UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

NO. 05-12424-BB

UNITED STATES OF AMERICA
Plaintiff-Appellee,

v.

THOMAS EDWARD SPRINGER
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. 05-12424-BB

United States v. Thomas Edward Springer

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. Honorable David A. Baker, United States Magistrate Judge

2. Robert E. Bodnar, Jr., Assistant United States Attorney, Counsel for the United States at the District Court

3. Shon J. Douctre, District Court Counsel for Springer

4. Honorable Patricia C. Fawsett, United States District Judge

5. Kendall Horween, District Court Co-Counsel for Springer

6. William Mallory Kent, Appellate Counsel for Springer

7. Linda Julin McNamara, Assistant United States Attorney, Appellate Counsel for the United States

8. Thomas Edward Springer, Defendant-Appellant

STATEMENT REGARDING ORAL ARGUMENT

Springer requests oral argument. This Circuit has only one recent unpublished decision on the issue of the application of *Crawford v. Washington* to testimony by an expert witness who relies upon hearsay evidence to reach her opinion. Therefore, this case will be a case of first impression in a published opinion, should the Court choose to address the issue in a published opinion. Further, this Court has had little opportunity to address the meaning and scope of the "testimonial hearsay" limitation set forth in *Crawford*, and this case presents an interesting opportunity to expatiate the term.

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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. This appeal was timely filed within ten days of entry of judgment and sentencing.

STATEMENT OF THE ISSUES

I. The Court Erred under *Crawford v. Washington* in Permitting an ATF Expert Witness to Establish the Interstate Commerce Element by an Expert Opinion Which Relied upon Testimonial Hearsay as its Basis, Alternatively the Opinion was Not Admissible Under Rule 703 and the Hearsay the Expert Relied Upon Did Not Possess the Required Guarantees of Reliability.

II. The Court Erred in Denying Springer's Motion for Mistrial in Response to a Government Witness's Interjecting That Springer's Wife Was Afraid Springer Was Going to Kill Her with the Weapons, after the Government Had Agreed to Exclude References to Domestic Violence.

STATEMENT OF THE CASE

Course of Proceedings

Thomas Springer was first indicted June 4, 2004 in a two count indictment charging in count one that on or about March 16, 2004 in Seminole County, Florida, having previously been convicted of two felonies, carrying a concealed firearm in 1990 and witness tampering in 1991, that he did knowingly possess six enumerated firearms which had been shipped in interstate commerce in violation of 18 U.S.C. § 922(g) and 18 U.S.C. § 924(a)(2), and in count two that on or about March 16, 2004 in Seminole County, Florida that he did knowingly possess a short barreled shotgun as defined in 26 U.S.C. § 5845(a), which had not been registered to him in the National Firearms and Transfer Record as required by 26 U.S.C. § 5841, in violation of 26 U.S.C. §§ 5861(d) and 5871. [R-1]

Springer was released on a $10,000 signature bond. [R-13,14]

A superseding indictment was filed September 15, 2004 [R-26] The only change in the superseding indictment was the addition of a seventh firearm. The

seven firearms: three shotguns, two .22 caliber rifles, and two revolvers. [R-26]

Shotgun	Harrington & Richardson 12 gauge
Shotgun *	**JC Higgins 12 gauge**
Shotgun	Savage 12 gauge
Rifle *	**Remington Arms .22 caliber**
Rifle *	**Marlin Glenfield Products 22 caliber**
Revolver	Rueger .357 magnum
Revolver	F.I.E. Titan Tiger .38 spl caliber

The first trial began October 4, 2004 [R-54] The first trial lasted five days, from October 4-8, 2004. [R-54-70] On October 12, 2004, the jury returned a not guilty verdict as to count two [possession of the unregistered short barreled shotgun] and was unable to reach a verdict as to count one. [R-72-73]

The second trial began on the remaining count one of the superseding indictment with jury selection on November 9, 2004. [R-91] After four days of trial the jury returned a guilty verdict on count one November 15, 2004. [R-99] The jury returned a special verdict finding Springer guilty of possession of only the three guns marked by asterisk in the chart above, that is, the Harrington & Richardson shotgun and the two .22 caliber rifles. [R-101]

Springer was allowed to remain free on bond. [R-99]

Springer filed various motions including a motion for new trial which were

denied. [R-108, 110]

Springer was sentenced on April 25, 2005 to 51 months imprisonment and two years supervised release, and allowed to voluntarily surrender on or before May 13, 2005. [R-124] Springer filed a timely notice of appeal April 27, 2005. [R-127]

Springer voluntarily surrendered and thereafter filed in the district court a motion for bond pending appeal on July 9, 2005 and a supplemental motion for bond pending appeal on July 15, 2005, which were denied by the district judge on July 28, 2005. [R-151, 152, 154]

This appeal has followed in a timely manner. Springer remains incarcerated at the Federal Medical Center, Ft. Worth, Texas. [R-136]

Statement of Pertinent Facts Generally

Deputy Michael Nelson testified that on March 16, 2004 he responded to the Springer home located in Oviedo, Seminole County, Florida in response to a 911 call. [R-143-44-45; R-144-108-109] Thomas Springer, Sr. and his wife, Diane Springer, were the only persons in the residence at the time. [R-144-109-110] Deputy Nelson observed two rifles and a shotgun in the back bedroom where he found Mrs. Springer. [R-144-111] While Deputy Nelson was speaking with Mrs. Springer, another deputy, Deputy Joe Wasser showed up. [R-144-111] Mr. Springer was arrested on "unrelated charges" [an alleged domestic battery that prompted the 911 call]. [R-144-112]

Mr. Springer asked to take some medical equipment with him he needed for breathing if he was going to be taken to jail, and the officers accompanied Mr. Springer into his bedroom to get the medical equipment. In Mr. Springer's bedroom the officers observed three more shotguns. [R-144-112-114]

At the time that Mr. Springer was arrested on the domestic battery charges a total of six guns were collected by law enforcement, three shotguns in Mr. Springer's bedroom, and two rifles and a third shotgun in the back bedroom where Mrs. Springer had been found. [R-144-115-116]

While the officers were at the Springer residence both Mr. Springer and Mrs. Springer mentioned that Mr. Springer was a convicted felon. [R-144-129]

Later that evening Deputy Gerald Taylor responded to a follow up call from Mrs. Springer and her son, Tommy, Jr. in which she asked Deputy Taylor to help them look for more weapons. [R-144-219-220] They searched the house together and found a sawed off shotgun [Springer was acquitted of possession of this gun in the first trial] and a .357 magnum revolver [Govt. Ex. 5] in Mr. Springer's bedroom [R-144-221] and a .38 revolver [Govt. Ex. 6] in the living room. [R-144-222]

There was confusion over where the Harrington & Richardson shotgun was located when it was seized by law enforcement on the day of Springer's arrest, March 16, 2004. According to ATF Agent Polak was that this shotgun was found in Tommy

Springer, Jr.'s bedroom, not in the defendant, Thomas Springer, Sr.'s bedroom. [R-145-97-98]

The Remington .22 caliber rifle, Govt. Ex. 3, was also found in Tommy Springer, Jr., the son's bedroom, not in the defendant, Thomas Springer, Sr.'s bedroom. [R-145-25] The Marlin .22 caliber rifle, Govt. Ex. 7, was found in the back bedroom where Mrs. Springer was when the police arrived, not the defendant's bedroom. [R-144-122] This was the son's bedroom, the same bedroom where the Remington .22 caliber rifle was recovered. [R-144-123]

Thomas Springer, Sr.'s son, Tommy Springer, Jr., was a witness for the government. [R-143-65] Tommy Springer, Jr. was 14 years old at the time of the alleged offense and 15 years old when he testified. [R-143-66] The son testified that the two .22 caliber rifles and one shotgun were in his room on March 16, 2004. [R-143-77] Tommy Springer said the short shotgun was the one in his room. [R-143-79] The short shotgun was the Harrington & Richardson, Gov. Ex. 2. [R-144-97] Tommy, Jr. testified that the guns were owned by his father. [R-143-77]

A neighbor of the Springers, Robert Eddy, testified that he saw Tommy, Jr. and another child shooting "rifles" and the defendant Thomas Springer, Sr. was with them - about a year before the trial. [ca. November 2003] [R-144-57-58]

Before the testimony of the neighbor, Robert Eddy, the court gave a Rule

404(b) limiting instruction that the evidence received from this testimony was only to be used to determine if the defendant had the necessary intent to commit the charged offense, that is, the possession alleged to have occurred on March 16, 2004, and not as evidence of the crime itself. [R-144-56-57]

> Ladies and gentlemen, I anticipate you may hear evidence of acts of the defendant which may be similar to those charged in the first superseding indictment, but which were committed on another occasion. As I instructed you earlier with another witness, you must not consider any of this evidence in deciding whether the defendant committed the acts charged in the first superseding indictment, which relate to March 16th, 2004. However, you may consider this evidence for other very limited purposes. If you find, beyond a reasonable doubt, from the evidence in this case that the defendant did commit the acts charged in the first superseding indictment, which is related to the date of March 16th, 2004, then you may consider evidence of the similar acts allegedly committed on other occasions to determine whether the defendant had the state of mind or intent necessary to commit the crime charged in the first superseding indictment.

