

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-8151

UNITED STATES OF AMERICA,

Appellee,

v.

VIRGINIA HIGH,

Appellant

ON APPEAL FROM A CONVICTION IN THE UNITED STATES
DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

BRIEF OF APPELLANT

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**CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT**

Pursuant to F.R.A.P. 26.1 and 11th Cir. R. 26.1-1, 26.1-2, and 26.1-3, the undersigned counsel of record for Appellant Virginia High, hereby certifies that the following persons and entities have an interest in the outcome of the instant appeal.

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STATEMENT REGARDING ORAL ARGUMENT

Appellant respectfully requests oral argument in this case because of the novelty, complexity and importance of the issues raised.

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STATEMENT OF JURISDICTION

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

STATEMENT OF THE ISSUES

- I. THERE WAS INSUFFICIENT EVIDENCE TO CONVICT THE DEFENDANT UNDER COUNT ONE, THE DRUG CONSPIRACY.
- II. THE TRIAL COURT ERRONEOUSLY CHARGED THE JURY ON TWO OBJECTIVES OF THE MONEY LAUNDERING CONSPIRACY CHARGED IN COUNT THIRTEEN OF THE INDICTMENT:
 - A. THE TRIAL COURT ADMITTED THAT IT ERRONEOUSLY CHARGED THE JURY ON STRUCTURED TRANSACTIONS TO AVOID THE FILING OF CURRENCY TRANSACTION REPORTS UNDER *RATZLAF V. UNITED STATES*, ___ U.S. ___, 114 S.Ct. 655 (1994).
 - B. THE TRIAL COURT ERRONEOUSLY REFUSED TO GIVE A REQUESTED CHARGE ON GOOD FAITH, WHICH WAS A COMPLETE DEFENSE TO THE CHARGE OF DEFRAUDING THE GOVERNMENT UNDER A SECOND OBJECTIVE OF THE MONEY LAUNDERING CONSPIRACY IN COUNT THIRTEEN.
- III. THE TRIAL COURT ERRED IN GIVING A DELIBERATE IGNORANCE INSTRUCTION REGARDING THE INTENT REQUIREMENT OF THE MONEY LAUNDERING COUNTS.
- IV. THE DISTRICT COURT'S FAILURE TO GRANT DEFENDANT A HEARING ON HER MOTION FOR BOND PENDING APPEAL, PURSUANT TO 18 U.S.C. §3143(B)(1)(2) AND RELATED STATUTES VIOLATES HER PROCEDURAL AND SUBSTANTIVE DUE PROCESS RIGHTS GUARANTEED BY THE FIFTH

AMENDMENT OF THE UNITED STATES CONSTITUTION, BECAUSE THE STATUTE DOES NOT PROVIDE AN OPPORTUNITY FOR NOTICE AND A HEARING BASED ON A STATUTORY CLASSIFICATION AND A SENTENCE OF IMPRISONMENT, AND BECAUSE IT DISCRIMINATES AGAINST THE DEFENDANT IN RELATION TO DEFENDANTS ELIGIBLE FOR BOND PENDING APPEAL WHOSE OFFENSES ARE NOT SO CLASSIFIED.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in Court Below

Virginia High was indicted in December, 1992 with fourteen other defendants in a twenty-nine (29) count indictment. High¹ was indicted in eleven of the twenty-nine counts alleging violations of 21 U.S.C. § § 841 and 846 (drug conspiracy); 18 U.S.C. § 371 & 2 (a separate money laundering conspiracy, alleging money laundering (18 U.S.C. § 1956), structuring (31 U.S.C. § 5324), investing drug money in the operation of enterprises engaged in interstate commerce (21 U.S.C. § 854), defrauding the United States of the equitable value of real estate (18 U.S.C. §981). R8, 11.

On September 21, 1993, trial began for Defendants Virginia High and co-defendants Alex Gracia, George High, and Robert L. Ward, Jr. On October 13, 1993, Virginia High was found guilty of eleven counts (Counts 1, 13, 16, 17, 18, 19, 20, 21, 22, 23, and 24). R18, 174. Defendant High was sentenced to a term of imprisonment of 97 months on counts 1, 17, 18, 20, 23 and 24 to run concurrently, and to 60 months imprisonment on Count 13. She was not sentenced on Counts 16, 19, 21 and 22 and those counts were subsequently dismissed.² Defendant High filed a timely notice of appeal.

¹ George High, the husband of Virginia High, was also indicted. In this brief, "High" will refer only to Virginia High, unless otherwise noted.

² The court vacated Counts 16, 19, 21 and 22, charging violations of 31 U.S.C. § 5324, based on *Ratzlaf v. United States*, __ U.S. ___, 114 S.Ct. 655 (1994). Order of November 16, 1994.

