90,419

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

APPEAL NO. 85-3774

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

GEORGE N. MEROS, ET AL.,

Defendants-Appellants.

On Appeal From The United States District Court

For The Middle District Of Florida

BRIEF OF APPELLANT MEROS

THIS IS A DIRECT APPEAL FROM A FINAL JUDGMENT
IN A CRIMINAL CASE PURSUANT TO 28 U.S.C. §1291

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EXHIBIT "A"

STATEMENT REGARDING PREFERENCE

This case is entitled to preference in processing and disposition pursuant to Eleventh Circuit Rule 11 [Appendix 1(a)(2)] and F.R.A.P. 45(b), as it is a direct criminal appeal.

STATEMENT REGARDING ORAL ARGUMENT

Appellant Meros requests oral argument to discuss the complex issues raised by this appeal. Specifically, this appeal raises important issues regarding:

(1) The total abrogation of the right to present a defense through the elimination of an entire range of questions posed to key government witnesses and denial of affirmative defense evidence demonstrating the involvement of an individual other than the Appellant in the crimes charged and the motives of these witnesses to fabricate testimony;

(2) The denial of a fair trial to the Appellant as a result of the cummulative effect of numerous erroneous trial rulings;

(3) The punishment of the Appellant for conduct which does not constitute a crime;

(4) The right of the Appellant to be free from improper and illegal search and seizures.

STATEMENT REGARDING ADOPTION BY
REFERENCE OF BRIEFS OF CO-APPELLANTS

Pursuant to F.R.A.P. 28(i), the Appellant George N. Meros hereby adopts the arguments made by his Co-Appellants in their respective briefs on appeal. Specifically, Appellant Meros adopts the arguments relating to the following:

(1) Limitation on cross-examination contained in the briefs of Co-Appellants Albert Papolos, Stephen Papolos, Michael Ferrentino and Linda Ferrentino;

(2) The sufficiency of the evidence to support a RICO conspiracy conviction as charged in the indictment, contained in the briefs of Stephen Papolos and Michael Ferrentino. This adoption is limited to the fact that Meros was in no way connected to any individuals charged in the "Brinney Louise" conspiracy;

(3) Improper joinder of defendants and failure of the trial Court to sever contained in the briefs of Appellant Michael Ferrentino and Linda Ferrentino;

(4) The propriety of the Jury Instructions on the definition of an enterprise, the RICO conspiracy count and the failure to charge on multiple conspiracies, delineated in the briefs of Appellants Michael Ferrentino and Stephen

Papolos;

(5) The jury problems contained in Appellant Linda Ferrentino and Appellant Johnson's respective briefs;

(6) The trial Court's order enjoining the Appellants from challenging the release of Swiss bank records as well as the introduction of foreign documents at trial, discussed in the brief of Appellant Robert Papolos;

(7) The improper comments by the prosecutor contained in the briefs of Appellant Michael Ferrentino and Linda Ferrentino;

(8) Co-Conspirator statements, and;

(9) Denial of a fair trial as a result of cummulative errors committed by the trial court.

Appellant Meros' adoption includes arguments contained in the briefs of other Co-Appellants on the same subject matter delineated above as well as other errors committed by the Court during his trial.

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STATEMENT OF THE ISSUES

I. WHETHER THE TRIAL COURT ERRED IN ITS CURTAILMENT OF CROSS-EXAMINATION OF KEY GOVERNMENT WITNESSES AND PROHIBITION OF DEFENSE EVIDENCE.

II. WHETHER THE TRIAL COURT ERRED IN ITS FAILURE TO PERMIT EVIDENCE DEMONSTRATING THE APPELLANT'S STATE OF MIND.

III. WHETHER THE ADMISSION INTO EVIDENCE OF THE APPELLANT'S POST-ARREST STATEMENT INVOKING HIS RIGHT TO REMAIN SILENT VIOLATED THE FIFTH AMENDMENT TO THE CONSTITUTION.

IV. WHETHER THE TRIAL COURT ERRED IN ITS FAILURE TO DISMISS COUNTS 15-25 AS A RESULT OF THE INSUFFICIENCY OF THE EVIDENCE.

V. WHETHER THE TRIAL COURT ERRED IN UPHOLDING THE APPELLANT'S CONVICTION FOR AN ACT WHICH DID NOT CONSTITUTE A CRIME AS ALLEGED.

VI. WHETHER THE TRIAL COURT ERRED IN ITS INSTRUCTION TO THE JURY REGARDING THE CTR VIOLATIONS.

VII. WHETHER THE SEARCH OF APPELLANT'S LAW OFFICE VIOLATED THE FOURTH AMENDMENT.

VIII. WHETHER THE CUMULATIVE EFFECT OF ERRORS COMMITTED BY THE TRIAL COURT DENIED THE APPELLANT A FAIR TRIAL.

STATEMENT OF THE CASE

Proceedings Below:

Appellant George N. Meros and twenty-one other individuals were indicted by a grand jury in the Middle District of Florida. On August 16, 1985, a jury returned a verdict for conviction on the following counts:

Count One: 18 U.S.C. §1962(d), conspiracy to violate RICO; Count Two: 18 U.S.C. §1962(c), RICO; Count Three: 21 U.S.C. §§841(a)(1), (b)(6) & §846, conspiracy to possess with intent to distribute a schedule I controlled substance (marijuana) in excess of one thousand pounds; Count Four: 21 U.S.C. §§952(a), 953; conspiracy to import a schedule I controlled substance (marijuana); Count Five: 21 U.S.C. §841(a)(1) i/c/w 18 U.S.C. §2, possession with intent to distribute a schedule I controlled substance (marijuana); Count Eleven: 18 U.S.C. §1952, use of a wire transfer in foreign commerce in aid of rackeetering enterprise; Count Twelve: 18 U.S.C. §1952 i/c/w 21 U.S.C. §846, conspiracy to use a wire transfer in interstate and foreign commerce in aid of rackeetering enterprise; Count Thirteen: 18 U.S.C. §§1952 & 2, interstate and foreign travel in aid of rackeetering enterprise; Counts Fourteen and Fifteen: 18 U.S.C. §1001 i/c/w 31 U.S.C. §1081 and §1059, defrauding an agency of the United States by trick, scheme or device; Counts Sixteen through Twenty-Two & Twenty-Five: 18 U.S.C. §2 i/c/w, 31 U.S.C. §§1081 & 1059, causing a bank to fail to

file currency transaction reports with the I.R.S.

The Appellant was found not guilty of Counts Twenty-Three and Twenty-Four, which charged the same offense as Counts Sixteen et seq.

The following sentences were ordered to run consecutive to each other: Count One, fifteen (15) years; Count Three, ten (10) years; Count Eleven, five (5) years; Count Fourteen, five (5) years; Count Sixteen, (5) five years; for a total of forty (40) years. The following sentences were ordered to run concurrent with all other sentences imposed: Count Two, fifteen (15) years; Count Four, five (5) years; Count Five, five (5) years; Count Twelve, five (5) years; Count Thirteen, five (5) years; Count Seventeen through Twenty-Two & Twenty-Five, five (5) years for each count. A $25,000.00 fine was imposed as to Count One. In addition, a special parole term of two years was imposed as to Counts Three and Five and ordered to be served concurrently. Meros is presently incarcerated.

Statement of Facts:

George Meros was a prominent St. Petersburg attorney. He had a general practice and did both civil and criminal work. (R82-56-58). Over the years, his firm's clients included several co-defendants as well as individuals who testified against him at the trial. His firm represented the entire Papolos family for many years on a myriad of legal matters. (R82-53-54). He also represented co-

defendant Mark Knight (R82-53).

The charges against George Meros included participation in a RICO conspiracy, interstate travel in aid of racketeering (ITAR) and one substantive RICO offense. The Government alleged that Meros was involved in "money laundering activities" involving Swiss bank accounts as well as Grand Shores West (a time share development in which Meros was a partner), aiding in currency transaction violations and financing three drug smuggling ventures ("Mis Vicki", "Toots" and "Mystar"). The majority of proof used to substantiate Meros' involvement was obtained through four witnesses: Byron Wever, Carol Wever, David Strongosky and David Capo, all former clients of George Meros.

The "Mis Vicki" was the first smuggling venture in which George Meros allegedly participated. According to Byron Wever's testimony, corroborated by Carol Wever, his wife, Meros was first approached in August, 1978 with the proposition that Meros finance this operation (R 34-16) and Byron Wever would be in charge of personnel (R 34-19). Both the Wevers testified the cash for the purchase of the "Mis Vicki" was given to Wever by Meros at his law office (R 32-28-29; R34-26-27). They further testified that Meros told them how to prevent a bank from filing CTRs so the money could not be "traced". They were advised to purchase wire transfers to pay for the "Mis Vicki" in sums less than $10,000 each (R 32-32; R 34-27-28). According to Byron Wever, as part of the agreement, Meros was to pay his

attorney's fees and bond if the venture was discovered by the authorities (R 34-21). In return, Wever was to keep Meros' identity a secret (R 34-21).

Meros was tied to the "Toots" venture through Byron Wever and David Strongosky. They both testified that Meros introduced them in the fall of 1978 (R 28-152-153; R 34-126-127). Meros backed the venture with money and Strongosky and Wever handled the rest. (R 28-152-155; R 34-128). The venture was unsuccessful.

The "Mystar" was a venture Wever put together by himself with the money left over from the "Toots" deal (R 34-132). Carol Wever and Donald Gray purchased the boat (R 34-132). The venture resulted in seizure by the Coast Guard (R 34-155) and Wever was eventually charged in 1981 with a continuing criminal enterprise (R 34-137) for his involvement in the "Mis Vicki", "Mystar" and several other boats (R 34-137).

Throughout the course of this trial, there were suggestions that Carol Wever's brother Vinnie Carone was the moneyman behind these ventures and not George Meros.

The testimony from David Capo relevant to Meros concerned "money laundering". According to Capo, he sought Meros' legal advice (R 71-126). George Meros discussed "cleaning money" with him (R 71-1128). According to Capo, he told Meros he had some money buried which he had made over the years (R 71-128). Meros had a plan. He would take the money over to Switzerland where it would be put in a

Swiss bank at 18% interest (R 71-129-130). The money would go into a numbered account and would be funneled back to the U.S. in the form of loans (R 71-130-131). He delivered a total of $465,000 to Meros for "cleaning" (R 71-131-132).

The facts concerning the currency transaction violations and the propriety of the law office search are contained in the sections of the brief discussing those issues.

Standard of Review:

I. Control of cross-examination is vested in the sound discretion of the trial court and is reviewed on an "abuse of discretion" standard. However, in this case the trial court ruled evidence inadmissible as a matter of law and was thus not exercising discretion but making a legal conclusion. These rulings should be reviewed as an error of law.

II. The violation of an individual's Fifth Amendment rights by introducing evidence of post-arrest silence is reviewed as an error of law.

III. Whether the trial Court erred in holding that structuring currency transactions is per se illegal without any evidence of the use of fictitious names, the purchase of cashier's checks or other deceptive conduct is reviewed as an error of law. This standard of review applies to both the sufficiency of the evidence and the improper jury instruction.

IV. Whether a search warrant is unconstitutionaly overbroad, and whether the manner of executing the search was unreasonable is reviewed as an error of law, United States v. Bowles, 625 F.2d 526 (5th Cir. 1980).

V. A trial court's conduct and control of the proceedings before it is reviewed on an "abuse of discretion" standard.

SUMMARY OF THE ARGUMENT

A. The trial court's refusal to admit evidence which inculpated a person not on trial and which exculpated the Defendant violated the Appellant's Fifth Amendment right to present a defense. The curtailment of cross-examination of key witnesses and restriction of impeachment violated his Sixth Amendment right of confrontation.

B. Testimony admitted at trial describing post-arrest silence violated the Appellant's Fifth Amendment right to remain silent.

C. No material fact was concealed by the Appellant when making deposits of currency in separate partnership accounts on a single day. He also committed no acts to "aid" any bank in failing to file currency transaction reports. As a result, the evidence was insufficient as to Counts 15-25 and the indictment failed to allege an offense as to Count 14. Moreover, the instruction to the jury on these Counts was incorrect.

D. The trial court erred in its failure to suppress all the evidence and fruits thereof seized during the search

of the Appellant's law office. The warrant itself and its execution were overbroad and violated the Fourth Amendment.

