UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

NO. 03-12378-II

UNITED STATES OF AMERICA
Plaintiff-Appellee,

v.

ROBERT MILLS
Defendant-Appellant.

A DIRECT APPEAL OF A CRIMINAL CASE
FROM THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF FLORIDA

BRIEF OF APPELLANT

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NO. 03-12378-II

United States v. Robert Mills

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Eleventh Circuit Rule 26.1-1, I HEREBY CERTIFY that the following named persons are parties interested in the outcome of this case:

1. El Amin Bashir, Alleged Co-Conspirator of Defendant-Appellant Mills
2. Honorable Timothy J. Corrigan, United States District Judge Who Presided Over the Trial and Motion Hearings
3. George Hall, Government Informant
4. Ronald Thomas Henry, Assistant United States Attorney, Trial Counsel for the United States
5. Honorable William Terrell Hodges, United States District Judge, Judge Who Placed Government Informant on Supervised Release and Whose Order of Supervised Release Prohibiting Confidential Informant Activity Was Violated By the United States.
6. William Mallory Kent, Appellate Counsel for Defendant-Appellant Robert Mills
7. Robert Mills, Defendant-Appellant
8. Thomas Morris, United States Magistrate Judge

9. Paul Ignatius Perez, United States Attorney

10. William J. Sheppard, Co-Appellate Counsel for Bashir

11. Mitchell Adam Stone, Trial Counsel for Defendant-Appellant Mills

12. Gray Thomas, Co-Appellate Counsel for Bashir

13. Marcio William Valladares, Assistant United States Attorney, Appellate Counsel for the United States

STATEMENT REGARDING ORAL ARGUMENT

Defendant-Appellant Robert Mills respectfully requests oral argument for his appeal. This case presents one of the most interesting set of facts and complex of issues that a court could expect to find. The case presents if not novel issues, certainly issues in a novel context, not likely, we hope, to be seen again. Counsel has attempted to master the record and expects to be able to resolve at oral argument any questions left unanswered by this brief.

CERTIFICATE OF TYPE SIZE AND STYLE

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

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STATEMENT OF JURISDICTION

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

STATEMENT OF THE ISSUES

I. The Court Erred in Denying Defendant Mills's Motion for Mistrial When the Government Intentionally Introduced Inadmissible 404(b) Evidence at the End of the Trial, Without Any Notice Whatsoever, and When the Evidence in Fact Was a Complete Surprise to the Defense, and but for the Admission of this Evidence the Government Failed to Present Legally Sufficient Evidence to Overcome Defendant Mills's Entrapment Defense, Because this Surprise Evidence Was the Only Evidence the Government Offered to Show Predisposition.

II. The Court Erred in Denying Mills's Pretrial Motion to Dismiss (Or, in the Alternative, Strike the Testimony of the Government's Witness, Informant George Hall), Which Motion Was Renewed Post Trial, Based on the Government's Violation of District Judge Hodges's Order of Supervised Release, Which Expressly Prohibited the Use of George Hall as an Informant.

III. The Court Erred in Denying the Government's Own Motion for Mistrial When the Jury Was Repeatedly and Hopelessly Deadlocked and Erred in Denying the Defendant's Motion for New Trial Based on the Affidavits of Three Jurors Who Stated That They Were Coerced by the Trial Judge's Order to Keep Deliberating after They Had Advised the Court Twice That They Were

Hopelessly Deadlocked, When the Deliberations Were Forced to Continue on a Friday Evening after 5:00 p.m., When Court Business Had Otherwise Always Ended at 5:00 p.m.

STATEMENT OF THE CASE

Course of Proceedings, Disposition in the Court Below and Relevant Facts

Robert Mills, the Defendant-Appellant herein, was charged with two counts in an indictment returned in the United States District Court for the Middle District of Florida on May 8, 2002. [R1] Mills was charged in count one with conspiracy to possess with intent to distribute five or more kilograms of cocaine, in violation of 21 U.S.C. § 846, and 21 U.S.C. § 841(b)(1)(A), and attempted possession with intent to distribute five or more kilograms of cocaine in violation of 21 U.S.C. § 841(a)(1), 21 U.S.C. § 841(b)(1)(A) and 18 U.S.C. § 2. As ultimately superseded by a second superseding indictment filed November 13, 2002 [R75], the conspiracy was alleged to have been committed in or about April 2002, in Jacksonville "and elsewhere," and the indicted coconspirators were Mills, El Amin Bashir and Jamad M. Ali. [R75]

Mills filed a motion to dismiss for outrageous governmental misconduct based on the government's having used a Bahamian citizen named George Hall as the confidential informant to set up the transaction, in violation of Hall's order of supervised release imposed by Judge William Terrell Hodges in Hall's federal criminal judgment and conviction. The order of supervised release included two provisions which expressly prohibited Hall working as a confidential informant and associating with known felons (Mills had a prior felony conviction) unless court

permission were first obtained, which permission was never sought nor obtained by the government. [R70; Defendant Exhibit 1 to Motion Hearing R125]. Two evidentiary hearings were held on the defendant's motion to dismiss, on December 6, 2002 and January 6, 2003. [R125; R101] The government conceded that it had violated the court's order and committed an offense against Judge Hodges by its failure to seek and obtain permission to use Hall as an informant while he was on supervised release. [R109-132-142] Judge Corrigan denied the motion to dismiss without prejudice to refile after further evidence was presented in the trial of the case that might relate to the issues in the motion. [R131]

The trial commenced on Monday, January 6, 2003 and continued through to verdict at about 6:00 p.m. on Friday, January 10, 2003. [R133; R149]

The defendant had submitted a proposed special form of entrapment instruction pretrial. [Defendant's Proposed Jury Instruction No. 16, RIV-154] Instead, at the government's suggestion and with the concurrence of the defendant, theEleventh Circuit's Pattern Jury Instruction 12.2 on entrapment was given. [RIV-155-168] The government and court accepted that Mills had made a *prima facie* case for entrapment and was entitled to the entrapment instruction. [RIV-155-158]

During the government's case in chief (the government did not present any rebuttal case), at what would have been the government's last witness, a jail house

informant named Augustus Tucker. Tucker had been incarcerated for a period of time in July 2002 together with Mills, after Mills's indictment. Tucker was claiming Mills had made incriminating statements to Tucker while they were in jail together. [RIII-180-212] At trial, the government elicited damaging 404(b) evidence from Tucker:

> [AUSA HENRY]: What, if anything, did he [Defendant Mills] tell you about whether or not he had done - - this is the defendant, had done deals, drug deals, with the guy from New Jersey before?
>
> [TUCKER]: He said that they were - - that they were - - they were in the gang or the drug business together, that they would quite often use these guys from the Georgia area to transport drugs back and forth.
>
> [AUSA HENRY]: And what were the guys from Georgia supposed to do, according to the defendant?
>
> [MILLS'S COUNSEL]: Your Honor, I'm going to object. May we approach?
>
> [THE COURT]: Yes, sir.
>
> (Sidebar conference)
>
> [MILLS'S COUNSEL]: Your Honor, I'd move at this time for a mistrial.