High also filed a Motion for Bond Pending Appeal on February 4, 1994. Her motion was denied without a hearing on February 16, 1994. The Defendant is incarcerated.

B. Statement of the Facts

The multiple count indictment against Virginia High and her husband George High, and eleven other defendants, centered around two separately alleged conspiracies. Count One was a drug conspiracy³ and Count Thirteen was a money-laundering and structuring conspiracy.⁴ Substantive violations stemming from each conspiracy were separately alleged.

Mr. and Mrs. High owned, and operated "High Realty", a real estate brokerage in Atlanta in which they sold residential real estate. George High was president and was a licensed broker. Virginia High acted as the secretary and office manger and was licensed as an agent. R.16, 53. High did primarily office and administrative work, such as the bookkeeping. Her husband George did most of the marketing, sales and negotiating. R.16, 54.

Virginia High admitted that it was not unusual in the black community in which she worked for clients to tender cash and she had no problem in accepting cash, R16, 57, nor was she surprised that a down payment would be made up of numerous checks from different people. R16, 62. High was not aware of the law regarding currency transaction reports. She believed that the \$10,000 figure had something to do with her taxes and was to be avoided, as she preferred to pay her taxes at the end of the year and she listed her properties on her tax return for that purpose. R16, 64-65.

³ 21 U.S.C. §§ 846 & 841.

⁴ 18 U.S.C. § 371 and § 1956 and 31 U.S.C. § 5324.

High denied knowing that any of her clients were drug dealers. R16, 56. No evidence was offered that Virginia High had any direct connection to drugs, drug manufacturing, drug negotiations or drug sales, nor was there evidence she was paid money other than her real estate commissions, or reasonable fees charged for client-related services. There was also no direct evidence that Virginia High knew that certain clients of High Realty were drug dealers. Those persons with whom High dealt professed to have legitimate jobs of one kind or another. For example, co-defendant Sims Jinks operated an automobile repair shop on Panola Road. High's son had his car repaired there. R.16, 55. David Wallace, Alex Gracia, and JoJo Peavy all told High that they worked for Ansar Entertainment, where they were in the business of promoting musicians and producing music. R16, 57.

High was also willing to manage properties for clients, including paying the rent, by check or by cash, maintaining the property, and even putting property in her own name if a client requested it. R16, 67-68. There is little doubt that her admitted lack of reservation in these matters made her an ideal person to use if one were a drug dealer.

C. Statement of the Standard or Scope of Review

ARGUMENT I

With respect to Appellant's Argument I (the sufficiency of evidence to support a conviction) the standard of review is a question of law subject to *de novo* review. *United States v. Thomas*, 8 F.3d 1552, 1556 (11th Cir. 1993).

ARGUMENT II (A)

With respect to Appellant's Argument II (A), (a district court's erroneous instruction), the standard of review is a question of law subject to *de novo* review.

ARGUMENT II (B)

With respect to Appellant's Argument II (B), (refusal to give a requested instruction), the trial court's instructions are reviewed for abuse of discretion. *United States v. Morales*, 978 F.2d 650, 652 (11th Cir. 1992).

ARGUMENT III

With respect to Appellant's Argument III, (a district court's erroneous instruction), the standard of review is a question of law subject to *de novo* review.

ARGUMENT IV

With respect to Appellant's Argument IV, (a violation of a defendant's Fifth Amendment rights) the standard is a question of law subject to *de novo* review.

SUMMARY OF THE ARGUMENT

I. THERE WAS INSUFFICIENT EVIDENCE TO CONVICT THE DEFENDANT UNDER COUNT ONE, THE DRUG CONSPIRACY.

Count One of the indictment was alleged as a drug conspiracy involving thirteen of the fifteen defendants indicted, including defendant Virginia High. The drug conspiracy alleged the agreement was "to knowingly and intentionally possess with intent to distribute and to distribute more than five kilograms of cocaine hydrochloride, and more than 50 grams of cocaine base, 'crack,' " in violation of 18 U.S.C. §§841(a)(1) and 846, and §2.

The Conspiracy alleged asserts that the conspiracy had three objectives: [1] to acquire quantities of cocaine for the purpose of distribution; to transport and store the cocaine, and manufacture the cocaine into cocaine base. [2] Two, to acquire property as fruits of their unlawful scheme to distribute and possess with the intent to distribute cocaine [3] to conceal the wealth derived from the trafficking through the use of false and fictitious names. The government had to prove that the defendant participated in at least one of the objectives of the conspiracy and the jury had to agree which one. There was no evidence that Virginia High [1] was involved with the cocaine at all, nor that she [3] assisted the drug dealers in using false and fictitious names. Thus, to be convicted of count 1, the jury must have unanimously decided that she [2] "would acquire property, both real and personal, as fruits of their unlawful scheme to distribute and possess with the intent to distribute cocaine hydrochloride and cocaine base."

