UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO.: 01-17176-B

UNITED STATES OF AMERICA,

Appellee,

versus

RENE GONZALEZ,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA
(CASE NO.: 98-721-CR-LENARD)

INITIAL BRIEF OF APPELLANT

PHILIP R. HOROWITZ, ESQUIRE
Court Appointed Attorney for the Appellant

CERTIFICATE OF INTERESTED PERSONS

No.: 01-17176-B, United States of America, Plaintiff/Appellee vs. Rene Gonzalez, Certificate required by Eleventh Circuit Local Rule 28-2(b).

The undersigned counsel of record in the trial court for the Appellant, Rene Gonzalez, certifies that as far as counsel is aware, the following list contains all persons who have an interest in the outcome of this case:

Stuart Adelstein, Esquire

Alejandro Alonso

Jack R. Blumenfeld, Esquire

David Buckner, AUSA

Richard Diaz, Esquire

Orlando do Campa, AFPD

Hon. Robert L. Dube, U.S. Magistrate Judge

Alvin Entin, Esquire

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Leonard Weinglass, Esquire

Kathleen Williams, Federal Public Defender

PHILIP R. HOROWITZ, ESQUIRE

STATEMENT REGARDING ORAL ARGUMENT

The Appellant submits that oral argument would be helpful and the decisional process would be significantly aided by its allowance. This request is made pursuant to Fed R. App. P. 34(c) and 11th Cir. R. 28-2(c).

STATEMENT REGARDING PREFERENCE

The instant matter is a criminal case on direct appeal from a final decision of the United States District Court for the Southern District of Florida. For purposes of preference in processing and disposition, this matter is governed by Fed. R. App. P. 45(b).

CERTIFICATE OF COMPLIANCE

The Appellant certifies that 14 point New Roman font is used in this brief and pursuant to Fed. R. App. P. 32 (a)(7)(C) this brief contains 12,160 words.

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PRELIMINARY STATEMENT

The Appellant, RENE GONZALEZ, was the Defendant below and will be so referred to in this brief when his actual name is not used. The United States of America, Plaintiff/Appellee, will be referred to as the "government.@ The symbol "DE" will have reference to the docket entry number. Since the final certificate of readiness has not been prepared by the District Court, the trial transcript will be referred to as (Tr.) as the pages were consecutively numbered. The sentencing hearings for this appellant occurred on December 13 and December 14, 2001. These transcripts will be referred to as (12/13/01 Tr.) and (12/14/01 Tr.) respectively.

STATEMENT OF JURISDICTION

This is a direct criminal appeal of a judgment in a criminal case and the sentence imposed by the United States District Court for the Southern District of Florida after a jury trial. Accordingly, this Court's jurisdiction over this appeal is predicated upon 28 U.S.C. ' 1291. Jurisdiction over the appeal of the sentence imposed pursuant to the United States Sentencing Guidelines is predicated upon 18 U.S.C. ' 3742(a).

STATEMENT OF THE ISSUES

I.

WHETHER THE TRIAL COURT CLEARLY ERRED IN DENYING MOTIONS UNDER BATSON WHERE THE GOVERNMENT VIOLATED THE EQUAL PROTECTION CLAUSE BY USING ITS PEREMPTORY CHALLENGES IN A RACIALLY DISCRIMINATORY MANNER.

II.

WHETHER THE TRIAL COURT ERRED FAILING TO GRANT THE DEFENDANT=S MOTION FOR JUDGMENT OF ACQUITTAL WHERE THE EVIDENCE, WHEN CONSIDERED IN THE LIGHT MOST FAVORABLE TO THE GOVERNMENT FAILED TO PERMIT A REASONABLE JUROR TO CONVICT THE DEFENDANT.

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THEIR EFFECTIVE REPRESENTATION OF THEIR CLIENTS TO THE POINT THAT THE DEFENDANTS WERE DENIED A FAIR TRIAL.

IV.

THE DISTRICT COURT ERRED IN FAILING TO INSTRUCT THE JURY AS TO THE MENS REA ELEMENT OF THE OFFENSE CHARGED UNDER 18 U.S.C. ' 951.

V.

WHETHER THE TRIAL COURT ERRED IN SENTENCING THE DEFENDANT TO CONSECUTIVE SENTENCES FOR HIS TWO COUNTS OF CONVICTION WHERE THERE WAS NO APPLICABLE GUIDELINE TO HIS OFFENSE.

STATEMENT OF THE CASE

On September 12, 1998, the defendant and nine other persons were arrested by agents of the Federal Bureau of Investigation (hereinafter AFBI@) on a criminal complaint alleging that each of them was acting, in various capacities, as agents of the government of Cuba. (DE #11)

The defendant was ordered temporarily detained and an arraignment and detention hearing date were set. (DE #16) The defendant waived his right to a speedy detention hearing and his hearing was reset until September 28, 1998. (DE #39) On that date, after a hearing was held, the defendant was ordered detained pending trial. (DE #79, 80, 82, 130)

The government, which had previously filed an information against two cooperating defendants named in the complaint (DE #71), superseded that information with an indictment that was returned by a federal grand jury in Miami, Florida on October 2, 1998. This defendant was named in counts 1 and 5 of that superseding indictment. On October 5, 1998 the defendant entered a not guilty plea to those charges. (DE #94)

Almost immediately thereafter, the government moved the court for a protective order and sought to invoke the relevant portions of the Classified Information Procedures Act (ACIPA@). (DE #104, 105, 107) On December 21, 1998 the trial

court entered an order setting an *ex parte* hearing in camera to resolve issues under to '4 of CIPA, (DE #158), for February 26, 1999. On or about April 1, 1999` the government began to disseminate classified discovery to the defendants. (DE #203)

On May 7, 1999 the grand jury returned a second superseding indictment in this case. (DE #224) The second superseding indictment charged this defendant with now thirteen others in the Southern District of Florida at Miami, Florida. This defendant and eleven of his codefendants were charged in Count 1 with a multi-object conspiracy in violation of 18 U.S.C. '371which allegedly occurred from 1994 until September 12, 1998. The objects that the defendant and the eleven others were accused of conspiring to violate were: (1) to commit offenses against the United States that is, knowingly and intentionally to act as agents of a Cuba without prior notification to the Attorney General; and (2) to defraud the United States of and concerning its governmental function and rights. In Count 15, the defendant was charged with from at least 1995 until September 12, 1998 with violating 18 U.S.C. '951 and 2 and 28 C.F.R. '73.01 *et seq*. in that it was alleged that he knowingly acted as an agent of the Republic of Cuba knowing that he did not provide prior notification to the Attorney General. (DE #224) On May 20, 1999, the defendant pled not guilty to the charges in the second superseding indictment. (DE #244)

During the course of the pretrial proceedings, numerous motions and

memoranda of law were filed to change the venue for the trial. The general bases for these motions were that the defendants, who were charged as being foreign agents of the Republic of Cuba, would be unable to get a fair trial in Miami based on the large Cuban exile community and the history of violent interaction of that community with the Cuban government[1] together with the unfavorable press coverage that the Republic of Cuba had received in the Miami press. (DE #317, 321, 329, 334) After having oral argument on the issues presented by the motions, the trial court eventually entered an order denying the motions to change venue. (DE #586) This order was entered despite an offer by the defendants to have the trial anywhere else in the Southern District of Florida other than Miami. Specifically, the defendants requested a trial in Ft. Lauderdale, Florida only thirty miles away.