E. The Appellant's trial was permeated with error. Many if not all of these errors were sufficient by themselves to warrant reversal, the cumulative effect of these errors resulted in the denial of a fair trial to the Appellant.

STATEMENT OF JURISDICTION

This is a direct appeal from a final judgment in a criminal case pursuant to 28 U.S.C. §1291.

ARGUMENT

I. THE TRIAL COURT VIOLATED THE APPELLANT'S FIFTH AND SIXTH AMENDMENT RIGHTS BY RESTRICTING CONFRONTATION OF KEY GOVERNMENT WITNESSES AND PROHIBITING THE INTRODUCTION OF EVIDENCE IN SUPPORT OF HIS DEFENSE

Meros' defense was premised on the theory that none of his dealings with the individuals in this case were illegal. He was not Byron Wever's partner or the "money man" behind any smuggling venture. He was an attorney who previously represented the principal witnesses against him (R29-150; R72-183; R32-25; R34-16) as well as the real smuggling "King Pin", Vinnie Carone (R35-165; 38-140).

The defense was rooted in the fact that Byron Wever, Carol Wever, David Strongosky and David Capo, the key prosecution witnesses, conspired to protect Carone and to frame Meros. Carol and Byron Wever's cooperation hinged on the Goverment's agreement not to ask either of them any questions regarding Carol's brother, Vinnie Carone (R32-155;

R33-21-23; R35-45), a well-known, long established drug smuggler (R38-125). David Strongosky had been acquainted with Vinnie Carone since 1973 and later became involved with him (R29-127). He participated with Byron Wever in the "Toots" (R29-143) and knew Carol Carone Wever who, as late as 1983, approached him about another possible drug deal (R29-128, 130-132). Although immunized, (R28-41), protection of his true drug source provided Strongosky with a powerful motive to testify against this defendant. David Capo was David Strongosky's good and trusted comrade (R71-199; R72-46, 47). They had smuggled together and with Capo's father for six years (R72-46). Their loyalty to each other knew no bounds. In fact, they had even covered for each other in smuggling operations which resulted in seizure (R72-45, 46). If Strongosky needed Capo's help to protect Carone, there was no question that it was his; Capo would join the fraternal order dedicated to the protection of Vinnie Carone no matter who he had to harm or what he had to do.

Meros sought to prove this defense through introduction of evidence and cross-examination of Government witnesses. It is well settled that an accused has a constitutional right to present a defense. United States v. Wasman, 641 F.2d 326 (5th Cir. 1981) (Unit B); United States v. Riley, 550 F.2d 233, 236 (5th Cir. 1977); United States v. Flom, 558 F.2d 1179 (5th Cir. 1977). That right is not limited to the right to testify; an accused also has a right to

introduce other evidence in support of his defense. See Washington v. Texas, 388 U.S. 14, 19 (1967) (accused has a fundamental due process right "to present his own witnesses to establish a defense"). As noted by this Court, "the right to present witnesses in one's own defense in a criminal trial lies at the core of the Fifth and Fourteenth Amendments' guarantee of due process of law." Boykins v. Wainwright, 737 F.2d 1539, 1544 (11th Cir. 1984). "[D]ue process in a criminal trial entitles him to call witnesses in his own behalf and to offer their testimony, and he certainly has the right to present his version of the facts as well as the prosecutor's to the jury, so it may decide where the truth lies." Chambers v. Mississippi, 410 U.S. 284 (1973). He may present his version through the production of evidence or through the vehicle of cross-examination, the core right of the Sixth Amendment. United States v. Mayer, 556 F.2d 254 (5th Cir. 1977); Washington v. Texas, 388 U.S. 14 (1967); Chambers v. Mississippi; Boykins v. Wainwright, 737 F.2d 1539 (11th Cir. 1984). United States v. Elliott, 571 F.2d 880, 908 (5th Cir. 1978).

Meros' cross-examination of Byron Wever regarding Carone's true involvement with these charges and what Wever told others was met with obstinate resistance. Wever either outright denied Carone's involvement, or claimed lack of memory. Much of these questions concerned what Wever told GBI Agent Harry Coursey who was involved in an

undercover capacity with Wever in the "Mis Vicki" smuggling venture from its inception to resulting seizure (R75-16).

QUESTION: "So you never made the statements to Agent Coursey or Agent Mason that Vinnie was your partner? . . . "
ANSWER: "That is correct" (R35-73).

". . . I remember telling Harry at one time or another that Vinnie was having some legal problems in Florida, but I do not ever remember referring to him in the context that he was my partner." (R35-76).

QUESTION: "On April 11, 1978, approximately 4:00 p.m., did you state [to Coursey] that you were having a big meeting with your partner and that you were going to discuss buying a big shrimp trawler?"
ANSWER: "I have no recollection of that sir." (R35-88).

QUESTION: "Did you state to him that this week was . . . your partner, Carol's brother, and it would be the same as his deal except that you were using the partner's . . . . boat? Did you make that statement?" (R35-94.).
ANSWER: "I deny that." (R35-95)

QUESTION: "Did you state to Agent Coursey and Mason that you were in the process of buying a boat, doing the deal with Vinnie and a friend of Vinnie's from out West; did you make

that statement on April 5, 1978?"

ANSWER: Absolutely not . . . . I deny that." (R35-139).

QUESTION: "On August 23, 1978 . . . Did you tell Harry Coursey that you'd be talking to your partner within 24 hours and would be discussing the purchase of a Detroit diesel?"

ANSWER: "I have no recollection of that." (R35-155).

QUESTION: "Did you state to Agent Coursey that the broker had found a boat but there had been a misunderstanding with Vinnie about purchasing the boat?" (R35-156).

ANSWER: "I never made that statement. The "Mis Vicki" was not bought through a broker. . . ." (R35-157).

QUESTION: "Did you say . . . your partner was on the run from the law?"

ANSWER: "I have no remembrance of that, sir." (R35-146).

QUESTION: "Did you tell Agent Coursey that your partner was the man with the money?"

ANSWER: "No, I do not. I do not remember saying that." (R35-149).

QUESTION: "Was Vinnie on the run in May of 1978?"

ANSWER: ". . . . I never told Mr. Coursey that he was on the run." (R35-151).

(See RECORD EXCERPTS for more of Wever's testimony on the subject).

Meros offered the following evidence which was excluded by the trial Court to counter Wever's testimony and prove it was Vinnie Carone and not George Meros involved in the illegal ventures.

Regarding the "Mis Vicki" venture, questions were posed by Meros to undercover Agent Coursey such as: "Who did you determine that he [Byron Wever] was getting his money from?" (R76-31); "Was it George Meros?" (R76-32); "Did he at any time state that George Meros was his partner?" (R76-33); "In connection with your investigation, did you learn the name Vinnie Carone?" (R76-55); "Did you hear Byron Wever discuss with Carol Wever who the money man in the case was?" (R76-58). If permitted, Agent Coursey would have testified that:

(A) Byron Wever told him in meetings after January 1978 that:

(1) Vinnie Carone was the money man and his partner in the "Mis Vicki" (R76-100-11);

(2) He and his partner, Vinnie Carone, had much success with using diesel boats for hauling marijuana (R76-100-11);

(3) These type of statements were made on numerous occasions throughout their dealings. (R76-100-11).

(B) He was present at discussions between Byron and

Carol Wever and the following type statements were made:

(1) "We have to get in touch with "V"."

(2) "We have to get in touch with Vinnie."

(3) "I'm going to talk to Vinnie about the purchase of the boat to bring in the marijuana; The "Mis Vicki" (R76-100-12).

(C) Byron Wever stated he had had successful marijuana dealings with people in South Carolina before the "Mis Vicki" was ever done. (R76-100-12).

The Court prohibited this proffered testimony from Agent Coursey on the basis that it was hearsay. More specifically, the Court held that Fed.R.Evid. 801(d)(2)(E) did not apply because the statements were not made "in furtherance" of the conspiracy. (R77-13). This ruling was error and deprived Meros of his ability to prove that it was Carone and not he who was the leader of the smuggling enterprise. The exclusion of this evidence precluded Meros from defending himself in violation of the Fifth Amendment right of due process, Chambers v. Mississippi, 410 U.S. 284 (1973); and the Sixth Amendment right of confrontation. The evidence was admissible pursuant to Fed.R.Evid. 801(d)(2)(E) ("In furtherance of the "Mis Vicki" venture); Fed.R.Evid. 804(b)(3) and Fed.R.Evid. 803(24). See United States v. Parker, 749 F.2d 628 (11th Cir. 1984); United States v. Mathis, 559 F.2d 294 (5th Cir. 1977) and as impeachment pursuant to

Fed.R.Evid. 613(b).[1]

Donald Gray, the Captain of the "Mystar" (R77-189) and long term associate of Wever (R77-186-189) would have relayed conversations he had with Byron Wever where Wever stated to him that his partner was Vinnie Carone. Again, the Court precluded the testimony (R77-185). This testimony was admissible under the same rationale that Agent Coursey's testimony was admissible.

The Court also prevented Meros himself from testifying that Byron Wever told him that Vinnie Carone was his partner in the "Mis Vicki", and "on a dozen smuggling ventures prior to that time." (R82-166),[2] and that Mr. Carone confirmed the information (R82-167); that Wever was concerned about the authorities having a list of "payments" with the letter

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1 The Court's ruling was in direct conflict with statements it made regarding Coursey's testimony at earlier times. At the suppression hearing, the Court stated, in regard to Byron Wever's telling Coursey that Carone was his partner, ". . . the jury will be entitled to hear all about this." (R19-118-120). During cross-examination of Byron Wever, the Court made the following statement to counsel for Meros outside the presence of the jury:

> THE COURT: " . . . I'm going to allow you, when you begin the jury again, to ask the witness, "Did you tell Mr. Coursey something?" Whatever you said about Vinnie Carone. If he says, "No," you bring in Mr. Coursey and let him testify." (R35-107-108).

This is exactly what happened and this is exactly what the Court did not permit.

2 The Court stated the following directly after that proffer: "Now, Mr. Garland, he testified to that exact thing in the presence of the jury already." (R82-166). This again reflects the Court's confusion regarding its own rulings.

"V" next to specified amounts representing money from Vinnie Carone (Government's Exhibit 23) (R91-56-57); and conversations between the Wevers (discussing Vinnie Carone) where he was present (R82-126) (See RECORD EXCERPTS for other examples of attempted questions to Meros on the subject).

Once more, the Court ruled this evidence inadmissible hearsay and would not even permit its introduction for the limited purpose of impeachment. Not only was this evidence admissible to contradict prior testimony, United States v. Winkle, 587 F.2d 705 (5th Cir. 1979), but it was also admissible to prove Meros' defense and to establish the motive and intent of these witnesses.

Counsel for Meros also sought to prove his defense through the notes and testimony of Dr. Goldstein, Byron and Carol Wever's marriage counselor. The doctor's notes and testimony revealed that Byron Wever had stated that Carol's brother was a "smuggling King Pin." (R93-30). Hearsay was once more the justification for the exclusion of the evidence (R93-33). Counsel for Meros repeated his assertion that the evidence was relevant and admissible under the right to offer a defense, as a prior contradictory statement of a witness to impeach the facts to which he testified, to all of which the Court responded: "I've heard what you said. Sit down." (R93-33).

Meros specifically sought to cross-examine Carol Wever, with no objection from the Government (R33-8) about her

participation in drug smuggling ventures with her brother. By ruling of the Court, however, her testimony was protected from vigorous cross-examination and impeachment. Outside the presence of the jury, the Court made the following decree:

> All right. Now I allowed Mr. Ragano to ask Mrs. Wever if it was part of the agreement, at her request, was the agreement on the part of her husband with the Government that she, Mrs. Wever, would not be asked about matters affecting her brother. She said that was part of the agreement and that's what she wanted. The jury heard all of that . . . .
>
> And you did ask her if her brother had participated in drug smuggling; she said he had.
>
> Now, her participation in drug smuggling with her brother, unless there was some conviction is not admissible. Rule 404 deals with that, and that is all there is to that.

(R33-8-9). Counsel for Meros was also prevented from questioning Carol Wever regarding the source of the money she used to pay attorney's fees (R33-112- 113, 114, 122-123). The purpose and relevance of the questions were to trace the money to Vinnie Carone, Byron Wever, David Strongosky and their various smuggling ventures.