The government's argument is that High was necessary to the success of the venture because of her ability to provide a service, *i.e.*, as a real estate agent, to provide a place for

the money generated by the conspiracy. However, the government also indicted Virginia High in a separate money laundering conspiracy of which she was convicted that specifically deals with her services as a real estate agent (Count 13). Thus, the government attempts to convict High in two separate conspiracies for the same activity.

It is not alleged in Count One that Virginia High engaged in a "conspiracy to aid and abet" the scheme to distribute and possess with the intent to distribute cocaine, but rather that she aided and abetted a drug conspiracy. There is a difference between "punishing an agreement to commit an act intended to aid another crime (a 'conspiracy to aid and abet') and imposing conspiratorial liability on one who, without agreement, merely assists conspirators in achieving their object (an 'aiding and abetting of a conspiracy')." *United States v. Orozco-Prada*, 732 F.2d 1076, 1080 (2d Cir. 1984). One who helped dispose of transported securities that had been in interstate commerce could not properly have been convicted "for having conspired to transport securities across state lines merely on proof that he ... helped to dispose of the stolen securities after the interstate transportation was concluded." *Bollenbach v. United States*, 326 U.S. 6907, 66 S.Ct. 402, 404 (1946); *United States v. Orozco-Prada*, 732 F.2d at 1081.

The government did not allege in Count 1 that money laundering was an object of the conspiracy. They did allege that, however, in Count 13. The government should not be allowed to convict her twice of a conspiracy to launder money, through the guise of the aiding and abetting statute in a drug conspiracy count.

II. THE TRIAL COURT ERRONEOUSLY CHARGED THE JURY ON THE OBJECTIVES OF THE MONEY LAUNDERING CONSPIRACY (COUNT 13).

Under the trial court's instructions, in order to convict the Defendant in Count Thirteen, the money laundering conspiracy, the government had to prove beyond a reasonable doubt that the Defendant under consideration willfully conspired with someone to commit one of the offenses which was an object of the conspiracy.

The trial court admitted it erroneously charged the jury under *Ratzlaf v. United States*, ___ U.S. ___, 114 S.Ct. 655 (1994) with regard to the substantive counts charging 31 U.S.C. §5324, which is also one of the three closely-related objectives of the money laundering conspiracy. The conspiracy charge should also have been dismissed as the Court cannot assume that the jury agreed unanimously on an objective of the conspiracy that was other than the structuring objective.

The trial court also erred when the Defendant requested but the Court refused to give a good faith defense to a charge to defraud Beneficial Mortgage Company of \$60,000, as the result of property which had been previously seized by the government, alleged as the fourth objective of the money laundering conspiracy. The mortgage loan was for a co-defendant of High, Sims Jinks. Jinks, a government cooperating witness, agrees that High had nothing to do with the loan and received no proceeds. If the jury believed that the Defendant Virginia High was in good faith, it was a complete defense to that charge. The defendant "is entitled to have presented instructions relating to a theory of defense for which there is *any foundation* in the evidence, even though the evidence may be weak, insufficient, inconsistent, or of doubtful credibility." *United States v. Morris*, 20 F.3d 1111, 1116 (11th Cir. 1994).

Defendant was charged, yet not directly associated, she was particularly vulnerable to an instruction allowing the jury to impute knowledge.

There was certain spill-over between the conflicting knowledge requirement regarding money laundering where the jury was allowed to consider "deliberate ignorance" and structuring where the trial court admitted it erroneously charged the jury that the government need not prove the defendant was aware of the illegality of "money structuring" in order to convict.

In analyzing the need for deliberate ignorance instructions, the courts have required facts "which would 'point' in the direction of deliberate ignorance." *United States v. Arias*, 984 F.2d 1139, 1143 (11th Cir. 1993). In this case, however, those instances which "point" in the direction of deliberate ignorance go to the structuring charges rather than to the money laundering charges, further adding to the confusion for jurors. In his argument the prosecutor gave extended examples to the jury of High allegedly going out of her way to avoid a currency transaction report, which points to "deliberate ignorance" on the structuring charge, not the money laundering charge.

It is simply impossible for a juror to distinguish between the knowledge required under a Title 31 structuring count and a Title 18 money laundering count, where the trial court admittedly mis-instructed the jury on the structuring counts.

