UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

UNITED STATES OF AMERICA,

v.

CASE NO: 6:08-CR-118-ACC-KRS

JUDE LACOUR,

Defendant
_____/

DEFENDANT JUDE LaCOUR'S
MOTION FOR NEW TRIAL AND MOTION FOR RECUSAL

The Defendant in the above styled and numbered cause, under Rule 33(b)(newly discovered evidence/other) of the Federal Rules of Criminal Procedure, respectfully moves the Court for an order granting the Defendant a new trial in this cause. In support of this motion, Mr. LaCour would argue:

I.

The verdict in this case was rendered on May 1, 2009 (doc.560).

Pursuant to Rule 33, the Court may vacate any judgment and grant a new trial if the interest of justice so requires.

The undersigned attorney was appointed to represent the *pro se* defendant, Jude LaCour, for sentencing purposes and subsequently for his appeal.

There is newly discovered evidence in this cause that requires that the

Defendant be granted a new trial. This motion is being filed within three years after the verdict or finding of guilty.

II.

A hearing on this motion is respectfully requested.

III.

Counsel for the Defendant conferred with the Assistant United States Attorney concerning this motion and the government is opposed to this motion.

MEMORANDUM IN SUPPORT OF DEFENDANT JUDE LaCOUR's MOTION FOR NEW TRIAL

The Defendant, through counsel, submits this Memorandum in Support of Defendant's Motion for New Trial.

FACTS (Rule 11)

The facts that support this Motion concern allegations that the trial court violated Fed. Crim. 11(c)(1).

Jude LaCour, was in jail the entire time before trial and during trial and represented himself at trial. He has a layperson's understanding of the law and did not understand what a Rule 11 violation was until informed by his counsel. The

other evidence cited in this Motion only became known to the undersigned well after sentencing and had to be developed before the filing of this type of Motion.

The trial 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, (transcript at doc. 313 page 8,-23) the trial court initially started talking about sentencing and the difference between how the guideline scores would differ for those defendants who pled than for 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 loose 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. (page 19, line 12-22). During this status conference the trial court spoke with each individual defendant about their positions and understanding as to offers made by the government. The trial 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. (page 27-28).

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

came about and the evolution of the guidelines that leads up to the fact that the trial court has great discretion on what is an appropriate sentence. The trial 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 at doc. 396, status hearing, beginning on page 20 and running to the end of the transcript.

The trial court Judge in this case was a special appointment that came from Ohio, and with the disposition on trying the case in less than twelve weeks with no continuances. His wife was also "on his back for agreeing to the appointment". (See transcript at page 39, line 21-25) It was common knowledge that the trial ended every Thursday in order to accommodate the trial 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 trial court used his bully pulpit to state his opinion what he thought the law was, when he told to the defendants, that this case was about prescribing controlled substances without ever physically seeing a patient (Volume IX of trial transcript page 118, line 16-24, doc. 873) and in the presence of the jury, he stated the law requires a physician to see his patient in order to prescribe medication. (Volume XII, of trial court transcript, page 38, doc. 875). The trial

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 controlled substances that were involved in this case.

It is alleged that on March 18, 2009, the trial 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 Jude LaCour's, e-mail from Jeff LaCour's attorney to the undersigned. Also, an affidavit attached as an exhibit from Jeff LaCour, that reflects that the trial court tried to use Jeff LaCour after he pled guilty, as a tool to get Jude LaCour to change his plea. This is further evidenced by the trial transcript (April 15, 2009, Volume X, pages 18-20, doc.#909) wherein the trial court admits talking to Jeff LaCour's counsel about the appointment of counsel for Jude LaCour, for the sole purpose of negotiating a plea deal. The trial court told Jude LaCour 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 Jude LaCour would be for the limited purpose of a change of plea, not for the purposes of aiding with the

trial. Also, April 15, 2009 was the day the court decided to have Jude LaCour go first in presenting his defense whenever the government closed it case. (Volume X, page 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 indeed not sentenced to prison (Doc. 799).

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 trial court took the initiative to try and broker a plea deal for the co-defendant Chebssi, because the trial court was concerned the jury would get hung during deliberations because the trial court thought the case against Chebbsi was not that strong, (the trial court's prediction was true – the jury did become hung at one point during deliberations - see jurors' note to judge filed at 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 trial court may have also have erred by becoming involved in plea negotiations between the government and the co-defendant Branawal.

(JURY TAMPERING)

During the course of the trial, the jurors received letters from an undetermined source. The record reflects (Volume XII of the trial transcript, page 4, lines 1-7 Doc. 875) 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" (page 4 line 19-20). The trial court conducted its own *voir dire* of the jurors in limited manner and refused the defense counsel the opportunity to *voir dire* the jurors (page 4, line 4-5). The trial court denied a motion for mistrial (page 56- 62.

After this incident the trial 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. (Volume XII page 27), which was the crux of their defense.

The Court continued to err, by continuing to confer with the jury outside the presence of counsel regarding jury tampering (Volume XV, pages 11-13, doc 929).

The trial 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. #s 606 and 611).

ARGUMENT

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 negations 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 contendre 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 F3d. 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 the argument in this Motion. As stated in *Bradley*, the failure to abide by the trial 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 negations 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 *Corbtit* 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 trial 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 Mr. LaCour may not have to show that he was prejudiced, Mr. LaCour 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.

The trial 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".

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 tem "proceedings is defined in *Erwin v. United States,* (D.C. 37 F. 470, 488, 2 L.R.A. 229) "in its general acceptation "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, Jude LaCour, was excluded from the "proceedings" between the trial court and Jeff LaCour's attorney and the government on March 18, 2009. He was excluded from the "proceedings" between the trial court, the government and Ms. Chebssi's attorney. He was possibly excluded from the trial court, the government and Mr. Branawal's

attorney. Lastly, he was excluded from the jury inquires and of course communications between the trial court and the jury.

CONCLUSION

Here, given the totality of the circumstances that transpired, with the obvious violation by the trial court regarding the Rule 11 as shown from record and the proffered evidence off the record, along with the mishandling of the jury's inquires, along with failure to allow the defendant to *voir dire* the jury after it received illegal and possibly prejudicial communications from an outside sources, creates a blatant impression, that the integrity of the trial was tainted and a new trial is warranted.

The Appeals court in *Bradley, Cano-Varela, Corbitt,* all replaced the judge that presided over the initial trial with a new judge. Here, this defendant requests that the trial court judge recuse himself, in order for a different judge to review this Motion.

WHERFORE Jude LaCour, prays that the Court enter an order granting the Defendant's Motion for a New Trial and Motion for Recusal.

Dated this 29th day of January, 2010.

/s/ H. Kyle Fletcher
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of January, 2010, I filed the original of the foregoing document by electronic delivery with the Clerk of the Court, of the Middle District of Florida and the Clerk of the Court for the Eleventh Circuit and the Clerk will send a notice electronically of this filing to the following: Assistant US Attorney, Karen Gable, U.S. Attorney's Office, Middle District of Florida, Nina Goodman, Esq., Department of Justice, Main Building, 1264, 50 Pennsylvania Avenue, N.W., Washington, DC 20530; and all other counsel of record for all defendants.

/s/ H. Kyle Fletcher
H. KYLE FLETCHER, ESQ.