

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

No. 09-13944-A

**JUDE LACOUR,
Defendant - Appellant,**

v.

**UNITED STATES OF AMERICA,
Plaintiff – Appellee.**

**APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

**BRIEF OF APPELLANT LACOUR
CRIMINAL CASE**

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May 14, 2010

Jude LaCour v. United States of America

Appeal No. 09-13944-A

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE
DISCLOSURE STATEMENT

In compliance with Fed. R. App. P. 21.1 and 11th Cir. R. 26.1-1, 26.1-2 and 26.1.1-3, the undersigned hereby certifies that the following listed persons and entities have an interest in the outcome of this case:

Albritton, A. Brian, United States Attorney, Middle District of Florida;

Baker David A., the Honorable Magistrate Judge;

Baranwal, Akhil, co-defendant;

Bigelow, Robert Bruce, former counsel for Christopher Tobin;

Chebssi, Geunnet, co-defendant;

Conway, Ann C., the Honorable United States District Judge;

Desonia, Andrew, co-defendant;

Donaldson, Michael, attorney for co-defendant, Margaret McIntosh;

Dowd, D. David, the Honorable United States District Judge;

E-Scripts, M.D. L.L.C., Ga. Limited Liability Co.;

Fletcher, H. Kyle Jr., counsel for the Defendant-Appellant;

Gable, Karen L, Assistant United States Attorney, Orlando Division;

Goodman, Nina Esq., Assistant United States Attorney, Washington D.C.;

Goolsby, Thomas C., former Counsel for Christopher Tobin;

Irick, Daniel C, Assistant United States Attorney, Orlando Division;
Irvin, Grady Irvin, counsel for co-defendant, James Pickens;
Jancha, Rick, counsel for co-defendant Abel Lau;
Jive Newtwork, Inc. privately held unindicted co-defendant;
Kenny, Peter Warren, counsel for co-defendant, Hudson Smith;
LaCour, Jeffery, co-defendant;
LaCour, Jude, defendant-Appellant;
Lau, Abel, co-defendant;
Leventhal, Robert Allan, counsel for co-defendant, Akhil Baranwal;
McIntosh, Margaret, co-defendant;
Nicola, Michael G., counsel for co-defendant Christopher Tobin;
Parker, Wilmer (Buddy) III, counsel for E-Scripts, M.D., L.L.C.;
Phillips, A. Brian, counsel for co-defendant, Geunnet Chebssi;
Pickens, James, co-defendant;
Rodriguez, Jose, counsel for co-defendant Alexis Roman Torres;
Smith, Hudson, co-defendant;
Tanner, John W. counsel for co-defendant, Jeffery LaCour;
Taylor, Charles E., Jr. counsel for co-defendant, Andrew Desonia;
Torres, Alex Roman, co-defendant.

STATEMENT REGARDING ORAL ARGUMENT

Appellant, Jude LaCour, respectfully requests oral argument. The facts and law suggest a case of first impression.

**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME
LIMITATION**

Appellant certifies that this brief contains 13,993 words.

PRELIMINARY STATEMENT

This is an appeal by the defendant from the final judgment and sentence entered on July 29, 2009 (Doc 768, Judgment in a Criminal Case). The defendant was not satisfied with the judgment and sentence because the district court erred when the Court, before trial and during trial denied most all of Mr. Lacour's pre-trial and post-trial Motions, and all motions filed by co-defendants that were joined or adopted by Jude LaCour or that were germane to Jude LaCour's defense or sentencing in this case.

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STATEMENT OF RELATED CASES

There are four related appeals from co-defendants, Akhil Baranwal, Geunnet Chebssi, James Pickens, and Christopher Tobin.

STATEMENT OF JURISDICTION

This Court has jurisdiction over the merits of the numerous issues on appeal in this case, pursuant to 28 U.S.C. § 1291, which provides for an appeal from a final order of a district court. This Court has jurisdiction over the sentencing issues on appeal pursuant to 28 U.S.C. § 3742.

STATEMENT OF THE ISSUES

- I. WHETHER THE COURT ERRED WHEN THE DISTRICT COURT DENIED THE APPELLANT'S MOTION TO DISMISS THE INDICTMENT?

- II. WHETHER THE COURT ERRED WHEN IT ALLOWED THE SECOND SUPERSEDING INDICTMENT TO DELETE THE TERM "WILLFULLY" THUSLY MAKING ALL CONSPIRACY COUNTS A GENERAL INTENT CRIME RATHER THAN A SPECIFIC INTENT CRIME?

III. WHETHER THE COURT ERRED WHEN IT DENIED THE APPELLANT THE OPPORTUNITY TO ARGUE THE CO-DEFENDANT'S, JEFFERY LACOUR'S, "MOTION TO DISMISS AND REQUEST TO REVIEW THE GRAND JURY TRANSCRIPTS" AT THE MARCH 18, 2009 HEARING WHEN THE DISTRICT COURT HAD ALREADY RULED (November 25, 2008 status hearing) THAT IT WAS ASSUMED THAT ANY PLEADING FILED BY A CO-DEFENDANT IS ADOPTED BY THE OTHER CO-DEFENDANTS?

IV. WHETHER THE COURT ERRED WHEN IT BECAME INVOLVED IN PLEA NEGOTIATIONS IN VIOLATION OF FED. CRIM. RULE 11(c)(1) AND FAILED TO GRANT THE APPELLANT'S MOTION FOR RECUSAL ?

V. WHETHER THE COURT ERRED WHEN IT FAILED TO GRANT A CONTINUANCE AT THE MARCH 18, 2009 STATUS HEARING, WHEN IT BECAME APPARENT THAT THE APPELLANT HAD NOT RECEIVED TRIAL EXHIBITS IN A TIMELY MANNER, ALONG WITH OTHER DISCOVERY AND WOULD NOT RECEIVE THE DISCOVERY UNTIL JUST OVER A WEEK BEFORE THE TRIAL; FURTHER, THE APPELLANT WAS HAMPERED BY NOT HAVING FULL ACCESS TO OVER 400,000

DOCUMENTS WHILE HE WAS IN JAIL AND THAT HIS SUBPOENA AND MOTIONS WERE NOT FILED BY HIS PREVIOUS ATTORNEY?

VI. WHETHER THE COURT ERRED WHEN IT DENIED THE DEFENSE THE OPPORTUNITY TO CROSS EXAMINE THE GOVERNMENT'S WITNESS, ANCONA, REGARDING THE RYAN HAIGHT ACT, WHEN IN CONTRAST IT ALLOWED THE GOVERNMENT TO ELICIT SUCH TESTIMONY FROM THEIR WITNESSES AS TO WHAT THE ULTIMATE QUESTION OF LAW WAS AND THEIR SUBJECTIVE INTERPRETATION OF IT?

VII. WHETHER THE COURT ERRED WHEN IT ALLOWED INTO EVIDENCE PURPORTED E-MAILS FROM APPELLANT, WITHOUT A PROPER PREDICATE OR CURATIVE INSTRUCTION, AND FURTHER ALLOWED THE GOVERNMENT TO INSINUATE THAT APPELLANT AUTHORED E-MAILS WHEN CO-DEFENDANTS/EMPLOYEES HAD ACCESS TO HIS COMPUTER AT WORK AND DID NOT ABIDE BY THE DOCTRINE OF ENTIRETY WHEN THE COURT ALLOWED ONLY A PORTION OF THE E-MAILS TO BE READ INTO EVIDENCE AND FURTHER ERRED BY NOT ALLOWING CROSS EXAMINATION AS TO I.P.

ADDRESSES WHICH WOULD HAVE ATTACKED THE CREDITABILITY OF THE ORIGIN OF E-MAILS ENTERED INTO EVIDENCE BY THE GOVERNMENT ?

VIII. WHETHER THE COURT ERRED WHEN IT ALLOWED INTO EVIDENCE STATEMENTS FROM A THIRD PARTY THAT WERE CONCLUSIONARY ABOUT THE STATE OF THE LAW AND FACTS THROUGHOUT THE TESTIMONY OF THE GOVERNMENT'S WITNESS, TIM McCROHAN?

IX. WHETHER THE COURT ERRED WHEN IT MUTED APPELLANT'S ABILITY TO CROSS EXAMINE THE GOVERNMENT'S WITNESS, TIM McCROHAN, REGARDING CORRUPT DATA IN COMPUTER EVIDENCE AND WHEN THE COURT'S ACTIONS HAD A CHILLING AFFECT ON APPELLANT'S ABILITY TO CROSS EXAMINE McCROHAN BY TELLING HIM THAT HE COULD CALL THE WITNESS AT A LATER TIME?

X. WHETHER THE COURT ERRED WHEN IT MUTED APPELLANT'S ABILITY TO CROSS EXAMINE THE GOVERNMENT'S WITNESS,

RAYMOND RAPKIN, ABOUT HIS KNOWLEDGE OF THE CONTROLLED SUBSTANCE ACT (CSA) WHEN THE WITNESS HAD ALREADY TESTIFIED UNDER DIRECT EXAMINATION THAT HE WAS FAMILIAR WITH THE CSA, AND WHEN THE DISTRICT COURT FAILED TO LET THE DEFENDANT IMPEACH AND QUESTION THE CRIMINAL HISTORY OF MR. RAPKIN?

XI: WHETHER THE COURT ERRED WHEN IT FAILED TO ALLOW THE APPELLANT TO ASK THE GOVERNMENT'S WITNESS, HUDSEN SMITH, WHETHER THE CSA STATED THAT A "FACE TO FACE" MEETING WAS REQUIRED BY A PHYSICIAN AND HIS PATIENT?

XII: WHETHER THE COURT ERRED WHEN IT COMMENTED, IN THE PRESENCE OF THE JURY, THAT INSTEAD OF CROSS EXAMINING A WITNESS THE APPELLANT COULD TESTIFY HIMSELF; THEREFORE, UNDERMINING THE APPELLANT'S RIGHT NOT TO TESTIFY?

XIII: WHETHER THE COURT ERRED WHEN IT FAILED TO GIVE A CURATIVE INSTRUCTION AFTER A WITNESS (HIEDER) TESTIFIED

THAT IT IS AGAINST “VARIOUS” STATE LAWS TO PRESCRIBE DRUGS OVER THE INTERNET AND DENIED THE DEFENSE THE OPPORTUNITY TO POINT OUT THAT IS NOT TRUE IN ALL STATES?