IV. THE DISTRICT COURT'S FAILURE TO GRANT DEFENDANT A HEARING ON HER MOTION FOR BOND PENDING APPEAL VIOLATES HER PROCEDURAL AND SUBSTANTIVE DUE PROCESS RIGHTS UNDER THE FIFTH AMENDMENT

Subsequent to the conviction and sentencing of the Defendant Virginia High, the Defendant filed her Motion For Release Pending Appeal. Having been convicted of a violation of 21 U.S.C. §846, a narcotic offense with a maximum statutory sentence of 10 years, and having been sentenced to a term of imprisonment, the defendant was not eligible for bond pending appeal under 18 U.S.C. §3142(f)(1)(C). See 18 U.S.C. § 3143(b)(1) & (b)(2). The trial court denied her motion for bond pending appeal without a hearing.

The Defendant contends that the statute denies her procedural due process to the extent it prohibits an opportunity for a hearing to determine whether she is a suitable candidate for bond pending appeal. *Fuentes v. Shevin*, 407 U.S. 67, 321 L.E.2d 556, 92 S.Ct. 1983 (1972). The referenced statutes deny her substantive due process to the extent that they discriminate against her in relation to defendants convicted under other statutes who appeal and are eligible to apply for bond pending appeal.

ARGUMENT

I. THERE WAS INSUFFICIENT EVIDENCE TO CONVICT THE DEFENDANT UNDER COUNT ONE, THE DRUG CONSPIRACY.⁵

Count One of the indictment was alleged as a drug conspiracy involving thirteen of the fifteen defendants indicted, including defendant Virginia High. The drug conspiracy alleged the agreement was "to knowingly and intentionally possess with intent to distribute and to distribute more than five kilograms of cocaine hydrochloride, and more than 50 grams of cocaine base, 'crack,' " in violation of 21 U.S.C. §§841(a)(1) and 846, and 18 U.S.C. §2. The trial court charged the jury, *inter alia*, as follows:

The Conspiracy alleged in count one of the indictment asserts that the conspiracy had three objectives: [1] one, to acquire quantities of cocaine hydrochloride for the purpose of distribution and possessing with the intent to distribute; to transport and store the cocaine, and manufacture the cocaine into cocaine base. [2] Two, that the defendants would acquire property, both real and personal, as fruits of their unlawful scheme to distribute and possess with the intent to distribute cocaine hydrochloride and cocaine base. [3] Three, the conspirators would conceal the wealth derived from the trafficking in cocaine hydrochloride and cocaine base, and their use and ownership of instrumentalities of the crimes, including real estate, automobiles, trucks, and

⁵ The defendant moved for a Rule 29 judgement of acquittal at the end of the government's case, and again after her evidence was presented. R11, 32, 40; R12, 74.

United States currency, through the use of false and fictitious names. R.13, 148-149.

The court went on to instruct the jury on the significance of the objectives in their deliberations:

I caution you that in order to convict a defendant, who is alleged to have been a member of the conspiracy set out in count one, the government does not have to prove that the defendant under consideration participated in all three of the objectives of the conspiracy. What the government must prove, and prove beyond a reasonable doubt, is that the defendant under consideration participated in at least one of the objectives of the conspiracy. Also, you must all agree on which objective the particular defendant was a participant of. R18, 148-149.

There is no evidence that Virginia High [1] acquired quantities of cocaine at all. There is also no evidence that she [3] assisted the drug dealers so they could use false and fictitious names. Thus, to be convicted of Count One, the jury must have unanimously decided upon the second "object" of the conspiracy as detailed in the court's instructions, and found that Virginia High, as a co-conspirator, [2] "would acquire property, both real and personal, as fruits of their unlawful scheme to distribute and possess with the intent to distribute cocaine hydrochloride and cocaine base."

The government chose to indict Virginia High in a conspiracy to possess and distribute cocaine (Count One), well knowing that she was not involved in either possession or distribution, manufacturing or sales of drugs. The government's argument is that she is necessary to the success of the venture because of her ability to provide a service, *i.e.*, as a

real estate agent, to provide a place for the money generated by the conspiracy. However, the government also indicted Virginia High in a separate money laundering conspiracy, of which she was convicted, that specifically deals with her services as a real estate agent (Count Thirteen). This double barreled attempt to convict her in two separate conspiracies for essentially the same activity should not succeed. That the activities of the two counts are the same can be seen in the closing argument of the prosecutor, in which he argues for a conviction of Virginia High in the drug conspiracy (Count One), but describes her alleged activities in the money laundering conspiracy (Count Thirteen):

Who can [defendant Alex Gracia] turn to when he cannot come out and say I'm Alex Gracia, I want a bank account. I can't have bank accounts. I'm Alex Gracia. I want a house but it can't be in my name. I'm Alex Gracia. I want a car and I want it insured, but it can't be in my name. You see, without people like George and Virginia High playing these kinds of roles that can launder this kind of money, Alex Gracia would just have boxes of money in the back of wherever. He would not be able to enjoy houses like 4970 Cascade Road. He would not be able to travel. He would not be able to do a lot of things. R18, 113.