[RIII-186-189]

Defendant Mills immediately objected, asked for a sidebar, and at sidebar moved for a mistrial, advising the court that this was 404(b) evidence for which the defense had received no prior notice whatsoever. Mills's counsel also advised the court that he had sent an investigator to interview this witness, but the witness had refused to answer any questions. Mills's counsel was caught completely by surprise by this 404(b) evidence. Mills renewed his motion for mistrial after advising the court of his prejudice. [RIII-186-189]

The government responded by taking the position that this was not 404(b) evidence, because it did not relate to specific acts or specific crimes. The government also argued that it was "part and parcel" of the current offense (the April 2002 conspiracy in Jacksonville). The government did not offer any excuse or explanation for its failure to give the pretrial notice of this 404(b) evidence, which under the Standing Order of discovery in the Middle District of Florida, must be given no later than 14 days prior to trial. [RIII-186-189]

Indeed the government had had knowledge of this 404(b) evidence Tucker had given for at least four months prior to trial. [R109-60-62] In fact, the government had affirmatively objected to the defense being told what Tucker would testify about. When the defense learned that Tucker would be on the government's witness list, the

defense filed on November 8, 2002 a motion to suppress Tucker's testimony (not knowing what it would be), based on a *Massiah* theory. [R68; R109-63] There was a pretrial evidentiary hearing on the motion to suppress at which Mills attempted to ask DEA case Agent X what Tucker had said. The government objected and the court would not allow Agent X to answer. [R109-63]

Without explaining its ruling, the trial judge denied defendant Mills's motion for mistrial and simply told the government to "move to another area." [RIII-189]

During jury selection and after the jury for this case was chosen and sworn, the trial judge made a point of emphasizing that their work day would end each day until the trial was finished *no later than 5:00 p.m.* The court was emphatic and insistent about timeliness and the strict application of this schedule:

> But we'll get as far as we can and *adjourn no later than 5 o'clock.* And it may even be earlier. Beginning tomorrow the trial will start *promptly* at 9 o'clock in the morning *and will go no later than 5 o'clock in the afternoon,* with appropriate breaks and a lunch break. *This will be the schedule from today until the trial is completed*.

[RI-184; emphasis supplied].

Again after the trial jury was picked, the judge made a point of telling the jury: *I'm intending to run the trial on a 9 o'clock sharp to no later than 5*

o'clock basis. [The judge went on at some length to the jury about the importance of the schedule and timeliness.]

[RI-294-295; emphasis supplied].

The defense's sole theory of defense was entrapment. The defense relied upon the judge's entrapment instruction in closing. [RIV-194-224]

Jury deliberations began at about 9:59 a.m. on Friday, January 10, 2003. [RV-40] The jury promptly issued a question, which proved to be the first of ten notes from the jury to the court. [RV-40-82] Six or seven of the notes in some way or other related to the entrapment defense or evidence surrounding the entrapment defense and two notes told the judge that the jury was deadlocked on entrapment. [RV-40-82]

At 1:33 p.m., after three and a half hours of deliberations, the jury presented question six. "Am I right in thinking that if Mr. Mills was entrapped the issue of guilt - - and it says of - - I think its innocence, is mute (*sic*), m-u-t-e? And I'm assuming he means moot, m-o-o-t. And I am assuming he means the issue of guilt or innocence." [RV-64-65] This was followed by question seven. "*Your Honor, we are deadlocked on the entrapment issue.* Please give me some advice. One of the juror's spouses was entrapped." [RV-66]

The judge suggested reading back the entrapment instruction again and also the so-called modified *Allen* charge. Both the government and defense agreed. [RV-67]

Minutes later there were two more questions at 2:02 p.m. [RV-77] Question eight - "Can we get a dictionary?" and question nine - "Can we get a copy of the current instructions you just gave us?" [RV-77]

The court gave the jury the modified *Allen* charge *in writing* and let them take it back into the jury room but said they could not have a dictionary. [RV80]

Then at 3:22 p.m. the court advised counsel there was a tenth jury note:

Your Honor, we are hopelessly deadlocked. It is my honest opinion that the jury will not change their minds about this.

[RV-82]

The judge noted that the jury had been deliberating over five hours. [RV-83] *The government moved for a mistrial and asked the court to declare a hung jury.* [RV-83] Another *Allen* charge would be futile, the government argued. [RV-83-84] Mills's counsel said it was only 3:30 and he would "*rather not try the case again*", so "our position is that they should keep going." [RV-84] The judge pointed out that this is twice that the jury declared they were deadlocked and this time they said they were *hopelessly deadlocked*. Mills's counsel asked for another *Allen* charge. [RV-85] Mills's counsel then said, reconvene the jury and ask them that they "continue deliberating for *a period of time longer* and see if they can resolve their differences." [RV-86]

The Court stated:

> One thought I had, Mr. Stone - - and I was hesitating to put a time limit on the jury's deliberation. But one thought I had was if I disagreed with Mr. Henry and agreed with your position, *tell them that I want them to deliberate until at least - - until 5 o'clock, and then to inform me at that time whether they are making progress or whether they remain deadlocked. And if I am advised at that time that they're still deadlocked, then I would - - then I would very likely declare a mistrial. . . . there's still time in the normal workday.*

[RV-86; emphasis supplied] Mills's counsel responded that "I'm a little concerned about putting a time limit on it *and telling them what we'd do at the end of that time limit*." [RV-87] The judge responded that:

> Oh, I wouldn't tell them. *I would just tell them that they would be reporting back to me at 5 o'clock as to whether or not they are making progress or not.* That would be the way I would put it. And *if they reported back to me at 5 o'clock we're still deadlocked and we're going to - - I mean, if the message was the same message I'm getting now, then I - - I'm sure I'd have no choice.*

[RV-87]

Mills's counsel responded that he did not think it would be appropriate to give the jury an actual time to report back, but just indicate to them that it was still early enough in the day that it may be advisable to continue deliberating *for a while longer and we can reconvene later and determine what to do*. [RV-87-88]

The government said: "*I think that by telling them to go on that you're going to frustrate them. That's my personal opinion*. So I'd just let the Court do what the Court thinks is appropriate, without any input." [RV-88]

The judge brought the jury back in at 3:38 p.m. The judge instructed them:

> All right. Ladies and gentlemen, I have received a communication from your foreperson, Mr. McGeveran. The communication is: Your Honor, we are hopelessly deadlocked. It is my honest opinion that the jury will not change their minds about this. And I appreciate that communication. As you know, I had previously given you the charge of the jury that is given when a jury is having difficulty reaching a decision. Sometimes a judge will read that decision (*sic*) to you again and ask you to continue deliberating. I'm not going to read it to you again, because you had previously asked for a copy of it. So you had a copy of it back there. And so I'm assuming everybody who wants to know what it says is able to know what it says. And if you want to look at it again, I would

encourage you to do that. And I appreciate the communication you have given me. And I appreciate the opinion expressed in it. But I am going to ask you to keep working at it and to see if you can make any progress *and to go further into the day to attempt to do that.* We will be here and we will be able to respond to you at any appropriate time. But I do think it's important that we make every effort tot ry to reach a conclusion and a verdict in this case. And so, therefore, without any further instruction, because I've already given you all the guidance I can give you, it's in your hands now, I am going to ask you to resume your deliberations. Thank you very much.

[RV-89-90]

The judge said again "But I think it's at least worth giving it the balance of the workday . . . " [RV-90]

The court did not, however, reconvene the parties *until about 6:00 p.m.*:

The record will reflect that 20 or 25 minutes ago - - *it 's about 6 o'clock. 20 or 25 minutes ago I was advised that the jury had reached a verdict*.

[RV-91] The court had not done what it said it would do, and did not reconvene and terminate deliberations at 5 o'clock.

The verdict was guilty on both counts. [RV-92]

On January 22, 2003, Mills filed a timely motion for new trial mistrial based on information from three jurors who had come to Mills's counsel and advised him that they felt coerced by the Judge's instruction to keep deliberating. [R156] Mills also filed a written request for an evidentiary hearing on his motion for new trial. [R171]

On February 14, 2003, Mills's counsel filed affidavits of the three jurors who had come to him, Elise Williams, Rosalind King, and Mary Williams, stating that they had been coerced into their verdict by the judge's instructions. The court denied an evidentiary hearing and denied the motion for new trial and the renewed motion to dismiss for outrageous misconduct.[1] [R193; 196]

Hall was thereafter sentenced on April 30, 2003 to twenty years imprisonment followed by ten years supervised release. [R273-43]. This appeal followed in a timely manner.

[1] On January 23, 2003, Mills had renewed his motion to dismiss for outrageous governmental misconduct. [R176]

Standards of Review

Abuse of discretion is the proper standard for reviewing the admission of 404(b) evidence. *United States v. Edwards,* 696 F.2d 1277, 1280 (11th Cir.), *cert. denied,* 461 U.S. 909, 103 S.Ct. 1884, 76 L.Ed.2d 813 (1983), cited in *United States v. Lail,* 846 F.2d 1299, 1301 (11th Cir. 1988).