A school friend of Tommy, Jr.'s, Andy Freal, testified that he saw a rifle and a shotgun in Tommy, Jr.'s bedroom during Winter break from school, the year before and that he, Tommy, Jr. and the defendant, Thomas Springer, Sr. shot the shotgun and he and Tommy, Jr. shot the rifle in the backyard of the Springer home. [R-144-71-74] Freal identified the shotgun as the Harrington & Richardson shotgun, Govt. Ex. 2 and the rifle as the Marlin .22, Govt. Ex. 7. [R-144-74]

Freal's testimony, like that of Eddy and Walker, was preceded by a Rule 404(b) limiting instruction that it was not to be taken as evidence of the charged offense. [R-144-70-71]

A clerk from a gun store, Matthew Walker, testified that he remembered the defendant, Thomas Springer, Sr., and his son, Tommy Springer, Jr., bringing in the two rifles for repair. [R144-90-93] The Marlin .22 caliber and the Remington .22 caliber, Government Exhibits 3 and 7. [R-144-90-91] This evidence was admitted conditionally under a Rule 404(b) limiting instruction that it was not to be considered as evidence of the charged offense. [R-144-87-88]

Springer was convicted of possessing only three of the seven charged firearms, the two .22 caliber rifles and the Harrington & Richardson shotgun. [R101] These were Government Exhibits 2, 3 and 7. [R-103]

ATF Expert Opinion Testimony

The ATF case agent, Alina Polak, testifed as an expert witness in firearms and interstate nexus. [R-144-258] The expert's opinion was the only evidence of interstate nexus. [R-146-43]

The basis for the ATF expert's opinion on the Govt. 3, the Remington Rifle, was a fax from a Tom Holden at Remington. [R145-38-39] Agent Polak also talked to Tom Holden, who she described as the historian at Remington. [R-145-39] Agent Polak admitted that her opinion on this gun was based on what Tom Holden told her and if he were wrong then her opinion is wrong. [R-145-39] Her opinion was also based on faxed documents from Remington that she was not sure she had provided to the defense. [R-145-32]

The basis for the ATF expert's opinion about the Harrington & Richardson shotgun was information that was relayed to her third hand from someone she sent in a request to at the tracking center who then talked to someone at the manufacturer. [R-145-17-19] She did not know who did the calling or who talked to the manufacturer. [R-145-19]

The basis for the ATF expert's opinion on the Marlin .22 caliber rifle, Gov. Ex. 7, was not based on a trace report, because the gun did not have a serial number on it and she was not able to trace it. [R-145-84-85] Her opinion was that it was

manufactured sometime between 1960 and 1965 based on her review of material she found on a computer CD disk that was distributed to her at an ATF training session. [R-145-88-89]

Springer objected to the ATF expert basing her opinion on hearsay and moved to strike her testimony on this basis. His objection was overruled. [R-145-40]

Evidence Relating to Motion for Mistrial

At one point in the trial in response to a motion for mistrial during the testimony of Andy Freal, the Court was informed of an agreement between the Government and the defense restricting the introduction of any evidence of domestic violence between Springer and his wife, who had made the 911 call which had prompted the arrival of deputies leading to the arrest of Springer for domestic battery and the seizure of the guns in issue in the trial:

> THE COURT: What kind of agreement do you all have about this?
>
> MR. BODNAR: *Your Honor, we're not bringing up the domestic violence incident nor any photographs nor anything related to it from the standpoint of why the police responded on the 16th.*
>
> THE COURT: *What kind of agreement do you have with reference to this, if any? What is the agreement that you have?*
>
> MR. BODNAR: *We are not introducing any evidence of the domestic violence battery.*
>
> I have not done that in this case.

THE COURT: That's an agreement between the government and the defense?

MR. BODNAR: It is, Your Honor, because it's extremely prejudicial information and we didn't feel the defendant would be able to get a fair trial if we were to introduce photographs as to why all the injuries that Diane Springer had --

THE COURT: I'm trying to find out the parameters of what you have agreed to.

MR. BODNAR: That was the extent of the agreement, Your Honor. We would not bring up the reasons the deputies responded on the 16th.

[R-143-80-81; emphasis supplied]

Minutes later, however, during the cross-examination of Deputy Michael Nelson, the following exchange took place leading to the defense requesting a mistrial:

Q. Were any of these weapons loaded?
A. No, they weren't.
Q. Answer this only if you're aware or not. Are you aware
of the fact that Mrs. Springer has testified under oath that she told you that there were loaded weapons in the house?

[hearsay objection by the Government overruled]

Q. If you know the answer to the question. Do you know if
she made that statement under oath?
A. Under oath? I did not hear her say that. No, I don't know.
Q. Okay. So then, it's your testimony you never heard her

make that comment before?
A. Basically, just the information she provided me on that
date, which was limited information, that *she was afraid that
she was going to be killed by the weapons that were in the house*, which I assumed --
MR. HORWEEN: Judge, I'm going to object to that as
nonresponsive and request a mistrial at this time.
THE COURT: Overruled and request denied.
. . .

Q. Did you gather up the weapons that were found in that room?
A. On that date, yes.
Q. Did you examine them beforehand?
A. I checked them for safety reasons, yes.
Q. Did you photograph them?
A. On that date, no.
Q. At what point did Ms. Springer tell you that
Mr. Springer was a convicted felon?
A. I believe, it was while I was in the room with her while
waiting for other county personnel.
Q. And she just said, "He's a convicted felon."
A. *She was stating that she was in fear that he was going to use the weapons on her*. She had made mention that --
MR. HORWEEN: Judge, I'm going to object to nonresponsive --
THE COURT: Counsel, the witness has to answer your
question with what he knows, and he is answering your question. I'll overrule your objection.
MR. HORWEEN: And I'll, again, request a mistrial for the record.
THE COURT: A mistrial request is denied.

Please proceed.

[R-144-147-150; emphasis supplied]

> MR. HORWEEN: Yes, Your Honor. I hope you'll recall, I asked if the Court would be willing to entertain again a discussion regarding the motion for mistrial, based on Deputy Nelson's testimony. I indicated I'd retrieved some transcripts regarding that. I have retrieved said transcripts, and I have a copy for both the Court and government and would like an opportunity to re-address the issue.
>
> THE COURT: What is the issue?
>
> MR. HORWEEN: Well, the issue is, I believe, there's been some mistake as to what the question was that I asked and which Mr. Nelson responded. My question was simply whether or not he knew if Diane Springer had made the statement under oath that she had told him that there were loaded guns in the house.
>
> So, I asked him about Diane Springer's statement under oath. His response was, "Basically, just the information she provided me on that date, which was limited information that she was afraid that she was going to be killed by the weapons that were in the house." That's is not -- and I objected it's nonresponsive and requested a mistrial.
>
> My question was only asked if he knew about a statement Diane Springer made under oath. That's completely nonresponsive. It suggests to the jury -- we have an open suggestion to the jury here, because it was stated that he was arrested on unrelated charges.
>
> Well, there's a crime stated in that statement that he was going to -- that she was going to be killed by the weapons. That suggests a threat by Mr. Springer. It suggests that Mr. Springer had knowledge of the weapons which, obviously, goes to the heart of our defense, and it's a violation of the motion in limine.

THE COURT: All right, counsel. I am going to deny your request for a mistrial. He did not answer whether that was under oath, but the man was struggling to answer your questions, and I am sure struggling to stay within what is, I assume, the direction to him was about not to get into what had occurred in that house and why Mr. Springer was arrested on that date. It does not warrant a mistrial.

What's the next issue?

MR. HORWEEN: Also, from the record, he also stated in response to the question, ...and she just said he's a convicted felon in relation to when she stated he was a convicted felon in the bedroom. His answer was, she was stating that she was in fear that he was going to use the weapons on her --

THE COURT: Slow down in your reading, please, so she can keep up with you.

MR. HORWEEN: I have a copy of this for both the government and the Court.

THE COURT: What is the issue?

MR. HORWEEN: The issue is, again, he states that she was in fear that he was going to use the weapons on her when I was asking him about how she blurted out that he was a convicted felon.

He's not being responsive to my question. He knows the parameters or should know the parameters of the motion in limine. He's testified before, so he's well aware of that.

And even, again, even after the previous objection, seeing that it's a potential issue, he raises it again that she's in fear.