XIV: WHETHER THE COURT ERRED, WHEN ON MORE THAN ONE OCCURRENCE, IT DENIED THE DEFENSE THE RIGHT TO CROSS EXAMINE THE GOVERNMENT’S WITNESS (EXPERT WITNESS CATIZONE) CONCERNING CHANGES IN THE LAW (CSA) AND WHY THE LAW WAS CHANGED THAT GOVERNED THE CSA, ESPECIALLY WHEN THE GOVERNMENT “OPENED THE DOOR” TO THE EVOLUTION OF THE CSA?

XV: WHETHER THE COURT ERRED WHEN IT STATED, IN FRONT OF THE JURY, THAT THE GOVERNING LAW REQUIRES A PHYSICIAN TO SEE HIS PATIENT IN ORDER TO PRESCRIBE MEDICATION WHEN SUCH A DETERMINATION IS A FACTUAL ONE TO BE DETERMINED BY THE JURY AND THE COURT FAILED TO GIVE A PROPER CURATIVE INSTRUCTION?

XVI: WHETHER THE COURT ERRED WHEN IT INSTRUCTED THE DEFENDANTS THAT THEY WOULD BE IN CONTEMPT OF COURT IF THEY MENTIONED THE CHANGE IN THE LAW i.e.,: THE RYAN HAIGHT ACT ANY MORE?

XVII: WHETHER THE COURT ERRED WHEN IT FAILED TO GRANT A MISTRIAL AFTER THERE WAS EVIDENCE THAT THE JURY HAD BEEN TAMPERED WITH OR JURY MISCONDUCT HAD OCCURRED, AND THE COURT FAILED TO ALLOW THE DEFENSE TO *VOIR DIRE* THE JURORS BY FAILING TO DISCLOSE ALL OF THE ILLEGAL COMMUNICATIONS THE JURORS RECEIVED AND COMMUNICATIONS THE COURT HAD ABOUT SUCH ACTIVITY OUTSIDE THE PRESENCE OF THE DEFENDANTS?

XVIII: WHETHER THE COURT ERRED WHEN IT FAILED TO FOLLOW THE PATTERN JURY INSTRUCTIONS FOR A DRUG CONSPIRACY AND A GOOD FAITH EXCEPTION?

XIX: WHETHER THE COURT ERRED WHEN IT GAVE JURY INSTRUCTIONS THAT DETERMINED WHETHER MONEY LAUNDERING HAD OCCURRED BASED UPON “PROCEEDS” RATHER THAN

“PROFITS” IN VIOLATION OF THE DICTATES OF *United States v. Santos*,
128 S. Ct. 2020 (2008)?

XX: WHETHER THE COURT ERRED WHEN IT GAVE A MODIFIED *ALLEN*
CHARGE TO THE JURY AFTER THE JURY HAD STATED THEY WERE
NOT ABLE TO REACH A VERDICT?

XXI: WHETHER THE COURT ERRED WHEN IT FAILED TO
COMMUNICATE TO THE APPELLANT QUESTIONS THE JURY HAD
DURING DELIBERATIONS?

XXII: WHETHER THE COURT ERRED WHEN IT GRANTED THE
GOVERNMENT’S MOTION FOR AN UPWARD DEPARTURE?

XXIII: WHETHER THE COURT ERRED WHEN IN CALCULATING THE
SENTENCING GUIDELINE SCORE, IT DENIED THE APPELLANT A TWO-
LEVEL REDUCTION FOR ACCEPTANCE OF RESPONSIBILITY?

STATEMENT OF THE CASE

OVERVIEW OF THE CASE:

This case began when on or about April, 2005, the FBI conducted a search warrant on the premise of a corporation (Jive Network) owned and operated by the Appellant. The Government's position is that Jive Network used the internet to distribute prescription drugs to customers in an unlawful manner based upon a violation of the Controlled Substance Act (CSA) and that proceeds from the sale of said prescriptions were subject to money laundering (Doc 1). The Appellant was *pro se* during trial but not at sentencing. The undersigned was assigned to this case for the purpose for appeal.

INDICTMENT:

An Indictment was filed on May 8, 2008 (Doc 1). Appellant along with his father, a company manager, five physicians and two pharmacists were named in the Indictment. The Indictment was superseded twice (Doc 279) with the major change from the original Indictment being that the Count I (conspiracy) was changed to take out the element of "willful" conduct and in essence make the conspiracy charge a general intent crime rather than a specific intent crime.

MOTION TO DISMISS:

On November 25, 2008, during a status hearing, the court ruled that all motions filed by a defendant would be considered joined by the other defendants, unless something was filed or made known to the court that a particular defendant would not be joining a particular motion. Against that back drop, two motions to dismiss were filed (Doc 244, Doc 248) that attacked the core of the Indictment on constitutional grounds, to-wit: the CSA was ambiguous and vague as written at the time of the alleged conspiracy took place. Appellant filed a supplement and a notice of adoption (Doc 252). The government filed a response (Doc 258) and an order of denial was entered (Doc 265). The issues argued in the Motion to Dismiss are issues of a first impression as to this circuit.

MOTIONS IN LIMINE:

Two Motions in Limine of consequence were filed in this case by the government (Doc 425, Doc 445). The first Motion in Limine was directed in precluding the defense argument of arguing good faith and mistake of law which the Court granted (Doc 483). The second Motion in Limine was directed at whether there could be a conviction based upon a disjunctive proof after charging the defendants conjunctively. The Court granted the second Motion (Doc 484)

stating that the government could obtain a conviction on either basis on and not requiring a dual burden of proof. Also, said Order denied the Defendants the argument that they subjectively thought they were not breaking the law.

MOTIONS FOR MISTRIAL:

Two distinct times a Motion for Mistrial were made.

First, the court erred when it failed to declare a mistrial when it was apparent from the record, that it was inferred by reference that Appellant may have sent letters to the jurors just before he put on his defense; therefore, may have committed jury tampering. (Doc 875 - Pgs 56-62).

The record reflects (Doc 875 - Pg 10) that the jurors talked among themselves about receiving letters (Doc 875 - Pg 9), and a juror implicates Appellant's name as being on the letter. The court had a clandestine meeting with the jurors, without the court reporter present and possibly the government present.

The court erred when it denied any *voir dire* of the jurors by the defendants when it is the defendants' burden of proof to show that they/he had been prejudiced by the correspondence\ thereby denying the defendant(s) due process (Doc 875 - Pg 7).

After this incident, the court further erred when it instructed the

defendants that they would be in contempt of Court if they mentioned the change in the law, i.e. Ryan Haight Act (Doc 875 - Pg 27).

Second, the court created a mistrial, when in front of the jury, the court stated the law requires a physician to see his patient in order to prescribe medication (Doc 875 - Pg 38). Mistrial was denied (Doc 875 - Pgs 56-62).

MOTIONS FOR NEW TRIAL:

Various Motions for a New Trial were filed at (Doc 617, Doc 623, Doc 626, Doc 627, Doc 628). The government responded (Doc 637) and the Court entered an order and memorandum (Doc 665) denying the Motions. The Order sets out the case history quite well.

SENTENCING:

During a preliminary sentencing hearing, on July 27, 2009 (Doc 882), the court erred when it granted the government's Motion for an Upward Departure (four levels) and erred again when calculating the base offense level by denying the defendant's objection to the assertion made by the office of probation that the defendant should not receive his acceptance of responsibility.

The court lastly erred, when it denied Appellant's Motion for Bond pending appeal when it granted everyone else's (Doc 763).

RULE 11 VIOLATIONS:

The court erroneously became involved in plea negotiations in violation of FED. CRIM. RULE 11(c)(1), when on the record during the status hearing of February 4, 2009, (Doc 313 - Pgs 8-23) the court initially started talking about sentencing and the difference between how the guideline scores would differ for those defendants who pled as opposed to those defendants who decided to go to trial, “ if I were counsel I would like to know at least what you think that client—assuming the plea of guilty with acceptance is one thing, a conviction with no plea acceptance is another thing”. The court spoke continually how the co-defendant physicians and pharmacists would lose their license to practice. Even to the point of hinting that a plea to one count may not affect a licensing commission as compared to being found guilty on numerous counts (Doc 313 – Pg 19, Lines 12-22). During this status conference the court spoke with each individual defendant about their positions and understanding as to offers made by the government. The court even cited a case, “*United States v. Lay* 568 F. Supp. 791” that he previously presided over, as an example of his liberalness in granting variances (Doc 313 - Pgs 27, 28).

During the February 25, 2009 status hearing, the court lectured the defendants on the history of federal sentencing and how the sentencing guidelines

came about and the evolution of the guidelines that led up to the fact that the court had great discretion on what is an appropriate sentence. The court then went to each defendant and made each defendant sign the written offer made by the government and had each of them personally state on the record that they were declining the offer made by the government. See transcript of the February 25, 2009 hearing, filed (Doc 396), status hearing, beginning on page 20 and running to the end of the transcript. The court knows his actions were in violation against the Rule 11. It has come to the undersigned's attention that this court Judge tried to change Rule 11, to give the court Judges cover when discussing plea agreements. See <http://www.uscourts.gov/rules/CR:> suggestions 2003/03-CR-G-S-Suggestions-Dowd.pdf-1780.3KB. Obviously, his proposal was rejected.

The court Judge in this case was a special appointment who came from Ohio and with the disposition of trying the case in less than 12 weeks with no continuances. He stated his wife was also "on his back for agreeing to the appointment" (Doc 396 - Pg 39, Lines 21-25). It was common knowledge that the trial ended every Thursday in order to accommodate the court judge's logistical problems. He had to travel back to Ohio every Thursday after trial in order to keep up with his work there.

During trial, the court used his bully pulpit to state his opinion as to what he

thought the law was, when he told the defendants that this case was about prescribing controlled substances without ever physically seeing a patient (Doc 873 - Pg 118, Lines 16-24) and to state in the presence of the jury, that the law requires a physician to see his patient in order to prescribe medication (Doc 875 - Pg 38). The court stated this, in the middle of the trial, knowing fully that the defendants were of the position that a physician did not have to see the patient in order to prescribe the medications that were involved in this case.

It is alleged that on March 18, 2009 the court, off the record in chambers and in the presence of only the government and Jeff LaCour's attorneys, spoke indirectly about how he would sentence the co-defendant, Jeff LaCour, to probation, if he would only withdraw his Motion to Dismiss and Request for Grand Jury Transcripts (Doc 342) and change his plea (see the accompanying exhibits, which reflect e-mails from the co-defendant, Jeff LaCour to a friend of Appellant's, e-mail from Jeff LaCour's attorney to the undersigned.) Also, an affidavit attached as an exhibit from Jeff LaCour reflects that the court tried to use Jeff LaCour, after he pled guilty, as a tool to get Appellant to change his plea. This is further evidenced by the trial transcript (Doc 909 - Pgs 18-20) wherein the court admits talking to Jeff LaCour's counsel about the appointment of counsel for Appellant, for the sole purpose of negotiating a plea deal. The court told

Appellant that, “it’s simply impossible for counsel for the government to speak directly to you about a possible

guilty plea agreement as they have talked with the other defendants in this case”... the court went on to state, the appointment of counsel for Appellant would be for the limited purpose of a change of plea, not for the purpose of aiding with the trial.