Trial had been set to commence on September 5, 2000, however, the trial court granted a motion for various depositions pursuant to Fed. R. Crim. P. 15 to be taken in Havana, (DE #636), and trial was reset for November 2000. On November 27, 2000, the trial commenced with jury selection. (Tr. at 9)(DE #765) After nearly seven days of jury selection, the jury was selected (Tr. at 1506). The trial then commenced with

[1]In fact, due to the sensitive nature of the motions to change venue all of the motions were filed under seal during the pretrial portion of the case. These motions and exhibits have been unsealed for appellate purposes only **after** the change of venue was denied.

opening statements. (Tr. at 1570)

After more than three months, the government rested its case on March 2, 2001. On March 5, 2001, the court recessed the trial in order to take up motions that were filed and argued orally pursuant to Fed. R. Crim. P. 29. The defendant made his motion under the aforementioned rule for a judgment of acquittal both orally (Tr. at 8124-29) and in writing. (DE #1053). The court reserved ruling as to all of the defendants as to all of the Rule 29 motions. (Tr. at 8160)

After the reservation by the Court of the various motions for judgment of acquittal, the defendants presented their respective cases. (Tr. at 8196) After the defendants all rested, the government proceeded with its rebuttal case and then rested. (Tr. at 13492)

Prior to the submission of the case to the jury, on May 22, 2001, the trial court entered a comprehensive order which denied all pending motions pursuant to Rule 29. (DE #1259)

After more than six months of trial, on June 4, 2001, the jury was instructed (Tr. at 14582) and commenced deliberations. (Tr. at 14620) After almost five days of deliberations, on June 8, 2001, the jury convicted this defendant of both Counts 1 and 15 of the second superseding indictment. (DE #1291)(Tr. at 14664-5)

On August 1, 2001, the defendant filed a post verdict motion for judgment of

acquittal pursuant to Fed. R. Crim. P. 29(c), (DE #1341), and a motion for a new trial. (DE #1342) The government filed an omnibus response to those motions. (DE #1363) Due to a delay in the preparation of the presentence reports, the sentencings were reset to commence the week of December 10, 2001. (DE #1370) Prior to sentencing, the district court entered an order denying all post trial motions as to all defendants. (DE #1391, 1392)

The defendant filed extensive objections to the presentence investigation report (hereinafter APSI@) prior to sentencing. (DE #1408) However, according to the PSI at &65-67, there was no applicable guideline range for either the convictions as to Counts 1 or 15. These objections were designed to instruct the trial court that while the probation office was of the position that there were no applicable guidelines, it did not mean that this was a non-guideline sentencing.

In addition it was the position that the second prong of the overall conspiracy offense that the defendant was convicted of did indeed have an applicable guideline range under the sentencing guidelines provide in '2C1.7. The defendant=s position was that an applicable guideline for a conviction for conspiracy to defraud by interference with governmental functions. Under '2C1.7(a) the base offense level would be 10 and A(i)f the offense involved an elected official or any official holding a high-level decision making or sensitive position, increase by 8 levels.@ See

'2C1.7(b)(1)(B).

The defendant further argued that since the guidelines were to be utilized, they did not authorize the court, under the facts and circumstances of the case, to impose consecutive versus concurrent sentences in determining the total sentence to be imposed. In addition, with no applicable guidelines ultimately found by the court, the court did not sustain any of the other objections which were presented at sentencing as mitigating factors.

Sentencing was held for this defendant on December 13 and 14, 2001. (DE #1452) After hearing the individualized objections and permitting the defendant to allocute, the court sentenced the defendant to the statutory maximum on both Counts 1 and 15 and imposed those sentences to run consecutively. Therefore, the court imposed a sentence of five years as to Count 1 and ten years as to Count 15 for a total sentence of fifteen (15) years. (DE #1437) On December 20, 2001, the defendant timely filed his notice of appeal. (DE #1440)

The Defendant/Appellant RENE GONZALEZ is presently incarcerated at and designated to the Federal Correctional Institution at Edgefield, South Carolina.

STATEMENT OF THE FACTS

One country=s patriot is another country=s spy. In 1992, the FBI created a

division known by the acronym of CART or the Computer Analysis Response Team. This division focused on the obtaining of computer evidence without leaving a trace during a search. (Tr. at 1730, 1731) Beginning on the night of August 5, 1996 pursuant to a FISA warrant, agents surreptitiously began to enter various apartments in South Florida (Tr. at 1735-6, 1750) The duty that night of Special Agent Vicente Rosado and other members of his CART team was to enter the apartment and copy of all of the computer evidence located there without physically removing a single item. (Tr. at 1744)

From opening an executable program contained within the disk operating system (DOS) (Tr. at 1770) no text would appear other than a command to insert a disk rather than produce the text of a document. Once one of the diskettes that was seized during these surreptitious searches by CART were inserted, documents would appear. (Tr. at 1773)

During a review of the documents, agents of the Federal Bureau of Investigation (FBI) were able to establish that references to ACastor@ or AIselin@ were meant to be Rene Gonzalez. (Tr. at 4435) According to a review of the documents that were retrieved from the diskettes, ACastor@ or AIselin@ was involved in reporting on the so-called Cuban exile groups known at Brothers to the Rescue and The Democracy Movement a/k/a ADemocracia@ among many others. However, the last

active participation that the defendant had with Brothers to the Rescue was in 1994, some two years prior to the events of February 24, 1996. (Tr. at 4925)

During 1995 the defendant was affiliated with the so-called exile group of The Democracy Movement a/k/a ADemocracia.@ (Tr. 2929, 4925) These groups were committed to antagonizing the Cuban government by incursions into Cuban territorial waters and disobeying the United States Coast Guard. (Tr. at 4930) This group=s aim was to defy the United States government and continue to challenge Cuban sovereignty. (Tr. 4931-2) Against this backdrop, the defendant prepared reports on these non-governmental organizations in this country dedicated to their own foreign policy.

One of the other groups that the defendant focused upon was Pardido Unidad Nacional Democatica or PUND among many other groups. The main purpose of these so-called exile groups were to Apersist in their desire to execute violent and provoking actions against Cuba@ (Tr. at 4935) They would, as of 1995, continue to plot, sabotage against tourist sites, power plants and the sugar industry in Cuba. They attempted to foster civil disobedience. In the broad scope of their plans, they contemplated the landing of armed commandos, to attack economic and military objectives and conciliate a supposed popular rebellion in Cuba, establish guerilla focal points in the mountain area of Cuba, carry out nautical attacks against coastal objectives and

execute terrorist actions with high social repercussions in Cuba. (Tr. at 4935-6)

It was felt that in order to materialize some of these plans these so-called exile groups cried to create secret cells and introduce weapons and explosives into Cuba and strengthen the internal counterrevolutionary organizations. (Tr. at 4936)(GX-DG 108)

It was felt that regardless of the fact that the majority of these investigations were penetrated by the Federal Bureau of Investigation, a notable increase in the so-called exile groups= plans and actions were detected in the mid 1990s. Just the same, although several terrorists were detained in Cuba in the last period while they were presumably willing to act against Cuba, the sanctions applied by the U.S. authorities, instead of deterring them, encouraged them to undertake new plans, other aspects that motivate action against Cuba. (Tr. at 4937) PUND in particular subscribed to these theories. (Tr. at 4941-2)