So, twice the jury heard that she's in fear of Mr. Springer using weapons on her. That suggests to them that perhaps he was arrested regarding the use of weapons on her. That suggests that the police would not have arrested him but for some evidence. It suggests that Mr. Springer is admitting and acknowledging that there are

> weapons in the house and that he can use them on her.
>
> Part of our defense is that he doesn't even know that there are weapons in the house. It goes to the heart of our defense; therefore, it's prejudicial, and it's a violation of the motion in limine. And we would request a mistrial regarding that as well.
>
> THE COURT: All right. Mistrial motion and request is denied.
>
> What is your next issue?
>
> MR. HORWEEN: In the alternative, then, the defense would request a curative instruction be given to the jury . . .

[R-145-68-72]

The Court gave added an instruction to the final jury instructions to respond to this, but the additional instruction did not amount to a curative instruction because it omitted any reference to the testimony in issue:

> THE COURT: "Defendant is on trial only for the specific offense alleged in the first superseding indictment. He is not on trial for any other offense."
>
> . . .
>
> MR. HORWEEN: Well, our concern is that we're telling them this is all he's being charge with and the jury is sitting there thinking, okay, that's great, but what they've heard is that perhaps the reason he got -- because he was arrested on unrelated matters, the testimony is that he threatened somebody with a gun.
>
> Now it's showing him with guns; whereas before, it didn't show him anywhere near a gun. But the statement now says, hey, maybe he was arrested on that. And now, it's out there and, I agree, we don't want to highlight it, but we're extremely concerned.

[R-145-206-212]

STANDARDS OF REVIEW

Issue One - Expert Testimony Based upon Hearsay in Violation of *Crawford v. Washington.*

Review of District Court Decision Generally

Although it has been said prior to *Crawford v. Washington* that a decision to admit expert testimony over a hearsay objection is reviewed for abuse of discretion. *See United States v. Gilliard,* 133 F.3d 809, 812 (11th Cir.1998), in light of *Crawford*, the proper standard of review is *de novo*, because the question presented is a purely legal question, relating to a defendant's claim of a constitutional right. *United States v. Van De Walker*, 141 F.3d 1451 (11th Cir. 1998); "to the extent Zayas is contending that the court violated his Sixth Amendment confrontation rights in light of *Crawford,* he preserved this argument by raising it during his revocation hearing. Our review of this claim, therefore, is *de novo.*" *United States v. Zayas*, 2005 WL 1953117, *4 (Unpublished slip opinion, 11th Cir. 2005), citing *United States v. Noel,* 231 F.3d 833, 836 (11th Cir. 2000).

Standard Applicable to *Crawford* Error

"Alleged violations of the Confrontation Clause are reviewed *de novo,* but are subject to a harmless error analysis." *United States v. Bell,* 367 F.3d 452, 465 (5th Cir. 2004), cited in *United States v. Delgado*, 401 F.3d 290, 299 (5th Cir. 2005).

However, when the error is *constitutional* error, the burden is on the government to show that the error was harmless beyond a reasonable doubt. *United States v. Mejia-Giovani*416 F.3d 1323 (11th Cir. 2005); *United States v. Robles*, 408 F.3d 1324, 1327 (11th Cir. 2005) ("When the error is of the constitutional variety, a higher standard is applied and it must be "clear beyond a reasonable doubt that the error complained of did not contribute to the sentence obtained." *United States v. Paz,* 405 F.3d 946 (11th Cir. 2005) (quoting *United States v. Candelario,* 240 F.3d 1300, 1307 (11th Cir. 2001)) (citations, brackets, and internal quotations omitted). The burden to prove the error was harmless beyond a reasonable doubt rests squarely on the government. *See United States v. Olano,* 507 U.S. 725, 741, 113 S.Ct. 1770, 1781 (1993)").

Precedential Authority of Prior Panel Decision in Light of Intervening Supreme Court Authority

As a rule, prior precedent is no longer binding once it has been substantially undermined or overruled by either a change in statutory law or Supreme Court jurisprudence or if it is in conflict with existing Supreme Court precedent. *See United States v. Romeo,* 122 F.3d 941, 942 n. 1 (11th Cir. 1997) (determining that prior precedent does not have to be followed by a panel where a "change in statutory law" undermines the precedent) (citing *United States v. Woodard,* 938 F.2d 1255, 1258 n.

4 (11th Cir. 1991)); *Lufkin v. McCallum,* 956 F.2d 1104, 1107 (11th Cir. 1992) (declining to follow prior panel holding "in order to give full effect to an intervening decision of the Supreme Court") (citing *United States v. Machado,* 804 F.2d 1537, 1543 (11th Cir. 1986)); *Tucker v. Phyfer,* 819 F.2d 1030, 1035 n. 7 (11th Cir. 1987) (declining to follow prior panel opinion that failed to consider controlling Supreme Court precedent); *United States v. Gallo,* 195 F.3d 1278, 1284 (11th Cir. 1999).

This Court's prior decision in *United States v. Floyd,* 281 F.3d 1346, 1348 (11th Cir. 2002),[1] that an expert could testify even though part of his opinion was based on hearsay, is no longer controlling in light of *Crawford v. Washington*, which expressly held that firmly rooted exceptions to the hearsay rules, even rules of evidence, do not override a defendant's Sixth Amendment right of confrontation in a criminal trial, overruling *Ohio v. Roberts.* Accordingly, the rationale of *Floyd* - that the testimony was permitted under the Rule 703, Federal Rules of Evidence, permitting an expert's opinion to be based on hearsay - is no longer good law.

Issue Two - Motion for Mistrial

The decision 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)

[1] Citing *United States v. Bonavia,* 927 F.2d 565, 567 n. 2 (11th Cir. 1991).

(quoting *United States v. Satterfield,* 743 F.2d 827, 848 (11th Cir. 1984). A reviewing 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). When a curative instruction has been given to address some improper and prejudicial evidence, a reviewing court will reverse only if the evidence "is so highly prejudicial as to be incurable by the trial court's admonition." *United States v. Funt,* 896 F.2d 1288, 1295 (11th Cir. 1990) (quoting *United States v. Tenorio-Angel,* 756 F.2d 1505, 1512 (11th Cir. 1985)), quoted in *United States v. Perez,* 30 F.3d 1407, 1410 (11th Cir. 1994).

However, the error in this instance affected Springer's right of confrontation under the Sixth Amendment, therefore it is subject to the higher harmless error standard applicable to constitutional error and the burden is on the government to show that the error was harmless beyond a reasonable doubt. *United States v. Mejia-Giovani*416 F.3d 1323 (11th Cir. 2005); *United States v. Robles*, 408 F.3d 1324, 1327 (11th Cir. 2005) ("When the error is of the constitutional variety, a higher standard is applied and it must be "clear beyond a reasonable doubt that the error complained of did not contribute to the sentence obtained." *United States v. Paz,* 405 F.3d 946 (11th Cir. 2005) (quoting *United States v. Candelario,* 240 F.3d 1300, 1307 (11th Cir. 2001)) (citations, brackets, and internal quotations omitted). The burden to prove the

error was harmless beyond a reasonable doubt rests squarely on the government. *See United States v. Olano,* 507 U.S. 725, 741, 113 S.Ct. 1770, 1781 (1993)").

SUMMARY OF ARGUMENTS

I. The Court Erred under *Crawford v. Washington* in Permitting an ATF Expert Witness to Establish the Interstate Commerce Element by an Expert Opinion Which Relied upon Testimonial Hearsay as its Basis, Alternatively the Opinion was Not Admissible Under Rule 703 and the Hearsay the Expert Relied Upon Did Not Possess the Required Guarantees of Reliability.

An essential element of the offense of conviction was proof of effect on interstate commerce. The only evidence of effect on interstate commerce was the opinion of an ATF expert, ATF case agent Alina Polak. Agent Polak based her opinion on testimonial hearsay, over a timely hearsay objection from Springer. The trial Court erred in admitting the expert opinion based on testimonial hearsay in light of *Crawford v. Washington. See United States v. Buonsignore*, 131 Fed.Appx. 252, *257, 2005 WL 1130367 (Unpublished slip opinion, 11th Cir, May 13, 2005).

Because the error is constitutional error the burden is on the government to show that the error was not harmless beyond a reasonable doubt. Because the expert opinion was the only evidence of effect on interstate commerce, an essential element of the offense, the government cannot meet its burden and Springer is entitled to a new trial.

Alternatively, were *Crawford* to not apply, the opinion was not admissible under existing Rule 703 requirements - it was not established that experts reasonably rely upon the type of data Agent Polak relied upon in reaching her conclusions. Even

if this could be established, the data relied upon, on the peculiar facts of this case, did not possess sufficient guarantees of reliability to be considered under *Ohio v. Roberts.*

II. The Court Erred in Denying Springer's Motion for Mistrial in Response to a Government Witness's Interjecting That Springer's Wife Was Afraid Springer Was Going to Kill Her with the Weapons, after the Government Had Agreed to Exclude References to Domestic Violence.