But, a district court abuses its discretion if, in deciding an issue, it applies the wrong legal standard, *Delta Air Lines, Inc. v. ALPA, Int'l,* 238 F.3d 1300, 1308 (11th Cir.2001).

The decision of whether to grant a mistrial lies within the sound discretion of a trial judge as he or she is in the best position to evaluate the prejudicial effect of improper testimony. *United States v. Holmes,* 767 F.2d 820, 823 (11th Cir.1985) (quoting *United States v. Satterfield,* 743 F.2d 827, 848 (11th Cir.1984), *cert. denied,* 471 U.S. 1117, 105 S.Ct. 2362, 86 L.Ed.2d 262 (1985)). This Court will not reverse a district court's refusal to grant a mistrial unless an abuse of discretion has occurred. *United States v. Christopher,* 923 F.2d 1545, 1554 (11th Cir.1991), cited in *United States v. Perez,* 30 F.3d 1407, 1410 (11th Cir. 1994).

This Court reviews the denial of a motion to dismiss an indictment under the abuse of discretion standard. *United States v. Pielago,* 135 F.3d 703, 707 (11th Cir.1998).

SUMMARY OF ARGUMENTS

I. The Court Erred in Denying Defendant Mills's Motion for Mistrial When the Government Intentionally Introduced Inadmissible 404(b) Evidence at the End of the Trial, Without Any Notice Whatsoever, and When the Evidence in Fact Was a Complete Surprise to the Defense, and but for the Admission of this Evidence the Government Failed to Present Legally Sufficient Evidence to Overcome Defendant Mills's Entrapment Defense, Because this Surprise Evidence Was the Only Evidence the Government Offered to Show Predisposition.

The government sprang potentially devastating 404(b) evidence from its final witness at trial - evidence that it had known about for four months - but which it had affirmatively withheld from the defense instead of complying with Rule 404(b)'s requirement of reasonable pretrial notice and the Middle District of Florida's Standing Order on discovery which requires 14 days advance notice. Not only was there no pretrial notice, the evidence was an actual surprise to the defense. The government offered no excuse or explanation for its failure to give pretrial notice, but instead asserted a frivolous position that it was not 404(b) evidence. The defense moved in a timely manner for mistrial. The court erred in denying the motion for mistrial and in failing to give any 404(b) cautionary instruction. But for the

introduction of this 404(b) evidence the remaining evidence was legally insufficient to meet the government's burden of proving beyond a reasonable doubt that Mills was predisposed to commit the crime the government agent had induced him to commit.

II. The Court Erred in Denying Mills's Pretrial Motion to Dismiss (Or, in the Alternative, Strike the Testimony of the Government's Witness, Informant George Hall), Which Motion Was Renewed Post Trial, Based on the Government's Violation of District Judge Hodges's Order of Supervised Release, Which Expressly Prohibited the Use of George Hall as an Informant.

The government used a Bahamian citizen named George Hall as a confidential informant to set up Mills in this case. Hall had recently been convicted in the very same district court of conspiracy to distribute a minimum mandatory quantity of cocaine. Hall was on supervised release which prohibited his associating with known felons and prohibited his working for law enforcement as a confidential informant. The government never requested nor received permission from the court to modify Hall's conditions of supervised release to allow the undercover work he did. Both Hall and the case agent claimed to not know that Hall was on supervised release and subject to these restrictions. The case agent admitted that he knew that Hall had been recently convicted in federal court - indeed his own training supervisor was the agent who had arrested Hall - but he said he never checked Hall's records, never discussed

it with anyone else at DEA and never discussed it with an Assistant United States Attorney. The DEA agent also admitted that he knew he had to get court permission to use a person on supervised release as a confidential informant and knew that the court did not always approve such requests. We submit that the informant and case agent's mutually corroborating statements are patently unworthy of belief. The district judge made no fact findings, and did not determine that the case agent, much less the informant, Hall, were being truthful in their testimony. The district judge instead said had trouble with some of what the agent said and had concerns about it. Hall admitted that he had been arrested for possession of approximately $100,000 of counterfeit United States currency just days before he began his cooperation in the Mills case, but he claimed to have never told Agent X about this arrest, and Agent X claimed to have not known about this felony arrest until two days before Mills's trial - nine months after the arrest took place.

Mills argued below and we submit that had Judge Hodges been advised of Hall's new felony arrest prior to his offer to serve as a confidential informant, Judge Hodges would never have consented to Hall then serving as a confidential informant. Instead, as a matter of law, Judge Hodges would have been required to revoke Hall's supervised release and sentence him to prison for the violation of supervised release.

Because the government could not have lawfully accomplished what they

accomplished by their admitted violation of Judge Hodges's order restricting Hall's activities, we argue that either the indictment should have been dismissed or at least Hall should have been excluded as a witness.

III. The Court Erred in Denying the Government's Own Motion for Mistrial When the Jury Was Repeatedly and Hopelessly Deadlocked and Erred in Denying the Defendant's Motion for New Trial Based on the Affidavits of Three Jurors Who Stated That They Were Coerced by the Trial Judge's Order to Keep Deliberating after They Had Advised the Court Twice That They Were Hopelessly Deadlocked, When the Deliberations Were Forced to Continue on a Friday Evening after 5:00 p.m., When Court Business Had Otherwise Always Ended at 5:00 p.m.

The jury twice reported they were deadlocked. The jury had already been given an *Allen* charge after they first reported being deadlocked over the entrapment defense, then they were later given the *Allen* charge in writing and allowed to have it in the jury room , then they reported again they were *hopelessly deadlocked*.

The government asked for a mistrial based on a hung jury. The defendant opposed this request, but together with the court agreed on instructing the jury to try to continue deliberating, but with the express understanding that the judge would stop the proceedings at 5:00o'clock, the time he had promised the jury they would stop

each day, and at that point declare a mistrial if they were still undecided. Instead, the judge sent the jury back to continue deliberating did not stop them at 5:00 p.m. as he had promised counsel he would. The jury came back with a guilty verdict about 5:30 p.m.

Counsel for Mills filed a motion for new trial in a timely manner advising the court that he had been contacted by three jurors all of whom stated that they had felt coerced by the court forcing them to continue after advising the court they were deadlocked and by not knowing when the court would let deliberations end. The three jurors later filed affidavits confirming what counsel had alleged.

Under these unique circumstances it was an abuse of discretion to not grant Mills a new trial based on the jury's verdict having been coerced.

ARGUMENTS

I. The Court Erred in Denying Defendant Mills's Motion for Mistrial When the Government Intentionally Introduced Inadmissible 404(b) Evidence at the End of the Trial, Without Any Notice Whatsoever, and When the Evidence in Fact Was a Complete Surprise to the Defense, and but for the Admission of this Evidence the Government Failed to Present Legally Sufficient Evidence to Overcome Defendant Mills's Entrapment Defense, Because this Surprise Evidence Was the Only Evidence the Government Offered to Show Predisposition.

The defense in this case was entrapment. [RIV-154; RIV-204;208;210-211] The defendant, Robert Mills, made a *prima facie* showing that his criminal conduct had been induced by a government agent, the informant, George Hall. The government agreed that the defendant was entitled to an entrapment jury instruction. [RIV-155-157] That had the effect of shifting the burden to the government to prove beyond a reasonable doubt that the defendant had a predisposition to commit this crime. *United States v. Francis*, 131 F.3d 1452 (11th Cir. 1997); *United States v. Miller*, 71 F.3d 813 (11th Cir. 1996); *United States v. Price*, 65 F.3d 903 (11th Cir. 1995).