The reports went on to list a group of terrorist organizations in the Miami area that, according to the government of Cuba, were perceived to be operating openly in the United States. (Tr. at 4449-52) The object of Rene Gonzalez=s attention was reporting on the activities of the non-governmental organizations. These reports specifically were to determine the contents of a plan of great proportions planned by PUND against Cuba. In addition, he was to determine whether the leaders of Brothers

to the Rescue and The Democracy Movement a/k/a ADemocracia@ were preparing actions and campaigns to be developed against Cuba. (Tr. at 4962) The next thing that he was to do was the detection of terrorist actions against economic objectives in Cuba. He was to discover the means that they will employ for such actions, emphasizing the high-powered equipment to be used, the place from where they will be positioned, type of equipment, frequency to be used, naval or aerial vessels that were being prepared with these objectives. (Tr. at 4962-3) Finally, he was to detect plans and indications of attempts against Fidel Castro and other leaders of Cuba, as well as to Cuban delegations attending international events. (Tr. at 4963-4)

In early 1996 Rene Gonzalez, in connection with his aforementioned activities with PUND, he came into contact with Hector Viamonte, a director of that organization. According to the trial testimony of Special Agent Alex Barbeito, a drug squad agent of the FBI, Rene Gonzalez met with the agent from late January (Tr. at 7029) through approximately June 1996 regarding Hector Viamonte as a result of Rene Gonzalez being approached regarding a narcotic importation. Based on the information provided by Rene Gonzalez, Barbeito administratively opened Rene Gonzalez as a paid informant of the FBI. (Tr. at 7031) The use of Rene Gonzalez as a prospective paid drug informant was approved by Special Agent Barbeito=s immediate supervisor, the Associate Special Agent in Charge of the FBI=s Miami

office and Assistant United States Attorney Lloyd King. (Tr. at 7050, 7052-3) The United States Attorney's Office for the Southern District of Florida specifically approved Rene Gonzalez being a paid informant. (Tr. at 7054)

As admitted in this defense case, defense exhibits RG-7, 18, and 19(a) completed the Hector Viamonte picture. In the government=s case-in-chief the jury was left with an incomplete picture that this Viamonte person was just made up by the defendant as a type of ruse to infiltrate the FBI.

Exhibit RG-7 showed that shortly after the conclusion of the defendant=s attempts to cooperate with Special Agent Barbeito, Viamonte was arrested by a joint investigation of the FBI and the United States Customs Service for exactly the same thing that brought Rene Gonzalez to law enforcement, to wit, cocaine trafficking.

In a similar vein, defense exhibits RG-18 and RG19-(a) the indictment and sentence of Hector Viamonte conclusively proved that the Viamonte was in fact a subsequently convicted cocaine trafficker.

However, though Special Agent Barbeito was interested in these drug trafficking activities, his investigation was not going anywhere. Due to Rene Gonzalez=s activities with PUND, Special Agent Barbeito sought to introduce Rene Gonzalez to a fellow FBI agent who specialized in handling anti-Castro organizations. (Tr. at 4972) Though Rene Gonzalez told FBI Special Agent Alonso he had nothing to

contribute, the FBI agent continued to be the initiator of the contacts. (Tr. at 4977) While Rene Gonzalez never sought to infiltrate the FBI, he did seek to keep an open line of communication in case of an emergency. (Tr. at 4980)

On September 12, 1998, a search was executed pursuant to a court ordered search warrant at 8000 S.W. 149th Avenue, Apartment #409 in the Kendall area of Miami. (Tr. at 1912) At the residence a computer hard drive was seized (Tr. at 1919) and a request for a copy of his own birth certificate (Tr. at 1926) Included within these documents was a copy of the INS application form for the admission of the defendant=s wife into the United States together with the supporting documents for that application. (GX SC-10)(Tr. at 1949-50) There was no evidence within the application or from the actual filing of that application that the defendant sought any congressional assistance in the processing of that application.

STANDARD OF REVIEW

A district court=s findings regarding whether a peremptory strike was exercised for a discriminatory reason largely involve credibility determinations and are entitled to great deference. Therefore, this Court reviews the district court=s findings in this respect only for clear error. United States vs. Novaton, 271 F.3d 968, 1001 (11th Cir. 2001); United States vs. Tokars, 95 F.3d 1520, 1530 (11th Cir. 1996).

The interpretation and constitutional validity of a statutory provision are reviewed de novo as questions of law. United States vs. Tinoco, 304 F.3d 1088, 1099, 1114 (11th Cir. 2002); United States v. Gray, 260 F.3d 1267, 1271 (11th Cir. 2001).

"The question of whether the trial court instructed the jury as to all of the elements of the offense is an issue of law over which this court has plenary power of review." United States v. Kotvas, 941 F.2d 1141, 1143-44 (11th Cir. 1991)

SUMMARY OF THE ARGUMENT

The trial court erred in denying the defendants= motion under Batson where the government failed to properly give a racially neutral reason for their systematic striking of African American jurors. During the jury selection process, the defendant was able to show to the trial court purposeful racial discrimination on the part of the prosecution. After making this preliminary showing, the government=s Arace neutral explanations@ were insufficient to mask its true motives. During the selection of both the trial panel and the alternates, the government used seven of their peremptory strikes on black jurors. In exercising those strikes, the defense moved on five separate occasions challenging those strikes under Batson and which were denied incorrectly by the trial court on each occasion.

The evidence was insufficient to convict the defendants as to Counts 1 and 15 of the second superseding indictment. As to Count 1 the government failed to prove either prong of the multi-object conspiracy as alleged in 18 U.S.C. ' 371 in that there was insufficient proof that the defendant either conspired to disrupt a governmental function or conspired not to register as an agent of a foreign power. Finally, there was insufficient evidence to show that the defendant intentionally did not register as a foreign agent as required by 18 U.S.C. ' 951 and 28 C.F.R. ' 73.01, et seq.

The district court erred in failing to instruct the jury as to the mens rea element of the offenses charged in the conspiracy and substantive charges under 18 U.S.C. ' 951 and 28 C.F.R. ' 73.01, et seq. No published opinion of any court has previously addressed the nature of the mens rea element of the statutory-regulatory provisions of this offense B defining activity that places persons within the category of foreign agency, requiring registration, and setting up a series of exceptions. For several reasons, the offense should have been interpreted to require knowledge on the part of the defendant that his constitutionally-protected actions are such as to require registration. First, as this Court has long recognized, mens rea is ordinarily an element of any serious offense. Second, this Court has consistently applied that mens rea standard to foreign and other regulatory offenses such as the relevant statute and regulation, because the detailed and particular requirements are ordinarily beyond the appreciation of innocent persons. Third, the doctrines of constitutional doubt and the rule of lenity suggest that the mens rea element exists here. The statute at issue B which touches on speech and related activity protected under the First Amendment as well as imposing a self-condemning regulatory requirement reaching Fifth Amendment concern regarding the privilege against self-incrimination B should be construed to require the existence of a guilty mind in order to sustain a conviction. Overruling defense objections, the district court omitted such an instruction in this

case. Hence, the Court should remand the case for a new trial.

The trial court abused its discretion in not granting a mistrial after a witness accused defense counsel of acting as an agent himself for the Cuban Government. During the trial, the defense called Jose Basulto as a witness. Basulto was the lone surviving pilot of the incidents that took place on February 24, 1996 that led to the murder conspiracy charges in Count 3. These inflammatory and unsolicited comments by the witness accusing defense counsel of being spies in front of the jury in the ethnically charged atmosphere that pervaded the trial further made a fair trial impossible and the trial court should have declared a mistrial.