Prior to trial the government had reached an agreement with Springer by which the government had agreed to not admit any evidence of domestic battery, particularly:

> [AUSA] MR. BODNAR: *Your Honor, we're not bringing up the domestic violence incident nor any photographs nor anything related to it from the standpoint of why the police responded on the 16th.*
>
> THE COURT: *What kind of agrement do you have with reference to this, if any? What is the agreement that you have?*
>
> MR. BODNAR: *We don't mention battery. I have not done that in this case.*

[R-143-80-81; emphasis supplied]

In violation of this agreement Deputy Michael Nelson twice volunteered hearsay statements of Springer's wife, who was a witness at the first trial which resulted in a hung jury, but whom the government elected not to call at the second trial, that she thought Springer was going to kill her and that he was going to use the

guns in issue against her.

The statements were inadmissible hearsay, more prejudicial than probative, and introduced in violation of the pretrial agreement the government made.

The statements were not invited by the defense and were extremely prejudicial. This case had been tried to an acquittal of one charge and a hung jury on the remaining charge at a first trial at which the wife had been the government's key witness. The jury's assessment of that case resulted in the government choosing to not put the wife on the stand in the second trial. The deputy's introduction of these damning hearsay statements enabled the government to use the most damaging evidence that the wife could present without having her be subject to confrontation and cross-examination.

Even the second trial resulted in a split verdict by which Springer was convicted of possessing only three of seven charged guns. Given the acquittal on one count in the first trial, the hung jury on the remaining count, and the split verdict at the second trial, this was obviously a close case, and the introduction of the wife's damning statement that she thought Springer intended to kill her with these guns, when she was not subject to cross-examination, when the statement was inadmissible hearsay, and was offered in violation of the government's pretrial agreement, was reversible error, and the lower court erred in denying Springer's motion for mistrial.

ARGUMENTS

I. The Court Erred under *Crawford v. Washington* in Permitting an ATF Expert Witness to Establish the Interstate Commerce Element by an Expert Opinion Which Relied upon Testimonial Hearsay as its Basis, Alternatively the Opinion was Not Admissible Under Rule 703 and the Hearsay the Expert Relied Upon Did Not Possess the Required Guarantees of Reliability.

Springer was charged in a single count superseding indictment with possession of a firearm by a convicted felon. [Docket 26] One of the essential elements of that offense is that the firearm(s) in question have *affected interstate commerce*, *see, e.g., Scarborough v. United States,* 431 U.S. 563, 572, 97 S.Ct. 1963, 52 L.Ed.2d 582 (1977) (upholding 18 U.S.C. §§ 1202(a), the predecessor statute to 18 U.S.C. §§ 922(g)); *United States v. McAllister,* 77 F.3d 387, 389 (11th Cir.1996) (reaffirming the constitutionality of §§ 922(g) after *Lopez*[2]); *United States v. Dupree,* 258 F.3d 1258 (11th Cir.2001) (reaffirming the constitutionality of §§ 922(g) after *Morrison*[3]), Title 18, U.S.C. § 922(g) prohibits felons from "possess[ing] in or affecting commerce" any firearm.

In Springer's trial, the government tendered ATF Agent Polak as an expert

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[2] *United States v. Lopez,* 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995).

[3] *United States v. Morrison,* 529 U.S. 598, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000),

witness for purposes of establishing the interstate commerce nexus. The Court accepted Agent Polak as an expert witness for that purpose over defense objection:

253:24 Q. Have you ever had any training regarding the specific
253:25 identification of firearms?
254:1 A. Yes, I have.
254:2 Q. Okay. Does that specifically refer to determining the
254:3 place of manufacture for firearms?
254:4 A. Yes. Classification, identification, and place of
254:5 manufacture.
254:6 Q. Is there a particular name for that, that your agency
254:7 uses?
254:8 A. Yes.
254:9 Q. What is that?
254:10 A. That's interstate nexus training program.
254:11 Q. What is the purpose of such interstate nexus training?
254:12 A. The purpose of interstate nexus training is to arm the
254:13 agents with the knowledge or the reference material needed to
254:14 be able to explain where the firearms have been manufactured
254:15 and how they travel in interstate commerce.

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255:14 Q. Can you describe for the jury this particular interstate
255:15 nexus type training, what does it consist of?
255:16 A. Yes.
255:17 Q. The firearms -- when the firearms are manufactured, the
255:18 manufacturers are to mark the firearms they make with certain
255:19 markings that cannot be easily removed. Basically, the name
255:20 of the manufacturer, the model, the caliber or gauge, the city
255:21 and state of manufacture.
255:22 Now, if the firearm was made outside of this
255:23 country, outside of the United States, then in addition to
255:24 having those markings, we also need to identify the location
255:25 where it was made; say it was in west Germany or outside the
256:1 country, the name of the importer, and the city and state of
256:2 that importer, those markings and, of course, the serial

256:3 number. Those markings need to be on the gun. The serial
256:4 number needs to be on the frame or receiver, which is the main
256:5 part of the gun where everything goes into.
256:6 Q. Are there levels of this type of training?
256:7 A. Yes.
256:8 Q. Can you explain?
256:9 A. The basic training is just to identify the individuals
256:10 who want to become involved in becoming interstate nexus
256:11 people. Not everybody passes, but it gives us a basic frame
256:12 of reference. And it gives us a lot of material to reference
256:13 to use in our research when we are looking at the firearms.

***

257:3 Q. How many identification courses have you had dealing
257:4 with interstate nexus?
257:5 A. I attended that basic one. And then, more recently, I
257:6 attended the advanced interstate nexus training, which that
257:7 one takes us to the actual manufacturers' factories.

***

257:12 Q. How many hours of training have you had with regard to
257:13 interstate nexus? Let's break it down. This year, how many
257:14 hours have you had?
257:15 A. Well, we receive e-mails that are industry-related;
257:16 industry-related, as far as, you know, new markings, new -- I
257:17 cannot say new regulation, but new markings from each of
the
257:18 companies, the manufacturers we regulate. We receive those
257:19 every day.
257:20 Q. Over the course of your career, how many hours of
257:21 training would you say you've had in this?
257:22 A. Oh, hundreds.
257:23 Q. Over your career, how many firearms have you
examined to
257:24 determine the interstate nexus of that particular firearm?
257:25 A. Hundreds.
258:1 Q. Have you ever testified as an expert in federal court
258:2 regarding interstate nexus of firearms?
258:3 A. Yes, I have.
258:4 Q. How many times?

258:5 A. Over a dozen times.
258:6 MR. BODNAR: Your Honor, at this time I would tender
258:7 special agent Polak as an expert in firearms and interstate
258:8 nexus.
258:9 THE COURT: Firearms and interstate nexus?
258:10 MR. BODNAR: Correct, Your Honor.
258:11 MR. DOUCTRE: I would object, Your Honor. This
258:12 requires no expert training. Whether, in fact, she is an
258:13 expert or not, I would move to exclude her testimony. As far
258:14 as an expert being irrelevant; a lay witness, yes, she did
258:15 look at the guns, she did check these manufacture dates, and
258:16 that sort of thing, but as to an expert, I would object.
258:17 THE COURT: What is the government's position in
258:18 terms of having her testify without having an expert
258:19 designation.
258:20 MR. BODNAR: Your Honor, I believe, expert training
258:21 is required in order to determine the place of manufacture and
258:22 also the date of manufacture on a lot of these firearms. As
258:23 she's already testified, a typical agent is unable to do that
258:24 without the additional training that she has received, and she
258:25 has been previously qualified as an expert in this area in
259:1 federal court.
259:2 THE COURT: All right. Rule 702 provides that if
259:3 scientific, technical, or other specialized knowledge will
259:4 assist the trier of fact to understand the evidence or to
259:5 determine a fact that's in issue, a witness qualifies as an
259:6 expert by knowledge, skill, experience, training, or
259:7 education, may testify thereto in the form of an opinion or
259:8 otherwise if, one, the testimony is based upon sufficient
259:9 facts or data; two, the testimony is the product of reliable
259:10 principles and methods; and, three, the witness has applied
259:11 the principles and methods reliably to the facts of the case.
259:12 So over objection, based on the qualifications
259:13 stated of the witness, I will allow her to testify as an
259:14 expert on appropriate question in the area of firearms and
259:15 interstate nexus.

[R-144-253-259]

Agent Polak's opinion testimony was the only evidence presented to establish the required interstate commerce nexus.

> 43:7 You've heard from Ms. Polak from ATF who has testified to
> 43:8 that. This interstate nexus. The interstate commerce
> 43:9 includes the movement of a firearm between any place in one
> 43:10 state and any place in another state.
> 43:11 When you look at these weapons, six of them --
> 43:12 remember there's seven for your consideration -- have stamped
> 43:13 right on there what state they came from. They're not from
> 43:14 the state of Florida. Common sense, deduction, and reason; to
> 43:15 get from where they're made to here, they cross interstate
> 43:16 lines. That gives the federal government jurisdiction. It's
> 43:17 not complicated.
> 43:18 Ms. Polak told you about the research and materials
> 43:19 that she has in reviewing the guns. You can look at those
> 43:20 guns, too. There's no of restamping on those guns. So, those
> 43:21 are the two elements you have to deal with, and I submit to
> 43:22 you that they have been proven beyond a reasonable doubt.