The government only had one piece of evidence to show predisposition, the

testimony of Augustus Tucker, who had been convicted and sentenced for aggravated assault with a deadly weapon.[2] [RIII-180-181; 187]

Tucker had won a remand from this Court for resentencing, and was at the Baker County Jail at one point at the same time as the Defendant, Robert Mills, in July, 2002. [RIII-193-194; III-181] Tucker claimed that Mills had made incriminating statements to Tucker. [RIII-182-191] Tucker did not come forward to the government with his claim that defendant Mills had made incriminating statements until about two months later, in September 2002 after he had retumed to FCI Petersburg. At that time he was interviewed by the DEA case agent in Mills's case, X. [R109-60-62]

The government apparently learned in September 2002 [R109-60-62], four months prior to Mills's trial, that Tucker was willing to testify that defendant Mills had admitted to Tucker, that Mills was *"in the gang or the drug business together* [with coconspirator Bashir], *that they would quiet often use these guys from the Georgia area to transport the drugs back and forth.*" [RIII-187]

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[2] Tucker had repeatedly stabbed his victim with a knife and been charged originally with attempted murder. [RIII-192] Tucker had appealed his sentence to this Court, gotten a remand for resentencing, but at resentencing received the same sentence again. [RIII-193-194]. *United States v. Augustus Tucker,* Case Number 01-16249 (11th Cir. 2001) and *United States v. Augustus Tucker*, Case Number 02-14030 (11th Cir. 2002).

This evidence - that defendant Mills was in the drug business and had used guys from Georgia to move drugs back and forth before - was evidence of another prior, uncharged crime, not the crime alleged in the indictment, and as such, clearly was subject to Rule 404(b), Federal Rules of Evidence.[3] *United States v. Cancelliere*, 69 F.3d 1116 (11th Cir. 1995); *United States v. Mills*, 138 F.3d 928 (11th Cir. 1998).

Although the government knew about this evidence four months in advance of trial, the government never provided the defense with any pretrial notice of this evidence, as required by both Rule 404(b), Federal Rules of Evidence, which requires that the government "*shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown*, of the general nature of any such evidence it intends to introduce at trial."

Although Mills did not know what Tucker might be prepared to say, Mills filed a pretrial motion to suppress Tucker's statements - whatever they might be - based on

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[3] **(b) Other Crimes, Wrongs, or Acts.** - - Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, ***the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown***, of the general nature of any such evidence it intends to introduce at trial. [emphasis supplied]

a *Massiah* theory.[4] [R68] The government's response to Mills's motion to suppress Tucker's statements did not identify what Tucker would testify, but simply objected that his testimony was not subject to *Massiah* because Tucker had not been a government agent at the time he allegedly elicited the statements from Mills. [R95] An evidentiary hearing was held on Mills's motion to suppress Tucker's statements one month in advance of trial, on December 6, 2002. [R101] At that hearing Mills's attorney advised the Court that he did not know where Tucker was [meaning he had no way to subpoena or obtain his appearance at the hearing] and asked the Court to postpone the hearing and require the government to produce Tucker for the hearing. [R109-56] Mills's counsel also advised the Court that the government had not turned over any reports concerning Tucker's statements. [R109-56] The government put DEA Agent X on the stand at this hearing on the motion to suppress to establish the lack of any foundation for a *Massiah* claim. [R109-59-60] No *Jenks Act* (18 U.S.C. § 3500) material was disclosed before or after Agent X testified.[5] [R109-

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[4] *Massiah v. United States*, 377 U.S. 201, 84 S.Ct. 1199 (1964).

[5] "[A]n interviewer's raw notes, and anything prepared from those notes (such as an FBI 302), are not *Jencks Act* statements of the witness unless they are substantially verbatim and were contemporaneously recorded, or were signed or otherwise ratified by the witness. *See United States v. Delgado,* 56 F.3d 1357, 1364 (11th Cir.1995). ***On the other hand, if the agent is called as a witness, these statements--depending on the scope of the agent's testimony on direct examination--may constitute Jencks material***." *United States v. Jordan*, 316 F.3d

59-60]

Instead of producing any *Jenks* material, instead of providing a 404(b) notice, when Mill's counsel asked Agent X what Tucker had told him, the government objected, and the objection was sustained.

> Q. [Mills's counsel, Mitchell Stone] And what did he [Tucker] tell you occurred while he was a cell mate [of Mills]?
>
> MR. HENRY [Assistant United States Attorney]: Objection, Your Honor.
>
> THE COURT: I'm going to sustain that, Mr. Stone.

[R109-63]

In other words, the government not only failed to provide pretrial notice of this 404(b) evidence as required by Rule 404(b), but also *affirmatively prevented the pretrial disclosure of the 404(b) evidence from Tucker*.

Entrapment was the only defense presented at trial. [RIV-194-224] Whether the defendant had been entrapped or not was the direct or indirect object of six or seven of the ten questions or notes the jury sent to the judge during its deliberations. [RV-

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1215, 1252 (11th Cir. 2003), *citing United States v. Saget,* 991 F.2d 702, 710 (11th Cir.1993) (emphasis supplied).

43; 48; 61; 66; 82] The jury twice advised the trial court that it was deadlocked over the entrapment defense. [RV-66; 82]

The *only evidence* of predisposition that the government presented to rebut the entrapment defense was this one statement from Tucker:

> Q. [AUSA] What, if anything, did he [defendant Mills] tell you about whether or not he had done - - this is the defendant, had done deals, drug deals, with the guy from New Jersey [coconspirator Bashir] before?
>
> A. [Tucker] He said that they were - - that they were - - they were in the gang or the drug business together, that they would quite often use these guys from the Georgia area to transport the drugs back and forth.
>
> Q. And what were the guys from Georgia supposed to do, according to the defendant?

[RIII-187]

Mills's counsel immediately objected and asked for a sidebar conference.

> MR. STONE [counsel for defendant Mills]: Your Honor, I'm going to object. May we approach?
>
> THE COURT: Yes, sir.
>
> (Sidebar conference)
>
> MR. STONE: Your Honor, I'd move at this time for a mistrial.

[RIII-187-188]

Defendant Mills's counsel advised the Court that the information was a complete surprise, that he had attempted to interview Tucker prior to trial and Tucker refused to answer any questions, and that the government had failed to provide any 404(b) notice. After pointing to the government's failure to provide any 404(b) notice, Mills's counsel renewed his motion for mistrial. [RIII-188]

> Incredibly, the government responded that this was not 404(b) evidence:
>
> MR. HENRY [AUSA]: Your Honor, 404(b) evidence requires specific acts of conduct. We don't have specific acts of conduct. What we have is an ongoing series of events that have led to the culmination of this drug deal. It is not a violation of 404(b).[6]

[RIII-188]

The trial judge accepted this response, denied the motions for mistrial, and allowed the government to proceed without even a cautionary or limiting instruction to the jury that it should not consider the evidence except for the purpose of deciding

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[6] Evidence can be outside the scope of Rule 404(b) if it concerns the context of the crime and is linked in time and circumstances to the charged crime, or forms an integral and natural part of an account of the crime, or is necessary to complete the story of the crime for the jury. This was not such evidence.

the defendant's intent.[7] *Cf. Eleventh Circuit Pattern Jury Instructions (Criminal)*, Trial Instruction No. 3.[8] [RIII-188-189]

The government was required to provide reasonable pretrial notice under Rule 404(b). The Middle District of Florida, where this case was tried, requires that Rule 404(b) evidence be disclosed by the government to the defense not later than 14 days prior to trial. Standing Discovery Order (III.B) (M.D.Fla.).

The standard for evaluating an *untimely* 404(b) notice was set in *United States v. Perez-Tosta*, 36 F.3d 1552 (11th Cir. 1994):

> [W]e can discern three factors the court should consider in determining the reasonableness of pretrial notice under 404(b):
>
> (1) When the Government, through timely preparation for trial, could have learned of the availability of the witness;
>
> (2) The extent of prejudice to the opponent of the evidence from a lack of time to prepare; and
>
> (3) How significant the evidence is to the prosecution's

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[7] The judge did tell the government at sidebar, after denying the motion for mistrial, "to move to another area." [RIII-189]

[8] The failure to give a cautionary instruction when 404(b) evidence is admitted can by itself justify a reversal. *United States v. Gonzalez*, 975 F.2d 1514 (11th Cir. 1992).

case.