Moments later, the prosecutor again argues to the jury for a conviction on the drug conspiracy:

George and Virginia High in laundering this drug money, ladies and gentlemen, are just as guilty of the drug dealing that produced this money as is

Alex Gracia and all of those other drug dealers that actually sold the drugs in order to generate that money. R18, 114.

The conspiracy alleged here demonstrates precisely why a conspiracy charge can be dangerous for a defendant when it paints with such a broad brush. First, it is not alleged in Count One that Virginia High engaged in a "conspiracy to aid and abet" the scheme to distribute and possess with the intent to distribute cocaine, but rather that she aided and abetted a drug conspiracy. There is a difference between "punishing an agreement to commit an act intended to aid another crime (a 'conspiracy to aid and abet') and imposing conspiratorial liability on one who, without agreement, merely assists conspirators in achieving their object (an 'aiding and abetting of a conspiracy')." *United States v. Orozco-Prada*, 732 F.2d 1076, 1080 (2d Cir. 1984).

One who helped dispose of transported securities that had been in interstate commerce could not properly have been convicted "for having conspired to transport securities across state lines merely on proof that he ... helped to dispose of the stolen securities after the interstate transportation was concluded." *Bollenbach v. United States*, 326 U.S. 6907, 66 S.Ct. 402, 404 (1946); *United States v. Orozco-Prada*, 732 F.2d at 1081; *United States v. Freeman*, 498 F.2d 569, 575 (2d Cir. 1974)(Mere fact that a person receives, comforts or assists one who has been a member of a completed conspiracy does not make him a participant in the conspiracy or liable for substantive crimes committed during the pendency of the conspiracy.)

Secondly, what the government alleged, *i.e.*, the acquisition of property as fruits of the scheme, is a "manner or means" of accomplishing the objective of possessing and

distributing cocaine and cocaine base. Acquiring property, or assisting others to acquire property, is not unlawful. Acquiring property to launder money or aiding and abetting money laundering is unlawful, just as the government has alleged in Count Thirteen of the indictment. As one author put it,

Either actions are unlawful or they are not; if they are unlawful, planning to commit them should properly result in a conspiracy conviction. If the object of the conspiracy is not unlawful the conspiracy conviction would be for planning to commit a legal act, surely an absurd result, a result not permitted in the vast majority of jurisdictions. Marcus, Prosecution and Defense of Criminal Conspiracy Cases, §2.06[1] (Matthew Bender, 1988).

The government did not allege in Count One that money laundering was an object of the conspiracy. They did allege that, however, in Count Thirteen. The evidence does not show that Virginia High is guilty of drug possession or distribution. The evidence is insufficient to convict her of that charge. The government should not be allowed to convict her twice of a conspiracy to launder money, through the guise of the aiding and abetting statute in a drug conspiracy count.

II. THE TRIAL COURT ERRONEOUSLY CHARGED THE JURY ON THE OBJECTIVES OF THE MONEY LAUNDERING CONSPIRACY CHARGED IN COUNT THIRTEEN OF THE INDICTMENT.

In Count Thirteen the trial court charged, *inter alia*, as follows:

In this instance, with regard to the conspiracy alleged in Count Thirteen, the indictment charges that the defendants conspired to commit various violations of the law of the United States such as set out in Title 18, United

States Code, Section 371. It is charged, in other words, that the defendants conspired to commit three⁶ separate substantive crimes or offenses.

In such a case it is not necessary for the government to prove that the defendant under consideration willfully conspired to commit all of those substantive offenses. It would be sufficient if the government proved beyond a reasonable doubt that the defendant under consideration willfully conspired with someone to commit one or both offenses. But in that event, in order to return a verdict of guilty, you must unanimously agree upon which of the three offenses the defendant conspired to commit. If you cannot agree in that manner, then you must find the defendant not guilty. R18, 157-58.

Three objectives were closely related. Those objectives are A) money laundering under 18 U.S.C. § 1956; B) investing the proceeds from the distribution of cocaine in enterprises engaged in interstate commerce in violation of 21 U.S.C. § 854, and C) knowingly structuring the deposit of currency in financial institutions so as to avoid the filing of Currency Transaction Reports, in violation of 31 U.S.C. § 5324.

The fourth objective of the conspiracy in Count Thirteen alleges that the co-conspirators defrauded the United States of the equitable value of an asset, *i.e.*, the improved property at 426 Peyton Road by mortgaging the property to Beneficial Mortgage Company, and receiving value in exchange, knowing that it had been lawfully seized by the United States, a violation of 18 U.S.C. §981.

⁶ The indictment charged that the co-conspirators had four objectives, not three.