[R-146-43]

The expert's opinion was clearly based on pure hearsay - testimonial hearsay - as was repeatedly established by defense counsel on cross-examination:

> Q. And that's Exhibit 1. Let's go to Exhibit 2. Which one is that?
> A. This one is the Harrington & Richardson, model 162, 12-gauge shotgun.
> ***
> Q. You did trace the gun?
> A. I traced the gun.
> Q. The answer is yes, you did?
> A. Yes.
> Q. Okay. Now, I'm going to ask you how you traced that

gun; not guns in general, that gun.
A. I collected the information from the gun, and I sent it to the firearms technology -- *I'm sorry, the National Tracing Center in West Virginia, and they are the ones who traced the gun for me. They make the phone calls needed in order to find out from the licensees who it was sold to.*
Q. Who was it sold to?
A. It was sold to --
THE COURT: Is that a question?
MR. DOUCTRE: "Who was it sold to?"
THE COURT: "Who was it sold to" is the question?
MR. DOUCTRE: Yes.
A. I don't have that with me right now.
BY MR. DOUCTRE:
Q. Okay. But you know it wasn't Diane Springer?
A. It was not Diane Springer.
Q. And you know it wasn't Thomas Springer?
A. No, it was not.
Q. That's all you know?
A. Correct.
Q. Okay. When was that gun made, do you think?
A. It was made in 1982.
Q. '82. So, 22 years ago?
A. Yes, sir.
Q. Who told you that?
A. From our records.
Q. What records?
A. Records that are maintained by ATF and by the manufacturer.
Q. Did you look at the records or did someone else look at the records?
A. Someone else looked at the records.
Q. Who?
A. The manufacturer.
Q. The manufacturer looked at the records?
A. Yes, sir.
Q. Who's that.
A. Harrington & Richardson -- actually, it's now H & R

1871.

Q. Okay. So who did you call? Do you know? Just a person, you don't know the name, some guy?

A. When I traced the gun, the gun is traced by the National Tracing Center. And they are the ones who call the manufacturer, wholesale, retail dealers, to obtain the individual who actually -- the first individual who purchased the firearm.

Q. We're in federal court, correct?

A. Yes.

Q. Can you tell me who you spoke to, a person's name, someone to talk to, anyone, as to when that gun was made? Can you give that name or not?

A. No, I cannot.

Q. Because you didn't write it down?

A. Because I did not speak to anybody. I sent in a trace request.

Q. So, you have a document backing this up?

A. Yes, sir.

Q. Where is it at?

A. I don't have it with me.

Q. So, we're supposed to take your word for it?

A. Yes, sir.

Q. Is there any reason why you would not produce evidence?

A. It's an internal document.

Q. Well, isn't the issue whether this gun was made after 1898 a critical issue in your expert opinion?

A. Yes.

***

Q. If a gun is an antique, you don't need to look at federal nexus; correct?

A. Correct, if the gun is an antique.

Q. So, you've got to determine whether it's an antique first, and then you look at federal nexus, and then you look at possession; right?

A. Yes.

***

Q. In your expert opinion, can anyone, a layperson, look at

that gun and determine whether it was made after 1898 or not or would there be complete guessing?

A. By looking at the gun?

Q. Yes.

A. Just by looking at the gun?

Q. Yes.

A. They would need to know something about guns, and they can also call the manufacturer and find out.

[R-145-15-24]

[Q. Let's see what other evidence we have. Let's go to Exhibit 7. What is that?

(Witness retrieves exhibit.)

A. It's the Marlin, Model 99G, .22 long rifle, caliber rifle.

Q. 99G. Does it have a serial number on it?

A. It does not.

Q. So, did you trace that gun?

A. I was not able to trace the gun.

Q. When do you think, perhaps, it was made?

A. It was prior to 1968.

Q. Prior to 1968. .22 calibers have been around for how long?

A. The late 1800s.

***

Q. Is Government's 63 in your report?

A. Yes.

Q. What does your notes say about that?

A. Manufactured between 1960 and 1965.

Q. And how did you know that? Who did you speak to, to learn that fact?

A. From my notes, my research material.

***

Q. What records did you look at?

A. Books, reference material that I have.

Q. Where's that?

A. My office.

Q. So, we're going to take your word for that?
MR. BODNAR: Objection; argumentative.
THE COURT: Sustained.
BY MR. DOUCTRE:
Q. Do you remember what book?
A. It was a number of books and ATF material, ATF records.
Q. Where are the records kept, in your office?
A. In my office, yes.
Q. So that one you found in your office?
A. We have a disk, a CD, with manufacturers' information that are maintained by ATF. It's distributed to the people who attend the interstate nexus class, and that's where I begin my investigation --

***

Q. But you said it's manufactured between '60 and '65?
A. Yes, sir.
Q. And you got that somewhere, right?
A. My reference CD collection.
Q. All right. Let's go to Exhibit 8.]

[R-145-84-91]

A. I looked at the records maintained by ATF. I looked at records maintained by Ruger. And I came to my conclusion.
Q. Where are those records?
A. ATF records are maintained by ATF headquarters firearms technology.
Q. Where?
A. Firearms Technology. I don't know exactly where they're keeping them now. They moved.
Q. So, you did it over the phone?
A. Yes, sir.
Q. Who'd you speak with?
A. I believe it was Michael Knapp also.
Q. Michael --
A. Knapp.
Q. Knapp? Is Michael Knapp on the witness list?

MR. BODNAR: Objection; relevance.
THE COURT: She may answer.
A. No, he's not.
BY MR. DOUCTRE:
Q. How did you communicate with Mike Knapp, on the phone, e-mail?
A. After doing my investigation, conducting my investigation on the evidence, I contacted individuals to confirm, just to check on my own investigation on the phone.
Q. Well, who is the expert, you or Mike Knapp?
A. We both are.
Q. So, you just collaborated with Mike Knapp?
A. Yes, I conferred with him.
Q. Do you doubt your opinion or what?
A. No. I just want to make sure that I was correct in my finding.
Q. So that you double checked?
A. Just to double check on my finding.
Q. Did you double check Exhibit 3 with Tom Holden?
A. Tom Holden, yes.
Q. Did you double check that one?
A. Yes.
Q. With who?
A. It was either Michael Knapp or -- there are many individuals; I just don't keep track of all the people I speak to over in Firearms Technology.
Q. Well, you're forming a basis here. You're forming an expert opinion in this case; right?
A. Yes, sir.
Q. Do you have a certified record or anything on that gun?
A. No, sir.

[R-145-57-59]

Q. Agent Polak, you've referred to reference materials. I'd like you to explain to the jury what are your reference materials?
A. I have over a dozen books that have been provided to me

by ATF. I have purchased some of them. There's publications. I have a number of publications. I have three CDs that were prepared by ATF with industry-related material. And we also received -- we also receive constantly, through our internal intranet, information about industry-related information. And all of that is printed out and maintained, just cataloged and maintained as my reference material.

Q. Can you explain to the jury, what's the difference between the intranet that you're referring to and the internet?

A. The internet everybody has access to or could have access to. Intranet is a firewall area that we have that nobody else has. We communicate with each other without the public being able to come in and look at our records.

Q. Are those the resources that you referred to when you made the determination whether these weapons had traveled interstate commerce?

A. Yes, sir.

Q. And also whether or not they were antique?

A. Correct.

Q. Did you prepare reports on these firearms based on information you had researched from the various sources from, I guess, the manufacturer of the firearms technology branch and your own research?

A. Yes, sir.

Q. Your reports that you completed, were they turned over to the defense in this case?

A. Yes, sir.

Q. Agent Polak, we're going to discuss Government's Exhibit 1 through 7 briefly. Number one is a JC Higgins Savage particular shotgun. Have you ever been to that manufacturer?

A. No, I have not.

Q. Why?

A. They're closed, out of business.

[R-145-143-146]

Q. Can you describe for the jury how does ATF get

manufacturers' records when they go out of business?
A. Manufacturers and dealers are required to send in their records by law to ATF when they go out of business.
Q. Why do firearms manufacturers even create such records?
A. So that we can trace the firearms.
Q. Is it mandated under the law?
A. Yes, it is.
Q. Can you explain how does ATF ensure that these records are in compliance or accurate?
A. When the manufacturers are current and active, they are inspected on a regular basis to make sure they're in compliance. When they go out of business, they ship the records to the National Tracing Center, and those regards are scanned in computers that were filmed and maintained in microfiche, but we maintain them at the National Tracing Center.

