on these facts, because it is not possible to "say with reasonable certainty that the reference to prior records 'had but very slight effect on the verdict of the jury.' " *Sumrall v. United States*, 360 F.2d 311, 314 (10th Cir.1966); see also *United States v. Walton*, 552 F.2d 1354, 1366 (10th Cir.), cert. denied, 431 U.S. 959, 97 S.Ct. 2685, 53 L.Ed.2d 277 (1977) (standard is whether the statement could "have had any appreciable effect on the action of the jury"); *United States v. Woodring*, 446 F.2d 733, 737 (10th Cir.1971) (same); *United States v. Sands,* 899 F.2d 912, 914 (10th Cir. 1990) (same).

*Sands* is instructive:

> The Government also contends that where "the sheer volume of evidence against the defendant was so great as to make insignificant an isolated comment that he had been in prison before, the defendant has suffered no significant prejudice" that would warrant a new trial. Government Brief at 10. As we observed in *Sumrall*:
>
> "[T]he question is not whether the appellants have been

> proven guilty, but whether guilt was established according to the procedural safeguards to insure trial before a fair and unprejudiced jury . . . The question we must decide is whether the jury was more prone to convict these appellants knowing they had previous records than without such knowledge."

*United States v. Sands*, 899 F.2d 912, 915 (10th Cir. 1990).

"The question we must decide is whether the jury was more prone to convict these appellants knowing they had previous records than without such knowledge." The answer is self-evident. The question is answered by the decision of the trial Court to deny admission of this evidence in the first place.

Without being asked to do so and without asking Davis if he wanted it done, the trial Court *sua sponte* instructed the jury to disregard the testimony about the prior arrest. [Aplt. App. at 126-127] This medicine kills rather than cures:

> Finally, the Government's stress on the fact that Sands did not want a cautionary instruction is somewhat disingenuous since the Government itself recognized that "[s]ometimes the defense would chose [sic] not to request anything so as not to emphasize [the reference to defendant's record]." Id. at 326. A cautionary instruction is generally preferred, but *we do not wish to prevent a defendant's defense counsel from making a tactical decision that such an instruction would do "more damage than good."* Id. at 339. *We recognized in Maestas v. United States*, 341 F.2d 493, 496 (10th Cir.1965), *that a cautionary instruction is not sufficient to cure the error where the error is likely to make a sufficiently strong impression on the jury that it will be unable to disregard it.* See also *United States v. Murray*, 784 F.2d 188, 189 (6th Cir.1986) (cautionary instruction under such circumstances is "*very close to an instruction to unring a bell*").

*United States v. Sands*, 899 F.2d 912, 915 (10th Cir. 1990) (emphasis supplied).

## III. THE TRIAL COURT REVERSIBLY ERRED IN FAILING TO GIVE TENTH CIRCUIT PATTERN CRIMINAL JURY INSTRUCTION 1.16, THE ADDICT INSTRUCTION, WHEN THE EVIDENCE SUPPORTED THE INSTRUCTION, THE REQUESTED INSTRUCTION WAS A CORRECT STATEMENT OF THE LAW, AND THE ADDICT WITNESS'S INCRIMINATING TESTIMONY WAS NOT CORROBORATED.

The defense presented unrebutted evidence to show that the Government's key witness, Darlington Stewart, aka "Dyce," upon whom the weight of the Government's burden of proof rested, was a drug addict.

The Defense put on Chenjerai Kumanyika as its first witness. [Aplt. App. at 213-214] Kumanyika testified that he was a music instructor and entertainer. [Aplt. App. at 213-214] He knew Darlington Stewart because they both had been in Davis's musical group.

> Q. And where did you meet Dyce?
>
> A. I met Dyce in New York at actually Justin's Restaurant in the capacity that he was hired as a disc jockey, which is someone who provides the background music for us to be -- to do our vocals and our rap, so we hired him to be part of the group.
>
> Q. Okay. And what is your function in the group?
>
> A. I am a vocalist. I'm also a song writer and producer for the group.
>
> Q. Okay. And what is Mr. Davis' function from the group?
>
> A. He was the same. He was also a song writer, vocalist and producer

for the group.

Q. What's the name of your group?

A. Our group is called Spooks.

Q. Okay. Now, did you travel as a group?

A. Yes, *we traveled extensive, primarily between the years of 1999 all the way through 2004*, was our primary time of travel, but we traveled extensive around the world and also around the United States.

[Aplt. App. at 214-215; emphasis supplied]

Mr. Kumanyika elaborated on the touring the Spooks did:

A. And I worked for the group. I was an outside DJ, and I toured with them around the world.

Q. Okay. Approximately how many tours did you go on for that?

A. *Numerous tours. Yes, many, numerous tours, and all the tours were mainly based in -- out in Europe and a couple in the states*.