- A. THE TRIAL COURT ADMITTED THAT IT ERRONEOUSLY CHARGED THE JURY ON STRUCTURED TRANSACTIONS TO AVOID THE FILING OF CURRENCY TRANSACTION REPORTS UNDER *RATZLAF V. UNITED STATES*, ___ U.S. ___, 114 S.Ct. 655 (1994).

Under the trial court's instructions, in order to convict the Defendant in Count Thirteen the government had to prove beyond a reasonable doubt that the Defendant under consideration willfully conspired with someone to commit one of the offenses which was an object of the conspiracy. Further, the jury had to unanimously agree upon which of the offenses the Defendant conspired to commit. If they could not agree, they were instructed to acquit the Defendant.

Under the three offenses in II(A), the trial court admitted it erroneously charged the jury with regard to the offense under 31 U.S.C. §5324. The trial court charged:

[T]he government need not prove the defendant was aware of the illegality of money structuring in order to convict the defendant of that offense under Title 31, United States Code, Section 5324(3). The government need only prove that the defendant was aware of the bank reporting requirement for currency transactions in excess of \$10,000 and sought to evade those requirements through money structuring. R18, 161.

In *Ratzlaf v. United States*, ___ U.S. ___, 114 S.Ct. 655 (1994), the Supreme Court held to the contrary, *i.e.*, that a jury had to find the defendant knew the structuring in which he engaged was unlawful. *Ratzlaf* at 663.

The trial court subsequently admitted error when, post trial, it dismissed the substantive counts under the same statute.

However, in convicting Defendant High on the conspiracy charge in Count Thirteen of the indictment, the Court cannot assume that the jury agreed unanimously on an objective of the conspiracy that was other than the structuring objective, and therefore the conviction on Count Thirteen cannot stand.

B. THE TRIAL COURT REFUSED TO GIVE A REQUESTED CHARGE ON GOOD FAITH, WHICH WAS A COMPLETE DEFENSE TO THE CHARGE OF DEFRAUDING THE GOVERNMENT UNDER A SECOND OBJECTIVE OF THE MONEY LAUNDERING CONSPIRACY IN COUNT THIRTEEN.

The trial court also erred when the Defendant requested but the Court refused to give a good faith defense to the charge to defraud. R18, 170-171. A defendant is entitled to have the court instruct the jury on the theory of the defense, as long as it has some basis in the evidence and has legal support. *United States v. Morris*, 20 F.3d 1111, 1114-15 (11th Cir. 1994); *United States v. Orr*, 825 F.2d 1537, 1542 (11th Cir. 1987).

The Defendant testified at trial and denied knowing about or having anything to do with the loan taken out by co-defendant Sims Jinks regarding the property at 426 Peyton Road in Atlanta. She testified that she was requested by the closing attorney for Beneficial Mortgage to correct a misspelling in the deed in connection with a mortgage loan that Sims Jinks had applied for from Beneficial Mortgage. The Defendant denied that she received any of the proceeds of the loan. R16, 84-87.

Co-defendant Sims Jinks was a cooperating witness for the government at the time of his testimony and was to get a recommendation for a reduced sentence from the government in exchange for his plea of guilty. R12, 151. He corroborated the testimony of Defendant High regarding her limited participation in the loan. Jinks admitted that the \$60,000 he received from Beneficial was for him and that Virginia High received none of the proceeds. R13, 14-18. Although there was evidence that High was aware the property had been seized, there was no evidence that she understood the impact of the seizure on the property or the connection to the loan to Mr. Jinks. R13, 13-14.

If the jury believed that the Defendant Virginia High acted in good faith (the only defense that she had to the charge of defrauding the government), it was a complete defense to that charge.⁷

⁷ The first paragraph of the pattern charge from this Circuit on good faith reads as follows:

Good faith is a complete defense to the charges in the indictment since good faith on the part of the Defendant is inconsistent with intent to defraud or willfulness which is an essential part of the charges. The burden of proof is not on the Defendant to prove his good faith, of course, since he has no burden to prove anything. The Government must establish beyond a reasonable doubt that the Defendant acted with specific intent to defraud as charged in the indictment. Special Instruction 13, Good Faith Defense to Charge of Intent to Defraud, Pattern Jury Instructions, Criminal Cases (U.S. 11th Cir. District Judges Association, 1985 Ed.)