[R-145-147-148]

Trial counsel for Springer objected to Agent Polak giving an opinion based on hearsay, which the Court overruled:

38:6 MR. DOUCTRE: Okay. Can I have this marked for
38:7 identification?
38:8 THE COURT: Yes.
38:9 COURTROOM DEPUTY: Defendant's Exhibit 57.
38:10 MR. DOUCTRE: Thank you.
38:11 THE COURT: That's 57?
38:12 COURTROOM DEPUTY: 57, judge.
38:13 MR. DOUCTRE: Can I look at it first? Thank you.
38:14 BY MR. DOUCTRE:
38:15 Q. You've had an opportunity to look at this document;
38:16 correct?
38:17 A. Yes, sir.
38:18 Q. So, this is a photocopy of a magazine or a book?
38:19 A. Remington records.
38:20 Q. What Remington records?

38:21 A. Remington Arms records maintained in their possession.
38:22 Q. Okay.
38:23 MR. DOUCTRE: Can I show the witness?
38:24 THE COURT: Yes, you may.
38:25 BY MR. DOUCTRE:
39:1 Q. Is that the record that forms your expert opinion?
39:2 A. Yes, sir.
39:3 Q. What is that?
39:4 A. It's the fax that I received from Tom Holden from
39:5 Remington's.
39:6 Q. Who is Tom Holden?
39:7 A. Tom Holden is the individual I spoke to. He's the
39:8 historian in Remington Arms.
39:9 Q. Is he on the witness list?
39:10 A. No, sir.
39:11 Q. So, we're going to hope Tom Holden's right, because if
39:12 he's wrong your expert opinion's wrong; right?
39:13 MR. BODNAR: Objection; argumentative.
39:14 THE COURT: She may answer.
39:15 BY MR. DOUCTRE:
39:16 Q. If Tom Holden is wrong, then, your expert opinion is
39:17 wrong; right?
39:18 A. If he's wrong.
39:19 Q. So, your proof is a magazine article or something of
39:20 that nature?
39:21 A. These are records maintained by them.

***

40:10 BY MR. DOUCTRE:
40:11 Q. So, your opinion as to that gun is based on Tom Holden
40:12 and that fax, correct?
40:13 A. Yes, sir.
40:14 MR. DOUCTRE: ***Your Honor, I believe an expert***
40:15 opinion cannot be based solely on hearsay. I'm going to move
40:16 to strike her expert opinion.
40:17 THE COURT: Well, that is not a correct statement,
40:18 counsel, and I'll overrule your objection.

[R-145-38-40]

The same hearsay opinion error applied to each of the three guns that Springer was convicted of possessing, the Remington Arms .22 caliber Rifle discussed above, the Harrington & Richardson, Inc. Model 162 12 Gauge Shotgun:

15:2 Q. And that's Exhibit 1. Let's go to Exhibit 2. Which one
15:3 is that?
15:4 A. This one is the Harrington & Richardson, model 162,
15:5 12-gauge shotgun.

***

17:23 Q. Okay. Now, I'm going to ask you how you traced that
17:24 gun; not guns in general, that gun.
17:25 A. I collected the information from the gun, and I sent it
18:1 to the firearms technology -- I'm sorry, the National Tracing
18:2 Center in West Virginia, and they are the ones who traced the
18:3 gun for me. They make the phone calls needed in order to find
18:4 out from the licensees who it was sold to.

***

18:19 Q. Okay. When was that gun made, do you think?
18:20 A. It was made in 1982.
18:21 Q. '82. So, 22 years ago?
18:22 A. Yes, sir.
18:23 Q. Who told you that?
18:24 A. From our records.
18:25 Q. What records?
19:1 A. Records that are maintained by ATF and by the
19:2 manufacturer.
19:3 Q. Did you look at the records or did someone else look at
19:4 the records?
19:5 A. Someone else looked at the records.
19:6 Q. Who?
19:7 A. The manufacturer.
19:8 Q. The manufacturer looked at the records?
19:9 A. Yes, sir.
19:10 Q. Who's that.

19:11 A. Harrington & Richardson -- actually, it's now H & R
19:12 1871.
19:13 Q. Okay. So who did you call? Do you know? Just a
19:14 person, you don't know the name, some guy?
19:15 A. When I traced the gun, the gun is traced by the National
19:16 Tracing Center. And they are the ones who call the
19:17 manufacturer, wholesale, retail dealers, to obtain the
19:18 individual who actually -- the first individual who purchased
19:19 the firearm.
19:20 Q. We're in federal court, correct?
19:21 A. Yes.
19:22 Q. Can you tell me who you spoke to, a person's name,
19:23 someone to talk to, anyone, as to when that gun was made?
Can
19:24 you give that name or not?
19:25 A. No, I cannot.

***

21:12 Q. If a gun is an antique, you don't need to look at
21:13 federal nexus; correct?
21:14 A. Correct, if the gun is an antique.
21:15 Q. So, you've got to determine whether it's an antique
21:16 first, and then you look at federal nexus, and then you look
21:17 at possession; right?
21:18 A. Yes.

***

[R-145-15-21]

and the Marlin Glenfield Products Model 99G .22 caliber Rifle:

84:23 Q. Let's see what other evidence we have. Let's go to
84:24 Exhibit 7. What is that?
84:25 (Witness retrieves exhibit.)
85:1 A. It's the Marlin, Model 99G, .22 long rifle, caliber
85:2 rifle.
85:3 Q. 99G. Does it have a serial number on it?
85:4 A. It does not.
85:5 Q. So, did you trace that gun?
85:6 A. I was not able to trace the gun.

85:7 Q. When do you think, perhaps, it was made?
85:8 A. It was prior to 1968.
85:9 Q. Prior to 1968. .22 calibers have been around for how
85:10 long?
85:11 A. The late 1800s.

***

88:10 Q. What does your notes say about that?
88:11 A. Manufactured between 1960 and 1965.
88:12 Q. And how did you know that? Who did you speak to, to
88:13 learn that fact?
88:14 A. From my notes, my research material.

***

89:3 Q. What records did you look at?
89:4 A. Books, reference material that I have.
89:5 Q. Where's that?
89:6 A. My office.
89:7 Q. So, we're going to take your word for that?
89:8 MR. BODNAR: Objection; argumentative.
89:9 THE COURT: Sustained.
89:10 BY MR. DOUCTRE:
89:11 Q. Do you remember what book?
89:12 A. It was a number of books and ATF material, ATF records.
89:13 Q. Where are the records kept, in your office?
89:14 A. In my office, yes.
89:15 Q. So that one you found in your office?
89:16 A. We have a disk, a CD, with manufacturers' information
89:17 that are maintained by ATF. It's distributed to the people
89:18 who attend the interstate nexus class, and that's where I
89:19 begin my investigation --

***

91:14 Q. But you said it's manufactured between '60 and '65?
91:15 A. Yes, sir.
91:16 Q. And you got that somewhere, right?
91:17 A. My reference CD collection.
91:18 Q. All right. Let's go to Exhibit 8.

[R-145-84-92]

Before *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004), the Court's ruling on this objection arguably would have enjoyed some support - - that is, under pre-*Crawford* precedent, an expert could be allowed to testify as to an opinion based in part on hearsay if the other predicates to admission of the expert opinion were satisfied. *Cf. United States v. Floyd*, 281 F.3d 1346, 1348 (11th Cir. 2002). Rule 703 of the Federal Rules of Evidence appears to permit this.

Rule 703 provides:

> The facts or data in a particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

As one commentator has stated:

> Since Rule 703 is intended to liberalize previous practice, the court should concentrate on the reliability of the opinion rather than on technical demonstration that hearsay was employed.

Weinstein & Berger, 3 Weinstein's Evidence, P 703(03) p. 703-17 (1978).

However, the Eleventh Circuit has recently recognized in *United States v. Buonsignore,* 131 Fed.Appx. 252, *257, 2005 WL 1130367 (11th Cir, May 13, 2005),

that such expert opinion testimony based on hearsay is no longer admissible under *Crawford v. Washington*:

> However, the [DEA expert witness] drug valuation testimony violated the Confrontation Clause. Although Rule 703 allows experts to rely on otherwise inadmissible evidence in formulating their opinions and the agent's testimony complied with our decision in *Brown,* ***it is inadmissible under the standard set forth in Crawford.*** The agent's testimony was based on information obtained from an unidentified individual at the DEA in Washington, D.C. The evidence is testimonial in nature. The government has not shown that both (1) that individual is unavailable, and (2) Buonsignore had the opportunity to cross-examine that individual. Thus, it was a violation of the Confrontation Clause to admit it.

United States v. Buonsignore, 131 Fed.Appx. 252, *257, 2005 WL 1130367 (11th Cir, May 13, 2005) (emphasis supplied)[4].

Crawford, which abrogated *Ohio v. Roberts,* 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), held that "[w]here testimonial evidence is at issue . . . the Sixth

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[4] A copy of *Buonsignore* has been provided to the Court and opposing counsel when this brief was filed.