Also, April 15, 2009 was the day the court decided to have Appellant go first in presenting his defense whenever the government closed its case. (Doc 909 - Pg 20).

It is a matter of record that Jeff LaCour, the number two (2) ranked co-conspirator who made millions of dollars from the alleged illegal business that he managed, and which the government characterized as nothing more than a pure drug conspiracy, was not sentenced to prison (Doc 799). He pleaded out.

It is the undersigned attorney’s understanding, after conferring with Attorney Brian Phillips, (attorney for the co-defendant, Ms. Chebssi), that during the period of the trial and off the record, the court took the initiative to try and broker a plea deal for the co-defendant, Chebssi, because the court was concerned the jury would get hung during deliberations because the court thought the case against Chebssi was not that strong. The court’s prediction was true – the jury did become hung at one point during

deliberations - see jurors' note to judge (Doc 611). It is also the undersigned's understanding that because of the judge's involvement, a deal for three misdemeanors was offered to Ms. Chebbsi; however, the United States Attorney declined to go along with his AUSA offering Ms. Chebbsi the deal.

Additionally, it is also rumored the court may have also have erred by becoming involved in plea negotiations between the government and the co-defendant, Baranwal.

COURSE OF PROCEEDINGS

AND DISPOSITION IN THE COURT BELOW:

Detention hearing October 8, 2008:

Appellant became the only defendant not to receive a bond.

Status Hearing November 25, 2008:

The court entered a ruling during the November 25, 2008 status hearing that all motions filed by a defendant would be considered joined by the other defendants unless something was filed or made known to the court that a particular defendant would not be joining a particular motion. The court therefore erred when it denied the defendant the opportunity to argue Jeffery LaCour's Motion to Dismiss and Request to Review the Grand Jury Transcripts on March 18, 2009,

when the court stated Appellant could not join in on the other defendant's motion.

Status Hearing February 4, 2009:

The court erred when it became involved in plea negotiations through out the status hearing (Doc 313 - Pgs 11, 19, 22, 27). The Court, in essence, stated he wanted this trial over with and that his wife did not want him in Florida (Doc 313 - Pg 39).

Status hearing on March 18, 2009:

The court erred when it failed to grant a continuance at the March 18, 2009, status hearing, when it became apparent the defendant had not been given trial exhibits and would not receive them along with the other discovery until just a little over a week before trial was to begin.

Further, the defendant was hampered by not having access to the documents that he already had, because the defendant was in jail and having to represent himself on little sleep. Further, the court erred when it became apparent that subpoenas and motions were not filed by the previous attorney.

Trial date April 1, 2009:

Court erred when it granted Government's Motion in Limine regarding good faith (Doc 868 - Pgs 142 -151).

The court stated, it is the defendant's burden of proof to the jury that a physician does not need to see a patient before issuing a prescription. Further, the

court stated on the record that “They tried to run a scam” (Doc 868 - Pg 207).

Trial date April 2, 2009:

Appellant put on the record, he was being awakened for trial at either 2:30 a.m. or 3:30 a.m., and Appellant could not give an opening statement because he had “no opportunity to review the evidence against me.” (Doc 869 - Pgs 6-8).

The court erred when it denied cross examination of Agent West regarding the fact that people can lie in a doctor’s office the same as they can lie on an online questionnaire (Doc 869 - Pg 148).

Cross examination proffer was denied as to the government’s witness, Vincent Ancona, regarding Ryan Haight Act (Doc 869 - Pgs 164, 171). In contrast, the government was allowed to elicit such testimony as to what goes to the ultimate question of law and its interpretation.

A question imposed by Appellant to Vincent Ancona was in effect sustained and the court then erred by stating that Appellant could testify, rather than ask the question (Doc 869 - Pg 176 - Line 23).

Trial date April 6, 2009:

Co-defendant, Baranwal, renewed the motion to review grand jury minutes based upon new evidence and the court refused to hear the argument. (Doc 889 - Pg 116).

During Agent Groeschner's testimony, the court erred by letting into evidence Appellant's financial records (Exhibit #152 and its sequence of sub Exhibits), and a proper foundation for letting the Agent testify was not made and the defense was not allowed an opportunity to *voir dire* the witness (Doc 889 - Pgs 129 -135).

The Judge stated, regarding his impression of Appellant, "he does not care what the jurors' problems are. He doesn't care about the other counsel. He doesn't care about the other defense. And he is hoping before it is over, at least it appears to me, that he will find a way to disrupt these proceedings" (Doc 889 - Pg 116).

Trial date April 7, 2009:

The court erred when it allowed into evidence purported e-mails from Appellant without a proper predicate or curative instruction. The court let the government insinuate to the jury that Appellant authored e-mails when other defendants had access to his computer (Doc 890 - Pgs 41-43).

The court failed to abide by the doctrine of entirety when it continuously

allowed only portions of e-mails to be read into evidence (Doc 890 - Pgs 41-43).

The court erred when it allowed testimony of a conclusionary nature as to what is the governing law, during the testimony of Tim McCrohan (Doc 890 – Pg 78).

The court erred when it failed to allow cross examination as to I.P addresses when it ruled such a question was outside the scope of direct examination for cross examination purposes and in effect not allowing the defense to impeach the testimony as to the creditability of the origin of e-mails entered into evidence by the government (Doc 890 - Pg 104).

The court erred when it muted Appellant’s ability to cross examine witness, Tim McCrohan, about corrupt data in computer evidence, the court’s action had a chilling effect in allowing Appellant to call Mr. McCrohan out of order, when the court hinted that the witness would not be available at a later time (Doc 890 – Pgs 116, 121, 122).

The court muted Appellant’s ability to cross examine Raymond Rapkin, when the court failed to allow Appellant to cross examine the witness about his knowledge of the Controlled Substance Act (CSA) when he had already testified under direct examination that he was familiar with the CSA (Doc 890 – Pg 206, Lines 20, 21).

Trial date April 8, 2009:

The court erred when it initially allowed (over objection) Appellant the opportunity to bring out in cross examination of the government's witness, Hudson Smith, the fact that he had concluded that the business Appellant was running was in the gray area of the law but then excludes from evidence Hudson Smith's statement that there is nothing in the law that requires a face-to-face meeting between a physician and a patient.

The court erred, when it stated that "the only evidence that Appellant could put in is when he testifies under oath." (Doc 870 - Pg 81, Line 9).

The court again erred when it sustained an objection when Appellant asked the government's witness, Dr. Hanny, if he was familiar with the CSA and Dr. Hanny responded that he was; then the court denied any inquiry about the content of the CSA and the fact that it does not state that online prescriptions are illegal (Doc 870 - Pg 147).

Trial date April 9, 2009:

The court erred, while in the middle of Appellant asking a question in cross examination of the government's witness, David Carlson, and without an objection pending from the government, by interrupting Appellant and by stating

that Appellant will get his time to testify (Doc 871 – Pg 162).

The court erred when it allowed the government's witness, Dr. Kopald, to opine, over objection, about state law of California as it relates to pharmacy procedures (Doc 870 - Pg 148).

The court erred when it denied cross examination of Dr. Kopald regarding there be no law forbidding on-line prescriptions (Doc 871 - Pg 162).

Trial date April 13, 2009:

The court erred when it allowed the government's witness, Timothy Heider (a newspaper reporter not a physician), to state it is against various state laws to prescribe prescriptions over the internet without a personal visit to a physician, when his statement was outside the context of the question posed to him and when the court had previously denied cross examination of prior government's witness (a physician) regarding the legality of the CSA (Doc 872 – Pg 178).

During the cross examination of witness, Deane Bender Harker, the court denied Appellant the ability to cross examine the full trial exhibits # 11 and # 12 . When the full exhibit would have let the jury hear that the DEA document stated there is insufficient guidance on the state of the law regarding internet pharmacies (Doc 872 - Pg 236). Contrast to what the court allowed the government to do on direct examination of Ms. Harker (Doc 872 - Pg 215).

The court stated to the defendant that he could not recall the previous witness after the Judge had told him he could (Doc 871 - Pg 266). Contrast statements (Doc 890 – Pgs 116, 121, 122).

Trial date April 14, 2009:

The court erred when it denied the defendant’s right to cross examine DEA agent, Noreen Valentine, whose duties... “are to monitor the business and individuals who have access to controlled substances and schedules II through IV, whether they manufacture the drug, distribute the drug or prescribe administer or dispense the drug” (Doc 873 - Pg 56) about changes in the law as it pertains to the CSA (Doc 873 - Pg 105).

The court erred when it denied scope of cross examination of expert witness, Dr. Carmine Catizone, on changes of law after the door was opened (Doc 873 - Pgs 173-183, 185). Further, the court erred in denying request for *Jenck* material, see *Jenck v. United States* 353 U.S. (1957) regarding expert Catizone (Doc 873 - Pg 183).

Court erred when it allowed Catizone to testify about matters outside his own expertise (Doc 873 - Pgs 190-193).

The court erred when it denied cross examination of the expert witness, Dr. Catizone, about clarifying what was a proper patient/prescriber relationship (Doc

873 - Pg 206).

Further, the court erred by being inconsistent in rulings regarding cross examination of expert witness about medical relationships (Doc 873 - Pg 209).

Also, the court erred in denying cross examination about “loopholes” in the federal law and a failure to allow impeachment by prior testimony in prior proceedings (Doc 873 - Pg 220).

Trial date April 15, 2009:

The court erred when it denied the defendant the opportunity to subpoena witnesses (Doc 909 - Pg 17).

The court erred when, during cross examination of the Government’s expert witness, Dr. Richard Weinberg, defense counsel was not allowed to ask whether there was a law that forbade physicians from prescribing controlled substances to patients without inpatient visit (Doc 909 - Pg 49).

Trial date April 16, 2009:

The court erred when it failed to grant a rule 29 Motion as to Counts 32-53 (money laundering oriented charges) argued by the defendant, (Doc 874 - Pg 58).

Trial date April 20, 2009:

The court erred when it failed to declare a mistrial when it was apparent from the record, that it was inferred (by reference) that Appellant may have sent

letters to the jurors just before he put on his defense and therefore committed jury tampering.