Q. How long have you known the defendant?

A. Four about -- for about five years.

Q. And *so it's within those five years that you have been on some tours with the group*?

A. Yes.

[Aplt. App. at 158-159; emphasis supplied]

Mr. Kumanyika testified that Darlington Stewart had been a member of the musical group since the year 2000:

Q. Of course, Dyce became a member of your group in 2000?

A. That's correct.

[Aplt. App. at 215]

Kumanyika testified about Stewart's drug abuse:

> Q. And then *while the group was on tour, what would Mr. Stewart do on his free time*?
>
> A. He was like very sort of antisocial. I mean, you know, he wasn't like an unpleasant person, but he would like stay basically and drink *and just get high in his hotel, you know, with marijuana*, I'm talking about, primarily, which is a big thing, but nobody in our group did that. He wouldn't go out. *He would just be in the hotel all the time* which was noteworthy to me because he had opportunity to make these connections, *and he would be in his room getting high*.

[Aplt. App. at 216-217; emphasis supplied]

On cross-examination the Government had Kumanyika repeat his assertion that Stewart "*smoked marijuana the whole time* . . . " [Aplt. App. at 218; emphasis supplied]

Drug abuse and addiction is such a common phenomenon among witnesses in criminal cases that the Tenth Circuit has provided a pattern jury instruction for such evidence:

**1.16**

**WITNESS'S USE OF ADDICTIVE DRUGS**

The testimony of a drug abuser must be examined and weighed by the jury with greater caution than the testimony of a witness who does not abuse drugs. [Name of witness] may be considered to be an abuser of drugs. You must determine whether the testimony of that witness has been affected by the use of drugs or the need for drugs.

The Defense made a timely request that the trial Court instruct the jury using Tenth Circuit Pattern Instruction 1.16 regarding Darlington Stewart's drug abuse. The trial Court refused the requested instruction, stating that:

> I have declined to give that requested instruction on substance abuser because I don't believe the evidence reflects anything other than an isolated comment that the individual had been observed on one occasion smoking pot. There is no evidence that he is a substance abuser.

[Aplt. App. at 230]

The trial Court reversibly erred in denying the Defense requested jury instruction. Clearly the trial Court's recollection of the testimony was mistaken. The evidence was not merely an "isolated comment" and it was not evidence of drug abuse on a single occasion. Rather, the evidence was that Darlington Stewart had been a member of the Spooks since the year 2000, thus the evidence was that Stewart had been abusing drugs the entire five year time period in question.

The evidence clearly supported the requested instruction, and the requested instruction clearly is a correct statement of the law, therefore the trial Court erred in denying the Defense's timely request that the jury be given Pattern Jury Instruction No. 1.16. Reversal is mandated if an error in the jury instructions "is determined to have been prejudicial, based on a review of the record as a whole." *Street v. Parham*, 929 F.2d 537, 539-40 (10th Cir.1991) (citations omitted), cited in *Denbo v. United States*, 988 F.2d 1029, 1034 (10th Cir. 1993).

The Government's burden of proof rested on the credibility of Darlington Stewart. The jury should have been told, as the law requires, that "The testimony of a drug abuser must be examined and weighed by the jury with greater caution than the testimony of a witness who does not abuse drugs." As the D.C. Circuit noted in *Fletcher v. United States*, 158 F.2d 321, 322 (D.C.Cir.1946) "a drug addict is inherently a perjurer where his own interests are concerned ...." (cited in *United States v. Smith*, 692 F.2d 658, 661 (10th Cir. 1982). *Smith* held:

> [N]ormally the trial court runs a substantial risk of causing prejudice to a fair trial when it fails to instruct the jury concerning the inherent unreliability of an addict's testimony. As a general rule, prudence dictates the giving of an addict instruction whenever the prosecution has relied upon the testimony of a narcotics addict.

*United States v. Smith*, 692 F.2d 658, 661 (10th Cir. 1982).

Whether the failure to give a requested addict instruction is considered

reversible error or not sometimes has been held to turn on whether the addict's testimony has been corroborated or not. In Davis's trial, there was no corroboration of any sort from another testifying witness. It was only Darlington Stewart telling his story alone. Darlington Stewart's version of the crime did not allow for nor incriminate anyone other than Davis. Darlington Stewart did not name any other names. Darlington Stewart's cooperation did not lead to the prosecution of any other co-conspirators, therefore at trial the Government had only Darlington Stewart as a witness to the alleged conspiracy. No other co-conspirators were even indicted, much less testified at trial against Davis in corroboration of Darlington Stewart's version of events.

It was only innocent details of Darlington Stewart's travel with Davis to Las Vegas that were "corroborated" as it were, by the evidence showing that Davis made and paid for the travel arrangements. Clearly this was not corroboration of any crime, because had it been the DEA would have boarded the Amtrak train with a warrant for Darlington Stewart's arrest, not merely knocked on his door and asked permission to search his luggage.

There was nothing corroborating Darlington Stewart's testimony that *incriminated* Davis, that is, that Davis had offered to take him on as a courier on a drug run, that Davis went to LA to get drugs, that Davis returned to Las Vegas and

brought the bottle of PCP to Stewart, etc. None of this was corroborated in any way. Truly the weight of the Government's burden of proof rested on Darlington Stewart. Because the testimony Stewart gave which served to incriminate Davis was uncorroborated, the failure of the trial Court to give the requested addict instruction was reversible error.