Amendment demands . . . unavailability and a prior opportunity for cross-examination." 541 U.S. at 68, 124 S.Ct. at 1374. This is a bright-line rule: if a statement is testimonial and the defendant did not have a prior opportunity for cross-examination, the declarant must testify at trial for the Confrontation Clause to be satisfied. Put differently, the Confrontation Clause is violated if a testimonial statement is introduced at trial and the defendant did not have an opportunity to cross-examine the declarant. *United States v. Abdelazz,* 2005 WL 1916352, *5 (11th Cir. 2005).

Although *Crawford* appears to permit the use of "business records" as an exception to the Confrontation Clause, to the extent the agent relied upon any records to render her opinion, no foundation was established to show that the "records" met the business records exception, and indeed they were not business records, but records compiled for the purpose of litigation. *See United States v. Davis*, 571 F.2d 1354 (5th Cir. 1978)(similar records relied upon by ATF agent witness were inadmissible under business records exception or any exception to hearsay and conviction reversed when interstate commerce nexus was established based on such inadmissible evidence).

Under *Ohio v. Roberts,* business records were generally considered sufficiently reliable to survive a Confrontation Clause challenge. 448 U.S. at 66 n. 8; *see also*

United States v. Miller, 830 F.2d 1073, 1077 (9th Cir.1987) (holding that admission of business records does not violate the Confrontation Clause under *Roberts*). But the "records" at issue in this case were *not* prepared in the routine course of business and were *not* introduced by a competent expert who could be questioned about the limitations of the information presented. *Cf. Valentine v. Alameida,* 2005 WL 1899321, *1 (9th Cir. 2005).

The U.S. Supreme Court recently ruled that out-of-court statements that are "testimonial" and made by a witness not present at trial are admissible only if the declarant is unavailable and the defendant had a prior opportunity to cross-examine. Crawford v. Washington, 541 U.S. 36, 68, 124 S.Ct. 1354, 1374, 158 L.Ed.2d 177 (2004). According to *Crawford*, the Sixth Amendment's Confrontation Clause requires such safeguards on the use of out-of-court testimony. *Crawford*, 124 S.Ct. at 1370 ("Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation."). The Sixth Amendment "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." Id. Accordingly, *Crawford* requires exclusion of some hearsay statements that previously were admissible under hearsay exception rules. See 5 Jack B. Weinstein et al., Weinstein's Federal Evidence § 802.05[3][e] (2d ed.2004).

While the Supreme Court did not establish a comprehensive definition for the term "testimonial," it did provide some guidance on its meaning. The Supreme Court noted that "testimony" is typically a "solemn declaration or affirmation made for the purpose of establishing or proving some fact." Id. at 1364 (internal quotation and citation omitted). "Whatever else the term [testimonial] covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Id.* At 1374. Testimonial statements may also include, but are not limited to, affidavits, custodial examinations, confessions, depositions, prior testimony without the benefit of cross-examination, and "statements that declarants would reasonably expect to be used prosecutorially." Id. at 1364 (internal quotation and citation omitted).

The record establishes that the persons Agent Polak talked to and the data she relied upon - email compendiums, intranet collections, internal CD collections not available to the public - were not "unavailable" at trial, and it is clear that none of these witnesses or materials were present. More to the point, the record is clear that Springer did not have an opportunity to cross-examine any of the persons at the companies or National Tracing Center that Agent Polak relied upon concerning their out-of-court statements, nor was Springer able to cross examine Polak on the materials she relied upon, which themselves were collections of hearsay, because

none of her materials were available in court for cross-examination.

Thus, it is left to this Court to determine whether these out of court statements from persons at the various manufacturers or persons at the National Tracing Center were "testimonial" under the rubric of *Crawford*. If so, the statements were inadmissible.

The Oxford English Dictionary ("OED") defines "testimonial" as "serving as evidence; conducive to proof;" as "verbal or documentary evidence;" and as "[s]omething serving as proof or evidence." XVII The Oxford English Dictionary 832 (2d ed., J.A. Simpson & E.S.C. Weiner eds., Clarendon Press 1989). The OED defines "testimony" as "[p]ersonal or documentary evidence or attestation in support of a fact or statement; hence, any form of evidence or proof." Id. at 833 (emphasis added). Similarly, Webster's defines "testimonial" as "something that serves as evidence: proof." Webster's Third New International Dictionary of the English Language (Unabridged) 2362 (Merriam-Webster Inc. 1993). "Testimony" is "firsthand authentication of a fact: evidence;" "something that serves as an outward sign: proof;" or "an open acknowledgment: profession." Id.

A review of relevant lexicographic sources is consistent with the U.S. Supreme Court's own jurisprudence on this issue. See *Crawford*, 124 S.Ct. at 1364 ("[The Confrontation Clause] applies to 'witnesses' against the accused-in other words, those

who 'bear testimony.' 1 N. Webster, An American Dictionary of the English Language (1828).").

When out-of-court statements are testimonial, the safeguards of the Sixth Amendment's Confrontation Clause must be observed. Thus, to be admissible at trial, the hearsay sources must have been unavailable for trial or Springer must have had a prior opportunity to cross-examine the hearsay sources. *Crawford*, 124 S.Ct. at 1374. It is sufficient that Springer did not have an opportunity to cross-examine for this Court to find that Agent Polak's testimony based on testimonial out-of-court statements was inadmissible at trial. Therefore, the District Court committed reversible error by allowing the statements to be introduced during Springer's trial. Accordingly, Springer's conviction must be reversed.

Even if this Court were to not accept the *Crawford* analysis, this expert opinion was nevertheless inadmissible under the ordinary pre-*Crawford* evidentiary rules applicable to the admission of expert testimony.

Fed.R.Evid. 703 allows an expert to testify based on facts otherwise inadmissible in evidence, Rule 703, however, is not an open door to all inadmissible evidence disguised as expert opinion. Although experts are sometimes allowed to refer to hearsay evidence as a basis for their testimony, such hearsay must be the type of evidence reasonably relied upon by experts in the particular field in forming

opinions or inferences on the subject. *United States v. Cox,* 696 F.2d 1294 (11th Cir.). The government made no showing that qualified firearms experts customarily rely on third persons to do telephone interviews of manufacturer's representatives, without any supporting business records, or rely upon telephone interviews of manufacturer's employees generally, or rely upon private, intranet emails from unknown and unsubstantiated sources, or rely upon CD Rom computer collections of data of unknown provenance and unestablished reliability. This may be good enough for the ATF but it is not good enough for either Rule 703 or the Sixth Amendment. *See*, dissent in *United States v. Corey*, 207 F.3d 84, 92-105 (1st Cir. 2000) (Torruella, Chief Judge, dissenting).

Even if *Crawford* does not apply, the government failed to establish that the hearsay that ATF Expert Polak relied upon possessed any particularized guarantee of trustworthiness. The Supreme Court has held that hearsay evidence must possess "particularized guarantees of trustworthiness," *Ohio v. Roberts*, 448 U.S. 56, 66, 100 S.Ct. 2531 (1980), such that "adversarial testing would be expected to add little, if anything, to [its] reliability," *Lilly v. Virginia*, 527 U.S. 116, 119 S.Ct. 1887, 1894 (1999). The hearsay evidence objected to in this appeal does not meet this high standard, particularly when we consider that this evidence was used to establish a jurisdictional fact, absent which there is no triable federal crime.

As Judge Torruella argued in his dissent in *Corey*, deference to the ATF in this regard is unwarranted as a matter of policy. The improper use of the tendered testimony serves no justifiable purpose. The government could easily establish the interstate nexus of a firearm by introducing records subpoenaed from the manufacturer or direct testimony from the manufacturer, *if such records exist* and this case demonstrates that it is possible that there were no supporting records. But if there were reliable evidence, this would require only a minimal expenditure by the government and relatively little effort on the part of the prosecution. In an industry where governmental oversight is endemic and record keeping is pervasive, it would not be unduly burdensome to require that such independent evidence be produced rather than to rely, as proof of a jurisdictional element of the crime charged, on self-serving "ATF research" material.

Agent Polak's opinion testimony was the only evidence presented to establish the required interstate commerce nexus. Because an essential element of the offense was established by expert opinion testimony which was based in whole or in part on testimonial hearsay which was inadmissible under *Crawford v. Washington*, which was objected to in a timely manner, it was error for the Court below to overrule the objection, and the verdict, which was founded as to this essential element wholly on such inadmissible evidence must be reversed.

Alternatively, the evidence was not admissible under Rule 703 and *Ohio v. Roberts*, because it was not established that experts reasonably rely upon the type of hearsay relied upon by Agent Polak in this particular case, and there was nothing to show that the hearsay relied upon possessed the constitutionally required guarantees of trustworthiness.