Perez-Tosta, 36 F.3d 1552, 1562 (11th Cir. 1994).

However, in our case, the government *never gave any notice and took the position below that the evidence was not subject to 404(b)*. The rule itself by its plain language requires that the government show *good cause* for its failure to provide timely notice. When, as here, the government has failed to show good cause, that is the end of the analysis. Good cause is a requirement of the rule. *Perez-Tosta's* three pronged test is a test for examining the sufficiency of the government's good cause in the context of the case and the violation. If the government does not present good cause, the *Perez-Tosta* analysis never comes into play.

Therefore, we submit, the *Perez-Tosta* standard does not apply. However, even if it did apply, Mills would prevail. The first consideration under *Perez-Tosta,* is when the government, through timely preparation for trial, could have learned of the availability of the witness. We know the answer to that. The government learned of this witness and his testimony *four months prior to trial*. This weighs heavily against the government.

In our case, too, there is an added factor, a factor for which the *Perez-Tosta* standard failed to take into consideration because it did not appear on the facts of that case, and that is whether, as here, the government affirmatively withheld the

evidence. It would be one thing, if the four month delay were purely a matter of neglect or inadvertence, but in this instance, the government intentionally withheld and actually blocked the defendant's attempt to discover the nature of the evidence this witness was going to present.

We argue that this added factor - which can be considered under *Perez-Tosta* in evaluating the timing of the government's receipt of knowledge of the witness and his testimony - should absolutely bar the admission of the evidence.

The second factor under *Perez-Tosta* is the extent of prejudice to the defendant from lack of time to prepare. We know the answer to this, because we know that the evidence was the only evidence to rebut the entrapment defense, and even so, the jury twice sent notes to the court advising the court it was deadlocked on the issue of entrapment. Was the defendant prejudiced by this surprise? Of course. This case was thoroughly prepared for trial by Mills's trial counsel. That preparation included sending investigators to attempt to interview Tucker [RIII-188] and sending an investigator to the Bahamas to investigate the original informant, George Hall. [RI-103]. Had Mills's counsel been put on notice that the government had a witness who would attempt to tie Mills to prior drug dealing with Bashir, that could have been investigated and discredited or at least prepared for. There is something fundamentally unfair about the government letting a defendant go to trial on an

entrapment defense, and then sandbagging that defense with the very last witness, through testimony that both Rule 404 and the Standing Order of the Middle District of Florida clearly required to be given in advance of trial.[9]

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[9] Tucker would have been the last government witness and was the last witness called by the government. The court ruled that the government had violated the *Jenks Act* with respect to Agent X in failing to turn over all of the *Jenks* material on Agent X, and as a remedy allowed the defense to recross-examine Agent X after the government, on court order, turned over the previously undisclosed *Jenks* material. This caused Agent X to retake the stand after Tucker finished for the limited purpose of allowing further cross-examination on the wrongly withheld *Jenks* material. [RIII-167-176] There was a third instance of the government violating its discovery obligations, and that was its complete and utter disregard of the trial court's order to turn over certain DEA documents relating to the informant, George Hall. [R109-11-12] When asked to explain why the documents had not been provided, the government told the court that the government had never advised the DEA of the court's order requiring the disclosure, a matter that disturbed the trial judge:

> [THE COURT]: I have to presume that when a United States District Court issues an order to the government that requires certain things to happen that the government passes that order along to the agencies that are affected by the order. I mean, otherwise we don't have much of a system, do we?

[RI-47-48] There was a fourth example of non-disclosure, perhaps the most troubling in terms of its admittedly volitional nature. The defense had filed a motion to dismiss for outrageous governmental misconduct based on the government's use of George Hall in violation of the district court's order that prohibited Hall, as a condition of his supervised release, from working as a confidential informant. [R70] At the first hearing on that motion, the government failed to produce Hall as a witness and the court ended up continuing the hearing until the morning of jury selection, a month later, for Hall to be present. [R109-46] In the meantime, the defense, through its own independent investigation, learned that Hall had been arrested in the Bahamas on March 2, 2002, on a flight from

The only factor seemingly in favor of the government is that the evidence was crucial to its case *as the government chose to present its case*. But this factor too ultimately weighs against the government, because there was alternative evidence the government could have chosen to use had the court sustained the defendant's 404(b) objection. Mills had suffered a prior conviction in 1996 for conspiracy to possess with intent to distribute more than 5 kilograms of cocaine, the very same offense for which he was on trial for in count one of this indictment. [R119; R1] That conviction was admissible to show his intent or predisposition in this case. *United States v. Zapata*, 139 F.3d 1355, 1358 (11th Cir. 1998). That the government chose not to do so and instead chose to proceed only with evidence that was not properly admissible, does not make that evidence essential to the government's case. The government strikes out on all three prongs of the *Perez-Tosta* standard.

We reiterate, it is our position that the *Perez-Tosta* standard does not apply

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Columbia via Cuba, and charged with possession of approximately $100,000 of counterfeit United States currency. This arrest occurred just days before Hall contacted the DEA and began to serve as a confidential informant and the charges were still pending in January 2003 when Mills case went to trial, and yet this had never been disclosed to the defense. Not only had the government not disclosed it, but the government had affirmatively represented to the court that Hall had no pending charges. [RI-33; 46; 103-105] The government's position was that their informant had misled them and they did not know about this arrest until the weekend before the evidentiary hearing, *but even then thegovernment intentionally chose to not disclose this Brady information.* [RI-114-115; R-119; RI-122-123]

because the government did not argue below that it had good cause for its failure to give timely notice of this 404(b) evidence. Second, even if *Perez-Tosta* applied, that all three of the *Perez-Tosta* conditions weigh in the defendant's favor, thus even under *Perez-Tosta*, the evidence should have been excluded.

Alternatively, however, if the evidence were admissible under *Perez-Tosta*, it was otherwise inadmissible, because this Court has held in *United States v. Webster,* 649 F.2d 346 (5th Cir. July 2, 1981) (*en banc*), that the government may not use hearsay to meet its burden of rebutting an entrapment defense and that such error is not harmless.[10]

The admission of the Tucker evidence is reversible and not harmless error in any event because the jury's repeated advice to the trial court that it was deadlocked on the entrapment defense. This Court cannot have confidence that the outcome of the trial would have been the same without the Tucker evidence.

Which leads to the final point. Without the Tucker evidence, the remaining evidence is legally insufficient to convict. The Tucker evidence *was the only evidence the government presented to rebut the defense of entrapment and establish the defendant's predisposition.* Absent what we have shown was clearly inadmissible

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[10] Decisions of the former Fifth Circuit entered prior to October 1, 1981 are binding precedent on this Circuit. *Bonner v. City of Prichard, Ala.*, 661 F.2d 1206 (11th Cir. 1981).

evidence, the government failed to meet its burden of proof beyond a reasonable doubt that Mills was predisposed to commit these offenses. *United States v. Francis*, 131 F.3d 1452 (11th Cir. 1997); *United States v. King*, 73 F.3d 1564 (11th Cir. 1996); *United States v. Brown*, 43 F.3d 618 (11th Cir. 1995); *and see Eleventh Circuit Pattern Jury Instructions (Criminal),* Special Instruction 12.2 (1997).

Accordingly, Double Jeopardy bars retrial of this case. *Burks v. United States,* 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978).

II. The Court Erred in Denying Mills's Pretrial Motion to Dismiss (Or, in the Alternative, Strike the Testimony of the Government's Witness, Informant George Hall), Which Motion Was Renewed Post Trial, Based on the Government's Violation of District Judge Hodges's Order of Supervised Release, Which Expressly Prohibited the Use of George Hall as an Informant.