The record reflects (Doc 875 - Pg 10) that the jurors talked among themselves about receiving letters and a juror implicates Appellant's name as being on the letter (Doc 875 - Pg 9). The fact is Appellant is no longer a suspect in this case. This may have poisoned the mind of the court as to future rulings. See April 6, 2009, statement by the court.

The court had a clandestine meeting with the jurors without the court reporter present and possibly the government present.

The court denied any *voir dire* of the jurors a by the defendants (Doc 875 - Pg 7).

The court further erred when it instructed the defendants that they would be in contempt of Court if they mentioned the change in the law i.e., Ryan Haight Act (Doc 875 - Pg 27).

The court improperly granted objection as hearsay when witness, Delores Alassani, was testifying (Doc 875 - Pgs 39-40).

The court created a mistrial, when in front of the jury, the court states the law requires a physician to see his patient in order to prescribe medication (Doc 875 Pg 38). The court erred when it denied a request for a mistrial (Doc 875 - Pgs

56-62).

Appellant was denied due process when he was not given adequate time to prepare for his own testimony (Doc 875 - Pg 123).

Jury Trial April 21, 2009:

The court erred again when it failed to grant another motion for mistrial based upon the proceedings the day before (Doc 870 - Pgs 4-11).

Jury Trial April 22, 2009:

The Court erred when it made known the fact that the jury had been illegally contacted again and failed to inform the defendants about the nature of contact and the substance of the contact and failed to allow a *voir dire* of the jury by the defendants (Doc 928 - Pgs 48, 168-171).

Jury Instructions April 23, 2009:

The Court continued to confer with the jury outside the presence of counsel regarding jury tampering (Doc 929 - Pgs 11-13).

The Court erred when it read the jury instructions that allowed the Jury to determine money laundering based upon the determination of proceeds rather than profits which is in direct contradiction of *United States v. Santos*, 128 S. Ct. 2020 (2008) (Doc 929 - Pgs 80-100).

Jury Trial April 27, 2009:

The court erred when it failed when it allowed the government to give a misstatement of the law during closing arguments (Doc 877 - Pgs 165, 166).

April 29, 2009 Jury Deliberation:

The court erred when it failed to give the proper jury instruction regarding proceeds for the money judgment. (Doc 879 - Pg 16). The court erred in handling the jury's question as to when the conspiracy began (Doc 879 - Pg 25).

The court erred when it improperly gave a modified *Allen* charge (Doc 879 - Pg 35).

The court erred when during the jury deliberations the court failed to inform the defendants about a correspondence (question) the jurors had regarding the jury instructions (no citation yet) .

April 30, 2009 Jury Deliberations:

The court erred when it failed to immediately notify the defendants of questions the jury had to the court regarding the jury instructions (Doc 880 - Pg 4).

May 1, 2009 Jury Verdict of Guilty: (Doc 560).

May 11, 2009 Forfeiture Trial:

The court erred when it allowed the jury to consider proceeds rather than profits during the forfeiture trial held on May 11, 2009.

July 27-29, 2009 Sentencing:

During a preliminary sentencing hearing, on July 27, 2009, the court erred when it granted the government's Motion for an Upward Departure (4 levels) (Doc 882 - Pgs 23-32) and the (Doc 910 - Pgs 45, 46) and denied the defendant's objection to the assertion made by the office of probation that the defendant should not receive his acceptance of responsibility (Doc 910 - Pgs 45-48) .

The court lastly erred, when it denied Appellant's Motion for Bond pending appeal when it granted everyone else's (Doc 763).

STANDARD OF REVIEWS

Motion to Dismiss: Appellant along with all of the other defendants filed a timely Motion to Dismiss which presented the grounds urged in this appeal; therefore, the suppression issue is preserved for review on appeal. *United States v. Hopkins*, 433 F.2d 1041, 1044 (5th Cir. 1970):

A more serious question exists with respect to the statement Hopkins made to Dallas Police Detective Hobbs. The Government, however, insists that Hopkins may not raise this issue on appeal because he failed to raise a timely objection at trial. While there may be some ambiguity, it appears that prior to trial Hopkins filed a motion to suppress both the

statement made to Agent Hanley and the statement made to Detective Hobbs. Even though Hopkins' counsel failed to object again to the admission of Hobbs' statement at trial, we hold that his pre-trial motion was sufficient to preserve this issue on appeal. See 3 C. Wright, Federal Practice and Procedure § 842, at 342-47 (1969).

See. *United States v. Rogers*, 475 F.2d 821, 825 (7th Cir. 1973) (failure to renew objection at trial, raised in pretrial motion to suppress, does not waive right to raise on appeal the pretrial objection).

A district court's denial of a motion to dismiss is reviewed under a mixed standard: we review the district court's findings of fact under the clearly erroneous standard and the district court's application of law to those facts *de novo*. *United States v. Gil*, 204 F.3d 1347, 1350 (11th Cir.2000).

Issues on Appeal that involve due process regarding the entry and/or denial of evidence: The court's entry of questionable evidence is reviewed for abuse of discretion. See *Mercado v. City of Orlando*, 407 F.3d 1152, 1161 (11th Cir. 2005). In that case, hearsay was at issue. If an evidentiary ruling is erroneous, it would be reversed only if there was not harmless error. See. *United States v. Hands*, 184 F.3d1322, 1329 (11th Cir. 1999). The Court is required to examine the entire record, comparing the error(s) with the strength of the evidence of the

defendant's guilt to determine whether an error had a substantial influence on the outcome. See. *United States v. Khanani*, 502 F.3d 1281, 1292 (11th Cir. 2007).

Issue of Rule 29: If the record is determined not to show that the *pro se* defendant LaCour did not did not preserve his Rule 29 argument, then it would be reviewed under the plain error standard of Rule 52 of the Federal Rules of Criminal Procedure. If the evidence was legally insufficient, even if no Judgment of acquittal was made, the conviction could still be set aside. See. *Fitzpatrick v. United States*, 410 F.2d 513 (5th Cir. 1969).

Request for Jury Instruction: A denial of a requested jury instruction is reversible only if: the request is correct; it is not substantially covered by another instruction that was delivered, and if it dealt with a point that is vital that the failure changes the defendant's ability to defend. See. *United States v. Ruiz*, 59 3d. 1151, 1154 (11th Cir. 1995).

Sentencing guideline Issue: The review of the guideline calculation is two pronged. First, it is reviewed for clear error in factual determination. Second, the application is reviewed *de novo*. See *United States v. Walker*, 490 F.3d 1282, 1299 (11th Cir. 2007).

SUMMARY OF THE ARGUMENT

The court stated on the record that "What the doctor did seems pretty

obvious. They tried to run a scam.” (Doc 868 - Pg 207). That was the court’s summary of this case and that was his theme, which was not much different from the government’s theme and it is my theme that the court’s agenda and the government’s were not much different. The court helped prosecute the case. Consider my theme as you peruse the cited transcripts, and it will become evident the court was bent on determining the outcome of this case.

In the beginning of this case the court made it clear that if you plea you will get the sentencing deal of the century, and if you go to trial you will miss out on a good deal. When you read about Mr. Jeff LaCour’s sentence, you will understand what I mean by the deal of the century; when you read about Appellant’s sentence, you will read about what happens when you do not listen to your father, who happens to be the messenger sent from the court.

When you read about how the court tried to get the defendants to plea before trial and even during trial, you will read about a set of facts that are shocking.

The denial of due process is rampant in this case, to- wit: when you are not allowed to *voir dire* a jury for prejudice after they have been tampered with and you are set up to look like the person who did the tampering.

Despite the Courts extra judicial activities, the jury was deadlocked after deliberations on all counts as to all defendants. Therefore, an *Allen* charge had to

be given. So, after a trial that had just a little of everything possible in it, except for the obviousness of guilt, it had to be resolved by a directive to the jury, from the Court, to consider the evidence on a different basis (unconstitutional considerations) and not to consider the evidence as given in the initial charge to the jury.

ARGUMENT AND LEGAL AUTHORITY

I. WHETHER THE COURT ERRED WHEN THE DISTRICT COURT DENIED THE DEFENDANT’S MOTION TO DISMISS THE INDICTMENT?

The Appellant, by for the sake of brevity, hereby adopts and incorporates in this brief the arguments set forth in the Motions to Dismiss, filed by the co-defendants and are part of the court record (Doc 342, Doc 244, Doc 248).

The reason Congress amended the CSA, was because there was evidence that more than one possible interpretation of the Statute. Therefore, the CSA was ambiguous. See. *United States v. Acosta*, 363 F.3d 1141, 1155 (11th Cir. 2004) “the existence of two reasonable competing interpretations is the very definition of ambiguity”.

What is special about this case is that there is a lay person’s analysis of

whether the CSA is ambiguous. That was done by the jury when it sent a statement to the Judge telling him, “We the jury are having difficulties coming to an agreement on the [U.S. generally recognized and accepted usual course of practice] guidelines for physicians and pharmacists in the internet industry” See. (Trial exhibit 32, filed at Doc 611)

II. WHETHER THE COURT ERRED WHEN IT ALLOWED THE SECOND SUPERSEDING INDICTMENT TO DELETE THE TERM “WILLFULLY” THUSLY MAKING ALL CONSPIRACY COUNTS A GENERAL INTENT CRIME RATHER THAN A SPECIFIC INTENT CRIME?

The Government intentionally removed the word “willfully” from the Second Superseding Indictment as to the Conspiracy Charge (Count I) (and the instructions to the grand jury). “Willfulness” is an essential part of the charge for a conspiracy to distribute controlled substances in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(D). This tactic was done because of the rulings in a strikingly similar case *United States v. Frank Hernandez*, et al. which was prosecuted in the Southern District of Florida, Criminal Division, No. 07-60027-CR-ZLOCH/SNOW. In that case, the Government relied on two unpublished opinions, *United States v. F Green*, 2008 WL 4605919, (11th Cir.

October 17, 2008) [crack cocaine} and *United States v. Morales De carty*, 2008 WL 4997100 (11th Cir. November 25, 2008) [Heroin] that sections 841(a)(1) and 846 of Title 21 were general intent crimes. That is not the law as stated in the *Hernandez* Order denying the attempt by the Government to make Conspiracy a general intent crime, “Conspiracy is a specific intent crime, and as such the Government must show that the individual had knowledge of the conspiracy and intended to join or associate with its objective. 15a C.J.S. Conspiracy section, 112 (2008); *United States v. Puche*, 350 F. 3d 1137 (11th Cir. 2003); *United States v. Charles*, 313 F.3d 1278 (11th Cir. 2002). Thus, willfulness is at issue in a conspiracy case. See argument presented in (Doc 342).

This error by the court overrode the opportunity of the defense throughout the trial to cross-examine witnesses who testified as to what the state of mind of Appellant was, regarding his understanding of the CSA. See the court’s ruling regarding good faith. (Doc 868 – Pgs 142 -151).