This line of inquiry was relevant and permissible under both the right to confront witnesses and the right within due process to present a defense. Evidence connecting Carol Wever to her brother in drug smuggling ventures advanced Meros' defense regarding the conspiracy to frame

him and protect Vinnie Carone, Washington v. Texas, 388 U.S. 14 (1967); Boykins v. Wainwright, 737 F.2d 1539 (11th Cir. 1984), revealed the extent of Carol Wever's deal by elaborating on the offenses for which she was not being prosecuted, United States v. Onori, 535 F.2d 938 (5th Cir. 1976), and disclosd her motives (protection of herself, her husband and her brother) and biases. Davis v. Alaska, 415 U.S. 308, 318 (1979); United States v. Hall, 653 F.2d 1002 (5th Cir. 1981).

Protection against robust and penetrating cross-examination was provided for David Strongosky as well. Defense counsel was prohibited from inquiring as to whether Bubba Capo, a co-defendant of Strongosky's in the "Steinhatchee Seven" trial and father of David Capo, a co-defendant who pled guilty in the present case, had his own organization (R31-160). The exact identity of the individuals involved in the "Steinhatchee" venture was also prohibited despite the fact that he testified that none of the defendants in this case were involved (R31-14). Most importantly, the trial court specifically denied counsel the right to explore any and all previous drug dealings of this witness unless they were ventures brought out on direct examination (R31-33).[3] The pattern was clear. The

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[3] Later in the trial the Court made the following statement: "Mr. Strongosky, that's the fellow I'm talking about. Mr. Strongosky had been granted immunity against everything. So therefore, in order to develop his -- what inducements there might have been for him to testify, Mr. Garland was allowed to ask him about all of the possible

Government was allowed to explore any smuggling venture it wanted to (whether related to the indictment or not) and the defense was only allowed to explore those chosen by the Government.

Evidence of all of Strongosky's previous drug dealings would have provided support for the defense theory that no "enterprise" existed, especially in light of Strongosky's testimony that most of the drug deals were just "coincidence; that was the way it was done 'on the beach.'" (R31-18). Moreover, this area of inquiry was designed to explore whether he was covering for other associates (such as Carone), providing him with a powerful motive to testify against Meros.

An accused has a right to introduce evidence and offer testimony to establish a defense. Washington v. Texas, 388 U.S. 14, 19 (1967); In re Oliver, 333 U.S. 257, 273 (1948). The testimony and evidence as to what Byron Wever told others regarding his partner and the moneyman in his smuggling ventures was crucial to that defense. It established that someone other than Meros was guilty. The evidence offered was substantively admissible and even if the evidence did not fit within a recognized exception to the hearsay rule,

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crimes he may have ever participated in, whether he had been convicted or not. We heard all about it, six or seven of the vessels, I think. It seems like six or seven, it might have been less. So that's for that . . . ." (R44-18). The Court itself recognized what the correct ruling ought to have been.

> In these circumstances, where Constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanically to defeat the ends of justice.

Chambers v. Mississippi, 410 U.S. 284, 302 (1973); Green v. Georgia, 442 U.S. 95, 97 (1979).

The evidence offered and cross-examination desired were at minimum permissible as impeachment. Although Fed. R. Evid. 608 (b) forbids an attack on the overall credibility of a witness through extrinsic evidence, "evidence may be admitted to prove or disprove material facts in a case, even though a previous witness has testified to the contrary." United States v. Di Matteo, 716 F.2d 1361 (11th Cir. 1983). "Extrinsic evidence which contradicts material testimony of a prior witness is admissible .... Rule 608 should not stand as a bar to the admission of evidence introduced to contradict and which the jury might find disproves a witness' testimony as to a material issue of the case." United States v. Calle, 822 F.2d 1016 (11th Cir. 1987); United States v. Opager, 589 F.2d 799, 803 (5th Cir. 1979); Collins v. Francis, 728 F.2d 1322 (11th Cir. 1984) (Statement of a co-participant to a witness that he intended to kill and rape the victim and that he had killed others are admissible through witness testimony as non-hearsay to show co-participant's intent where defense argued that co-participant, not defendant, was actually murderer).

In Calle, the defendant was convicted of distribution and possession with intent to distribute cocaine. His defense was based on the fact that the government's key witness, Garcia, was not an intermediary (the government's theory) but was the major drug user and dealer (not Calle). Calle called Lee Martin and inquired whether or not he had ever obtained cocaine from Garcia on occasions other than the one in question. Although he was allowed to answer, the trial judge refused to allow defense counsel to inquire into specific instances of Garcia's alleged drug related activities despite defense counsel's explanation that he was attempting to rebut Garcia's testimony that he was not a major drug trafficker. The court did, however, allow one extraneous incident to be discussed and then halted the line of questioning.

In reversing Calle's conviction, this Court noted that Martin's testimony not only contradicted the government's theory that Garcia was only an intermediary, but it "was crucially important to the defense because it supported the inference that Garcia, not Calle was the true source of the cocaine in the transaction."

> Martin's statements would have been relevant to show Garcia's motive to falsify his testimony. . . . Th[e] contradiction would have raised the possibility that Garcia lied about his prior drug activities in order to protect himself from further prosecution and shift the major part of the blame in this case from himself to Calle. The self-interest of a witness, as opposed to the witness' general character for veracity is not a collateral issue. . .

> (Cite omitted). Therefore, evidence that happens to include prior misconduct still may be admissible when offered to show the witness' possible bias or self-interest in testifying.

Calle 822 F.2d 1016. Accord: United States v. Brady, 561 F.2d 1319 (9th Cir. 1977) (reversible error to fail to permit cross-examination of government witness as to a prior source of narcotics; the question is relevant for the purpose of impeaching her testimony and lending support to the defense theory that the witness was attempting to protect her real source of narcotics); United States v. Leake, 642 F.2d 715 (4th Cir. 1981) (trial court's erroneous refusal to permit defense counsel to fully cross-examine primary government witness regarding prior misconduct held to be prejudicial and to require a new trial); United States v. Kohan, 806 F.2d 18 (2nd Cir. 1986).

Harmful error still occurs when some but not all relevant evidence is admitted. Calle; United States v. Kohan, 806 F.2d 18 (2nd Cir. 1986) (reversible error to exclude testimony of a witness despite the introduction of the substance of the testimony through the previous testimony of government witnesses).

> Butler's [excluded witness] testimony had significantly greater probative value than the agent's testimony for two reasons: First, it would have been received on Lowery's direct case rather than during cross-examination of government witnesses; Second, perhaps more importantly, Butler's testimony would have corroborated Lowery's statements to law enforcement officials,

> thereby helping to diminish the effect of their self-serving nature.

Kohan at 22. The denial through either cross-examination or presentation of evidence in his case-in-chief to present a defense contradicting a material element of the government's theory (namely the identity of the man behind the smuggling ventures) resulted in a thorough denial of due process.

Moreover, Meros was prohibited from producing evidence which demonstrated Byron Wever's self-protective nature and state of mind. Counsel proffered testimony of Russ Sirmons [involved with the "Mis Vicki" smuggling venture since early 1978 (R78-123)], that while continuing criminal enterprise charges were pending against Byron Wever, Wever approached Sirmons and requested that Sirmons lie under oath and tell the authorities that Donald Gray was the head of the organization (R78-161). The trial Court ruled this testimony inadmissible as hearsay and further stated that it did not constitute impeachment (R78-162). Both edicts were incorrect. This testimony was non-hearsay under Rule 801(c) in that it was offered to prove the fact that it was said and Wever's state of mind, intent and ability to substitute innocent people in order to protect himself and the "King Pin", Collins v. Francis, 728 F.2d 1322 (11th Cir. 1984); all illustrative of his common plan or scheme. United States v. Darby, 744 F.2d 1508 (11th Cir. 1984). The evidence was also admissible as impeachment

of Wever's denial of this earlier subornation.[4]

Intent and motive were key issues concerning the witnesses in this case. Byron Wever had testified that he met David Strongosky through George Meros. However, he also admitted that Vinnie Carone had a close association with Strongosky and, for that matter, David Capo. All had a motive to protect their drug source by fixing the blame on the defendant. Carol and Byron had an especially strong interest in protecting Vinnie because he was Carol's brother. Moreover, due to the fact that part of the Wevers' cooperation agreement included no questions about Vinnie, questioning Carol in particular about possible deals she may have done with Vinnie was of vital importance to show how profitable her deal was with the Government, United States v. Onori, 535 F.2d 938, 945 (5th Cir. 1976); United States v. Hall, 653 F.2d 1002, 1008 (5th Cir. 1981); "whether in fact any such deals or understandings were affected," does not preclude such questioning. United States v. Mayer, 556 F.2d 245, 249 (5th Cir. 1977).

Carol Wever's prior drug dealings also provided her with experience and knowledge to fabricate her elaborate testimony against Meros. The problem that developed was that her detailed testimony led the jury to infer that she

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QUESTION: "Did you go to Russ Sirmons and ask Russ Sirmons to testify as a witness for you that Don Gray was the financier of your drug deals?"
ANSWER: "I have no remembrance of that, sir." (R35-96).

was telling the truth because if she (or Byron) had not been involved in these deals with George Meros, how would she be capable of describing the events with such particularity? The defense was prevented from establishing that her extensive background in drugs with Vinnie Carone provided her with knowledge to fabricate the story. All she had to do was substitute Meros for Carone in the events she described.

The testimony sought from Carol Wever showed intent and motive and was of paramount importance to Meros' case. It was therefore admissible under Rule 404(b). United States v. McClure, 546 F.2d 670, 672-673 (5th Cir. 1977).

David Strongosky testified about Meros' involvement. However, the Court barred all questions regarding importation schemes Strongosky participated in which were not asked on direct examination. In other words, the Government was permitted to pick and choose the various importation schemes to which David Strongosky had been a part for the defense to question him. The degree of his protection from prosecution -- that is, the scope of his immunity -- needed to be explored through robust cross-examination of his participation not with George Meros, but with the Carone enterprise.

Moreover,

> Counsel often can not know in advance what pertinent facts may be elicited on cross-examination. For that reason it is necessarily exploratory; and the Rule that the examiner must indicate the purpose of his inquiry does not, in

> general, apply.... It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts reasonable cross-examination might develop. Prejudice ensues from the denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and credibility to a test, without which the jury can not fairly appraise them.... To say that prejudice can be established only by showing the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial.

Alford v. United States, 282 U.S. 687, 692 (1931); Green v. Wainwright, 634 F.2d 272, 275 n. 3 (5th Cir. 1981).

II. THE TRIAL COURT ERRED IN EXCLUDING EVIDENCE RELEVANT TO EXPLAIN MEROS' STATE OF MIND

An out of court statement introduced for a reason other than to establish the truth of the statement is not hearsay. Fed.R.Evid. 801(c). Declarations of another, heard by the defendant, may explain his conduct or establish his absence of intent. United States v. Webster, 750 F.2d 307, 330 (5th Cir. 1984) (defendant's statements to a large audience about an airplane on his property illustrated lack of criminal intent: jury could infer that a guilty man would not make such statements); United States v. Gibson, 675 F.2d 825, 833-834 (6th Cir. 1982); United States v. Abascal, 564 F.2d 821 (9th Cir. 1977); United States v. Roberts, 676 F.2d 1185 (8th Cir. 1982). Out of court statements uttered to a witness may also be used to show a

defendant's lack of knowledge, United States v. Parry, 649 F.2d 292 (5th Cir. 1981); United States v. Gold, 743 F.2d 800 (11th Cir. 1984), or to explain the witness' motive to fabricate or exaggerate. United States v. Darby, 744 F.2d 1508 (11th Cir. 1984). Such statements may also be introduced to impeach the rendition of a conversation offered by the Government. United States v. Winkle, 587 F.2d 705 (5th Cir. 1979) (impeachment to demonstrate the untruth of a witness' testimony is not excludable as hearsay because it is not offered primarily to prove the truth of the matter asserted, but to contradict prior testimony).

Meros sought to introduce several statements as non-hearsay to explain his actions. These statements were probative of his state of mind and absence of intent. The Court, however, erroneously branded these out of court statements "hearsay" and ruled them inadmissible.

During examination of Donald Gray, the Court excluded as hearsay Gray's affirmative response to the question: "Did Mr. Meros advise you to tell the truth" to the grand jury? (R77-192). The assertion was not hearsay. It was a verbal act. Moreover, the statement demonstrates a lack of criminal intent inasmuch as it could be inferred that a guilty man would not make such statements. Webster, 750 F.2d 307. If Meros was involved in the criminal conduct as alleged in the indictment, a direction to tell the truth to an individual involved in the crimes charged would be inconsistent with such involvement.