There was a clear basis here supporting the Defendant's good faith. The loan in question was not for her; she did not apply for it, nor receive any of the proceeds. Her sole participation, by the accounts of all parties, was to correct a deed at the request of the closing attorney. There is no indication that she made any connection between the loan applied for by Jinks without her knowledge, and the seizure of the property, nor that she participated in any way to prevent the loan company from being aware of the seizure so that the loan could go forward. As this Circuit has stated:

A defendant is 'entitled to have the case submitted to the jury in a manner which [will] enable the jury fairly to consider his proffered defenses.' *United States v. Banks*, 942 F.2d 1576, 1580-81 (11th Cir. 1991). "We have repeatedly held that 'a defendant is entitled to a charge which precisely and specifically, rather than merely generally or abstractly, points to the theory of his defense.'" *United States v. Lewis*, 592 F.2d 1282, 1286 (5th Cir. 1979)(quoting *United States v. Wolfson*, 573 F.2d 216, 221 (5th Cir. 1978)), cited in *United States v. Morris*, 20 F.3d 1111, 1117 (11th Cir. 1994).

Failure to give this instruction as a theory-of-defense charge, when requested to do so, is error. *United States v. Goss*, 650 F.2d 1336 (5th Cir. 1981):

The law is clear that the defendant "is entitled to have presented instructions relating to a theory of defense for which there is *any foundation* in the evidence, even though the evidence may be weak, insufficient, inconsistent, or of doubtful credibility." *United States v. Morris*, 20 F.3d 1111, 1116 (11th Cir. 1994), citing *United States v. Opdahl*, 930 F.2d 1530, 1535 (11th Cir. 1991) (quoting *United*

States v. Lively, 803 F.2d 1124, 1126 (11th Cir. 1986) (quoting *United States v. Young*, 464 F.2d 1560, 164 (5th Cir. 1972) (emphasis in *Lively*). Here there was an evidentiary foundation for the charge and a request for it to be given. The failure to do so is reversible error.

III. THE TRIAL COURT ERRED IN GIVING A DELIBERATE IGNORANCE INSTRUCTION REGARDING THE INTENT REQUIREMENT FOR THE MONEY LAUNDERING COUNTS.

Counts 17, 18, 20, 23 and 24 comprise the money laundering substantive counts of the indictment, each alleging a violation of 18 U.S.C. §1956(a)(1)(B)(i) & (ii). In the instructions to the jury, the district court charged that knowledge could be established by "deliberate ignorance," *i.e.*, that if the jury should find that the facts support the inference that the Defendant was aware of a high probability of the existence of the fact in question and that she deliberately closed her eyes to what she had every reason to believe was the fact. R18, 141-142. The Defendant objected to the charge. R17, 80.

The Eleventh Circuit has noted that a deliberate ignorance charge should not be given in every case in which a defendant claims a lack of knowledge, "but only in those comparatively rare cases where ... there are facts that point in the direction of deliberate ignorance." *United States v. Rivera*, 944 F.2d 1563, 1570 (11th Cir. 1991) (emphasis supplied), citing *United States v. Murieta-Bejarano*, 552 F.2d 1323, 1325 (9th Cir. 1977). The danger is that the jury "will convict on a basis akin to a standard of negligence that the defendant *should* have known that the conduct was illegal." *Id.* at 1570 (emphasis in original). The Court also noted a further consideration that "deliberate ignorance is easier to prove

than actual knowledge and ... prosecutors should not be granted such a windfall advantage when the giving of such an instruction is not appropriate." *Id.* at 1571, n.30, *citing* Robbins, The Ostrich Instruction: Deliberate Ignorance as a Criminal Mens Rea, 81 J.Crim.L. & Criminology 191, 200 & n.55.

This is not the "rare" case where a trial court should have granted the prosecution a windfall and given a deliberate ignorance instruction. On the contrary, because of the particular facts of this case which has structuring counts which are closely related *factually*, but require very different legal instructions regarding knowledge, *and* because of the prejudicial nature of large scale drug activities with which the Defendant was charged, yet not directly associated, she was particularly vulnerable to an instruction allowing the jury to impute knowledge.

There was certain to be spill-over between the conflicting knowledge requirement regarding money laundering (18 U.S.C. § 1956) where the jury was allowed to consider "deliberate ignorance" and structuring (31 U.S.C. § 5324) where the trial court admittedly charged erroneously that the government need not prove the Defendant was aware of the illegality of "money structuring" in order to convict the Defendant of that offense. R18, 161. In his argument to the jury, the prosecutor referred more than once, however, to money laundering and "money structuring" in the same argument, as if they were the same:

The real issue in dealing with the money laundering charges and the structuring charges with regard to Mr. High and Mrs. High and Mr. Ward, Sergeant Ward, is what did they know. R18, 120.

At other times, in paraphrasing the law to the jury, there was room for the jury to misunderstand the prosecutor's argument, even when he was technically correct:

What the law requires, and I submit Judge Vining is going to tell you, is not that the government prove the defendant knew the money came from drug sales.

R17, 104.