III. WHETHER THE COURT ERRED WHEN IT DENIED THE DEFENDANT THE OPPORTUNITY TO ARGUE THE CO-DEFENDANT, JEFFERY LACOUR’S, “MOTION TO DISMISS AND REQUEST TO REVIEW THE GRAND JURY TRANSCRIPTS” AT THE MARCH 18, 2009, HEARING WHEN THE DISTRICT COURT HAD ALREADY RULED (November 25, 2008 status hearing) THAT IT

WAS ASSUMED THAT ANY PLEADING FILED BY A CO-DEFENDANT IS
ADOPTED BY THE OTHER CO-DEFENDANTS?

Jeff LaCour withdrew his Motion to Dismiss (Doc 342) during the hearing for said
Motion on March 18, 2009. Appellant filed a Notice of Joiner at

(Doc 351). After the withdrawal of the motion by Jeff LaCour, Appellant was not allowed to go forward with his argument, thus violating his due process rights. It is the undersigned's understanding from seeking out the transcripts from this hearing that most of the transactions from the hearing were expunged, by agreement, between the United States and Jeff LaCour.

An Indictment's failure to specify the *mens rea* necessary for conviction of the conspiracies charges in this case is not subject to a harmless error review, and requires dismissal where the Appellant's challenge to the Indictment was timely brought. It is also a mystery whether the grand jury considers the wrong standard of intent in this case. The Court erred by denying every request for the grand jury transcripts made by Appellant and the other co-defendants. See *United States v. Du Bo* (186 F.3d 1177) (9th Cir. 1999) See argument put forth in Issue II.

IV: WHETHER THE COURT ERRED WHEN IT BECAME INVOLVED IN PLEA NEGOTIATIONS IN VIOLATION OF FED. CRIM. RULE 11(c)(1) AND FAILED TO GRANT THE APPELLANT'S MOTION FOR RECUSAL?

Rule 11 states: **No Court Involvement in plea negotiations.** It is a very simple rule.

The rule prohibiting the court from engaging in plea negotiations is important

because it (1) diminishes the possibility of judicial coercion of a guilty plea; (2) protects the court's impartiality; and (3) does not mislead the parties as to the role of the court in the proceeding. For the comprehensive analysis for the issues in this motion see, *United States v. Bradley*, 455 F.3d 453 (4th Cir. 2006) (Judicial involvement in plea negotiations may affect the judge's ability to preside impartially over a trial if the defendant rejects the plea agreement and may diminish the judge's objectivity in post trial matters such as sentencing and motion for judgment of acquittal..... The prohibition against a court from participating in the plea bargaining process deprecates the image of the trial judge as a fair and neutral arbiter, an image that is necessary to public confidence in the impartial and objective administration of criminal justice.....District's court's violation of rule prohibiting judicial involvement in plea negotiations by imitating and participating in plea negotiations during drug conspiracy trial affected defendant's substantial rights and thus was plain error... It will be rare ... it will be rare that a clear violation of the prohibition against judicial involvement in plea negotiations does not affect substantial rights.) also see, *United States v. Casallas*, 59 F.3d 173, 1178 (11th Cir. 1995) and *United States v. Corbitt*, 996 F.2d 1132 (11th Cir. 1993), which reiterates the holdings in *Bradley* and also states a court must not suggest to the defendant that it wants the defendant to enter a plea of guilty or nolo contendere because even this suggestion may be seen as coercive. See. *United States v. Baker*, 489 F.3d 366 (D.C. Cir.2007). Likewise,

the court should not make any other statements which may pressure or entice the defendant to enter a guilty plea. See, *United States v. Rodriguez*, 197 F.3d 156 95th Cir. 1999) and *United States v. Diaz*, 138 F.3d 1359 911th Cir.), cert. denied, 525 U.S. 913,119 S.Ct. 259, 142 L.Ed.2d 213 (1998). Neither should the court discuss with the defendant the differences between the sentence to be served after a plea agreement versus one that should be a jury conviction. See, *United States v. Duran-Nevarez*, 287 Fed. Appx. 688 (10th Cir. 2008).

The above cited cases all deal with the withdrawal of pleas, but that does not deter the crux of this argument. As stated in *Bradley*, the failure to abide by the court's hints that a defendant should change their plea taints the whole judicial process from pre-trial rulings to rulings during trial and to sentencing. It can give you the sentiment that if you do not plea you will not get a fair trial, but if you do plea, you will get a more than fair sentence. In *United States v. Corbitt*, 996 F.2d 1132, 1135 (11th Cir. 1993) "... [r]ule 11 prohibits the participation of the judge in plea negotiations under any circumstances: it is a rule that, as we have noted, admits no exceptions." The Eleventh Circuit, further states in *Corbitt*, "Judicial participation is plain error, and the defendant need not show actual prejudice" and *Corbitt* also cites *United States v. Adams*, 634 F.2d at 830, 836 and 839(5th Cir. Unit A Jan. 1981) and *United States v. Bruce*, 976 F.2d

552 (9th Cir. 1992). Judicial involvement in trying to negotiate pleas is a violation of a “bright line rule”. The Eleventh Circuit has exercised its discretion to correct such an error when such actions by the court judge has occurred because it “may have created in the public... this misleading impression that a judge is anything less than a neutral arbiter - an error that seriously affects the fairness and integrity of judicial proceedings.” See *United States v. Allen*, 305 Fed.Appx 654, 2008 WL 5422654 (C.A.11 9Fla.) quoting *United States v. Cano-Varela*, 497 F.3d 1122, 1133-34 (10th Cir. 2007).

Even though Appellant may not have to show that he was prejudiced, Appellant had a right to know about the trial judge’s involvement in trying to negotiate pleas with his co-defendants. It would have altered his trial strategy and it violates his due process rights.

It is prejudicial error not to inform the defendants of court proceedings. See, *United States v. Rodgers*, 422 U.S. 35. 95 S. Ct. 2091 (1975). *Rodger’s*, (page 38) goes on to state, “that the orderly conduct of a trial by jury, essential to the proper protection of the right to be heard, entitles the parties who attend for the purpose to be present in person or by counsel, at all **proceedings** from the time the jury is impaneled until it is discharged after rendering the verdict”. The term “proceedings” is defined in *Erwin v. United States*, (D.C. 37 F. 470, 488, 2 L.R.A. 229) “in its general acceptance “proceeding” means the form in which actions are to be brought

and defined, the manner of intervening in suits, of conducting them, the mode of deciding, them, of opposing judgments and executing.” “Ordinary “proceeding” intend the regular and usual mode of carrying on a suit by due course of common law.” See, *People v. White*, 14 How.Prac. (N.Y.) 498. In this case, Appellant, was excluded from the “proceedings” between the court and Jeff LaCour’s attorney and the government on March 18, 2009. He was excluded from the “proceedings” between the court, the government and Ms. Chebssi’s attorney. He was possibly excluded from the court, the government and Mr. Baranwal’s attorney.

The legal argument, regarding these issues, is also made in the defendant’s Motion for New Trial based upon New Evidence (Doc 962, Doc 964). The Order denying the Motion for New Trial was entered at (Doc 965) and is attached to this pleading. In footnote 8 of said Order, the court latently admits the accusations stated above regarding the court’s extrajudicial activity in trying to broker plea deals. The court also latently admits having a meeting with Jeff LaCour without the presence of Jeff LaCour’s counsel, before the trial began. The purpose for the meeting was to try and get Appellant to change his plea. The court had the opportunity to deny that he acted in such a manner as accused in the Motion for New Trial but he did not deny the accusations that he tried to broker plea deals. In the Order of denial, the court erred in his analysis that all of the suggested evidence was not new. Certainly, the actions of

the court regarding the brokering of a plea deal for the co-defendants, Chebbsi and Baranwal, is undeniably new evidence that was not discovered until after the trial. The incident with the court talking to Jeff LaCour in open court, without his attorney present, has been confirmed by the undersigned by talking to other counsel who was present during the trial and witnessed the court call Mr. Jeff LaCour to the bench.

Further, the court erred in his analysis in footnote 8 of the Order denying the Motion for New Trial (Doc 965). The issue of the court brokering plea deals would not be evidence put before the jury regarding Appellant's guilt or innocence; therefore, the court's reliance on *United States v. Thompson*, 422 F.3d 1285, 1295 (11th Cir. 2005) is in error and is a red herring. The court failed to address the accusations pursuant to *United States v. Campa*, 459 F. 3d 1121 (11th Cir. 2006) which states: that newly discovered evidence need not relate directly to the issue of guilt or innocence to justify a new trial "but may be probative of another issue of law" (*United States v. Beasley*, 582 F.2d 337, 339 (5th Cir. 1978) (as cited in *Campa* at 1151.)) In *Campa* at 1151, the Appellate Court gives an example of what may be a probative issue of law, i.e., an unfair jury, *Brady* violation or for that matter anything that creates the issue that a trial was unfair. Extrajudicial activity constitutes an unfair trial. Please remember the attached exhibits accompanying the Motion for New Trial that is within the Index for exhibits to this Motion that is evidence of the extrajudicial activity. See:

United States v. Barnwell, 477 F.3d 844 (6th Cir. 2007) where the court's intervention is analogous to this case, it is was held the "district's courts ex parte communications with government counsel violated defendant's rights to due process, presence at critical stages of trial, effective assistance of counsel, and impartial judge and jury."

The Appellant technically made the above argument in his Motion for Recusal (Doc 519) and the Court erred by not granting it in the form of new trial (Doc 549).

V. WHETHER THE COURT ERRED WHEN IT FAILED TO GRANT A CONTINUANCE AT THE MARCH 18, 2009, STATUS HEARING WHEN IT BECAME APPARENT THAT THE DEFENDANT HAD NOT RECEIVED TRIAL EXHIBITS IN A TIMELY MANNER, ALONG WITH OTHER DISCOVERY AND WOULD NOT RECEIVE THE DISCOVERY UNTIL JUST OVER A WEEK BEFORE THE TRIAL, FURTHER THE DEFENDANT WAS HAMPERED BY NOT HAVING FULL ACCESS TO OVER 400,000 DOCUMENTS WHILE HE WAS IN JAIL AND THAT HIS SUBPOENA AND MOTIONS WERE NOT FILED BY HIS PREVIOUS ATTORNEY?