The trial court further erred in sentencing the defendant to consecutive sentences for these convictions on the two counts in this case. Though the court found that there were no applicable guidelines, the defendant still should have been sentenced according to the guidelines regarding when the sentencing court could and could not impose consecutive sentences as to the counts of conviction. In the instant case, the trial court did not find any circumstances and conduct on the part of the defendant that justified an upward departure. Under ' 5G1.2 this sentencing court was mandated to run the sentences for the two counts concurrently.

ARGUMENT

I.

WHETHER THE TRIAL COURT CLEARLY ERRED IN DENYING MOTIONS UNDER BATSON WHERE THE GOVERNMENT VIOLATED THE EQUAL PROTECTION CLAUSE BY USING ITS PEREMPTORY CHALLENGES IN A RACIALLY DISCRIMINATORY MANNER.

After almost seven days of questioning of potential jurors in this case, the parties began to select the jury to try this case. (Tr. at 1492) During the course of the jury selection, counsel for the defendants moved under Batson vs. Kentucky, 476 U.S. 79 (1986), to force the government to give a racially neutral reason for their systematic pattern of striking black jurors. (Tr. 1496-7) At the time that the challenge was made, the government had used four of their six peremptory challenges on black jurors. All together, during the jury selection process the issue of the racially motivated striking of black prospective jurors pursuant to Batson was raised not just once but ***on five separate occasions*** during the selection process. (Tr. 1498, 1500, 1501-2, 1506, 1511)

By forcing the government to give a racially neutral reason for exercising each one of these five strikes, the trial court believed that a *prima facie* case was established. However, the reasons proffered by the government leave much to be desired. From being unhappy with jurors for having their hands folded (Tr. at 1506)

to being a normally prosecution-desired corrections officer (Tr. at 1500), to a simple laugh (Tr. at 1511) but for the skin color, all should have remained on the jury. However, the trial court, despite five separate individual challenges during the course of the jury selection found each of the excuses proffered by the government to be racially neutral. (Tr. at 1499-1500, 1501, 1503, 1508, 1512)

A district court=s findings regarding whether a peremptory strike was exercised for a discriminatory reason largely involve credibility determinations and are entitled to great deference. Therefore, this Court reviews the district court=s findings in this respect only for clear error. United States vs. Novaton, 271 F.3d 968, 1001 (11th Cir. 2001); United States vs. Tokars, 95 F.3d 1520, 1530 (11th Cir. 1996)

In Batson vs. Kentucky, 476 U.S. 79 (1986), the United States Supreme Court recognized that a prosecutor violates a defendant=s equal protection rights where he or she uses peremptory challenges in a racially discriminatory manner in order to strike from the petit jury members of the defendant=s race. In Powers vs. Ohio, 499 U.S. 400 (1991), the Supreme Court held that a defendant of any race can raise an equal protection challenge to the prosecutor=s discriminatory use of peremptory challenges, thereby eliminating the need for a criminal defendant raising such an equal protection challenge to show commonality of race with the excluded juror.

As the Court noted in Powers, Athe discriminatory use of peremptory challenges by the prosecution causes a criminal defendant cognizable injury . . . not because the individualized jurors dismissed . . . may have been predisposed to favor the defendant(, but) because racial discrimination casts doubt on the integrity of the judicial process and places the fairness of a criminal proceeding in doubt. 499 U.S. 400, 411 (1991)

Thus, in order to promote enforcement of the equal protection rights of a defendants and jurors alike, the Powers court created standing in any criminal defendant to challenge a prosecutor=s racially discriminatory use of peremptory strikes, whether or not the defendant and the excluded jurors are of the same race. Eagle vs. Linahan, 279 F.3d 926, 941 (11th Cir. 2001); Farrell vs. Davis, 3 F.3d 370, 372 (11th Cir. 1993)

Courts then evaluate Batson objections under the following three-step procedure:

(1) the objector must make a *prima facie* showing that the peremptory challenge is exercised on the basis of race;

(2) the burden then shifts to the challenger to articulate a race neutral explanation for striking the juror in question; and

(3) the trial court must determine whether the objector has carried its burden of

proving purposeful discrimination.

United States vs. Brown, 299 F.3d 1252, 1255 (11th Cir. 2002); Bui vs. Haley, 321 F.3d 1304 (11th Cir. 2003); United States vs. Allen-Brown, 243 F.3d 1293, 1297 (11th Cir. 2001).

The establishment of a *prima facie* case is an absolute precondition to further inquiry into the motivation behind the challenged strike. Central Alabama Fair Housing Center, Inc. vs. Lowder Realty Co., 236 F.3d 629, 636 (11th Cir. 2000) In determining whether a *prima facie* case of discrimination has been established, the trial court should consider all relevant circumstances including but not limited to whether there is a pattern of strikes against jurors of a certain race. Batson, 476 U.S. at 96-97.

While the mere striking of a juror or a set of jurors of a particular race may not create the inference of racial discrimination, Athe number of persons struck takes on meaning only when coupled with other information such as the racial composition of the venire, the race of the other struck, or the voir dire answers of those who were struck compared to the answers of those who were not struck. The existence of a substantial disparity between the percentage of jurors of one race struck and the percentage of their representation on the jury may create such an inference of discrimination whereas the unchallenged presence of jurors of a particular race on a

jury substantially weakens the basis for a *prima facie* case of discrimination in the peremptory striking of jurors of that race. Novaton, 271 F.3d at 1002.

Once the *prima facie* case of discrimination is established, then the prosecution must offer a race-neutral explanation for its strikes. After a race-neutral explanation is offered, a court must then determine whether an equal protection violation has occurred. It is during the third step of the Batson framework that the persuasiveness of the justification proffered by the prosecutor becomes relevant B the step in which the trial court determines whether the opponent of the strike has carried the burden of proving purposeful discrimination. Purkett vs. Elem, 514 U.S. 765, 768 (1995); Novaton, 271 F.3d at 1002-1003.

While the defense contention is that all five of the strikes by the government were racially motivated, the fact that some or all of the strikes may have been racially motivated is not controlling. Indeed, even if there are black jurors seated in this case (which there were) this is not relevant for this court=s consideration. As this court noted in United States vs. David, 803 F.2d 1567, 1571 (11th Cir. 1986) Athe striking of one black juror for a racial reason violates the Equal Protection Clause, even where other black jurors are seated, and when valid reasons for the striking of some black jurors are shown.@ Therefore, the mere presence of blacks on the jury does not preclude a finding of racial discrimination. Eagle vs. Linahan, 279 F.3d at 942 (11th

Cir. 2001); see also Cochran vs. Herring, 43 F.3d 1404, 1412 (11th Cir. 1995)(citing United States vs. Allison, 908 F.2d 1531, 1537 (11th Cir. 1990)).

Therefore, as this Court stated in Eagle vs. Linahan, 279 F.3d at 943 (11th Cir. 2001), both criminal defendants and the excluded jurors alike are denied equal protection of the laws when the trial jury is constructed in a racially discriminatory manner. Clearly five challenges under Batson established the violation of the Equal Protection Clause and the remedy for such a violation is the reversal of the defendant=s conviction and the ordering of a new trial.

II.