Carol Wever testified during the Government's case-in-chief that she informed Meros that she gave false testimony at a bond hearing in Louisiana and that "he [Meros] did not tell me to correct the answers as my attorney of counsel after I had told him what I said on the stand." (R33-90). Peter Meros was present at this conversation. The Court prohibited Peter Meros from testifying that George Meros told her to go back and correct the testimony and she responded, she would (R95-63). Peter Meros' statements impeached the rendition of the conversation and was thus admissible. United States v. Winkle, 587 F.2d 705 (5th Cir. 1979).

These various rulings when taken in conjunction with the prohibition of defense evidence and cross-examination resulted in the Court's support of the incredible deal struck by the Government and the Wevers to protect Vinnie Carone, despite the aggregate of evidence linking him to the transactions in question. Depriving the jury of this evidence constituted classic harmful error, and requires a reversal of Meros' conviction.

III. THE TRIAL COURT COMMITTED CONSTITUTIONAL ERROR BY ITS ADMITTING EVIDENCE OF THE POST ARREST INVOCATION BY MEROS OF HIS RIGHT TO REMAIN SILENT

The Court permitted Agent Mazur to testify during the Government's case-in-chief that after he placed Meros under arrest and read him his rights, Meros stated that "at that time he didn't want to speak" (R 68-188). Objections and motions to strike and for mistrial were made following this

testimony (R 68-188; R69-24-25). The law on this subject is clear. Virtually any description of a defendant's silence following arrest and Miranda warnings will constitute a violation of the defendant's Constitutional right to remain silent. U.S. Const. Amend. 5, Matire v. Wainwright, 811 F.2d 1430 (11th Cir. 1987); United States v. Rosenthal, 793 F.2d 1214 (11th Cir. 1986); United States v. Cardenas Alvarado, 806 F.2d 566 (5th Cir. 1986); United States v. Schuler, 813 F.2d 978 (9th Cir. 1987).

Had the Court not permitted Meros' post-arrest statement into evidence and had the error not been compounded by comments by the Court on a defendant's right to remain silent supra Meros may not have testified. As a result, the error in permitting this testimony reciting his invocation of that right was not harmless. United States v. Johnson, 812 F.2d 1329 (11th Cir. 1986).

IV. THE EVIDENCE WAS INSUFFICIENT ON COUNTS 15-25 TO SUSTAIN THE CONVICTION BECAUSE NO MATERIAL FACT WAS CONCEALED AND NO CRIME WAS AIDED AND ABETTED BY VIRTUE OF DEPOSITING CURRENCY IN SEPARATE PARTNERSHIP ACCOUNTS ON A SINGLE DAY

During the summer of 1981, Meros' bookkeeper, Barbara Ermatinger, began managing the financial operation of Grand Shores West, a partnership organized by Meros (R66-122). This time-share venture had three accounts with Landmark Union Trust Bank in Pinellas County: escrow, marketing and construction (R66-120). The operation was constantly beset with cashflow inadequacies (R66-123-24, 127). Ermatinger would routinely deposit cash into the three accounts to

cover outstanding checks (R67-14). The amount of cash deposited on each occasion into each account was decided by Ermatinger (R67-14).

Ermatinger received the cash from Meros. He gave her cash eight or ten times during the summer with which she made thirty-six deposits (R66-130-31).

Meros advised Ermatinger that cash transactions in excess of $10,000 must be reported by the bank to the IRS (R67-9-10). Meros never directed Ermatinger to use different branches (R82-5) and never directed her to conceal the transactions (R67-30) in order to avoid the currency transaction reporting (CTR) requirement.

Between May 22, 1981, and October 2, 1981, deposits into the three Grand Shores West accounts were made routinely. Occasionally, deposits were made in the same account at different branches of the bank on the same day. Frequently, cash deposits were made at one branch to different accounts on the same day. Individual deposits to a single account also occurred (R68-62-72). None of the deposits exceeded $10,000, but on certain days, the total deposit to all accounts in all branches did exceed $10,000. The bank filed no CTR's.

Counts 16 through 25 charged Meros with aiding and abetting the bank's failure to file CTR's on ten separate days.[5] Count 15 charged Meros with a violation of 18

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[5] Meros was acquitted of Counts 23 and 24.

U.S.C. §1001 in connection with the same transactions.

The most fundamental principle of criminal law is embodied in the maxim nullum crimen sine lege, nulla poena sine lege: No crime or punishment without law. Meros was convicted in ten counts of the indictment for offenses relating to violations of currency transaction reporting laws. These laws, however, impose no duty on a bank customer. The requirement that certain currency transactions be reported to the IRS is imposed solely on banks. 31 U.S.C. §1081 and 1059; 31 C.F.R. §103.22.[6]

The Government proceeded on two theories. First, the splitting up of cash deposits into separate transactions represents a concealment by trick, scheme or device, of a material fact within the jurisdiction of the Treasury Department, thus constituting a violation of 18 U.S.C.

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The statute is now codified at 31 U.S.C. §5313:

> The report of any transaction required to be reported under this subchapter shall be signed or otherwise made both by the domestic financial institution involved and by one or more of the parties thereto or participants therein, as the Secretary may require. If any party to or participant in the transaction is not an individual acting only for himself, the report shall identify the person or persons on whose behalf the transaction is entered into, and shall be made by the individuals acting as agents or bailees with respect thereto.

31 C.F.R. §103.22(a) reads:

> Each financial institution shall file a report of each deposit, withdrawal, exchange of currency or other payment or transfer, by through, or to such financial institution, which involves a transaction in currency of more than $10,000. Such reports shall be made on forms prescribed by the Secretary and all information called for in the forms shall be furnished.

The bank files the report on IRS Form 4789.

§1001 (Counts 14 and 15).

Second, the Government argued that structuring cash deposits so that the bank failed to file the CTR form represents an aiding and abetting crime: That is, Meros aided and abetted the bank's commission of a crime. 18 U.S.C. §§1081, 1059 and 2.

Meros contests his conviction of these CTR violations on three grounds: (1) There being no law regulating the conduct of bank customers, there can be no crime; (2) Meros engaged in no conduct which constitutes a misrepresentation or concealment of any fact. Furthermore, he did nothing which constitutes aiding and abetting a criminal venture; (3) When these banking transactions occurred in 1981, there had not yet developed the body of caselaw outlawing the conduct involved in this case. No notice existed then that making incremental deposits into different existing partnership accounts was a crime.

This term, the Supreme Court re-affirmed the principle of nullum crimen sine lege, nulla poena sine lege in reversing a mail fraud conviction:

> There are no 'constructive offenses'; and before one can be punished, it must be shown that his case is plainly within the statute.

McNally v. United States, 483 U.S. _____, 107 S.Ct. 2875 (1987). See also Fasulo v. United States, 272 U.S. 620, 629 (1926). The doctrine of lenity -- ambiguity concerning the ambit of criminal statutes must be resolved in favor of

the defendant -- is a manifestation of this policy of strict construction. Liparota v. United States, 105 S.Ct. 2084 (1985); Rewis v. United States, 401 U.S. 808 (1971).

No law proscribes structuring cash deposits in a bank. No law requires that cash transactions be conducted in such a manner that the bank is assured of filing a report. No law requires customers to facilitate the bank's filing of reports.

Many Circuits which have considered this issue have condemned the expansive criminalization of conduct exemplified by the earlier precedents in this Circuit. Recently, the Seventh Circuit joined the First, Eighth and Ninth Circuits in reversing a customer's CTR conviction. United States v. Gimbel, ____ F.2d ____ slip no. 86-1808, (7th Cir. 1987). See United States v. Anzalone, 766 F.2d 676 (1st Cir. 1985); United States v. Larson, 796 F.2d 244 (8th Cir. 1986); United States v. Reinis, 794 F.2d 506 (9th Cir. 1986).

Gimbel involved a customer who made a series of $9,900 withdrawals from an account during one day. The Court reversed the bank customer's conviction for the simple reason that withdrawals of $9,990 -- no matter how many such withdrawals are made in a single day -- do not have to be reported by the bank. Neither the statute (31 U.S.C. §§5311-22) nor the regulation (31 C.F.R. §103.22(a))

requires the aggregation of discrete transactions.[7] Since no reportable transaction occurred, no material fact was concealed and no aiding and abetting was committed. Gimbel's repudiation of the aggregation requirement represents a more fundamental rejection of the CTR indictments than other Circuits have undertaken.

The First, Eighth and Ninth Circuits have reversed CTR convictions for the simple reason that customers have no duty to disclose the aggregate amount of their daily transactions and thus cannot be held criminally responsible for failing to do so. In Anzalone, decided while the Meros trial was in progress, the First Circuit reversed a customer's conviction:

> We can find nothing on the face of either the Reporting Act, or its regulations, or in their legislative history, to support the proposition that a 'structured' transaction by a customer constitutes an illegal evasion of any reporting duty of that customer.

766 F.2d at 681. The First Circuit concluded, "If the Government wished to impose a duty on customers, or 'other participants in the transaction' to report 'structured' transactions, let it require so in plain language." Id. at

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Form 4789, on which the bank complies with the reporting requirement, contains the only requirement that separate transactions in a given day be aggregated. The form, which expands the reporting requirement was not promulgated in compliance with the Administrative Procedure Act. United States v. Reinis, 794 F.2d 506, 508 (9th Cir. 1986); United States v. Gimbel, slip op. at 8.

682.[8] Because the Defendant had no legal duty to disclose any fact, he could not legally conceal any fact.

The Eighth Circuit reversed a CTR conviction in United States v. Larson, 796 F.2d 244 (8th Cir.

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On October 24, 1986, Congress took the cue and enacted the, "Comprehensive Money Laundering Prevention Act." Among the Act's principal features is a provision which expressly outlaws structuring transactions in order to evade the reporting requirement. The new Act provides, inter alia,

> §5324. Structuring transactions to evade reporting requirements prohibited.
>
> No person shall --
>
> (3) structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with one or more domestic financial institutions for the purpose of evading the reporting requirements of §5313(a) with respect to such transaction.

Congress implicitly acknowledged that the law in effect in 1981 did not outlaw structured transactions and the new law was required if such conduct is to be proscribed.

> The Courts have declared that the mere fact that the Legislature enacts an amendment indicates that it thereby intended to change the original act by creating a new right or withdrawing an existing one. Therefore, any material change in the language of the original act is presumed to indicate a change in legal rights. The Legislature is presumed to know the prior construction of terms in the original act, and an amendment substituting a new term or phrase for one previously construed indicates that the judicial or executive construction of the former term or phrase did not correspond with the legislative intent and a different interpretation should be given the new term or phrase. Thus, in interpreting an amendatory act there is a presumption of change in legal rights. This is a rule peculiar to amendments and other acts purporting to change the existing statutory law.

1A SANDS, SUTHERLAND STATUTORY CONSTRUCTION, §22.30 (4TH ED. 1985); Argosy Ltd. v. Hennigan, 404 F.2d 14 (5th Cir. 1968); West Winds, Inc. v. M.V.Resolute, 720 F.2d 1097 (9th Cir. 1983).

1986). With little discussion, the Court sided with Anzalone and held that absent a statutory duty to disclose, a customer may not be prosecuted even if his conduct is designed to prevent the bank from reporting.

The Ninth Circuit, also relying on the rule of lenity and the requirement of strict construction, reversed a customer's CTR conviction in United States v. Varbel, 780 F.2d 758 (9th Cir. 1986). Though not deciding whether there was a duty on the part of the bank to aggregate discrete transactions which total in excess of $10,000,[9] the Court found that no duty was imposed on the customer.

In summary, other Circuits have reversed CTR convictions for two reasons:

(1) Neither the statute nor implementing regulations require a bank to aggregate transactions occurring over the course of a day and to report such aggregate transactions when they exceed $10,000. In the absence of a duty to aggregate, when a customer structures transactions, the bank has no duty to report and thus the customer has aided and abetted no crime and concealed no material fact.

(2) Whether the bank has the responsibility to aggregate or not, a customer has no duty to report anything. Absent a duty to report, there can be no concealment. See United States v. London, 550 F.2d 206 (5th Cir. 1977).