Appellant was without counsel on March 13, 2009, based upon a Motion to Withdraw. (Doc - 362) .The trial began on March 31, 2009. Appellant was the only defendant that went to trial not represented by counsel and the only defendant not on

pre-trial release. His ability to digest the evidence against him was hampered by the jail not providing him with a computer to the over 400,000 documents of evidence against him. Further he was precluded from being able to call witnesses and have subpoenas issued. (Doc. 909 - Pg 17). A Rule 16 violation ‘is reversible error only when it violates a defendant’s substantial rights.’ *United States v. Vamargo-Vergara*, 57 F.3d 993, 998 (11th Cir. 1995). “Substantial prejudice exists when a defendant is unduly surprised and lacks an adequate opportunity to prepare a defense, or if the mistake substantially influence the jury.” *Id* at 998-99.

VI. WHETHER THE COURT ERRED WHEN IT DENIED THE DEFENSE THE OPPORTUNITY TO CROSS EXAMINE THE GOVERNMENT’S WITNESS, ANCONA, REGARDING THE RYAN HAIGHT ACT WHEN IN CONTRAST IT ALLOWED THE GOVERNMENT TO ELICIT SUCH TESTIMONY FROM THEIR WITNESSES AS TO WHAT THE ULTIMATE QUESTION OF LAW WAS AND THEIR SUBJECTIVE INTERPRETATION OF IT?

The court erred when it denied cross examination of Agent West regarding the fact that people can lie in a doctor’s office the same as they can lie on an online questionnaire (Doc 869 – Pg 148).

Cross examination proffer is denied as to the government’s witness Ancona,

regarding the Ryan Haight Act (Doc 869 - Pgs 164, 171). In contrast the government was allowed to elicit such testimony as to what goes to the ultimate question of law and its interpretation.

A question imposed by Appellant to Ancona was objected to and sustained, the court then erred by stating that Appellant could testify rather than ask a question. (Doc 869 - Pg 176 - Line 23). This gave the jury the impression that Appellant would have to testify thus abrogating his right not to testify. Therefore, the court abused its discretion in allowing the testimony of Ancona and West who were not expert witness and by failing to allow meaningful cross examination. See. *United States v. Marshal*, 173 F. 3d 1312 (11th Cir. 1999) and *Montgomery v. Aetna Co. Cas. & Sur. Co.*, 898 F.2d 1537, 1541 (11th Cir. 1990).

VII. WHETHER THE COURT ERRED WHEN IT ALLOWED INTO EVIDENCE PURPORTED E-MAILS FROM APPELLANT WITHOUT A PROPER PREDICATE OR CURATIVE INSTRUCTION AND FURTHER ALLOWED THE GOVERNMENT TO INSINUATE THAT APPELLANT AUTHORED E-MAILS WHEN CO-DEFENDANTS/EMPLOYEES HAD ACCESS TO HIS COMPUTER AT WORK AND DID NOT ABIDE BY THE DOCTRINE OF ENTIRETY WHEN THE COURT ALLOWED ONLY A

PORTION OF THE E-MAILS TO BE READ INTO EVIDENCE AND FURTHER ERRED BY NOT ALLOWING CROSS EXAMINATION AS TO I.P. ADDRESSES WHICH WOULD HAVE ATTACKED THE CREDIBILITY OF THE ORIGIN OF E-MAILS ENTERED INTO EVIDENCE BY THE GOVERNMENT ?

The court erred when it allowed into evidence purported e-mails from Appellant without a proper predicate or curative instruction. The court let the government insinuate to the jury that Appellant authored e-mails when other defendants had access to his computer (Doc 890, Page 41-43).

The court failed to abide by the doctrine of entirety when it continuously allowed only portions of e-mails to be read into evidence (Doc 890, Pages 41-43).

Therefore, the court abused its discretion in allowing into evidence said e-mails. See. *United States v. Marshal*, 173 F. 3d 1312 (11th Cir. 1999).

VIII. WHETHER THE COURT ERRED WHEN IT ALLOWED INTO EVIDENCE STATEMENTS FROM A THIRD PARTY THAT WERE CONCLUSIONARY ABOUT THE STATE OF THE LAW AND FACTS THROUGHOUT THE TESTIMONY OF THE GOVERNMENT'S WITNESS, TIM McCROHAN?

The court erred when it allowed testimony of a conclusory nature as to what the governing law is, through e-mails of a non-testifying witness, Brian Roth (Doc 890-76-78).

Therefore, the court abused its discretion in allowing into evidence said testimony and by failing to allow a proper cross examination. See. *United States v. Marshal*, 173 F. 3d 1312 (11th Cir. 1999) and *Montgomery v. Aetna Co. Cas. & Sur. Co.*, 898 F.2d 1537, 1541 (11th Cir. 1990).

IX. WHETHER THE COURT ERRED WHEN IT MUTED APPELLANT'S ABILITY TO CROSS EXAMINE THE GOVERNMENT'S WITNESS, TIM McCROHAN, REGARDING CORRUPT DATA IN COMPUTER EVIDENCE AND WHEN THE COURT'S ACTIONS HAD A CHILLING AFFECT ON APPELLANT'S ABILITY TO CROSS EXAMINE McCROHAN BY TELLING HIM THAT HE COULD CALL THE WITNESS AT A LATER TIME?

The court erred when it muted Appellant's ability to cross examine witness, Tim McCrohan, about corrupt data in computer evidence and the court's action had a chilling effect in allowing Appellant to call Mr. McCrohan out of order, when the court hinted that the witness would not be available at a later time (Doc 890, pages 116, and 121-122).

Therefore, the court abused its discretion in allowing into evidence said testimony and by failing to allow a proper cross examination. See. *United States v. Marshal*, 173 F. 3d 1312 (11th Cir. 1999).

X. WHETHER THE COURT ERRED WHEN IT MUTED APPELLANT'S ABILITY TO CROSS EXAMINE THE GOVERNMENT'S WITNESS, RAYMOND RAPKIN, ABOUT HIS KNOWLEDGE OF THE CONTROLLED SUBSTANCE ACT (CSA) WHEN THE WITNESS HAD ALREADY TESTIFIED UNDER DIRECT EXAMINATION THAT HE WAS FAMILIAR WITH THE CSA, AND WHEN THE DISTRICT COURT FAILED TO LET THE DEFENDANT IMPEACH AND QUESTION THE CRIMINAL HISTORY OF MR. RAPKIN?

The court muted Appellant's ability to cross examine Raymond Rapkin, when the court failed to allow Appellant to cross examine the witness about his knowledge of the Controlled Substance Act (CSA) when he had already testified under direct examination that he was familiar with the CSA (Doc 890 - Pg 206, Line 20-21).

Therefore, the court abused its discretion in allowing into evidence said testimony and by failing to allow a proper cross examination. See. *United States v.*

Marshal, 173 F. 3d 1312 (11th Cir. 1999) and *Montgomery v. Aetna Co. Cas. & Sur. Co.*, 898 F.2d 1537, 1541 (11th Cir. 1990).

XI: WHETHER THE COURT ERRED WHEN IT FAILED TO ALLOW THE DEFENDANT TO ASK THE GOVERNMENT’S WITNESS, HUDSEN SMITH, WHETHER THE CSA STATED THAT A “FACE TO FACE” MEETING WAS REQUIRED BY A PHYSICIAN AND HIS PATIENT?

The court erred when it initially allowed (over objection) Appellant the opportunity to bring out in cross examination of the government’s witness, Smith, the fact that he had concluded that the business Appellant was running was in the gray area of the law but then excludes from evidence Smith’s statement that there in nothing in the law that requires a face to face meeting between a physician and a patient.

Therefore, the court abused its discretion in allowing into evidence said testimony and by failing allowing a proper cross examination. See. *United States v. Marshal*, 173 F. 3d 1312 (11th Cir. 1999) and *Montgomery v. Aetna Co. Cas. & Sur. Co.*, 898 F.2d 1537, 1541 (11th Cir. 1990).

XII: WHETHER THE COURT ERRED WHEN IT COMMENTED, IN THE PRESENCE OF THE JURY, THAT INSTEAD OF CROSS EXAMINING A WITNESS THE DEFENDANT COULD TESTIFY HIMSELF; THEREFORE, PREJUDICING THE DEFENDANT’S RIGHT NOT TO TESTIFY?

The court erred, when it stated that “the only evidence that Appellant could put in is when he testifies under oath.” (Doc 889 - Pg 81 - Line 9). The court misled the jury regarding the law and violating Appellant’s , Fifth, Sixth, and Fourteenth amendments rights to a fair trial and right not to testify. The Judge’s comments gave the impression that Appellant had to testify and because he did not, it prejudiced him in front of the jury. The jury would assume the evidence was not refutable. Therefore, the Judge’s remarks were improper and prejudicial. Most case law deals with the prosecutor making prejudicial comments that destroy a defendant’s right to a fair trial, here it is even worse because it came from the Judge. Therefore, the comment had authority and causing more concern for prejudice. See. *United States v. Gardner*, 396 v. 987 (8th Cir. 2005) for analogous assessment.

XIII: WHETHER THE COURT ERRED WHEN IT FAILED TO GIVE A CURATIVE INSTRUCTION AFTER A WITNESS (HIEDER) TESTIFIED THAT IT IS AGAINST “VARIOUS” STATE LAWS TO PRESCRIBE DRUGS OVER THE INTERNET AND DENIED THE DEFENSE THE OPPORTUNITY TO POINT OUT THAT IS NOT TRUE IN ALL STATES?

The court erred when it allowed the government’s witness, Heider (a newspaper reporter not a physician), to state it is against various state laws to prescribe prescriptions over the internet without a personal visit to a physician, when his statement was outside the context of the question posed to him and when the court had previously denied cross examination of prior government’s witness (a physician) regarding the legality of the CSA (Doc 872 - 178). Therefore, the court abused its discretion in such testimony and by failing to allow proper cross examination. See *United States v. Marshal*, 173 F. 3d 1312 (11th Cir. 1999) and *Montgomery v. Aetna Co. Cas. & Sur. Co.*, 898 F.2d 1537, 1541 (11th Cir. 1990).

XIV: WHETHER THE COURT ERRED, WHEN ON MORE THAN ONE OCCURRENCE, IT DENIED THE DEFENSE THE RIGHT TO CROSS EXAMINE THE GOVERNMENT'S WITNESS (EXPERT WITNESS CATIZONE) CONCERNING CHANGES IN THE LAW (CSA) AND WHY THE LAW WAS CHANGED THAT GOVERNED THE CSA, ESPECIALLY WHEN THE GOVERNMENT "OPENED THE DOOR" TO THE EVOLUTION OF THE CSA?