Referring to the alleged attempts to avoid currency transaction reports, both the Court and the prosecutor referred to "money structuring" which sounds a lot like "money laundering." The judge told the jury regarding the structuring count that, "the government need not prove the defendant was aware of the illegality of "money structuring" in order to convict the defendant of that offense under Title 31, United States Code, Section 5324(3)." R18, 161. In explaining the law on money laundering, however, the relationship between money laundering and "money structuring" becomes fuzzy indeed:

The Prosecutor: And then the fourth element [in money laundering] is again a purpose element. The government must prove that the defendant engaged in the transaction knowing that the transaction is designed in whole or in part to do one of two things, that is, either conceal or disguise the nature, location, the source, the ownership or the control of the proceeds of specified unlawful activity, or to avoid a transaction reporting requirement under state or federal law. R17, 106.

In analyzing the need for deliberate ignorance instructions, the courts have required facts "which would 'point' in the direction of deliberate ignorance." *United States v. Arias*, 984 F.2d 1139, 1143 (11th Cir. 1993). A further problem in this case, however, is that those

instances which "point" in the direction of deliberate ignorance go more to the structuring charges of 31 U.S.C. § 5324, then to the money laundering charges under 18 U.S.C. § 1956, further adding to the confusion for jurors. For example, in his argument the prosecutor gave extended examples to the jury of High allegedly going out of her way to avoid a currency transaction report, pointing to "deliberate ignorance" on the structuring charge, not the money laundering charge. *E.g.*, See R17, 106, 107, 108, 109.

It is simply impossible for a juror to distinguish between the knowledge required under a Title 31 structuring count and a Title 18 money laundering count, where one is part and parcel of the requirements of the other. The fact that the trial court admittedly mis-instructed the jury on the structuring counts substantially aggravates an already difficult issue on knowledge. The spill-over requires that the defendant's money laundering convictions be reversed.

IV. THE DISTRICT COURT'S FAILURE TO GRANT DEFENDANT A HEARING ON HER MOTION FOR BOND PENDING APPEAL, PURSUANT TO 18 U.S.C. §3143(B)(1)(2) AND RELATED STATUTES, VIOLATES HER PROCEDURAL AND SUBSTANTIVE DUE PROCESS RIGHTS GUARANTEED BY THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION, BECAUSE THE STATUTE DOES NOT PROVIDE AN OPPORTUNITY FOR NOTICE AND A HEARING BASED ON A STATUTORY CLASSIFICATION AND A SENTENCE OF IMPRISONMENT AND DISCRIMINATES AGAINST THE DEFENDANT IN RELATION TO DEFENDANTS ELIGIBLE FOR BOND PENDING APPEAL WHOSE OFFENSES ARE NOT SO CLASSIFIED.

On February 4, 1994, subsequent to the conviction and sentencing of the Defendant Virginia High, the Defendant filed her Motion For Release Pending Appeal. The government's response cited 18 U.S.C. §3143(b)(1) and (b)(2) which provides that:

The judicial officer shall order that a person who has been found guilty of an offense in a case described in subparagraph (A), (B), or (C) of subsection (f)(1) of section 3142 and sentenced to a term of imprisonment, and who has filed an appeal or a petition for writ of certiorari, be detained.

Having been convicted of a violation of 21 U.S.C. §846, a narcotic offense which carries a maximum statutory sentence of 10 years or more, which is listed in 18 U.S.C. §3142(f)(1)(C), and having been sentenced to a term of imprisonment, and having filed a notice of appeal, the defendant was, by statute(s), not eligible for bond pending appeal.

The Defendant's Reply to the government's response asserted that the statute(s) are unconstitutional.

The trial court, citing the Defendant's motion and the government's response, denied her motion for bond pending appeal without a hearing on February 16, 1994. R.E. tab 7.

The Defendant Virginia High contends that the cited statute(s) deny her procedural due process to the extent that they prohibit an opportunity for a hearing to determine whether she is a suitable candidate for bond pending appeal, based solely on the classification of the statute under which she was convicted and the fact that she received a sentence of imprisonment. *Fuentes v. Shevin*, 407 U.S. 67, 321 L.E.2d 556, 92 S.Ct. 1983 (1972). The referenced statutes deny her substantive due process to the extent that they discriminate

against her in relation to defendants convicted under other statutes who appeal and are eligible to apply for bond pending appeal.

CONCLUSION

For the reasons stated, and based upon the authorities cited, the defendant's convictions should be reversed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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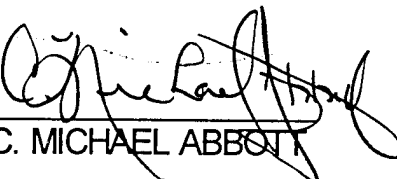
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by placing a copy of the foregoing in the United States mail with adequate postage affixed thereon to ensure delivery.

This 24th day of February, 1995.


C. MICHAEL ABBOTT