The government made its case against the defendant, Robert Mills, by use of a confidential informant, George Hall. [RII-69-114] The problem with this was that George Hall was on federal supervised release on a charge of conspiracy to possess cocaine. [RII-71] Hall was convicted in the United States District Court for the Middle District of Florida, Jacksonville Division, the same court that Mills was being prosecuted in. [RI-14] Hall was sentenced on February 27, 1998 by Judge William Terrell Hodges to 27 months imprisonment, followed by four years supervised

release. [RI-70-71; Defendant Exhibit 1 to Motion Hearing, R101] He was released from the Bureau of Prisons custody October 23, 1998. [RI-72] He was subject to the standard terms and conditions of supervised release at the time he began working as a confidential informant for the DEA. [RI-72-73]

While on supervised release Hall's conditions imposed by Judge Hodges included:

> 12) the defendant [Hall] shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

and

> 9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

and

> 11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

[Defendant Exhibit 1 to Motion Hearing R101]

Based on the government's use of Hall as a confidential informant without court permission, in violation of Judge Hall's order of supervised release, Mills filed

a pretrial motion to dismiss [R70], resulting in a evidentiary hearing on January 6, 2003. [R125]

At that hearing, Hall claimed to "not remember" the terms of his supervised release. [RI-18] The DEA Agent who was supervising Hall's work as a confidential informant, X, knew that Hall had been convicted in federal court in Jacksonville for a cocaine conspiracy. [RI-29] But Hall said that he and Agent X "never spoke about" whether he was on supervised release after he started working as a confidential informant in March 2002. [RI-25; 30] But Hall had to admit that Judge Hodges had told him he would be on supervised release. [RI-59]

Hall also had been arrested March 2, 2002 upon entry into the Bahamas from Cuba on his way from Colombia and had been charged with possession of approximately $100,000 of counterfeit United States currency, but Hall claimed this had nothing to do with his contacting the DEA a few days later and starting to work as a confidential informant. Hall also claimed to have never even told the government about these charges until the weekend before the Mills trial was to begin, in January 2003. [RI-31-38; RI-43]

DEA Agent X claimed to not have known that Hall was on supervised release. [RI-81] Agent X admitted that had he known, he would have had to ask the court for permission before he could have used Hall as an informant, and he admitted that in

his experience, such requests were not always granted. [RI-81]

Agent X also admitted he knew that Hall was recently convicted of a federal drug crime *because Agent X's own training agent at DEA, Special Agent Y, had been the agent who had arrested Hall in the first place*. [RI-78] Yet despite this, Agent X persisted in his claim that he did not know Hall was on supervised release, and therefore he did not know that Hall was subject to a court order preventing him from working as a confidential informant. [RI-81] Agent X supported his ignorance by claiming that he had never checked the court records on Hall and never looked at his judgment and sentence. [RI-81] Similarly, Agent X claimed to never have discussed this with a prosecutor [RI-81], and never discussed it with anyone at DEA. [RI-79]

Agent X also claimed ignorance of Hall's arrest on possession of $100,000 of counterfeit United States currency just days before Hall began cooperating with the DEA, and Agent X said he did not know this because he had never checked Hall's criminal record in the Bahamas. [RI-79]

Agent X persisted in this claim of ignorance although he admitted that the DEA maintains DEA Agents at the Nassau Airport where Hall had been arrested with the $100,000 of counterfeit United States currency.

Agent X admitted that he was supposed to have documented Hall as an informant according to DEA regulations, as soon as he began working as an

informant, but he did not do so until four months after the fact and three months after the arrests took place in this case. [RI-82-83]

The trial judge had trouble with this testimony from Agent X:

> [JUDGE CORRIGAN]: I guess what I'm having trouble with is that when Mills' name came up they checked him out, they went into the database, they - - they found out about his prior problems, they knew a lot about Mr. Mills, and yet here's this person, Mr. Hall, who is in the Bahamas, and there seemed to be a lot less information about him, a fellow who they're going to be relying on, to make a case. And that's what I'm having trouble with.

[RI-132]

The government, in response, conceded that:

> [AUSA HENRY]: [T]hey should have checked to see if he was on supervised release. But I think the most important thing for the Court's consideration is the fact that the - - ***the violation is against the Court. It's against the local rules that are imposed by the District Courts in the Middle District of Florida***. It's not a due process violation against the defendant. It's not the sort of outrageous governmental misconduct that's contemplated by the motions to dismiss. And while there are - -

while it is problematic that this person was used when he was still on supervised release, it's not a due process violation against this defendant.

THE COURT: *So you're saying it's really an offense against Judge Hodges, is what you're saying?*

[AUSA] MR. HENRY: ***That's correct. Yes, sir.***

THE COURT: You're saying that Judge Hodges signed a judgment that said this person should not associate with known felons or provide any cooperation to the government without my approval - - that's what Judge Hodges said in his order. And you're saying that the DEA - - *we'll assume inadvertantly for purposes of my question* the DEA has essentially allowed or encouraged Mr. Hall to violate that provision of his supervised release and that - - so it's really - - it does not rise to the level of outrageous conduct such that the indictment against these defendants should be dismissed?

[AUSA] MR. HENRY: That's correct, Your Honor. *Because the defendant's in the same position now as he would have been* ***if the Court had given permission for George Hall to work undercover***. *That's the only difference.*

> THE COURT: I guess I - - I do, again, Mr. Henry - - and, you know, a lot of what you say, I hear. And I know it's [an] extremely high standard. And that may be the answer. *But I have to tell you that I've had an awful lot of government lawyers get up and - - on violation hearings for things that were a lot less serious and be pretty mad at the defendant for what this defendant [Hall] did. And now I'm being told that, Well, when the DEA agent did it, it's problematic, but it's not something that I ought to really get too concerned about.*

[RI-132-134; emphasis supplied]

Counsel for Mills argued that if Judge Hodges had been made aware of all the facts that Judge Corrigan now knew, Judge Hodges would not have approved Hall's use as a confidential informant. [RI-138] The government never took issue with this argument.

After hearing argument of counsel Judge Corrigan stated from the bench that he was "concerned about some of what I have heard today" [RI-142], but felt that the defendant's motion to dismiss did not meet "the high standard that the Eleventh Circuit has. . ." [RI-142] Judge Corrigan entered a written order that simply denied the motion without further explanation. [R131]

Interestingly, *Judge Corrigan did not make any findings of fact*, in particular

he did not find that Agent X's explanations - or the informant Hall's corroboration of X's claims - were truthful. This Court is left with a cold record of testimony that frankly strains credibility past the breaking point. The government's witnesses' unbelievable explanations for their violations of the district court's order do not, therefore, come to this Court with any presumption of correctness whatsoever, and this Court, should it choose to do so, is free to not accept such testimony.

But whether the testimony were accepted in whole or in part or not at all, the end result should be the same. The government conceded that the district court's order was violated. The government conceded that such violation was an offense against the court.

The government's sole rationale for why such an offense should be completely disregarded was that defendant Mills was no worse off than he would have been *had Judge Hodges approved Hall's working as an informant.* Even if the government's rationale is correct -which we do not concede - it does not get the government to the result it sought. The government's argument assumes the conclusion, a common logical fallacy, but none the less, a fallacy.

For there is no doubt whatsoever that had the government disclosed all the facts to Judge Hodges, not only would he never have permitted Hall to work as an undercover confidential informant, but he would have instead had him immediately

arrested and in due course revoked his supervised release and sentence him back to prison.

This answer is dictated by the fact that Hall had committed a new Grade A supervised release violation prior to his attempt to start cooperating, in that he was arrested for a new felony offense in the Bahamas, the possession of the $100,000 of counterfeit United States currency. U.S.S.G. § 7B1.1(a)(1). By law Judge Hodges would have been *required* to revoke Hall's supervised release - he had no discretion to do otherwise. U.S.S.G. § 7B1.3(a)(1). Judge Hodges would have been required to sentence Hall to a renewed term of imprisonment of not less than 24 months. U.S.S.G. §§ 7B1.3(b), 7B1.4.