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9 In a later decision, the Ninth Circuit held that there is no duty on the part of the bank to aggregate. United States v. Reinis, 794 F.2d 506 (9th Cir. 1986).

The Eleventh Circuit has often been cited as the vanguard of the opposing camp. In a series of decisions, this Court has reviewed, and for the most part affirmed, CTR convictions. United States v. Tobon-Builes, 706 F.2d 1092, 1097-98 (11th Cir. 1983); United States v. Giancola, 783 F.2d 1549 (11th Cir. 1986); United States v. Cure, 804 F.2d 625 (11th Cir. 1986); United States v. Denemark, 779 F.2d 1559 (11th Cir. 1986).

The Court has concluded that banks must aggregate single day transactions. United States v. Tobon-Builes, 706 F.2d 1092, 1097-98 (11th Cir. 1983). The Tobon-Builes Court also held that a customer may be prosecuted for concealing a material fact or aiding and abetting the bank's failure to aggregate.

However, despite the Eleventh Circuit's doctrine relating to aggregation and the customer's duty, there is inevitably a more blatant act of deception or concealment in the Eleventh Circuit cases which accounts for the concealment conviction.

In Tobon-Builes the defendants not only structured their transactions but also disguised their laundering operation by employing fictitious names and using no existing legitimate account. The defendants dissembled the transaction in such a way that the bank could not in any way comply with the obligation to report. This Court expressly relied on this aspect of the scheme in finding the requisite concealment:

> [H]is use of false names and his structuring of . . . transactions . . . represents nothing more than a scheme to prevent the financial institutions from fulfilling their legal duty to file reports for these transactions.

706 F.2d at 1098.

Tobon-Builes was re-affirmed in United States v. Puerto, 730 F.2d 627 (11th Cir. 1984). The customers engaged in a conspiratorial agreement with bank employees to file fraudulent CTR's and their culpability was predicated not on structuring transactions but on filing false CTR's.[10]

United States v. Denemark, 779 F.2d 1559 (11th Cir. 1986), is the only Eleventh Circuit decision reversing a CTR conviction. The defendant obtained numerous cashier's checks in amounts less than $10,000, each from a different bank. The Court reasoned that because no financial institution was involved in a transaction in excess of $10,000, no report was required to be filed. There being no such requirement, the defendant neither aided and abetted nor concealed a fact which he had a duty to disclose. Denemark expressly rejected the Government's argument that any effort to avoid the reporting requirement is a crime. Intent, alone, is not a crime. To be guilty of a crime, a

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An agreement among customers and a banker also distinguish the case sub judice from United States v. Thompson, 603 F.2d 1200 (5th Cir. 1979) and United States v. Cure, 804 F.2d 625 (11th Cir. 1986). Cure also involved a conviction for structuring without an agreement with a banker, but as in Tobon-Builes and Giancola, the scheme depended on the use of fake names.

reportable transaction must occur, but be disguised.

Denemark's rational was of no avail to the bank customer in United States v. Giancola, 783 F.2d 1549 (11th Cir. 1986), which was argued to the same Eleventh Circuit panel. Giancola went to different branches of the same bank and obtained cashier's checks in exchange for currency. As in Tobon-Builes, a principal feature of the plan was the use of fictitious names and no established account. The Court, over dissent of Judge Hill, held that while different banks need not aggregate, different branches of the same bank do have that obligation and the defendant's efforts to avoid the reporting requirement by the use of fake names in conjunction with structured transactions represented a conspiracy to defraud the United States.

Meros argues first that the position espoused by the Eleventh Circuit should be re-evaluated and abandoned. The weight of authority from sister Circuits as well as the amendment to the CTR laws in 1986 counsel in favor of a stricter reading of the statutes. See also McNally v. United States, 483 U.S. _____, 107 S.Ct. 2875 (1987).

Even if this Court were to adhere to the Tobon-Builes and Giancola decisions, the facts of this case stand in stark relief to the facts in those cases.

First, unlike Tobon-Builes and Giancola -- in fact, unlike virtually every CTR prosecution canvassed in this argument -- Meros was not laundering currency. He never

exchanged cash for cashier's checks. Rather, he deposited currency in legitimate, accurately-named, partnership accounts. Furthermore, unlike Tobon-Builes, Giancola and Cure, Meros never used a fictitious name; not at the teller's window and not with respect to the account into which the currency was deposited.

Far from concealing currency transactions, Meros' deposits were in his name at his bank to his Grand Shores account on which he was a signatory. Deposits into the Grand Shores account were not transient acts as in the other cases. Such deposits were frequent occurrences over an extended period of time.

The evidence in this case reveals that the failure to file CTR's was as much a function of the bank's negligence as Meros' banking practice. In Tobon-Builes, Giancola and Cure, a bank could not know of its duty to file a CTR. There is no method of aggregating different customers' purchase of cashier's checks. Because the defendants in those cases used fake names, they appeared to the bank as different customers.

Here, however, the bank actually compiled an aggregate daily transaction report: The computers aggregated the cash deposits and posted the daily total to the accounts (R68-82). Yet, despite this record, the bank failed to report. Similarly, the bank knew that Grand Shores had three accounts and had daily computerized records of the deposits to those accounts. Yet, despite this record, the bank

failed to report. Meros did nothing to contribute to this negligence on the part of the bank. In fact, on more than one occasion the bank failed to file a CTR even when currency in excess of $10,000 was handed to one teller at one time (R69-24, 41). In fact, prior to August, 1981, the bank made no attempt to aggregate transactions even when a teller was aware of transactions which totalled in excess of $10,000 (R69-20, 42). Meros did not aid and abet a crime or conceal any material fact. Nothing was hidden, nothing disguised, nothing misrepresented. The bank simply was not sufficiently automated to generate the reports.

> No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.

Lanzetta v. New Jersey, 306 U.S. 451 (1939). No law requires cash in excess of $10,000 to be deposited in a lump sum in a partnership's marketing account. No regulation outlaws the deposit of $7,000 into the partnership's construction account and $7,000 into the partnership's escrow account. Such deposits may be made on the same day and in the same or different branches of a bank.

In the summer of 1981, there was not even a hint that such conduct was felonious. Tobon-Builes was two years hence. Recently, this Court noted that:

> It is well established in this Circuit that a bank customer is liable for disguising a transaction such that a bank is unaware of its duty to file a CTR.

Cure, supra at 630. No such claim could have been made in the summer of 1981.[11] Not one case in the country existed to forewarn attorneys of this soon-to-be judicially-enacted crime. In fact, just one day before the deposits involved in Count 21, that is, on July 23, 1981, the Comptroller General of the United States advised Congress, "[A]lthough the regulation required reporting for each single transaction above $10,000, they did not specifically prohibit dividing a large transaction into several smaller transactions to circumvent the reporting requirement. . . [T]he propriety of multiple transactions still has not been addressed in the regulations." Bank Secrecy Act Reporting Requirements Have Not Yet Met Expectations, Suggesting Need For Amendment, GED-81-80, July 23, 1981. If the Comptroller of the Currency was befuddled by the law, how can a bank depositor be held to a higher standard? Such a holding would mock the constitutional requirement embodied in the Due Process Clause that criminal statutes clearly set forth prohibited acts.

V. COUNT 14 FAILED TO ALLEGE AN OFFENSE

Count 14 of the indictment charged Meros with an additional CTR violation: On November 21, 1980, Meros obtained two cashier's checks from two different banks.

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11 The ambiguity in the currency laws has also led to reversals in connection with the international currency reporting laws. See e.g., United States v. Gonzalez Medina, 797 F.2d 1109 (1st Cir. 1986).

Each check was in an amount less than $10,000 but together they totalled more than $10,000. This is not a crime. United States v. Denemark, 779 F.2d 1559 (11th Cir. 1986). Meros' conviction on Count 14 must be reversed for failure to allege or prove an offense.

VI. THE TRIAL COURT ERRED IN ITS INSTRUCTION TO THE JURY REGARDING THE CTR VIOLATIONS

The trial court instructed the jury:

> It is unlawful for a person to structure a transaction involving more than $10,000 as multiple smaller transactions of less than $10,000 in an effort to avoid the currency transaction reporting requirements. Such structuring does not remove the requirement that the transaction be reported.

(R106-144-45). This constitutes a gross over-generalization of the law. It does not account for the requirement that the deposits must be made on one day before the reporting requirement is triggered. It does not account for the requirement that the transactions must occur at one financial institution. It does not account for the requirement that there must be overt acts of concealment such as the use of fictitious names. Meros objected to the CTR instruction (R101-20-21; R106-168-170). For the reasons set forth in Argument IV, this instruction was erroneous and the convictions on Counts 14 through 22 and 25 must be reversed.

The failure to allege an offense in Count 14; the improper instruction with respect to the alleged offenses; as well as the failure to require proof of

deceptive conduct tainted more than just the CTR Counts. The evidence on these non-crimes infected the entire trial. The jury was led to believe that Meros' financial transactions were illegal and thus he must have been hiding something. Because his financial transactions were not illegal, the inference was flawed. The error, thus, should be reviewed much like the erroneous admission of other crime's evidence under Fed.R.Evid 404(b). Just as the erroneous admission of 404(b) evidence requires a reversal of a conviction, United States v. Peterson, 808 F.2d 969 (2d Cir. 1987); the evidence of pseudo-crimes reflected in the CTR charges sullied the entire trial. Meros' conviction on all Counts should be reversed because of the CTR errors.

VII. THE SEARCH OF MEROS' LAW OFFICE VIOLATED THE FOURTH AMENDMENT

George Meros was arrested on September 26, 1983, in Woodbine, Georgia. Immediately, federal agents in Florida began drafting an affidavit in support of a search warrant of Meros' law office. Agent Mazur, in conjunction with Assistant United States Attorney William King, drafted the affidavit during the 26th and 27th of September. The warrant was signed by a Magistrate during the evening of the 27th. Without any judicial authorization, however, the law offices were occupied beginning the evening of September 26.

The search warrant, as discussed in detail, infra, was sweeping in scope: virtually the entire law office was

subject to search and seizure. All corporate records , all banking records, were listed as subject to seizure. Nothing in the affidavit supported a probable cause foundation for the scope of the warrant. Probable cause was not even suggested or hinted to support the seizure of either all corporate records or all banking records.

The manner of searching the office and seizing records was staggering. Over the course of two days, a dozen federal and state agents reviewed every open and closed file in the entire law firm. Every lawyer's office was searched. Every lawyer was searched. The lawyers' family records were seized. Firm ledgers were seized.

The Government's case-in-chief relied extensively on documents seized during the search and evidence derived from those seized documents. Records of Grand Shores West (R68-97); airline tickets (R68-101, 103); land sale contracts (R68-102); corporate records (R68-111); various bank records (R68-112 et seq.); law firm checks and checks on Meros' personal account (R68-117-120); the client files of various members of the Papolos family which linked them to Meros (R20-35-37, 227-233); as well as other clients' files (R68-122 et seq.) were all introduced at the trial.

The Fourth Amendment violations in this case were not subtle: The breadth of the search warrant licensed the seizure of virtually anything on paper. Though the government may attempt to negate the Fourth Amendment violation by Leonizing the search nothing in the Supreme

Court's recent decisions immunizes the government from the flagrant and readily apparent deficiencies in the warrant.

The execution of the warrant was no less unconstitutional. Coupling Fourth, Fifth and Sixth Amendment violations with the manifest trampling of the attorney-client privilege and the work product doctrine, the executing agents were apparently oblivious to the requirements of a search warrant generally, and the more rigorous demands of a law office search. With no regard for the rights of clients, totally innocent law partners and support staff, the agents conducted a general search of the law office, rummaging through virtually every file, searching everybody present and disregarding the few limitations which were contained in the warrant.

A. THE WARRANT WAS OVERBROAD AND FAILED TO PARTICULARIZE THE DOCUMENTS TO BE SEIZED

Document searches more than any other type of search must be supported by a warrant which specifies the focus of the search with scrupulous exactitude. Stanford v. Texas, 379 U.S. 476 (1965); Zurcher v. Stanford Daily, 436 U.S. 547 (1978); United States v. Apker, 705 F.2d 293 (8th Cir. 1983). In the context of a law office search, because of the presence of documents protected by the Fifth Amendment (See Fisher v. United States, 425 U.S.391 [1976]), the Sixth Amendment, as well as the attorney-client and the work product rules, this requirement must be rigorously enforced. Klitzman v. Krut, 744 F.2d 955 (3rd Cir. 1984); Andresen

v. Maryland, 427 U.S. 463 (1976); People v. Hearty, 644 P.2d 302 (Colo. 1982); NCTC v. United States, 635 F.2d 1020 (2d Cir. 1980); United States v. Medows, 540 F.Supp. 490 (S.D.N.Y. 1982).