II. The Court Erred in Denying Springer's Motion for Mistrial in Response to a Government Witness's Interjecting That Springer's Wife Was Afraid Springer Was Going to Kill Her with the Weapons, after the Government Had Agreed to Exclude References to Domestic Violence.

Deputy Michael Nelson testified that Springer's wife stated to him that she was afraid Springer would use the guns against her and that he would kill her:

> Q. Were any of these weapons loaded?
> A. No, they weren't.
> Q. Answer this only if you're aware or not. Are you aware
> of the fact that Mrs. Springer has testified under oath that she told you that there were loaded weapons in the house?
>
> [hearsay objection by the Government overruled]
>
> Q. If you know the answer to the question. Do you know if
> she made that statement under oath?
> A. Under oath? I did not hear her say that. No, I don't know.
> Q. Okay. So then, it's your testimony you never heard her
> make that comment before?
> A. Basically, just the information she provided me on that

date, which was limited information, that *she was afraid that*
she was going to be killed by the weapons that were in the house, which I assumed --

MR. HORWEEN: Judge, I'm going to object to that as
nonresponsive and request a mistrial at this time.

THE COURT: Overruled and request denied.

. . .

Q. Did you gather up the weapons that were found in that room?
A. On that date, yes.
Q. Did you examine them beforehand?
A. I checked them for safety reasons, yes.
Q. Did you photograph them?
A. On that date, no.
Q. At what point did Ms. Springer tell you that Mr. Springer was a convicted felon?
A. I believe, it was while I was in the room with her while
waiting for other county personnel.
Q. And she just said, "He's a convicted felon."
A. *She was stating that she was in fear that he was going to use the weapons on her*. She had made mention that --

MR. HORWEEN: Judge, I'm going to object to nonresponsive --

THE COURT: Counsel, the witness has to answer your
question with what he knows, and he is answering your question. I'll overrule your objection.

MR. HORWEEN: And I'll, again, request a mistrial for the record.

THE COURT: A mistrial request is denied.

Please proceed.

[R-144-147-150; emphasis supplied]

Springer's wife was not a witness at the second trial. The statements were both inadmissible hearsay under Rule 801(c) and 802, Federal Rules of Evidence, and not admissible under any exception to the hearsay rule. Rules 803, 804 and 807, Federal Rules of Evidence. Furthermore, the statement was more prejudicial than probative even had it been admissible. Rule 403, Federal Rules of Evidence.

Significantly, there had been a pretrial agreement, previously disclosed to and accepted by the court, that the government would not introduce such evidence:

> THE COURT: What kind of agreement do you all have about this?
>
> MR. BODNAR: *Your Honor, we're not bringing up the domestic violence incident nor any photographs nor anything related to it from the standpoint of why the police responded on the 16th.*
>
> THE COURT: *What kind of agreement do you have with reference to this, if any? What is the agreement that you have?*
>
> MR. BODNAR: *We are not introducing any evidence of the domestic violence battery.* I have not done that in this case.
>
> THE COURT: That's an agreement between the government and the defense?
>
> MR. BODNAR: It is, Your Honor, because it's extremely prejudicial information and we didn't feel the defendant would be able to get a fair trial if we were to introduce photographs as to why all the injuries that Diane Springer had --
>
> THE COURT: I'm trying to find out the parameters of what you have agreed to.
>
> MR. BODNAR: That was the extent of the agreement, Your Honor. We would not bring up the reasons the deputies responded on the 16th.

[R-143-80-81; emphasis supplied]

In this Circuit the Court requires government counsel to adhere to an agreement made prior to trial on disclosure of evidence. *United States v. Millet,* 559 F.2d 253, 256 (5th Cir. 1977); see also *United States v. Atisha,* 804 F.2d 920, 924 (6th Cir. 1986). In such instances, defense counsel "is justified in relying upon the government's representation." *Id.* A violation of the agreement involving the "withholding [of] important evidence or a key theory can obviously cause great prejudice to a defendant." *Id. accord United States v. Cole,* 857 F.2d 971, 976 (4th Cir. 1988) ("It is paramount that when the government enters into a pretrial discovery agreement with a criminal defendant that it abide fully and completely by that agreement.") (citing *United States v. Millet,* 559 F.2d 253, 256 (5th Cir. 1977)).

This Court held in *Millet*:

> Unequivocably, the Government has the obligation to fully comply with any and all agreements and promises it makes with and to defendants and we would interpret any non-compliance as a serious breach of the Government's duty, as well as a possible violation of a defendant's constitutional due process rights. (Citing *Santobello v. New York*, 404 U.S. 257, 92 S.Ct. 495 (1971); *United States v. Ross*, 511 F.2d 757 (5th Cir. 1975); and *United States v. Scanland*, 495 F.2d 1104 (5th Cir. 1974).

United States v. Millet, 559 F.2d 253, 256 (5th Cir. 1977)).

Springer's questions on cross-examination clearly did not open the door to these statements:

> Q. Answer this only if you're aware or not. Are you aware of the fact that Mrs. Springer has testified under oath that she told you that there were loaded weapons in the house?

[R-144-148]

> Q. At what point did Ms. Springer tell you that Mr. Springer was a convicted felon?
>
> A. I believe, it was while I was in the room with her while waiting for other county personnel.
>
> Q. And she just said, "He's a convicted felon."
>
> A. *She was stating that she was in fear that he was going to use the weapons on her*. She had made mention that –

[R-144-149; emphasis supplied]

The first question was narrowly tailored to inquire if the deputy was aware that Mrs. Springer had testified under oath that she had told him that there were loaded weapons in the house. The government had had a duty to make the deputy aware of its agreement with the defense to not introduce any evidence of domestic battery or

threats, and an experienced law enforcement officer witness clearly would understand the significance of the hearsay statement he volunteered - that it was in violation of the pretrial agreement the government had made with the defense, that it was hearsay, and that it was highly prejudicial.

The second exchange - following on the motion for mistrial after the first remarks so that the witness was on even greater notice of the care with which he needed to respond to counsel's questions - was even more inappropriate and unresponsive, because the question was at what point had Mrs. Springer told the deputy that Mr. Springer was a convicted felon and in response to that [counsel's echo of the answer was not a question] the deputy volunteered again that Mrs. Springer "*was in fear that he* [Mr. Springer] *was going to use the weapons on her.*"

Neither response was invited by either question and a witness such as this, a trained law enforcement officer with 14 years experience as a deputy [R-144-107] knew better than to volunteer such statements, and even if he did not know better, he was under an agreement the government had made that bound him not to do so.

Springer's contemporaneous objection and motion for mistrial should have been granted.[5]

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[5] The court's only remedial action was to include a single sentence in the final jury instruction that Springer was only on trial for the charged offense and no

The error was not harmless because this was a close case, as evidenced by the acquittal on one count in the first trial, the hung jury on the remaining count in the first trial, and the split verdict on the weapons in this trial. Springer's wife had been a witness in the first trial, resulting in an acquittal as to one count and a hung jury on the possession of the unregistered short-barreled shotgun and a hung jury on the possession of the remaining weapons. Obviously the impression she made as a witness in the first trial when that the jury was able to observe as to her demeanor and response to cross-examination was such that the government elected to not present her at the second trial.

Deputy Nelson's interjection of this damning hearsay statement from Mrs. Springer allowed the government to gain more benefit from Mrs. Springer than it could have obtained had she testified at the second trial, because (1) it could not have properly elicited this statement even had Mrs. Springer testified at the trial, and (2) had the statement come in by Mrs. Springer as a witness her demeanor and credibility could have been judged by the jury and the statement and her credibility could have been subjected to meaningful cross-examination. As it was, Springer was denied his

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other. This belated instruction did not in any way cure the harm done, and Springer both objected to the instruction as being inadequate and renewed his motion for mistrial in response to the instruction.

Sixth Amendment right of confrontation and the government got its cake and ate it too.[6]

The lower court erred in denying the motion for mistrial, the error is of constitutional proportion, it was timely objected to, the government is unable to show that the error was harmless beyond a reasonable doubt, because, to the contrary, the error denied Springer a fair trial and tipped a close case, which had been tried to mistrial once before when the hearsay declarant had been subjected to cross-examination, therefore Springer is entitled to a new trial.

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[6] Because the error in admitting this testimony was constitutional error, the burden is on the government to show that the error was harmless beyond a reasonable doubt. *United States v. Robles*, 408 F.3d 1324, 1327 (11th Cir. 2005)

CONCLUSION

Appellant Thomas Edward Springer respectfully requests this honorable Court vacate his judgment and sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing have been furnished to Linda Julin McNamara, Esquire, Assistant United States Attorney, Office of the United States Attorney,400 North Tampa Street, Suite 3200, Tampa, Florida 33602, by United States Postal Service, first class mail, postage prepaid, this August 29, 2005.

_____

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 13,120 words.

CERTIFICATE OF TYPE SIZE AND STYLE

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