WHETHER THE TRIAL COURT ERRED FAILING TO GRANT THE DEFENDANT=S MOTION FOR JUDGMENT OF ACQUITTAL WHERE THE EVIDENCE, WHEN CONSIDERED IN THE LIGHT MOST FAVORABLE TO THE GOVERNMENT, FAILED TO PERMIT A REASONABLE JUROR TO CONVICT THE DEFENDANT.

Whether the record contains sufficient evidence to support the jury's verdict, the evidence is viewed in the light most favorable to the government, with all reasonable inferences and credibility choices made in the government's favor. Glasser vs. United States, 315 U.S. 60, 80, 62 S.Ct. 457, 469 (1942), United States vs. Waymer, 55 F.3d 564, 570 (11th Cir. 1995), United States vs. Harris, 20 F.3d 445, 452 (11th Cir. 1994).

The verdict must stand if there is substantial evidence to support it, that is "unless no trier of fact could have found guilt beyond a reasonable doubt." United

States vs. Battle, 892 F.2d 992, 998 (11th Cir. 1990).

If, however, the record reveals a lack of substantial evidence from which a fact finder could find guilt beyond a reasonable doubt, the Defendant's conviction must be reversed. United States vs. Kelly, 888 F.2d 732, 740 (11th Cir. 1990).

It is not necessary that the evidence exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt . . . (as a) jury is free to choose among reasonable constructions of the evidence. United States vs. Bell, 678 F.2d 547, 549 (5th Cir. Unit B 1982)(en banc) aff'd on other grounds 462 U.S. 356, 103 S.Ct. 2398 (11th Cir. 1990).

A conviction should be reversed on the grounds of insufficient evidence only if no reasonable jury could find proof beyond a reasonable doubt. United States vs. Thomas, 8 F.3d 1552, 1556 (11th Cir. 1993), United States vs. Ramsdale, 61 F.3d 825, 828 (11th Cir. 1995).

When all reasonable inferences are drawn, the government's case should have failed under the aforementioned standard.

Count I

There are two types of conspiracies alleged under 18 U.S.C. ' 371: conspiracies to commit an offense against the United States and conspiracies to defraud the United States or any agency thereof.

If the government proceeded under the Adefraud@ clause, the United States must be the target of the conspiracy. Tanner vs. United States, 483 U.S. 107 (1987); United States vs. Harmas, 974 F.2d 1262 (11th Cir. 1992). To Adefraud@ the government within the meaning of '371 means, among other things to interfere with or obstruct one of its lawful government functions by deceit, craft, or trickery, or at least by means that are dishonest. United States vs. Elkins, 885 F.2d 775 (11th Cir. 1989).

In order to sustain a conviction under 18 U.S.C. '371 the Government must prove the following beyond a reasonable doubt that: (1) the existence of an agreement to achieve an unlawful objective; (2) the defendant=s knowing and voluntary participation in the conspiracy; and (3) the commission of an overt act in furtherance of the conspiracy. United States vs. Brenson, 104 F.3d 1267 (11th Cir. 1997); United States vs. Suba, 132 F.3d 662 (11th Cir. 1998)

Though not controlling, presence and association are material and probative factors that a jury may consider in reaching its verdict. A jury may infer knowledgeable voluntary participation from presence, when the presence is such that it would be unreasonable for anyone other than a knowledgeable participant to be present. United States vs. Lluesma, 45 F.3d 408 (11th Cir. 1995).

In Lluesma, the evidence was *insufficient* to prove that one defendant had any

knowledge of the illegal conduct that he was participating. The conspiracy involved the export of stolen property. Though the defendant helped to prepare certain vehicles to be exported, there was no proof that he was aware that the vehicles were stolen.

A careful reading of Count 1 shows that the Government has alleged that these Defendants stand accused of conspiring to violate two separate and distinct crimes.

The first is conspiring to act as agents of Cuba while also conspiring not to give prior notification to the Attorney General. The second is to defraud the United States of its governmental function and right. The jury=s special interrogatory verdict, (DE #1291), found the defendant guilty as to both objects. The overt act portion of the second superseding indictment contains a sum total of 31 overt acts in relation to the two conspiratorial violations. (See DE#224 at overt acts 7-11) Within those overt acts, there is no delineation as to which apply to each multiple object.

In addressing the first of the two conspiratorial objects, while the trial of this matter contained numerous instances of the acting emissaries of the Government of Cuba, sent as a form of their national defense against the onslaught of terrorist activities emanating from Miami, the record is totally silent as to whether or not they sought to evade or conspired to evade the reporting requirement of 18 U.S.C. '951 as outlined within 28 C.F.R. 73.01 *et seq.*

There is no evidence that the defendant knowingly and intentionally avoided the

reporting requirements as required. The precious little testimony in this regard was during a portion of the cross examination of the government=s lone cooperating defendant who testified in this case. During the cross examination of Joseph Santos, who had pled guilty to Count 1, he was questioned on this point. The initial questioning by defense counsel (Tr. at 3523) dealt with issues regarding what Santos had pled guilt to. Santos= response, at line 16-17, was Aconspiracy to act as a foreign agent.@ As the examination continued, questions regarding Santos= knowledge of the reporting requirements that go hand in hand with the aforementioned sections were sustained. (Tr. at 3523-3525)

However, the questioning then turned to the witness= training. Santos admitted once again that he received his Aspy@ training in Cuba he had received no training in AAmerican criminal law.@ (Tr. at 3526) It can therefore be inferred that within his training he was never instructed as to the reporting requirements. Therefore, the Government has not produced any evidence regarding the knowing and intentional violation of the full requirements of that statute.

As stated within the instructions that were given to the jury: AThe word "knowingly," as that term has been used in the indictment or in these instructions, means that the act was done voluntarily and intentionally and not because of mistake or accident.@ The evidence was silent in this regard. See United States vs. Butenko,

384 F.2d 554 (3rd Cir. 1967)

The second portion of Count 1 is the defrauding of the United States of and concerning its governmental function and rights. Pertaining to RENE GONZALEZ there are three overt acts that can arguably seek to enter into the Agovernmental function,@ to wit, overt acts 12, 15, and 20. In order provide this Court some sense of orderly progression to the indictment and the evidence at trial as to each of these three overt acts will be addressed separately.

#12: The government in this paragraph alleges A(t)hat sometime after on or about July 3, 1996 Castor provided Giro a report incorporating the text of a letter Castor had caused a United States Congressional Representative to write seeking the humanitarian admission of the wife of Castor into the United States from Cuba.@ (DE #224)

The saga that is contained in the three of decrypted volumes materials that were seized, when viewed in the light most favorable to the government, did not contain sufficient reference to this Defendant and the efforts to bring his wife to the United States such that those efforts were tantamount to the interference with any government function.

What was glossed over, both in the indictment and the evidence is Government Exhibit SC-10. This exhibit appears to be a file that the Defendant kept in his

residence that was discovered during the execution of a search warrant on September 12, 1998. This exhibit contained documents primarily from 1994 where the defendant sought to acquire permission from the INS to bring his wife to the United States. One of the items recovered from within that file was a 1994 letter authorizing the entry of the defendant=s wife, Olga, into the United States. While she was authorized entry into the United States, the evidence showed that she did not come here until December 1996.

According to the testimony of Special Agent Richard Gianotti, Government Exhibit DG-107 lists the letter that the Acongressional representative@ purportedly wrote. It is important to note that there was no evidence in their case in chief that the letter was actually written, no testimony from the Acongressional representative@ or their staff, nor the actual letter itself, or any actions taken by the United States Interests Section in Havana based on the alleged letter.