The court erred when it denied scope of cross examination of expert witness, Dr. Catizone, on changes of law after the door was opened (Doc 873 - Pgs 173-183, 185). Further, the court erred in denying request for *Jenck* material regarding expert Catizone (Doc 873 - Pg 183). The Court referenced that Appellant would be given *Jencks* material the day before testimony (Doc 386 cited in Index at Doc 665 appendices V page 2). See. *Lewis v. United States*, 340 F.2d 678, 682 (8th Cir. 1965) "individual notes and reports of agents of the Government, made in the course of a criminal investigation, are proper subject of inquiry and subject to production under the *Jencks* Act." This denial occurred to almost every witness.

Court erred when it allowed Catizone to testify about matters outside his own expertise (Doc 873 - Pgs 190-193).

The court erred when it denied cross examination of the expert witness, Dr.

Catizone, about clarifying what was a proper patient/prescriber relationship (Doc 873 - Pg 206).

Further, the court erred by being inconsistent in his rulings regarding cross examination of expert witness about medical relationships (Doc 873 - Pg 209).

Also, the court erred in denying cross examination about “loopholes” in the federal law and a failure to allow impeachment by prior testimony in prior proceedings (Doc 873 - Pg 220).

Therefore, the court abused its discretion in allowing into evidence legal conclusions and failing to allow a proper cross examination. See. *United States v. Marshal*, 173 F. 3d 1312 (11th Cir. 1999) and *Montgomery v. Aetna Co. Cas. & Sur. Co.*, 898 F.2d 1537, 1541 (11th Cir. 1990).

XV: WHETHER THE COURT ERRED WHEN IT STATED, IN FRONT OF THE JURY, THAT THE GOVERNING LAW REQUIRES A PHYSICIAN TO SEE HIS PATIENT IN ORDER TO PRESCRIBE MEDICATION WHEN SUCH A DETERMINATION IS A FACTUAL ONE TO BE DETERMINED BY THE JURY AND THE COURT FAILED TO GIVE A PROPER CURATIVE INSTRUCTION?

The court created a mistrial, when in front of the jury; the court states the

law requires a physician to see his patient in order to prescribe medication (Doc 875 - Pg 38). The court erred when it denied a request for a mistrial based upon its comments to the jury (Doc 875 - Pgs 56-62).

The court became an unauthorized expert witness for the government when it made the comment about the governing law and failed to correct the situation by granting a mistrial or adequate curative instruction.

Therefore, the court abused its discretion in allowing into evidence legal conclusions made from the bench. See *United States v. Marshal*, 173 F. 3d 1312 (11th Cir. 1999) and *Montgomery v. Aetna Co. Cas. & Sur. Co.*, 898 F.2d 1537, 1541 (11th Cir. 1990).

XVI: WHETHER THE COURT ERRED WHEN IT INSTRUCTED THE DEFENDANTS THAT THEY WOULD BE IN CONTEMPT OF COURT IF THEY MENTIONED THE CHANGE IN THE LAW i.e.: THE RYAN HAIGHT ACT ANY MORE?

The court further erred when it instructed the defendants that they would be in contempt of Court if they mentioned the change in the law i.e., Ryan Haight Act (Doc 875 - Pg 27). This error by the court denied all of the defendants the opportunity to refute the emphatic statement from the bench addressed in Issue

XV. This had a chilling affect on litigating what was a questionable fact of law and what was in the state of mind of the defendants and had a chilling affect on strategy for the rest of the trial and denied the best possible representation; therefore, abrogating the right to a fair trial.

XVII: WHETHER THE COURT ERRED WHEN IT FAILED TO GRANT A MISTRIAL AFTER THERE WAS EVIDENCE THAT THE JURY HAD BEEN TAMPERED WITH OR JURY MISCONDUCT HAD OCCURRED AND THE COURT FAILED TO ALLOW THE DEFENSE TO *VOIR DIRE* THE JURORS BY FAILING TO DISCLOSE ALL OF THE ILLEGAL COMMUNICATIONS THE JURORS RECEIVED AND COMMUNICATIONS THE COURT HAD ABOUT SUCH ACTIVITY OUTSIDE THE PRESENCE OF THE DEFENDANTS?

During the course of the trial, the jurors received letters from an undetermined source. The record reflects (Doc 875 - Pg 4 - Lines 1-7) that the court understood what was in the letters by stating, “the contents of the envelope are designed to, in some fashion, influence the jury as to how they should handle the case.” When asked by a co-defendant’s counsel if the defendants could look at the letters the court responded that, “We haven’t opened the letters” (Doc 875 Pg 4 -Lines 19-

20). The court conducted its own *voir dire* of the jurors in a limited manner and refused the defense counsel the opportunity to *voir dire* the jurors (Doc 875 – Pg 4 - Lines 4-5). The court denied a motion for mistrial (Doc 875 - Pgs 56- 62).

The court erred when it made known the fact that the jury had been illegally contacted again and failed to inform the defendants about the nature of contact and substance of the contact and failed to allow a *voire dire* of the jury by defendants (Doc 928 - Pg 48 - Lines 168-171).

The court continued to err, by continuing to confer with the jury, outside the presence of counsel, regarding jury tampering (Doc 929 - Pgs 11-13).

The court failed to allow the defendants to view correspondences between the court and the jurors during deliberations. Said communications were not made public until after the trial and then only after a motion for their publication had been made by a co-defendant (Doc 606, Doc 611).

The court also erred when it denied any *voir dire* of the jurors by the defendants when it is the defendants' burden of proof to show that they/he had been prejudiced by the correspondence, thereby denying the defendant(s)' due process. See, *United States v. Sylvester*, 143 F. 3d 923 5th Cir. 1998) “When confronted with credible allegations of jury tampering, district court must notify counsel for both sides and hold hearings with all parties participating” . . . “[e]ven

the most diligent *ex parte* inquiry was insufficient”. See *Turner v. Louisiana*, 379 U.S. 466, 473, 85 S. Ct. 546,550, 13 L.Ed.2d 424 (1965) ; *Remmer v. United States*, 347 U.S. 227, 228; 75 S. Ct. 450, 451,; 98 L.Ed 654, 1954-1 C.B. 146 (1954); *United States v. Martinez*, 416 F. 3d 1291, 1307 (11th Cir. 2005) “Prejudice is presumed the moment the defendant establishes the extrinsic contact with the jury did in fact occurred.” See also *McNair v. Campbell*, 416 F.3d 1291, 1307 (11th Cir. 2005).

Further, the facts state that Appellant’s name was on the correspondence to the jurors and his corporation’s name was too (Doc 875 -Pg 9 - Line 17). Therefore, the court failed to protect Appellant from the possibility that the jury would unfairly implicate Appellant as the one having instigated the illegal conduct with the jurors. See *Stimack v. Texas*, F.2d 588 (5th Cir. 1977) “When there has been an attempt at jury tampering, the court must guard against the possibility that the jury will assume one of the parties was responsible for the attempt and based on that assumption, decide the merits of the case unfavorably to that party.”

It is prejudicial error not to inform the defendants of communications from the jury during deliberations. See., *United States v. Rodgers*, 422 U.S. 35. 95 S. Ct. 2091 (1975). *Rodger’s*, (page 38) goes on to state, “that the orderly conduct of a trial by jury, essential to the proper protection of the right to be heard, entitles the parties who attend

for the purpose to be present in person or by counsel, at all **proceedings** from the time the jury is impaneled until it is discharged after rendering the verdict". The term "proceedings" is defined in *Erwin v. United States*, (D.C. 37 F. 470, 488, 2 L.R.A. 229) "in its general acceptance "proceeding" means the form in which actions are to be brought and defined, the manner of intervening in suits, of conducting them, the mode of deciding them, of opposing judgments and executing." "Ordinary "proceeding" intend the regular and usual mode of carrying on a suit by due course of common law." See, *People v. White*, 14 How.Prac. (N.Y.) 498. In this case, Appellant , was excluded from the "proceedings" between the court and the jury's inquires, and of obvioulsy other communications between the court and the jury. Thus, his Due Process rights were violated.

XVIII: WHETHER THE COURT ERRED WHEN IT FAILED TO FOLLOW THE PATTERN JURY INSTRUCTIONS FOR A DRUG CONSPIRACY AND A GOOD FAITH EXCEPTION?

Special Instruction 18 of the Eleventh Circuit Pattern Jury Instructions states in part: "Good Faith on the part of the Defendant is inconsistent with the existence of willfulness which is an essential part of the charge." Pattern Jury Instruction, Criminal cases, Eleventh Circuit (2003). The necessary corollary is that when willfulness is not a part of the charges, good faith is not a complete defense. Put another way, good faith

can only be a complete defense in specific intent crimes, not general intent crimes. In this case because willfulness was left out of the Second Superseding Indictment the jury instructions could never be correct and the instructions given by the court were incorrect and confusing; therefore, violating due process.

XIX: WHETHER THE COURT ERRED WHEN IT GAVE JURY INSTRUCTIONS THAT DETERMINED WHETHER MONEY LAUNDERING HAD OCCURRED BASED UPON “PROCEEDS” RATHER THAN “PROFITS” IN VIOLATION OF THE DICTATES OF *United States v. Santos*, 128 S. Ct. 2020 (2008): AND CORRESPONDINGLY WHETHER THE DISTRICT COURT ERRED WHEN IT FAILED TO GRANT THE RULE 29 MOTION (Doc 616, Doc 665) AS TO COUNT 32-52 (money laundering charges)?

The court erred when it failed to give the proper jury instruction regarding proceeds for the money judgment. (Doc 879 - Pg 16). The defendant was found guilty from evidence of proceeds not profits. All of the money gained by the Defendant in this case was accounted for and taxes were paid. No money was hidden. The evidence presented by the government was not concise as to distinguish the monies from being profits or proceeds. The money received by the Appellant was his accounted for salary. See. *United States v. Santos*, 128 S. Ct.

2020 (2008). The jury was not instructed properly on how to determine the difference between proceeds rather than profits, See. *United States v. Khanani*, 502 F. 3d 1281 (11th Cir. 2007).

The Court must remember that Appellant can only be convicted for the “profits” he received not “proceeds”. Please see a recent case where the trial Judge threw out the money laundering charges in a moonshine conspiracy. The case is out of Roanoke, Virginia. A synopsis of the case written by *Kenneth Rijock* Financial Crime Consultant, for World-Check states:

Judge reverses Money Laundering Conviction under *Santos* Rule. A U.S. District Judge in Roanoke, Virginia has thrown out twenty-five money laundering guilty verdicts obtained against two local brewers of illegal moonshine, because the illicit profits earned were absorbed by overhead, or "essential expenses," and as such cannot be regarded as "proceeds" for the purposes of money laundering, in cases where the punishment for the underlying criminal activity is substantially less. The rule, which was established in the 2008 US Supreme Court case of *US vs. Santos*, holds that receipts of a "specified unlawful activity" do not constitute "profits". The defendants, Jody "Duck" Smith and Margaret Smith, were convicted on other charges.