A search warrant is overbroad when the category of documents or tangible objects enumerated in the search warrant are not shown with probable cause in the supporting affidavit to be contraband, the fruit of a crime or evidence of a crime. In re Grand Jury Proceedings (Young), 716 F.2d 493 (8th Cir. 1983); In re Lafayette Academy, 610 F.2d 1 (1st Cir. 1979). Fed. R. Crim. P. 41(b).

Paragraph Two of the warrant in this case is characteristic of the overbreadth and deficient particularization: The officers were directed to seize all records pertaining to any foreign or domestic bank accounts or foreign and domestic corporations. No limitation is offered with respect to time; no limitation on the nature of the corporation; no limitation on the type of records; no limitation on the type of bank accounts. The inevitable result is that a law partner's child's savings account passbook was seized (R22-172-73, 178). This clause of the warrant is not even remotely supported by any probable cause in the affidavit. The affidavit, at most, suggested the existence of probable cause to search only corporate or bank account records in which Mark Knight, James McLaughlin or Byron Wever had an interest, that is, individuals who allegedly laundered money with the help of Meros.

Paragraph Three directs the agents to seize "copies of cashiers check or bank checks or wire transfers in amounts less than $10,000.00 and receipts pertaining thereto." Again, no limitation as to time; no limitation as to the payor or payee; no limitation as to which banks or financial institution. The affidavit does not advance even a scintilla of evidence that all $10,000.00 checks are evidence of crime. The affidavit would have authorized a seizure, at most, of such transactions involving Wever and Meros in 1979, involving Coit in 1979 and 1980 and involving Mark Knight and James McLaughlin.

The purpose of the particularity requirement is to proscribe the indiscriminate rummaging through a person's belongings. Coolidge v. New Hampshire, 403 U.S. 443 (1971); United States v. Betancourt, 734 F.2d 750 (11th Cir. 1984). The failure of the warrant to particularize the items which are subject to seizure; or the overbroad characterization of categories of seizable documents, enables -- in fact, necessitates -- the exercise of discretion on the part of the executing agent. "Nothing should be left to the discretion of the officer executing the warrant." Marron v. United States, 275 U.S. 192, 196 (1927); United States v. Cardwell, 680 F.2d 75 (9th Cir. 1982); United States v. Fuccillo, 808 F.2d 173 (1st Cir. 1987); Rickert v. Sweeney, 813 F.2d 907 (8th Cir. 1987); United States v. Spilotro, 800 F.2d 959 (9th Cir. 1986).

The Assistant United States Attorney who accompanied

the searching agents conceded that he exercised his discretion when he testified that he made decisions beyond merely deciding what was covered by the warrant (R20-24-25). One of the searching agents also testified that they only seized corporate records which interested them (R21-135-38, 141). Obviously, there was no probable cause to seize all corporate records if the agents were picking and choosing once they began their search.

Warrants which order the seizure of a generic classification of items -- such as "all records" or "all copies of cashiers checks" -- are not inherently unreasonable. However, the propriety of their use requires that there be reason to believe that a large collection of similar contraband or criminal evidence is present on the premises and that the agent is told how to distinguish contraband from other items. United States v. Klein, 565 F.2d 183, 188 (1st Cir. 1977); United States v. Pollock, 726 F.2d 1456 (9th Cir. 1984); United States v. Fuccillo, 808 F.2d 173 (1st Cir. 1987). There was no such showing or even suggestion in the affidavit or warrant to satisfy either of these tests.

The search warrant in this case is the antithesis of the narrow and particularized warrant required by the Fourth Amendment:

> The executing officers could not or made no attempt to distinguish bona fide patient's records from fraudulent ones, so they seized all of them in order that a detailed examination could be made later. This is exactly the kind of

> investigatory dragnet that the fourth amendment was designed to prevent.

United States v. Abrams, 615 F.2d 541, 545 (1st Cir. 1980). The seizure of "all records" is only justified in those rare cases where the entire business is illegal. United States v. Gomez-Soto, 723 F.2d 649, 653 (9th Cir. 1984); United States v. Betancourt, 734 F.2d 750 (11th Cir. 1984); United States v. Brien, 617 F.2d 299 (1st Cir. 1980); Roberts v. United States, Misc. No. M9-150 (S.D.N.Y. 1987).

Searches of law offices are not per se unreasonable. If a warrant is properly drawn and supported by probable cause, a lawyer is no more shielded from a search than any other citizen. See, e.g., United States v. Bithoney, 631 F.2d 1 (1st Cir. 1980) (Seizure of sixteen particular client files); United States v. Jacobs, 657 F.2d 49 (4th Cir. 1981) (narrow category of clients: Those treated by a particular doctor or filing claims against a particular insurer); United States v. Haimowitz, 706 F.2d 1549 (11th Cir. 1983); United States v. Medows, 540 F.Supp. 490 (S.D.N.Y. 1982). But a warrant which authorizes the seizure of all corporate records in a law firm and all bank records is blatantly unconstitutional. Here, there were five attorneys practicing in the firm, some of whom did corporate work (R21-187). There is no justification for the seizure of all corporate records. Indeed, the search of any other lawyers' files was totally unjustified; yet, every lawyers' files were reviewed (R20-41-43), including the lawyers'

personal records and the records of the other lawyers' wives and children (R22-22, 135, 172, 173, 178, 189).

The warrant was facially overbroad. Nothing in United States v. Leon, 468 U.S. 897 (1984), countenances the execution of a search warrant which is so manifestly overbroad. "A warrant may be so facially deficient -- i.e., in failing to particularize . . . the things to be seized -- that the executing officers cannot reasonably presume it to be valid." 468 U.S. at _____. Agent Mazur, the agent who prepared the affidavit knew, as any reasonable officer would know, and as the attending Assistant United States Attorney knew, that there was no cause -- probable, possible or fantasy -- to support the seizure of all bank records, or cashier's checks since the beginning of time, or corporate records, or all evidence of Meros' vacations. The warrant in this case was a carte blanche to rummage through every document in the law office searching for what the case agent and the Assistant U. S. Attorney believed would be incriminating. It was an authorization to engage in an exploratory search.

The executing officers were aware of the facial overbreadth of the warrant. Were the warrant valid, the officers would be in derogation of their duty in failing to seize every record in the office. They knew that the magistrate had conferred on them the authority to choose what should be seized. Leon does not sanction this delegation of authority from the magistrate to the executing

authority. United States v. Spilotro, 800 F.2d 959 (9th Cir. 1986). This type of warrant cannot be resurrected by the good faith of the officer. The unreasonable execution of the warrant as detailed in the next section is also probative on the issue of good faith. United States v. Rule, 594 F.Supp. 1223, 1239 (D.Me. 1984); United States v. Fuccillo, 808 F.2d 173 (1st Cir. 1987).

The warrant in this case mocks the Fourth Amendment. The remedy is clear: Suppression of all documents seized under the authority of the facially defective warrant. In re Grand Jury Proceedings (Young), 716 F.2d 493 (8th Cir. 1983); United States v. Abrams, 615 F.2d 541 (1st Cir. 1980); United States v. Roche, 614 F.2d 6 (1st Cir. 1980); In re Lafayette Academy, 610 F.2d 1 (1st Cir. 1979); United States v. Klein, 565 F.2d 183 (1st Cir. 1977). A general warrant cannot be salvaged by permitting the continued retention of those documents which could have been seized if the warrant had been properly drafted. United States v. Cardwell, 680 F.2d 75, 78 (9th Cir. 1982); United States v. Rettig, 589 F.2d 418 (9th Cir. 1978). Indeed, any other result would render the particularity requirement a sham.

B. THE MANNER OF EXECUTION WAS UNREASONABLE

The Fourth Amendment requires that searches and seizures be reasonable. One aspect of reasonableness is the probable cause prerequisite. Another facet of reasonableness focuses on the method or manner of executing

a warrant.

The execution of the search warrant in this case was undertaken with deliberate disregard for the law firm's clients, the staff, and the other attorneys. Work product and attorney client communications were trespassed without hesitation. Justice Department guidelines designed to prevent this type of abuse were ignored.

A brief review of the "highlights" of the search follows:

1. The seizure of the law office began at 9:30 p.m. on the evening of September 26, 1983, preceeding the arrival of the search warrant by 24 hours. During this time, the sole target was George Meros, who was under arrest. (R20-10-17; R21-47, 48). Contrast Segura v. United States, 468 U.S. 796 (1984). During this period, nobody could remove anything from the office. (R21-47, 48).

2. When one of the occupants of the office suggested that they were going to video-tape the search, the officer advised that he would be arrested for obstruction of justice if he attempted to film the execution of the search warrant.(R20-31).

3. This was a "total wall-to-wall search" which included the inspection of every single file and every document within the files, whether or not the file indicated that it contained information pertaining to anyone in the warrants. Bricks and mortar were the only things left undisturbed. See United States v. Tranquilla, 330 F.Supp. 871 (M.D.

Fla.1971); United States v. Strand, 761 F.2d 449 (8th Cir. 1985). There was an orderly filing system, with clients' names clearly marked on each file (R22-23). There was no need to review every shred of paper in the office to determine whether a document fell within the parameters of the warrant. See United States v. Slocum, 708 F.2d 587, 604 n.24 (11th Cir. 1983). Other lawyers' divorce clients' files were searched (R21-196), and because all bank records could be seized, the divorce clients' bank records were seized (R22-185).

> [I]t is difficult to believe that the draftsmen of the Fourth Amendment did not insert "reasonable" to avoid just such an in terrorem state as the agents created and wreaked here. Moreover, just as "unreasonable" can be applied to the breadth of the warrant, so much the more can it be applied to the manner of execution because it is the "manner" which, as vividly illustrated by the facts of this case, can create and constitute the prohibited invasion.

VonderAhe v. Howland, 508 F.2d 364, 370 (9th Cir. 1975).

4. Prior to the execution of the search warrant, Meros and the other lawyers agreed to deliver the records requested by the search warrant under seal to a special master, and requested a hearing. See 28 C.F.R. §59.1 et seq. This request was denied. (R20-52).

5. The officers stated that they intended to search everybody entering or leaving the office. See Ybarra v. Illinois, 444 U.S. 85 (1979). They searched secretaries and lawyers not only when they entered and exited the premises,

but also when they went from one room to the next (R20-46, 48, 49; R21-185, 186; R22-22, 84, 111).

6. The officers made no attempt to preserve any confidential communications which were included in the files. Everything was examined. No exceptions.

7. The agents searched every file in the office during the execution of the search warrant regardless of what the file label said. (R20-73, 146).

8. The officers seized files of other criminal clients such as Vinnie Carone and Raymond Mayer. See Klitzman, supra.

9. From Peter Meros' office, the son and law partner of the Defendant, the agents seized personal banking records, personal checks, cashier checks, his childrens' bank records and a tape from the desk of Peter Meros regarding another criminal case, which contained incriminating evidence. (R22-22, 84, 111).

10. The officers examined the client list, the master logs of phone calls, messages from clients, account ledgers, time records on clients, personal phone books, client bills, escrow accounts and all matters relating to the operation of the firm. They went through the personal tax records of Dede Meros and those of Walt Smith.

11. The agents searched mail as it arrived each day and also went through all the incoming phone messages (R20-39; R21-199).

12. During the initial search, the executing officers made

notes of documents which were not immediately seized; the agents then obtained a second search warrant to seize those documents (R20-35, 37, 89, 117, 135, 227, 232).

13. All documents relating to the law firm operation were seized, including checkbooks, ledgers, and deposit books. (R21-201).

14. The offices of Peter Meros, Dede Meros Neufield, Walt E. Smith and Jay Fusco, were searched thoroughly and many documents were seized, although their names were not mentioned in any portion of the warrant or affidavit, nor was the entire firm of Meros and Smith mentioned, nor was it alleged that all members of the firm were engaged in any of the alleged activities.

15. There were about 500 open files in the firm and thousands of closed cases. 30% of these files were seized and removed (R21-15; R22-22).