So the government's untested hypothesis that Mills was no worse off despite the government's violation of the district court's order, does not withstand scrutiny. Mills was not in the same position he would have been had the matter been brought to Judge Hodges's attention and the true facts disclosed to the Court prior to using Hall as an informant. Indeed, using the government's own rationale, it was error to not impose some sanction.

The only question is, what sanction? We repeat our argument that this Court is free to reach whatever conclusion it decides the record supports in regard to accepting or not accepting George Hall and Agent X's farfetched explanation that

neither one of them knew that Hall was on supervised release or that Hall had not told Agent X of his new arrest. Should this Court decide that the explanations are not worthy of belief, then we submit the only appropriate sanction would be to vacate Mills's convictions and order the indictment dismissed.

The Supreme Court has held that a judgment obtained by fraud may be vacated under a court's inherent power. *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 248, 64 S.Ct. 997, 1002 (1944), *Standard Oil Company of California v. United States*, 97 S.Ct. 31, 50 L.Ed.2d 21 (1976). This Court clearly has the authority to dismiss the indictment in this case based upon a fraud upon the court below.

However, should the Court decide to accept the testimony of informant Hall and Agent X, a sanction is nevertheless still mandated, and the appropriate sanction in that case would be to remand the case for new trial with an order that Hall not be permitted to be called as a government witness at any retrial. For that, indeed, would put Mills back in the *status quo ante* had the government complied with the Court's order of supervised release.

This Court has recently held that exclusion of evidence is a proper remedy for violation of a local court rule, when maintenance of the rule is important to the integrity of the court process. *United States v. Venske*, 296 F.3d 1284, 1291 (11th Cir. 2002) ("[W]here attorneys or parties obtain evidence in violation of the court's rules

or orders, the court may exercise its power to enforce those rules and orders by excluding the evidence wrongfully obtained.") If this honorable Court does not simply dismiss the indictment with prejudice, then we ask this Court to sanction the government's failure to obtain prior court permission before using Hall as a witness by reversing Mills's convictions and remanding for new trial, with instructions that the government not be allowed to call Hall as a witness in the event the case is retried.

III. The Court Erred in Denying the Government's Own Motion for Mistrial When the Jury Was Repeatedly and Hopelessly Deadlocked and Erred in Denying the Defendant's Motion for New Trial Based on the Affidavits of Three Jurors Who Stated That They Were Coerced by the Trial Judge's Order to Keep Deliberating after They Had Advised the Court Twice That They Were Hopelessly Deadlocked, When the Deliberations Were Forced to Continue on a Friday Evening after 5:00 p.m., When Court Business Had Otherwise Always Ended at 5:00 p.m.

As soon as the jury retired to begin delibearting, there was an immediate question: Question (1) "Is the defendant involved in 12-step program for his alcoholism?" [RV-43] This was to be the first of ten jury notes to the court. The judge wrote back to make their decision only on the basis of the testimony and evidence presented. [RV46]

Then three more questions came from the jury:

Question (2) "Can we use, and it says, is state mind - - I'm assuming it means his state of mind - - in figuring out if he was entrapped? " [RV-48]

Question (3) "Can we get a copy of Mr. Hall's testimony? If not, can we find out when Mr. Hall first contacted Mr. Mills?" [RV-48]

Question (4) "Are you going to let us listen to the tapes?" [RV-48]

In answer to Question (2), the judge referred the jury back to the entrapment instruction but did not reread it. [RV-54] In answer to Question (3), the judge told the jury they would have to rely upon their memories for Hall's testimony. [RV-55] The court told the jury that arrangements would be made so that they could listen to the tapes, in answer to Question (4). [RV-55]

Then the jury asked Question (5).

"Are we allowed to use our common sense and reasoning re knowledge that prior calls between Mr. Hall and Mr. Mills before the taping began occurred?" [RV-61]

The judge simply answered "Yes." [RV-65]

Then a stunning Question (6), as read into the record by the judge:

"Am I right in thinking that if Mr. Mills was entrapped the issue of guilt

- - and it says of - - I think its innocence, is mute (*sic*), m-u-t-e? And I'm assuming he means moot, m-o-o-t. And I am assuming he means the issue of guilt or innocence." [RV-65]

Which was followed by jury Question (7).

"*Your Honor,* ***we are deadlocked*** *on the entrapment issue. Please give me some advice. One of the juror's spouses was entrapped*." [RV-66]

The jury had begun deliberating at 9:59 a.m. [RV-40] The jury's first notice to the court that it was deadlocked came at 1:33 p.m. [RV-64; emphasis supplied]

The judge suggested reading back the entrapment instruction again and also giving the so-called modified *Allen* charge. Both the government and defense agreed. [RV-67] This was done at 1:50 p.m. [RV-70] The jury went back out at 1:59 p.m. [RV-75]

Minutes later there were two more questions at 2:02 p.m. [RV-77]

Question (8) - "Can we get a dictionary?"

Question (9) - "Can we get a copy of the current instructions you just gave us?" [RV-77]

The court gave then gave the jury the *Allen* charge in writing and said they could not have a dictionary. [RV80]

Finally at 3:22 p.m. the court advised counsel there was a tenth question:

Question (10) - "***Your Honor, we are hopelessly deadlocked. It is my honest opinion that the jury will not change their minds about this***."

[RV-82; emphasis supplied]

The judge noted that the jury had been deliberating over five hours and asked each side for its position. [RV-83]

The government moved for a mistrial and asked the court to declare a hung jury. [RV-83] The government argued that giving another *Allen* charge would be futile. [RV-83-84] Counsel for Mills, however, pointed out that it was only 3:30 p.m. and he would "rather not try the case again," so "our position is that they should keep going." [RV-84]

The judge seemed to object, and pointed out that this was twice that the jury has declared they were deadlocked and this time they said they were *hopelessly deadlocked*. Nevertheless, counsel for Mills asked for another *Allen* charge. [RV-85] Counsel for Mills then further suggested that the court convene the jury and ask them that they "continue deliberating for *a period of time longer* and see if they can resolve their differences." [RV-86] The Court:

> One thought I had, Mr. Stone - - and I was hesitating to put a time limit on the jury's deliberation. But one thought I had was if I disagreed with Mr. Henry and agreed with your position, *tell them that I want them to*

deliberate until at least - - until 5 o'clock, and then to inform me at that time whether they are making progress or whether they remain deadlocked. And if I am advised at that time that they're still deadlocked, then I would - - then I would very likely declare a mistrial. . . . there's still time in the normal workday.

[RV-86]

Counsel for Mills responded

I'm a little concerned about putting a time limit on it *and* ***telling them*** *what we'd do* ***at the end of that time limit***.

[RV-87]

The judge responded:

Oh, I wouldn't tell them. I would just tell them that they would be reporting back to me at 5 o'clock as to whether or not they are making progress or not. That would be the way I would put it. ***And if they reported back to me at 5 o'clock we're still deadlocked and we're going to - - I mean, if the message was the same message I'm getting now, then I - - I'm sure I'd have no choice.***

[RV-87]

Counsel for Mills responded that he did not think it would be appropriate to

give the jury an actual time to report back, but just indicate to them that it was still early enough in the day that it may be advisable to continue deliberating *for a while longer and we can reconvene later and determine what to do.* [RV-87-88]

The government said:

> I think that by telling them to go on that *you're going to frustrate them*. *That's my personal opinion.* So I'd just let the Court do what the Court thinks is appropriate, without any input.