## IV. THE TRIAL COURT'S APPLICATION OF THE SENTENCING GUIDELINES RESULTED IN A *DE FACTO* VIOLATION OF THE FIFTH AND SIXTH AMENDMENTS.

The *Booker*[5] remedy as applied by the federal courts has resulted in a *de facto* violation of the Fifth and Sixth Amendments, because the lower federal courts have in practical effect continued to apply the Guidelines in a mandatory fashion. *Booker's* remedy for the Sixth Amendment violation caused by judicial fact-finding of facts essential to the determination of the sentence, was to excise 18 U.S.C. § 3553(b)(1), which made the Guidelines mandatory and replace it with the instruction that the Guidelines, henceforth, would be advisory only.

However, as Justice Scalia predicted,[6] the result has been anything but advisory

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[5] *United States v. Booker*, 543 U.S. 220 (2005).

[6] "Will appellate review for "unreasonableness" preserve *de facto* mandatory Guidelines by discouraging district courts from sentencing outside Guidelines ranges? Will it simply add another layer of unfettered judicial discretion to the sentencing process? Or will it be a mere formality, used by busy appellate judges only to ensure that busy district judges say all the right things when they explain how they

Guidelines. Instead what has developed in practical application are *de facto* mandatory Guidelines. *See* U. S. Sentencing Commission, Final Report on the Impact of *United States v. Booker* on Federal Sentencing, (March 2006), found at http://www.ussc.gov/booker_report/Booker_Report.pdf.

When the practical application of a statute results in a constitutional violation, the court is required to fashion a remedy which prevents the constitutional harm. Whatever the standard of scrutiny applicable to a Sixth Amendment violation, whether strict scrutiny (which we suggest is the appropriate standard), intermediate scrutiny or otherwise, the result of the *Booker* remedy provision has been to *de facto* incorporate mandatory Guidelines back into the sentencing process. The evidence from the Sentencing Commission is not subject to any other reasonable interpretation, and enough cases have been analyzed at this point (over 76,000 post-*Booker* sentencings were studied) to enable us to state with confidence that this has been the effect, intended or not. This has been no remedy - - this has been a new wrong.

This Court is familiar with its equitable power to fashion a remedy for governmental action which results in *de facto* constitutional harms. The remedy is clear - - until Congress acts to rewrite the sentencing statutes to provide a constitutionally permissible sentencing regime, This Defendant, and others similarly

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have exercised their newly restored discretion?" *Booker*, 543 U.S. at 313.

situated, is entitled to resentencing utilizing procedures that *insure* that his Fifth and Sixth Amendment rights will be safeguarded. *Booker* has notably failed to achieve that requirement.

A proper remedy is not difficult and is easily implemented. This Defendant's case should be remanded with instructions that he be resentenced under the applicable Guidelines without, however, the application of any guideline enhancement that was not charged in the indictment and found by a jury beyond a reasonable doubt. This means that the trial judge alone may not determine prior convictions nor the existence of obstruction of justice in applying the Sentencing Guidelines. This simple mechanism would insure the protection of the Defendant's constitutionally guaranteed liberty as no other remedy has or could.

## CONCLUSION

Appellant Joseph Miles Davis respectfully requests this honorable Court vacate his judgment and sentence and remand the case to the District Court with instructions (1) that Davis's motion to suppress be granted, or in the alternative (2) that the case be remanded for new trial with the requested jury instruction should Darlington Stewart again testify against Davis at the new trial, or (3) that the case be remanded for resentencing consistent with the arguments presented herein.

Respectfully submitted,

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## STATEMENT REGARDING ORAL ARGUMENT

Joseph Miles Davis requests oral argument. His appeal appears to present a significant question of first impression in this Circuit.

In this appeal the Court is asked to decide the question whether after September 11, 2001, given the security measures which have been instituted at major United States airports, a reasonable airline passenger who is approached for questioning in the baggage area of a major international airport, Los Angeles International Airport, by two armed police officers, would consider himself free to leave and discontinue the encounter, and free to decline a "request" to search his passenger bag, when the police officers neither inform him he is free to leave nor inform him he may refuse to consent to the search of his bag without any adverse consequences, or whether instead, the passenger would reasonably feel that he is not free to decline the interview and leave and not free to refuse permission to search his bag.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to David Williams, Esq., Assistant United States Attorney, Office of the United States Attorney, 201 Third Street, Suite 900, Albuquerque, New Mexico, 87102, by United States Postal Service, this the 11th day of February, 2008.

s/ William Mallory Kent
William Mallory Kent

## CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(c), the undersigned counsel certifies that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B). This brief contains approximately 13,092 words.

## CERTIFICATE OF TYPE SIZE AND STYLE

Counsel for Appellant Davis certifies that the size and style of type used in this brief is 14 point Times New Roman.

## CERTIFICATION OF DIGITAL SUBMISSIONS

I hereby certify that all required privacy redactions have been made and, with the exception of those redactions, every document submitted in Digital Form or scanned PDF format is an exact copy of the written document filed with the Clerk, and the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, Norton 360, that was updated October 15, 2007 and, according to the program, are free of viruses.

__s/ William Mallory Kent____
William Mallory Kent