16. During the course of the search, the federal agents decided to invite state law enforcement agents to the firm. The state agents were permitted to review files with the federal agents and their opinions regarding certain client files were solicited (R20-136, 137; 21-69, 70, 104, 107, 128). When it was discovered in conversations with the state agents that some clients, the Papolos', were "notorious" drug dealers, their files were scrutinized -- despite the fact their names were not on the initial affidavit and warrant -- and segregated from the other files. A second search warrant was then obtained to justify

the seizure of those files (R20-35, 37, 89, 117, 135, 227, 228, 232, 233). At the suppression hearing the federal agents offered the explanation that the state agents were simply there for "security". But this lame suggestion was belied by proof that the state agents were the leaders of various state organized crime units and narcotics divisions (R21-171-175).

One of the federal agents candidly admitted that the state agents were invited because, "We intended to broaden the scope of the investigation. We knew that they had expertise in regard to certain people that we felt were going to be included in the conspiracy." (R21-104). People whose names were not in the warrant.

Like kids in the candy store, the federal agents invited their state counterparts to join in a tour through every file in the law firm. This was hog heaven for law enforcement. And violative of the Fourth, Fifth and Sixth Amendments of the Constitution and not even remotely justified by the warrant.

The Government sought to justify this practice on two grounds: Since a review of every document and file was necessitated by the warrant, no harm was done by inviting others to review the documents too; and since the Papolos' files were in "plain view", the examination of them was not unlawful, and setting them aside in anticipation of a second warrant was permissible.

The first argument suffers from two vices: Circularity

and failure to minimize. One of the problems is the overbreadth of the warrant. To rely on that poison as an antidote for the methodical review of documents and files which had no link to any probable cause of criminality is unavailing. The duty to minimize the intrusion is essential in a document search. The agents in this case took no steps to minimize and the review of the Papolos' files is paradigmatic.

The plain view excuse is foreclosed by Hicks v. Arizona, _____ U.S. _____, 107 S.Ct. 1149 (1987). In violation of Hicks, those files were carefully scrutinized. More importantly, because there was nothing immediately incriminating, the plain view exception has no application. Coolidge v. New Hampshire, 403 U.S. 443 (1971); Texas v. Brown, 460 U.S. 730 (1983).

A law office is not a sanctuary immune from a search. Yet, it is different than a corporate headquarters or a murder suspect's dwelling. The Supreme Court has cautioned that Fourth Amendment issues cannot be resolved without regard to the circumstances of the search. Roaden v. Kentucky, 413 U.S. 496 (1973); Zurcher v. Stanford Daily, supra. A search in a law office threatens the Sixth Amendment rights of clients; jeopardizes the attorney client and work product privileges and is vulnerable to abuse unless deftly executed and carefully supervised.

Threatening occupants with criminal obstruction of justice charges is not deft. Searching occupants without a

warrant does not exhibit due care. Seizing files of clients not mentioned in the warrant or affidavit is deplorable. To sanction this search is to put the Court's imprimatur on a massive violation of countless individual's constitutional rights. See United States v. Offices Known As 50 State Distributing, Co., 708 F.2d 1371 (9th Cir. 1983) (If search is executed in a manner which shocks the judicial conscience, suppression is proper remedy). To allow this evidence to be used at trial made the federal courts "accomplices in the willful disobedience of a Constitution they are sworn to uphold." Elkins v. United States, 364 U.S. at 223.

VIII. THE CUMULATIVE EFFECT OF THE ERRORS COMMITTED[12] BY THE TRIAL COURT DENIED THE APPELLANT A FAIR TRIAL

During Meros' trial the Court availed itself of every opportunity to thwart Meros' right to receive a fair trial. In addition to those errors already discussed by Meros, the Court made many other improper rulings and actions which resulted in the denial of a fair trial. These rulings and actions included: supporting the credibility of government witnesses; silencing counsel and the record on appeal; making opinions on issues and improper comments in the

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12 For purposes of this argument, Meros specifically adopts and incorporates herein all errors committed by the trial Court which are discussed in the briefs of his Co-Appellants'; as well as the trial Court errors analyzed elsewhere in this brief.

presence of the jury; and inconsistently favorable treatment and rule interpretation for the prosecution, and undue restrictions on cross-examination of numerous witnesses; .

"In a trial by jury in the federal court, the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law." Quercia v. United States, 289 U.S. 466, 469 (1933). "The basic requirement [of a judge] is one of impartiality in demeanor as well as in actions." United States v. Hickman, 592 F.2d 931, 933 (6th Cir. 1979); United States v. Frazier, 584 F.2d 790, 794 (6th Cir. 1978). The role of a judge extends to "controlling the trial and its participants so as to minimize confusion and delay while maximizing orderly, clear and efficient presentation of the evidence." United States v. McLain, 823 F.2d 1457, _____ (11th Cir. 1987); United States v. McDonald, 576 F.2d 1350, 1358 (9th Cir. 1978).

Potential prejudice is a problem that "lurks behind every intrusion into a trial made by a presiding judge." Hickman, at 933. His position makes "his slightest action of great weight with the jury," Quercia at 470; United States v. Lanham, 416 F.2d 1140, 1144 (5th Cir. 1969); United States v. Pisani, 773 F.2d 397 (2nd Cir. 1985). This Court has long held that counsel's function is almost equal in importance to that of the judge; hence counsel is "entitled to courtesy and respect." McLain, at___, citing

Zebouni v. United States, 226 F.2d 826, 827 (5th Cir. 1955). Discrediting defense counsel is improper. Id.

If a trial judge has reason to comment or interject during the trial, it is crucial that he maintain an objective demeanor. "Outright bias or belittling of counsel is ordinarily reversible error." Hickman, 592 F.2d at 933. An appearance of partiality can easily arise if the judge continually intervenes on the side of one of the parties. "Interference with the presentations of counsel has the potential of making a mockery of a defendant's right to a fair trial, even in the absence of open hostility." Id. at 934; United States v. Sheldon, 544 F.2d 213, 216-219 (5th Cir. 1976). The Court in Hickman reversed the defendant's conviction, holding that the trial court's constant interjections, limits on cross-examination by the defense, use of an anti-defendant tone in his interruptions, denied the defendants a fair trial because it left the jury with a strong impression of the Court's belief in the probable guilt of the defendants. Hickman at 936.

Individual errors occurring during a trial are often sufficient by themselves to mandate the reversal of a conviction and the grant of a new trial. A reversal and new trial, however, may also result from the cumulative effect of trial court errors. United States v. McLain, 823 F.2d 1457 (11th Cir. 1987).

A. The Trial Court Encroached On The Province Of The Jury By Supporting The Credibility Of Government Witnesses

The bias of the trial court against the defense led to reversible error in its support and bolstering of government witnesses. The trial Court instructed the jury that David Strongosky was "not expected to remember" his grand jury testimony (R 29-205) and that Donald McCoy was "going to tell the truth about what was told to him" (R46-28).

Agent Mazur was anointed a money laundering expert in the jury's presence and was then allowed to testify to the practical aspects of the term (R 68-104). The Government had not offered him as an expert and there was nothing about his testimony that had anything to do with opinion. He identified documents. He summarized entries of accounts. Moreover, Mazur, the chief case agent, had been sitting at the prosecution table throughout the trial. His coronation as an expert and allowing him to testify about "money laundering" increased the prosecutor's credibility, and compounded the already existing prejudice from the use of the term.

"The credibility of a witness is ... a jury question ... and this function is not to be unduly infringed by judicial comment." United States v. Onori, 535 F.2d 938, 944 (5th Cir. 1976). When statements by the Court invade this function, reversal must ensue. United States v. Fischer, 531 F.2d 783 (5th Cir. 1976).

B. The Trial Court's Repeated Practice Of Denying Counsel The Right To Be Heard And Refusing Objections And Motions, Denied The Appellant Effective Assistance Of Counsel And Resulted In Harmful Error

As recently reaffirmed by this Court, "...any deprivation of assistance of counsel constitutes reversible error and necessitates a new trial." Crutchfield v. Wainwright, 803 F.2d 1103, 1108 (11th Cir. 1986). It is axiomatic that counsel cannot provide assistance if the Court denies counsel the right to be heard.

The Court's refusal of all motions for severance resulted in a mass trial with numerous defendants and defense counsel. The number of people and the distinctions in issues relating to each created an unfair trial atmosphere. Everytime defense counsel was permitted to object and be heard, the jury was ushered out of the courtroom (R 34-102, 107). The number of individuals often became the excuse for the judge denying counsel the right to be heard.[13]

When making an objection, the Court erred by prohibiting counsel from stating in or outside the presence of the jury any more than the word "objection" and the legal ground (that, too, was limited; counsel could only say

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13 Example: The Court: "Alright, go ahead counsel. Let the record show there are 19 lawyers, and if everytime I tell someone to go forward, another one stands up and wants to be heard, that I don't let them do that" (R 51-177).

things such as "confrontation", Rule 104, etc.).[14] Counsel often and vigorously objected to this cut-off procedure (R 33-16-17; R34-105-108; R44-65; R44-171; R49-133; R70-227-233). Yet the Court routinely erred and denied counsel the right to be heard, to make objections or motions and cut counsel off threatening contempt when counsel would try to articulate his position. (R34-98, 109; R39-173; R44-21-22, 171; R45-19-24,131-133; R49-131-134; R57-184-185; R70-63, 90-91; R79-19; R93-33).[15] Counsel was also barred

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Judge Krentzman's attitude regarding his refusal to hear objections and motions by counsel was exemplified in the following discourse:

> Mr. Garland: "But Your Honor does not let us, during cross-examination, be heard from."
> The Court: "You don't have to be. If I'm not educated about what you're talking about, that's my problem, and if I'm wrong, I'll get reversed."
> Mr. Garland: "It's my client's problem."
> The Court: "It's not a question for the jury at all, and you don't have to give the reasons. If I make an error, you will have the benefit of that appeal, whether you warned me about it in the record or not." (R 33-16-17)

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These citations represent examples of the Court's uniform procedure of restricting counsel from doing his job: articulate objections and make motions. It must also be noted that this procedure also made it difficult for counsel to preserve the record on appeal. The following which occurred outside the presence of the jury constitutes a typical example of this practice:

> Mr. Garland: "I wish to be heard --"
> The Court: "Not while it's before me."
> Mr. Garland: "I wish to be heard."
> The Court: "You can join as an --"
> Mr. Garland: "I wish to be heard, but -- I insist upon the right to be heard."
> The Court: "Well, you may insist and I'm going to refuse it."
> Mr. Garland: "You're denying that?"
> The Court: "Yes sir, absolutely, flat out."

from putting these motions and objections in the record in the Court's absence (R 49-132).

If muzzling counsel in this manner was not sufficient, the Court's application of the local rules similarly prejudiced the Appellant. The Court determined that Rule 503.9[16] meant that the defense attorney who was in the midst of examining a witness was the only individual who would be heard by the Court, despite the fact that he was not representing all of the defendants (R 45-17-19).

Additional objectionable treatment of defense counsel by the trial court was only visible upon close scrutiny of the record. Often times the Court would excuse the jury under conditions where it was plain that the Court was preparing to argue with or reprimand defense counsel. The Court also raised its voice at defense counsel in the jury's presence. This conduct was explained more fully by counsel

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Mr. Fugate: "Judge, shouldn't each defendant have a right to voice an opinion to the Court about it's admissibility?"
The Court: "No sir .... That's all. Everybody who wants to be heard, hold your hand up and I'll recognize you."
Mr. Garland: "I want to state my ground."
The Court: "I understand what you did. I denied you -- well, I deny everybody else, that's all ...."
(R 44-22)

16

Rule 503.9 states "only one attorney for each party shall examine or cross-examine each witness. The attorney stating objections, if any, during direct-examination shall be the attorney recognized for cross-examination."

for defendant for defendant Francis in his motion for mistrial (R44-60-68).

All these actions prejudiced by the Defendant. All individually chilled the right to counsel. Each independent error, however, also hightened the jury's awareness of the Court's bias toward the Government and displeasure with the defense, creating even more prejudicial error as the result of this accumulation of errors.