[RV-88]

The judge brought the jury back in at 3:38 p.m. The judge instructed them:

> All right. Ladies and gentlemen, I have received a communication from your foreperson, Mr. McGeveran. The communication is: Your Honor, we are hopelessly deadlocked. It is my honest opinion that the jury will not change their minds about this. And I appreciate that communication. As you know, I had previously given you the charge of the jury that is given when a jury is having difficulty reaching a decision. Sometimes a judge will read that decision (*sic*) to you again and ask you to continue deliberating. I'm not going to read it to you again, because you had previously asked for a copy of it. So you had a copy of it back there. And so I'm assuming everybody who wants to know what it says is able

to know what it says. And if you want to look at it again, I would encourage you to do that. And I appreciate the communication you have given me. And I appreciate the opinion expressed in it. But I am going to ask you to keep working at it and to see if you can make any progress ***and to go further into the day to attempt to do that.*** We will be here and we will be able to respond to you at any appropriate time. But I do think it's important that we make every effort to try to reach a conclusion and a verdict in this case. And so, therefore, without any further instruction, because I've already given you all the guidance I can give you, it's in your hands now, I am going to ask you to resume your deliberations. Thank you very much.

[RV-89-90]

The judge said again to counsel:

But I think it's at least worth giving it *the balance of the workday* . . .

[RV-90]

However, the court did not do what it said it would do. The court did not stop the deliberations at 5:00 o'clock as he had said he would. Instead, when there was no word from the jury at 5:00 o'clock, the judge simply made the jury keep going without any interruption. This was not only inconsistent with what counsel for Mills

had agreed to, it was inconsistent with the advice the judge had plainly given the jury panel when they were first called to court and after they were selected as the jury in the case. At that time, the judge made a point of emphasizing to the jury that court would stop each day at 5:00 o'clock at the latest:

> But we'll get as far as we can and adjourn *no later than 5 o'clock. And it may even be earlier*. Beginning tomorrow the trial will start promptly at 9 o'clock in the morning *and will go no later than 5 o'clock in the afternoon,* with appropriate breaks and a lunch break. *This will be the schedule from today until the trial is completed*.

[RI-184; emphasis supplied] Again after the trial jury was picked, the judge made a point of telling the jury:

> I'm intending to run the trial on a 9 o'clock sharp to *no later than 5 o'clock basis.*

The judge continued on at some length to the jury about the importance of the schedule and timeliness. [RI-294-295]

After letting the jury continue without any further instructions after 5:00 p.m., the jury reached a verdict at about 5:35 p.m. or 5:40 p.m. The court reconvened the parties stating:

> The record will reflect that 20 or 25 minutes ago - - *it 's about 6 o'clock.*

20 or 25 minutes ago I was advised that the jury had reached a verdict.[11]

[RV-91]

The court had not done what it said it would do; the court had not done what Mills had agreed to; the court did not reconvene and terminate deliberations at 5:00 o'clock.

Thereafter, Mills filed a timely motion for new trial under Rule 33, Federal Rules of Criminal Procedure, based on information from three jurors who had come to Stone and advised Stone that they felt coerced by Judge's instruction to keep deliberating.[12] [R156] Mills's counsel further alleged in his motion that a fourth juror had been of the same opinion. Mills asked for an evidentiary hearing. [R175]

On February 14, 2003, Mills filed the sworn affidavits of Elise Williams, Rosalind C. King, and Mary Williams, jurors in the case, each of whom swore:

That during deliberations it was my honest belief that Mr. Mills was not

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[11] The verdict was guilty on both counts. [RV-92].

[12] Rule 33 requires motions for new trial to be filed within seven days of the verdict. Rule 45, Federal Rules of Criminal Procedure, excludes Saturdays, Sundays and national holidays from the computation of any period of time less than 11 days. The verdict was returned Friday, January 10, 2003. Monday, January 20, 2003 was Martin Luther King, Jr. federal holiday. (*See White House Press Release,* January 17, 2003, http://www.whitehouse.gov/news/releases/2003/01/20030117.html)

> proven guilty of the crimes charged. In fact, at approximately 3:30 p.m. it was apparent that due to my not guilty vote along with three others the jury was not able to come to a unanimous decision with regard to the verdict in this case. However, the Court informed us that we should continue to deliberate *until the end of the business day*. . . . after 5:00 p.m. the pressure from not knowing when we would be permitted to go home became insurmountable and at approximately 5:30 p.m. I along went along with the guilty verdicts as a result of undue pressure exerted on me by other jurors. . . . had we been allowed to adjourn for the day at 5:00 p.m. or at (*sic*) had we known how late the Court intended to make us stay and deliberate I would not have changed my verdict and would have maintained my vote that Mr. Mills was not guilty of both counts.

[R193]

The court denied an evidentiary hearing and denied the motions citing *United States v. Cuthel*, 903 F.2d 1381, 1383 (11th Cir. 1990) and Rule 606(b), Federal Rules of Evidence, prohibited juror testimony to impeach a verdict except as to "outside influences" brought to bear on them. [R196] The Court also defended its actions in requiring the jurors to continue deliberating stating that the court had done "exactly what the defendant asked . . . " [R196]

The Court misapplied Rule 606(b) under the peculiar circumstances of this case. *United States v. Badolato*, 710 F.2d 1509, 1515 (11th Cir. 1983) ("None of the matters said to have been described by the jurors refers to extraneous information or outside influence on the jury, *except that the statement concerning the judge's instructions, perhaps arguably, can be considered to relate to extrinsic circumstances as part of the overall circumstances"*).

The judge's suggestion, without use of the term, that the error was invited, does not end the analysis. Even invited error is subject to plain error review, especially in a criminal case. *Maiz v. Virani,* 253 F.3d 641, 676-677 (11th Cir. 2001) ("[R]eversal for plain error in the jury instructions or verdict form will occur only in exceptional cases where the error is so fundamental as to result in a miscarriage of justice.")

First, invited error should not be applied when the court is presented with a motion for new trial based on juror affidavits which resulted *after* the events in issue. That is, Mills premised his motion for new trial not on what he asked the judge to instruct or what the judge said in his instructions, but on what the four jurors disclosed *after the fact* the effect of those instructions *and the judge's failure to stop the deliberations at the end of the business day as he had told the jury he would do.*

Which brings us to the second point, the judge did not do what the judge said he would do. The judge unambiguously stated to counsel and to the jury that he

would halt the deliberations at 5:00 p.m. (the end of the business day). This was not a new or novel concept for this judge to use with this jury, but rather was an operating rule that he had been firm and persistent in repeating and honoring - until it came to the jury's continued deadlock at 5:00 p.m. on Friday. Then the judge did not honor his own instructions and promise to the parties. This error was not invited.

And we know from the jurors' affidavits that it was this error that coerced the verdict. If it were not for the two preceding notes from the jury advising the court that they were deadlocked, *hopelessly deadlocked*, it might be that this Court could overlook or rationalize the obvious coercive pressure the judge's refusal to honor the jury's announcement of deadlock had. But given the repeated notice from the jury, and the emphatic language used in its final note, the decision to force the jury to continue deliberating, and to then force them to continue past the time the court had promised that the deliberations would stop for the day, must be reversible error. *See United States v. Robinson*, 953 F.2d 433 (8th Cir. 1992).

CONCLUSION

Defendant-Appellant Robert Mills respectfully requests this honorable Court pursuant to his arguments in Issue I above, to reverse his convictions as to both counts, and remand with instructions that the indictment be dismissed with prejudice, and retrial is barred under the Double Jeopardy clause of the United States Constitution, or reverse both convictions based on the arguments in Issue II above, and either remand with instructions that the indictment be dismissed with prejudice because of the fraud committed on the court and the violation of the lower court's order, or remand for new trial with instructions that the government not be allowed to call George Hall as a government witness, or reverse both conviction based on the arguments in Issue III above, and simply remand for a new trial.

Respectfully submitted,

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RULE 28-1(m) CERTIFICATE OF WORD COUNT AND CERTIFICATE OF SERVICE

I HEREBY CERTIFY pursuant to 11th Cir.R. 28-1(m) and FRAP 32(a)(7) that this document contains 12,419 words.

I ALSO HEREBY CERTIFY that two copies of the foregoing have been furnished to Marcio William Valladares, Esquire, Assistant United States Attorney, Office of the United States Attorney, 300 North Hogan Street, Suite 700, Jacksonville, Florida 32202, by United States Postal Service, first class mail, postage prepaid, this the 26th day of January, 2004.

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William Mallory Kent

APPENDIX