According to page 31 of GX DG-107 the defendant appeared to have filled out a standard form regarding some basic information. It appears that though the defendant purportedly went to this office in June 1996 the report was written, per Special Agent Gianotti, at some point in October 1996. (Tr. at 4626, 4947) It is important to note that at no point did the defendant ever get past was appeared to be a secretary at a local congressional office. He never actually met the Acongressional

representative.@ He received no special treatment as evidenced by the report showing that he went in June and the letter was not sent to the interests section until July. Finally, the report is unclear as to whether the letter was brought to the attention of the Acongressional representative@ for a signature. The three-volume set of reports and the trial testimony remain silent as to what, if any, action was contemplated by the United States Interests Section in Havana or whether or not any action was taken.

During the defense case, Defendant=s Exhibit RG-12 was admitted. This exhibit was a May 24, 1994 letter from Rene Gonzalez to his wife who was then back in Cuba. In that letter it came to light that two years ***prior*** to the alleged letter being written, this defendant=s wife had already been approved for admission into the United States. Therefore, any intervention on the part of this July 3, 1996 text was irrelevant and certainly did not disrupt any government function wahtsoever.

#15: The government in this paragraph alleges that (i)n or about autumn of 1996 Castor met with the FBI in the guise of a Acooperating individual.@ This allegation is at best in conflict with the trial testimony. According to the trial testimony of Special Agent Alex Barbeito, the defendant met with him from January through approximately June 1996 regarding Hector Viamonte as a result of being approached regarding a narcotic importation. (Tr. at 4970)

In autumn 1996, according to Barbeito=s testimony, the defendant was turned

over (not at the request of the defendant) as a potential cooperating witness on the so called Cuban exile community to the NSA squad member FBI Special Agent Alex Alonso. (Tr. at 4972-4) During the government=s case in chief the only evidence of Aautumn 1996" meetings with the defendant and the FBI came in the three volume set of decrypted material that was seized from the residence of Gerardo Hernandez.

In DG-106 at pages 21-22 the Defendant explained how he was Arecruited@ by the FBI. According to the trial testimony of Special Agent Gianotti, DG-106 is dated at approximately December 1996 (Tr. at 4456, 4976) and itemizes the first meeting between the defendant and Special Agent Alonso.

Page 21 of DG-106 showed that it was the FBI and **not** the defendant who initiated the contact. (Tr. at 4976) It specifically was the FBI that wanted the defendant to be their mole within the various exile organizations. The defendant never sought out the FBI for this purpose. It was the FBI that specifically sought out the defendant. (Tr. at 4977) In the top third of page 22 of the same report, the defendant explains his state of mind regarding the contact and how it does not evidence any conspiracy to defraud any type of governmental function. He explains that he is not looking to lead Special Agent Alonso astray and he is not seeking to infiltrate the FBI. (Tr. at 4981)

What the reports suggests, that at the persistent efforts of the FBI to use the

defendant as an informant, it was the goal of the defendant not to contact the FBI but merely to leave a line of communication open in case of an emergency. Preserving the sovereignty of both Cuba and the United States by keeping the terrorist groups from invading the island of Cuba was the goal in that enforcement in the United States was scant. Keeping the line of communication open was paramount in case of another problem. The establishment of a safety valve based on an unsolicited approach is not sufficient to disrupt a government function.

#20: Finally, in this paragraph the government alleges that A(o)n or about March 27, 1997 Castor reported that he had been flying close to Homestead Air Base with the aim of observing any strange movement, as Giro had directed.@ This allegation, from what can be ascertained, comes from government=s exhibit DG-109 at page 14. Within this note that was discovered at the residence of Gerardo Hernandez, there is a small reference to a flight that the defendant had in proximity of that base. There are no specific references to any specific types of military armament or hardware. There are no descriptions of types of jets or transport planes not what a strange movement contemplated. (Tr. at 4920-22)

Within the nearly 1,500 pages of the three volume set, these are the only two to three paragraph references to this Defendant and the military. This defendant was ***not*** criminally charged with any espionage activities. These musings at page 14 of DG-

109 standing alone do not seek to defraud the United States or interfere with any type of government function.

Count 15

This Count charged the Defendant with a substantive violation of 18 U.S.C. '951 or the Foreign Services Registration Act. While the proof at trial, in the light most favorable to the government, showed that the defendant did not register, the record is devoid of any evidence that the defendant affirmatively knew that his status was such that registration was required as promulgated by the Attorney General.

III.

WHETHER THE TRIAL COURT ERRED IN NOT GRANTING A MISTRIAL BASED ON THE IMPROPER AND UNSOLICITED COMMENTS BY A HOSTILE WITNESS, WHICH CAST ASPERSIONS ON THE ROLE OF DEFENSE COUNSEL AND THEIR EFFECTIVE REPRESENTATION OF THEIR CLIENTS TO THE POINT THAT THE DEFENDANTS WERE DENIED A FAIR TRIAL.

During the defense case and specifically on March 13, 2001 the following exchange took place between the hostile defense witness Jose Basulto and co-counsel:

Q: Did you go to Mexico in 1995 and meet with a group called Partido Accion National, PAN?

A: **Are you doing the work of the intelligence government**

of Cuba; because I was not there who met with those people.

MR. McKENNA: I move that remark be stricken from the record and that you instruct the witness and you instruct the jury.

THE COURT: The motion to strike is granted. The jury is instructed to disregard the last comment by the witness. Larry, take the jurors out for a few minutes.

(Tr. at 8945) (emphasis added).

The court then admonished Mr. Basulto outside the presence of the jury regarding his inappropriate remark. (Tr. at 8945-6) The remarks by Mr. Basulto were clearly designed to accuse counsel for the lead defendant of being either a spy, a representative of the Cuban Government, a communist, or in the employ of the Cuban intelligence service. This implication from the trial=s most important witness was designed to extract the emotion from the jury most sympathetic to his cause and position irrespective of all counsel=s obligation to vigorously defend their respective clients. The comments were so outrageous that the defendants were denied their right to a fair trial.

Following a recess, a joint motion for mistrial and renewed motion for change of venue were made. (Tr. at 8947-9) These motions were denied by the Court and an

instruction was given to the jury that went as follows:

> ALadies and gentlemen of the jury, Mr. McKenna=s job is to provide a vigorous defense for his client. Mr. Basulto=s statement regarding Mr. McKenna was inappropriate and unfounded . . . @

(Tr. at 8955).

The decision to grant a mistrial lies within the sound discretion of the trial court because the judge is in the best position to evaluate the prejudicial effect of the improper testimony. See United States vs. Mendez, 117 F.3d 480 (11th Cir. 1997)

However, the inflammatory and highly prejudicial remarks were so far out of line and designed to inflame the passions of the jury and the community such that the defendants were denied a fair trial.

While the court took great pains to explain the basic tenets of American jurisprudence to Mr. Basulto in its admonition to him, the instruction to the jury did not cure the effects of his inappropriate comments. The motions for mistrial and renewed motions for change of venue that were contemporaneously made with the outburst, highlighted for the court that the witness= insinuations amounted to pure Ared baiting@ that the motions were designed to prevent. As result, this Court should have granted the mistrial as requested.

IV.

THE DISTRICT COURT ERRED IN FAILING TO INSTRUCT THE JURY AS TO THE MENS REA ELEMENT OF THE OFFENSE CHARGED UNDER 18 U.S.C. '951.