C. The Interjections By The Trial Court In The Jury's Presence As Well As Several Of Its Rulings Tainted The Fairness Of The Trial And Was Prejudicial Error

During witness examination, the Court indicated to the jury its opinion on an issue in the case. During examination of Margaret Laub, employee in charge of handling the CTRs at Landmark Union Trust Bank in St. Petersburg, Florida (R 68-33), the Court's interjections[17] amounted to

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17 The following instances occurred during Margaret Laub's examination:

a) From a review of Exhibit 306, counsel notes that there are two deposits at the main office, three minutes apart, (April 6th), same teller. The witness testifies that the bank should have filed a CTR. Counsel asks why the teller would not have filed one and the following occurred:

> Mr. Garland: "That's an issue in the case, that's what the question goes to, the central issue in the case."
> The Court: "She says she doesn't know that. Ask her if she knows why the teller didn't do it."
> Question: "Do you have any idea why this teller didn't do what you told the teller to do?"
> Answer: "Because the teller made an error."
> The Court: "Of course the issue in the case -- you know what the issue is."
> Mr. Garland: "Yes Your Honor. I do know what the issue is."

an instruction to the jury to disregard an important issue in the case: why the bank did not file a CTR where deposits were made on the same day in excess of $10,000.[18] Error occurs when the Judge makes comments which the jury might have construed as an instruction to disregard a particular issue in a case. U.S. v. Vreeken, 803 F.2d 1085 (10th Cir. 1986).

Other prejudicial statements were made by the Court in the jury's presence. One such statement was the Court's instruction to the jury regarding the sentencing process. The jury was misled by the Court to believe that the Government does not effect sentencing through its statement that the Court does not ask the Government its recommendation as to sentence. If there is a plea agreement

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The Court: "You haven't touched on that."
Mr. Garland: "I certainly have."
The Court: "This situation doesn't fit that." (R79-26, 27)

(Outside the presence of the jury, counsel moves for a mistrial based on those comments (R 79-27).

b) Appellant asked the following: "If a customer has an account and in that account are two deposits in cash exceeding $10,000.00 in total but neither of which exceed $10,000.00, what was the procedure for reporting prior to August 1, 1981?" Answer: "Are they both made at the same teller at the same time?" (R 79-19). The prosecution objects to the hypothetical. The Court sustains the objection stating that there are "obviously too many conditions here" refuses to hear counsel on its precise application to this case, the importance of the issue and sustains the objection. (R79-19-20).

18 Counts 15-25 of the indictment charged that Meros in some way caused the failure to file currency transaction reports. (See Argument IV, supra.)

the recommendation is in the agreement (R44-143-145).

Other statements were made by the Court which were impermissible comments on a defendant's right to remain silent. "Well counsel, all evidence is available to everybody. While no person is required to produce any evidence, no defendant is required to produce any evidence or offer any witness, any defendant may do that. And, the defendant has the subpoena power of the federal government and can secure evidence like everyone else can" (R 70-99). A strong implication resulted from this particular reference: that a defendant has a duty to put up evidence in his favor. Moreover, the word "defendant" instead of "witness" was used by the Court in explaining "immunity" to the jury (R 63-76).[19] Such statements were clearly impermissible as comments by the Court on a defendant's right to remain silent. Raper v. Mintzes, 706 F.2d 161 (6th Cir. 1983); United States v. Flaherty, 668 F.2d 566 (1st Cir. 1981).

Several rulings of the Court also affected the fairness of Meros' trial. These rulings included allowing the use of the inflammatory term "money laundering" over

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19 The Court instructed the jury as follows: "Ladies and gentlemen, this procedure of granting use immunity is because any person called to testify has under the Fifth Amendment of the Constitution of the United States the right to refuse to give testimony which might tend to incriminate him .... That being done, the defendant no longer had the need for the protection of the Fifth Amendment and he can be compelled to testify .... (R 63-76).

objection of counsel (R 26-114; R68-140-141; R69-24-3). Another erroneous ruling by the Court was the limitation of good character witnesses on Meros' behalf to three (R 94-130-132). Although limitation of these witnesses is within the Court's discretion, the limitation in this case was abusive. Meros was a well respected attorney in the community. The limitation resulted in the implication that Meros could only locate three individuals to speak on his behalf. This error created by the Court's abuse of discretion was exacerbated by the trial Court's refusal to instruct the jury, as requested by Meros, that such limitation was made (R 102-67).

D. The Trial Court's Bias Against The Defense And Allegiance To The Prosecution Resulted In Incongruous Rulings Which Displayed His Favoritism Openly To The Jury

Several of the trial Court's edicts can only be viewed as favoritism for and allegiance to the prosecution. One such "edict" was the Court's interpretation and definition of the business record exception to the hearsay rule (Fed. R. Evid. 803(6)): if offered by the prosecution, the tendered evidence was admissible as a "business record"; if offered by the defense, the same type of evidence was held inadmissible. The error was thus threefold:

(1) Defense records which were admissible as a business record were kept out; (2) Prosecution records which were not business records were allowed in; (3) The standard for a business record was different for the

prosecution. If the Court applied the same rules to defense records, none would have been denied admission. The following constitute a few instances of the rule's application:

Meros offered several records which were erroneously denied admission by the trial Court on the basis that they were hearsay and not within the business record exception. One such record was the medical file of Dr. Costellano (Ear, Nose and Throat Specialist) containing information on Meros' hearing impairment (R 87-207). The evidence was relevant and crucial to explain Meros' responses in various taped conversations. His assertion was that because of his hearing problem, he often responded in ways that seemed like agreement when in reality he had not heard what was said. The file of Dr. Goldstein (Psychologist) (R 94-113-114), comprised of notes taken by Dr. Goldstein during sessions with Byron and Carol Wever were also erroneously denied admission by the Court.

Elizabeth Mills was offered as the custodian of records for her husband's realty company in order to introduce documents of that company [Government exhibit 175; (R 62-78)]. Through her, the Government was permitted to introduce these "business records" into evidence.[20]

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No showing was made that the records were kept in the regular course of business or that any of the other requirements of the exception were met. She helped set up the business in 1977 and that was the extent of her involvement. She did not work for his business during 1980 (date of the records) and was not involved in making any of

Another example occurred with the introduction of and the testimony concerning a chart (Government exhibit 298) relating to the "Ocean Boy" during direct-examination of John Booker (R 22-182-184). The back of the chart contained a hand written notation concerning various individuals. The whole exhibit was declared by the Court a "business record" and therefore admissible, despite the fact that it was never established that it was done in the regular course of business. Moreover, Booker's notations were made from information he obtained from another individual and lacked trustworthiness (R 63-146); it was hearsay and thus inadmissible. United States v. Davis, 571 F.2d 1354 (5th Cir. 1978); United States v. Ordonez, 737 F.2d 793 (9th Cir. 1983). It was also created to serve his own purpose which also denied its admission as a business record. United States v. Bohrer, 807 F.2d 159 (10th Cir. 1986).

The best evidence rule was another canon subject to varied application by the trial Court. Copies of notes from Mr. LaPorte's file on Byron Wever offered by the defense were unacceptable under the rule and counsel was required to obtain the originals (R 36-167-168). A copy of Donald McCoy's telephone book, however, offered by the Government, was acceptable (R 42-55-56).

The Court displayed its bias in favor of the

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the records produced which included hand written notes (R 62-82-86). These records were thus inadmissible. United States v. Dreer, 740 F.2d 18 (11th Cir. 1984).

prosecution and against the defense through other rulings as well. It would allow the prosecutor to refresh a witness' memory before he stated he had none and allowed the prosecutor to ask leading questions on direct-examination over objection (R 28-145-148; R29-66; R31-211; R32-28, 44, 45; R33-238; R34-96-100, 104, 105; R40- 22; R64-81). When direct-examination became inconvenient, and without request by counsel, the Court allowed the prosecutor to proceed as if on cross-examination (R 73-106- 107).[21] When using grand jury testimony to impeach a witness, defense counsel was admonished by the Court that it must read specific questions and answers (R 29-204-205; R35- 87,156-157). This rule was not applied to the Government (R 34-98-100, 105, 106; R77-82-85; R79-122-124). The Court would also ask the prosecution if offered evidence should be used against all defendants. The prosecutor decided (R 68-94-95). These acts, when combined with other actions by the Court resulted in impermissible favoritism warranting reversal. Killilea v. United States, 287 F.2d 212 (1st Cir. 1961). In the eyes of the jury, the prosecution and the Court were one.

Many of the errors committed by the Court were sufficiently harmful in and of themselves to require reversal. However, the facts derived from the voluminous

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21 Contrast this action with forcing defense counsel to proceed as though on direct while in the middle of cross (R 31-145; R65-25; R66-158). Also, when counsel requested to cross an adverse witness, this request was denied (R 70-6).

record also mark this trial as a prototypical example of how the cumulative effect of errors and displays of partiality result in the denial of a fair trial to a defendant. United States v. McLain, 823 F.2d 1457 (11th Cir. 1987); United States v. Pearson, 746 F.2d 787 (11th Cir. 1984); United States v. Diharce-Estrada, 526 F.2d 637 (5th Cir. 1976); United States v. Williams, 523 F.2d 1203 (5th Cir. 1975).

E. The Trial Court Violated Appellant's Sixth Amendment Right To Cross-Examine Through The Myriad Restrictions It Placed On That Right

The curtailment of cross-examination by counsel included witnesses such as Byron and Carol Wever, David Strongosky, Donald McCoy, Joseph O'Hara, Buddy McCarthy and Alexander Biscuiti.[22] All of these witnesses affected Meros because they "proved" the enterprise.

Moreover, several actions of by the trial court resulted in prejudicial interference with Meros' rights of confrontation and to assistance of counsel. These actions included requiring counsel, while in the middle of cross-examination, to proceed as though he were on direct (R31-171; R66-24, 25), thus hindering proper cross-examination

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22 Meros incorporates herein the law regarding limitation on cross-examination and the curtailment of the right with key witnesses fully briefed in Argument "I" of this brief. Moreover, for purposes of this argument, Meros has specifically adopted the arguments on limitation of cross-examination contained in Co-Appellants Michael Ferrentino's and Stephen Papolos' and Albert Papolos' briefs.

and implying the witness was friendly. The Court also engaged in a practice of interrupting counsel during examination making its effectiveness minimal (R 62-65-70; R44-25-33; R33-20-120).

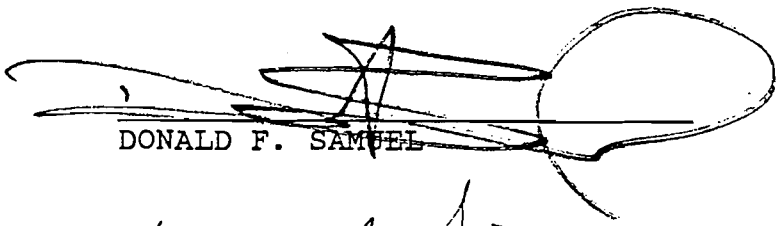
The Court also erred by interfering with preparation for cross-examination. Over strenuous objection, the Court fashioned a rule enjoining counsel from interviewing any Government witness located in the courthouse. (R 44-209; R49-128-129). The only time defense counsel could speak to a government witness in the federal courthouse was when the Judge permitted such action under his supervision. Indeed, even this controlled interviewing was not routinely granted. Counsel was denied the right even after request (prior to cross-examination) to interview Mitchell Rome, a witness who was not on the government's witness list (R 64-90). In regard to witnesses McCarthy and O'Hara, whose whereabouts were unknown to the defense, the Court told counsel to give the witness his phone number and "the witness would call them" (actually, the phone numbers were given to the prosecutor to give to the witness) (R 44-218, 221-223). There was no guarantee that such a witness would call, and if he did, counsel would not see the witness' demeanor when answering questions or know if there was an agent or other individual present in the room directing him how to answer or whether to answer at all. Each act was error and with each error, more prejudice ensued.

CONCLUSION

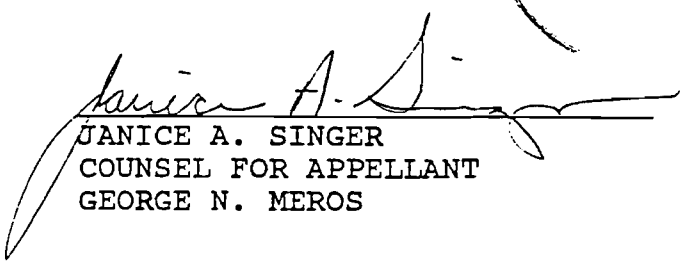
For the within and foregoing reasons, Appellant Meros' convictions should be reversed, or in the alternative, reversed and remanded for a new trial.

Respectfully Submitted,

EDWARD T. M. GARLAND



DONALD F. SAMUEL



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