To quote the Court's* decision:

"The Court believes that *Santos* stands for the proposition that, as a matter of law, the revenue generated by a specified unlawful activity used in a financial transaction to pay the essential expenses of operating that same illegal business cannot constitute 'proceeds' under the money laundering statute, if the penalties for money laundering are substantially more severe than those for the underlying specified unlawful activity." *Smith at 11.* **US vs. Smith*, Case No.: 07-CR-00079-JCT (WD VA).

In *Smith*, the dismissal of the money laundering charges was done by the

court after the trial. In this case, if the Government did not distinguish between “profit” and “proceeds”, and if the evidence was of a fungible nature, then Appellant should not be punished for it, nor should the Court implement an upward variance or upward departure. Appellant has lost all his “profits” based upon the forfeiture and the Government’s civil action.

The essence of what Appellant did is simply to agree to receive payments for his operation of Jive Network which he deposited into his accounts at local banks without any concealment or "laundering" action on his part. See *United States v. Esterman*, 324 F.3d 565, 572 (7th Cir. 2003), “Cases in which money laundering charges have not succeeded are typically simple transactions that can be followed with relative ease, or that involve nothing but the initial crime." This is precisely the context in which all of Appellant financial transactions fit, relative to Jive Network, and are charged as money laundering.

Appellant was and has remained completely transparent with respect to the monies he received and deposited from Jive Network. Appellant never set up dummy accounts to conceal anything or to disguise his ownership or the origin of these funds. As the *Esterman* Court noted, citing 11th Circuit precedent, "something more than mere transfer and spending is needed for money laundering":

Cases concluding that the line has been crossed into the 'money laundering' territory include *United States v. Thayer*, 204 F. 3d 1352, 1354-55 (11th Cir. 2000) (funneling illegal funds through various fictitious accounts); *United States v. Marjors*, 196 F.3d 1206, 1212-13 ("elaborate shell game" involving multiple inter-company transfers with a variety of signatory names) Id.

Most significantly, as to the Section 1956(h) Conspiracy, the evidence construed in the light most favorable to the Government, likewise shows no real money laundering conspiracy in this case. As to the so-called "common unlawful plan" and criminal "agreement" between Jeffrey LaCour and Appellant for an "unlawful purpose and as to the elements to the offense charged, the only "agreement" between the two of them was that Jeffrey LaCour would be paid for his services from profits of Jive Network, when it became profitable. This, without more evidence, hardly crosses the line into money laundering territory and is insufficient to support a conspiracy to commit money laundering. See *United States v. Johnson*, 440 F.2d 1286 (11th Cir. 2006) (Section 1956(h) conspiracy conviction based *inter alia* on Defendant's transfer of \$550,000.00 of proceeds of securities fraud to his mother's Luxembourg account vacated where there was insufficient evidence of criminal agreement to support money laundering conspiracy). Compare and contrast *United States v. Hasson*, 333 F.3d 1264 (11th Cir. 2003).(Section 1956(h) conspiracy conviction sustained where defendant funneled proceeds of fraudulent jewelry sales to an off-shore shell corporation in

the Isle of Man using multiple accounts opened with forged documents using fictitious names). Nothing in this case even closely approaches what was determined to be **insufficient** for a money laundering conspiracy in *Johnson* (Supra.).

The inclusion of money laundering charges in this case grossly overstates Appellant's culpability for criminal conduct. The money laundering charges appeared to have been brought primarily as a tool supporting forfeiture to capture all of the Appellant's monies from his operation at Jive Network.

The Appellant respectfully submits that nothing in this case remotely shows, or could be reasonably inferred from the record, to demonstrate that Mr. Appellant had any intent "to cross the line into money laundering territory."

XX: WHETHER THE COURT ERRED WHEN IT GAVE A MODIFIED *ALLEN* CHARGE TO THE JURY AFTER THE JURY HAD STATED THEY WERE NOT ABLE TO REACH A VERDICT?

The court erred when it improperly gave a modified *Allen* charge (Doc 879 - Pg 35). This charge was given after the jury stated "we the jury have not been able to reach a unanimous agreement for each defendant on any and all counts." (Doc 879 - Pgs 33-34) Please remember Appellant was charged with 52 counts. But the

next day, after the *Allen* charge and after the court told the jury they would be kept over another week (Doc 880 - Pgs 2-5), suddenly the jury came to agreement as to all defendants and all counts.

On behalf of the defendants, the attorney for Dr. Pickens, objected to the form of the *Allen* charge (Doc 879 - Pgs 36-37). In *United States v. Rey* (822 F.2d 1453 (11th Cir. 1987) the Eleventh Circuit states forth its distain for the *Allen* charge. “Although the trial judge’s *Allen* charge to the jury, urging jury to reach verdict, tended to coerce jury into reaching verdict, especially in light of court stressing of cost of another and asking jurors to discount their views” *Rey* at 1453. The modern trend is against the *Allen* charge because it pressures jurors to give up their honest held beliefs, not in response to the considerations of guilt or innocence, but in response to saving expenses. *Rey* at 1458 and 1459.

There is also no guarantee that there will be another trial as stated in the *Allen* charge therefore the *Allen* charge is flawed and based upon a non truth. (*Allen v. United States*, 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528 (1896).

Given the backdrop of the *Allen* charge and the fact that the jury was told that they would be delayed a week, the legitimacy of the jury verdict is in question as one of being coerced. See. *United States v. Willis*, 88 F.3d 704, 717 (11th Cir. 1996).

Please remember how powerful the judge is. He decides when a jury eats, where they stay, where they sleep. His relationship to the jury becomes paternal as well as that of a teacher and a supervisor. His influence can and did in this case, change the format of this trial from being a fair trial in theory to an unfair trial in reality.

XXI: WHETHER THE COURT ERRED WHEN IT FAILED TO COMMUNICATE TO THE DEFENDANT QUESTIONS THE JURY HAD DURING DELIBERATIONS?

The court erred when it failed to immediately notify the defendants of questions the jury had to the court regarding the jury instructions (Doc 880 - Pg 4). It is prejudicial error not to inform the defendants of communications from the jury during deliberations. See. *United States v. Rodgers*, 422 U.S. 35. 95 S. Ct. 2091 (1975). *Rodger's* (pg 38) goes on to state "that the orderly conduct of a trial by jury, essential to the proper protection of the right to be heard, entitles the parties who attend for the purpose to be present in person or by counsel, at all **proceedings** from the time the jury is impaneled until it is discharged after rendering the verdict". The term "proceedings is defined in *Erwin v. United States*, (D.C. 37 F. 470, 488, 2 L.R.A. 229) "in its general acceptance "proceeding" means the form in which actions are to be brought and defined,

the manner of intervening in suits, of conducting them, the mode of deciding, them, of opposing judgments and executing.” “Ordinary “proceeding” intend the regular and usual mode of carrying on a suit by due course of common law.” See, *People v. White*, 14 How.Prac. (N.Y.) 498. In this case, Appellant was excluded from the “proceedings” between the court and the jury.

XXII: WHETHER THE COURT ERRED WHEN IT GRANTED THE GOVERNMENT’S MOTION FOR AN UPWARD DEPARTURE?

During a preliminary sentencing hearing, on July 27, 2009, the court erred when it granted the government’s Motion for an Upward Departure (4 levels) (Doc 882 - Pgs 23-32) and (Doc 910 - Pgs 45-46) . The government filed a Motion for Upward departure against every Defendant that went to trial. Obviously, if you exercise your right to a trial by jury you are then subject to an enhancement. But if you plead guilty and do not go to trial then an enhancement is not warranted even though you are guilty of the same behavior as those who went to trial. This is the government’s way of thinking. Therefore, the enhancement is in this case a punishment that is not warranted to some but to others. In effect, we have two classes of defendants those who go to trial and those who do not. If you do not go to trial then your actions in this case are “exceptional” as argued by the

government concerning the Sentencing Guidelines rule 2(d) 1.1 note 16 and 5(k) 2.0 (cited in Doc 882 - Pgs 23-26). The enhancement should be applicable to all the defendants or none. It is arbitrary and capricious to apply certain parts of the sentencing guidelines that could be argued against all of the defendants and then punish only a few (those who went to trial).

But the government's assertion that this case is "exceptional" is not correct. This case did not even involve the selling of an illegal narcotic drug. Further, if it is "exceptional", then a upward departure should have been given to all of the defendants, not just Appellant.

XXIII: WHETHER THE COURT ERRED WHEN IN CALCULATING THE SENTENCING GUIDELINE SCORE IT DENIED THE DEFENDANT A TWO-LEVEL REDUCTION FOR ACCEPTANCE OF RESPONSIBILITY?

Appellant objected to the assertion made by the office of probation that the defendant should not receive his acceptance of responsibility (Doc 882 - Pgs 45-48).

Appellant along with the other co-defendants, for all intents and purposes, argued the affirmative defense that they acted in good faith thinking that

their actions were not against the law. The affirmative defense of Good Faith is not a denial of the factual allegations and is a pure legal argument. See. *United States v. Schultz*, 917 F.Supp. 1343, N.D.Iowa, February 23, 1996 (NO. CR 95-3011) and *United States v. Thompson*, 191 Fed Appx. 185 C.A. 4 (Va.) 2006. It is a very similar situation where a defendant who was *pro se* represented himself at trial for his involvement in an Internet Pharmacy case, the court gave him acceptance of responsibility. Further, conditional pleas are not allowed in the Middle District of Florida and therefore to preserve certain arguments on appeal one must go to trial despite that they agree they committed the accused actions. Therefore, it is Appellant's contention that he should have received acceptance of responsibility.

CONCLUSION

Based on the foregoing argument, reasoning, and citations of authority, Appellant, respectfully requests: that this Court reverse the order denying that the charges be dismissed against the Appellant or acquit the Appellant and/or in the alternative, reverse and remand this case or grant or other such relief available by law or equity; that this Court, in any events, enter an order releasing the grand jury transcripts; and in the event that this case is remanded, a new Judge be appointed.

If this court is inclined to dismiss the arguments set forth as harmless errors, these errors were so numerous their cumulative affect warrants, at least, a new trial.

Respectfully Submitted,

/s/ H. Kyle Fletcher

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief of Appellant, Jude Lacour, was furnished by U.S. Mail to on this 14th day of May 2010 to:

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I HEREBY CERTIFY that, in compliance with 11th Cir. R. 31-5(c), an Adobe Acrobat® PDF file of the foregoing brief was uploaded via the Internet to this Court's website on May 14, 2010.

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