During the charge conference regarding the jury instructions to be utilized in this case, the defendants requested that the district court instruct the jury with respect to the 18 U.S.C. '951 and 28 C.F.R. '73.01 et seq. allegations in counts 1, 13-17[2], 19 and 22-26 that a defendant=s failure to register as a foreign agent under the regulatory definitions cross-referenced in that statute were not a violation of the statute absent the defendant=s knowledge that he was a foreign agent for whom registration was required. The requested instruction provided, inter alia:

> In order to convict any of the defendants on charges that he acted unlawfully as an unregistered foreign agent, the government must prove beyond a reasonable doubt that the defendant knew that he was required by law to register as a foreign agent, and that he knowingly failed to comply with that requirement.

DE #1197:5 (citing United States vs. Peace Information Center, 97 F.Supp. 255 (D.C. 1951); United States vs. Adames, 878 F.2d 1374 (11th Cir. 1989)). The district court denied the instruction and determined, over defense objection, that neither specific intent nor knowledge of the required registration status were elements of a '951

[2] This defendant was charged in Count 15 with a substantive violation of 18 U.S.C. '951.

violation.

This Court has held that in order to prove a criminal violation of regulations concerning trading with other counties, the government must establish beyond a reasonable doubt that the regulations were Aactually known@ and Aintentionally violated@ by the defendant. United States vs. Frade, 709 F.2d 1387, 1392 (11th Cir. 1987). In United States vs. Adames, 878 F.2d 1374 (11th Cir. 1989), this Court held that although the defendant=s actions involved the export of firearms B a well known highly-regulated area B the conviction for failing to comply with export regulations still could not be sustained absent evidence of the defendant=s knowledge of the regulatory obligation. The district court=s decision contravenes an unbroken line of authority holding that more than a general awareness of unlawful activity is required to support a criminal conviction for intentional violation of a regulatory provision. See Adames, 878 F.2d st 1377; Frade, 709 F.2d at 1392; United States vs. Warren, 612 F.2d 887 (5th Cir. 1980) (en banc), cert. denied, 446 U.S. 956 (1980), and United States vs. Hernandez, 662 F.2d 289 (5th Cir. 1981).

The question whether the quasi-regulatory notification and agency statute at issue here B 18 U.S.C. '951 B applies to unintentional violations has never been addressed in any published decision. But the language used in cases dealing with similar concepts indicates that particularly where First and Fifth Amendment rights

may be affected by the imposition of such a regulatory obligation, some element of knowledge of the obligation must be recognized. The statutory penalty for the '951 offense is imprisonment for up to ten years (the sentence which was imposed as to Mr. Gonzalez on count 15), making it a very serious felony offense. Congress will ordinarily not be presumed to create strict liability offenses carrying such stiff penalties absent some non-frivolous mens rea element. AHornbook law defines a crime as actus reus plus mens rea, subject of course to a long list of exceptions. The United States Supreme Court has made it clear that guilty knowledge and criminal intent are fundamental elements of any serious crime unless Congress indicates otherwise.@ United States vs. Zayas-Morales, 685 F.2d 1272, 1276 (11th Cir. 1982)(citing Morissette vs. United States, 342 U.S. 246 (1952)); see also id. at 1277 (holding that showing of criminal intent was necessary to convict defendants for bringing illegal Cuban aliens to the United States; ABy our decision in this case, we simply articulate that which is inherent in the prosecution of any serious crime-proof of a general intent to commit an illegal act.@).

The concern with guilty knowledge is particularly significant given the First and Fifth Amendment concerns raised by a citizen=s taking actions that may leave him deemed an agent of a foreign country within the formulation of a regulatory definition. See United States vs. Peace Information Center, 97 F.Supp. 255, 261-263

(D.C. 1951). In Peace Information Center, the Court held that a statute that limited its registration requirement B which was statutorily-based, rather than regulatorily-governed as in the instant case B to vocational activities did not impermissibly intrude on First and Fifth Amendment concerns. But here, the registration requirement can be invoked by temporary, politically-based actions, such that imposition of liability without any mens rea requirement would raise questions of a constitutional dimension. AIt is a cardinal principle of statutory interpretation . . . that when an Act of Congress raises a serious doubt as to its constitutionality, this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.@ Zadvydas vs. Davis, 533 U.S. 678, 689 (2001) (internal quotations and citations omitted); see also United States vs. X-Citement Video, Inc., 513 U.S. 64, 78 (1994) (in context of possible First Amendment restrictions affected by criminal statute, A[i]t is . . . incumbent upon us to read the statute to eliminate those doubts so long as such a reading is not plainly contrary to the intent of Congress@); Almendarez-Torres vs. United States, 523 U.S. 224, 238 (1998) (construction of statute that avoids invalidation best reflects congressional will). Cf. Marchetti vs. United States, 390 U.S. 39, 48 (1968) (Fifth Amendment issue raised where Aobligations to register . . . created for petitioner real and appreciable . . . hazards of self-incrimination@).

The serious penalties invoked by the regulatory offense in combination with

questions of constitutionality raised by strict liability enforcement of the statute compel the conclusion that mens rea was an element of the offense and that absent knowledge that their status placed them within the scope of the regulatory burden, the defendants could not be convicted of the regulatory offenses. The jury instructions given on the '951 offenses in the instant case removed from the jury=s consideration the essential element of guilty knowledge and thus violated the Supreme Court=s decisions in In Re Winship, 397 U.S. 358 (1970), Mullaney vs. Wilbur, 421 U.S. 684 (1975), Sandstrom vs. Montana, 442 U.S. 510 (1979), and their progeny, holding that the jury must be permitted to resolve the elements of the offense beyond a reasonable doubt in order to sustain the conviction. Because the government failed to offer any evidence of the defendant=s knowledge of the registration requirement in this case, the error was not harmless and the convictions on counts 1 and 13-17, 19 and 22-26 of the indictment should be reversed.

V.

WHETHER THE TRIAL COURT ERRED IN SENTENCING THE DEFENDANT TO CONSECUTIVE SENTENCES FOR HIS TWO COUNTS OF CONVICTION WHERE THERE WAS NO APPLICABLE GUIDELINE TO HIS OFFENSE

On December 13 and 14, 2001, the Defendant stood before the court for sentencing convicted of two violations of federal criminal law. While the probation

officer stated within the PSI that there are no applicable guidelines for the defendant=s counts at conviction (PSI at &65-67), the sentencing guidelines and the Sentencing Reform Act of 1984 should not have gone by the wayside. In the PSI, while the statutory maximum sentences are correctly set forth in &105 of the PSI, it is the position of the Defendant that under '5G1.2 the sentencing court should have run the sentences concurrently.

The Sentencing Reform Act granted district courts discretion to order that a sentence run concurrently or consecutively to an undischarged term of imprisonment. 18 U.S.C. '3584(a). United States vs. Fuentes, 107 F.3d 1515 (11th Cir. 1997) In the instant case, there is no such undischarged term. However, by analogy to this case, whenever a defendant is subject to an undischarged sentence imposed for criminal activity that U.S.S.G. '1B1.3 treats as relevant conduct, '5G1.3(b) directs the court to impose a sentence that runs concurrently to the undischarged sentence. United States vs. Fuentes, 107 F.3d at 1526-27, United States vs. Blanc, 146 F.3d 847 (11th Cir. 1998).

In this case, the two counts that the defendant was convicted of at trial were clearly intertwined and relevant to each other to prove different elements of the crime charged. When looked at separately, they have common elements and, if they had applicable guidelines, would be subject to the grouping rules of '3D1.1 of the

guidelines. As a result, imposing a consecutive sentence for the two counts was tantamount to imposing a vindictive sentence.

In its desire to relieve sentencing courts of the discretion in this area, Congress and the sentencing commission appeared to reserve the applicability of consecutive sentences versus the imposition of concurrent sentences for three separate and distinct areas none of which are present or applicable here. The first area is where the statute mandates that the sentencing court impose a consecutive sentence. This is present when, for example, such as a conviction under 18 U.S.C. ' 924(c) for using or carrying a firearm in connection with a drug trafficking crime or a crime of violence or under 18 U.S.C. ' 3141 for bond jumping.

The second area is the situation previously mentioned regarding the undischarged term of imprisonment where the offenses are separate and not considered relevant conduct as outlined by ' 5G1.3. See 18 U.S.C. ' 3584(a)

The third and final area where a sentencing court is permitted to impose a consecutive sentence, which was also not present in this case, is a situation under ' 5G1.2(d) where there are multiple counts of conviction and the guidelines are higher than the statutory maximum for any of the counts convicted of, the sentence will run consecutive Ato the extent necessary to produce a combined sentence equal to the total punishment. In all other respects, sentences on all counts ***shall run concurrent***,

except to the extent otherwise required by law.@ (Emphasis added)

Without any of the three circumstances present that would give the court the authority as required by law to impose consecutive sentences, the punishment that the sentencing court should have imposed for the two counts of conviction should have been a concurrent sentence.

The goal of the Sentencing Reform Act of 1984 was sentencing uniformity. Similar situated defendants are to be punished within a narrow range. Only under exceptional circumstances should a sentencing court depart upward or downward. As this Court has stated on numerous occasions, a defendant may not usually appeal a district court=s refusal to depart downward. United States vs. Baker, 19 F.3d 605, 614-15 (11th Cir. 1994). There is an exception to this rule, however, for those cases in which the court erroneously believed that it lacked the authority to depart. Id. at 615.

In their argument, the government cited a flawed and unsupported legal argument under the guidelines. (12/13/01 Tr. at 102) At this defendant=s sentencing the government led the court to believe as follows: AThe court first determines the appropriate sentence then looks to the availability of sentencing options within the counts and if they are capable of being done with those counts running concurrently, that is how the appropriate sentence is imposed. If not, the court is free to impose the sentences consecutively. The touchstone is for the court to determine the appropriate

sentence. This precedes the question of whether to run them concurrently or consecutively. (12/13/01 Tr. at 102)

However, the government=s argument should have been fatally flawed by '5G1.2(d) in which where a sentencing court finds none of the three previously mentioned scenarios present, Athe sentence imposed on one or more counts shall run concurrent.@

The sentencing court, however, ignored the three scenarios for the imposition of consecutive punishment and mysteriously carved out a fourth example when it found pursuant to 18 U.S.C. '3553 and '3584 that it could impose either consecutive or concurrent sentences for the offense of conviction but the sentencing ultimately Awill make that determination at the time I impose sentence.@ (12/13/01 Tr. at 106) This marked deviation from the guidelines fits squarely within the way that defendants were sentenced prior to the sentencing guidelines where the sentencing court was the final arbiter of the sentence and were authorized to impose any sentence within and up to the statutory maximum.

In deciding to impose a consecutive sentence, the sentencing court looked to 18 U.S.C. '3553 and ignored each and every mitigating factor set forth in the objections to the presentence investigation report previously filed. (DE #1408) The court stated four factors relied upon as outlined in 18 U.S.C. '3553 which included Athe nature

and circumstances of the offense and the history and characteristics of the defendant. (12/14/01 Tr. at 43-44) Such was the mantra of pre-guideline sentencing cases. In pre-guideline sentencing cases, sentencing judge often ignored the person, their family and characteristics and imposed harsh statutory penalties.

The guidelines sought to end that practice under the banner of uniformity. Because the defendant, as most defendants who proceed to trial, showed Ano remorse for his criminal activity@ (12/14/01 Tr. at 44) should not result in the imposition of consecutive sentences and was improper. The guidelines do not reward failure to accept personal responsibility under '3E1.1 of the guidelines nor do they penalize a defendant. A policy statement of the guidelines goes even further in that A(a) defendant=s refusal to assist authorities in the investigation of other persons may not be considered as an aggravating sentencing factor. U.S.S.G. '5K1.2

By imposing a consecutive and maximum statutory offense, the sentencing court ignored numerous other self-entitled mitigating factors including the defendant=s role in the offense (U.S.S.G. '5H1.7) and lack of criminal history (U.S.S.G. '5H1.8). These Amitigating factors@ as they were entitled in the defendant=s objections to the presentence investigation report (DE #1408) were derived from the policy statements of the sentencing commission themselves. By considering these as relevant factors the commission looked to avoid the sentencing

disparity of the past. The mission and policy statements of the guidelines were clearly ignored in order to impose the maximum punishment.

The sentencing court ignored that one of the two objects within Count 1 (the 18 U.S.C. '371 count) did, in fact, have an applicable guideline assigned to it. The sentencing guidelines provide in '2C1.7 an applicable guideline for a conviction for conspiracy to defraud by interference with governmental functions as charged specifically against Rene Gonzalez. Under '2C1.7(a) the base offense level would be 10 and A(i)f the offense involved an elected official or any official holding a high-level decision making or sensitive position, increase by 8 levels.@ See '2C1.7(b)(1)(B)

Since the allegations were that the defendant did not personally involve himself with or come into direct contact with the congressional representative and only a staff assistant, the base offense level should be 10. With a criminal history category of I the guideline range should have been 6-12 months. Even assuming that the defendant would have been subject to the eight level increase, his guidelines would have been 27-33 months which is a far cry from the sixty (60) month sentence imposed for Count 1.

This court explored the conflict between 18 U.S.C. '3584(a) which grants discretion over consecutive and concurrent sentences and the Sentencing Guidelines in

United States vs. Fossett, 881 F.2d 976 (11th Cir. 1989). However, Fossett involved a case where a defendant sought a concurrent sentence for an escape charge to their forgery charge. There the guidelines called for a consecutive sentence and the court found that the sentencing court did have the authority to downwardly depart under 18 U.S.C. ' 3584(a) but only of the court followed the procedures for departing from the sentencing guidelines.

Conversely, and applicable to this case, this court logically held that where the guidelines do not permit the imposition of consecutive sentences as in this case, the court may have the authority to impose a consecutive sentence if it also follows the procedures from departing from the guidelines. United States vs. Perez, 956 F.2d 1098, 1103 (11th Cir. 1992)

As happened here, failure to determine that an upward departure was warranted, may not result in the imposition of a consecutive sentence. Therefore, the sentence must be vacated and the matter remanded for a new sentencing hearing. See United States vs. Fuentes, 107 F.3d at 1527 (11th Cir. 1997)

CONCLUSION

WHEREFORE, the Defendant/Appellant RENE GONZALEZ respectfully requests that this Court for the foregoing reasons enter an order reversing his conviction as to either or both Counts 1 and 15 of the indictment or alternatively, order a new trial and/or sentencing hearing in this matter for the reasons stated herein.

Respectfully submitted,
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