

APPENDIX

APPENDIX

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10 TRANSCRIPT OF HEARING

11 BEFORE THE HONORABLE WILLIAM P. DIMITROUFEAS

12 U.S. DISTRICT JUDGE

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1 the trial.

2 May I have one moment, Judge?

3 THE COURT: Sure.

4 MR. HOROWITZ: I think I have covered everything.

5 Judge, there is an issue also regarding the enhanced
6 audio. I did supply -- and it's my fault. I supplied the
7 order on Friday to have the Clerk's Office make copies for both
8 Ms. Waugh and myself of that CD.

9 THE COURT: I don't think the Clerk's Office makes
10 copies of CD's.

11 MR. HOROWITZ: I know from speaking with the Clerk --
12 I know -- obviously it's part of the court file -- they didn't
13 want to give it to me. They were also rather leery of putting
14 the CD on their system for security reasons to play it for me,
15 so --

16 THE COURT: Is that the CD from which Mr. Daniels
17 wrote out the transcript?

18 MR. HOROWITZ: Correct, Your Honor.

19 THE COURT: Then why don't I just accept Mr. Daniels'
20 testimony that the transcript is an accurate transcription of
21 what's on the CD?

22 MR. HOROWITZ: That's what we would ask, Judge.

23 THE COURT: Any objection to that, Ms. Waugh?

24 MS. WAUGH: No, Your Honor.

25 THE COURT: Okay.

Transcript

This is an accurate transcript of the audio sound recording from the back seat of the police vehicle between Geary Lynch and Vernon Daniels, which occurred on January 16, 2008. The transcript accurate reflects the time according to the audio sound recording.

By Vernon Daniels

00:00:02: This is Special Agent VanVliet. Today's date is January 16, 2008; the time is approximately 9:11 p.m., placing a digital recording in the back seat of Marked Unit 4376.

00:00:6:09UM: You guys all right back there?

6:10GL: Yeah, we good.

6:11UM: All right. What's you guys' names?

6:12 GL: My name Geary

6:13 UM: Geary what?

6:14 GL: Lynch

6:15 UM: And what's yours?

6:16 VD: And mines, Vernon Daniels

6:17 UM: Vernon Daniels? Okay. Vernon, you do you guys know you're in a marked unit here? It's a police car.

6:21 VD: yeah, yeah.

6:21 GL: Yeah, yeah

6:22 UM: Just to let you know, we searched the back seat of this car so anything afterwards we find—any drugs, anything like that—it belongs to you guys, okay?

6:28 GL: I understand. Alright, did you search it good, though?

6:31 UM: Yeah

6:32 GL: Cause we in enough shit as is.

6:33 VD: Hell yeah.

6:34 UM: I got you, I got you.

6:37 GL: What can they do, bro? They Leroy guns he registered bro, he registered bro.

6:43 VD: Damn these cuffs tighter than a bitch.

6:46 GL: I mean what the fuck, like.

6:49 VD: (Unintelligible) weed still in the back of my pocket.

6:52 GL: (Unintelligible) where it's at?

6:53 VD: In my back pocket.

6:56 (Unintelligible) You seen that motherfucking badge, bruh.

7:00 VD: Mm-hmm

7:02 GL: That's ATF, bro. That's the feds, bro. So you think they taking us with them?

7:12 VD: (Unintelligible)

7:13 GL: The feds. You think they gon' take us?

7:18 VD: (Unintelligible) that ain't the feds?

7:21 GL: Man, the nigga that just was talking to us is the feds, man. (7:35) let me say something bruh. I' ma just ask him what can I do to get all y'all off. Real shit, bruh. Like man What the fuck-- I mean like-- they can't really-- for attempt they ain't find-- see they thought they was gon' find guns on all of us, bro. you feel me? (8:01) GL: I just hope Leroy just take all them fucking guns. If everybody say that it ain't my gun right. We ain't got no guns bruh?

8:11 VD: My only concern is about that weed from (Unintelligible). I had (Unintelligible).

8:22 GL: What?

8:23 VD: (unintelligible) shit back on me.

8:41 GL: Damn you got (Unintelligible) on you too.

8:44 VD: I had the weed in the pouch. (Unintelligible)

8:52 GL: (Unintelligible)

9:02 VD: hmm?

9:03 GL: (Unintelligible)

9:24 VD: (Unintelligible)

9:31 GL: All the guns was in Leroy possession, bro. And he got a firearm license.

9:39 VD: (unintelligible) too. (10:01) Shit

10:02 GL: What?

10:03 VD: these cuffs tight

10:32 GL: Look out.

10:34 VD: Hmm? (10:44) He took the purple bag?

10:51 GL: (Unintelligible) Hmm?

10:52 VD: I said do you know what he did with that Purple bag. (Unintelligible) Purple bag. You know if he took it?

10: 59 GL: That purple bag?

11:00 VD: Mm-hmm

11:01 GL: He say he took it.

11:02 VD: You sure?

11:03 GL: Mm-hmm

11:04 VD: You seen him?

11:05 GL: Mm-mm. Trust me man.

11:12 VD: you sure he ain't put the bag in my pocket. You think he gon put that on me, homie.

11:19 GL: Probably

11:22 VD: (Unitelligent)

11:28 Damn bruh. You seen what he did with the weed I had, bruh?

11:34 GL: Hmm?

11:35: VD: You seen what he did with the weed I had

11:38: GL: (Unintelligent)

11:40: VD: I remember I had (Unintelligible)

11:44: GL: (Unintelligible) (12:08) Aw Shit.

12:58: VD: (Unintelligible)

13:01: GL: Hmm?

13:02: VD: (Unintelligible)

13:07: GL: what?

13:08: VD: (Unintelligible)

13:14: GL: What?

13:15: VD: That's the reason. That's why I had to talk you like (Unintelligible).

13:28: GL: Mmm Hmm. I don't know bruh.

14:57 GL: Did Leroy tell you what I told him, that he got to take all the guns right?

15:02 VD: (Unintelligible)

15:33 GL: What do they got, bruh. What do they fucking got, bruh. They got. What do they got? I mean, nuttin, us talking about -- a robbery that they brought to us? Damn it, what the fuck is that, bruh? Y'all brought that to us. Okay, y'all brought that robbery to us, Now when y'all brought that robbery to us, we yea -- of course we gon' indulge in that shit and now boom, we came and met with y'all, yes, on numerous occasions. And we never had no gun or none of that, you feel what I'm saying? That's why I said we needed another rental, bruh.

16:11 VD: Mm-hmm

16:13 GL: If they keep all the guns there, they wouldn't have had shit.

16:19 VD: (Unintelligible)

16:22 GL: I felt it after -- when I got in there. I just said fuck it, like, fuck it. I'm – I'm here now. I'm done. Whatever.

16:32 VD: Mm-hmm.

17:09 GL: So they don't got that. They got all these guns, you feel what I'm saying?

17:16 VD: Mmm Hmm.

17:17 GL: None of um was in our possession. It was all on Leroy possession. You feel what I'm saying? Leroy got a conceal license. That 38 is his, bruh. You feel what I'm saying? That—hopefully ain't none of them – I hope ain't none of them guns dirty, bruh.

17:52 GL: Ay Shawn I don't know what they had on us bruh. We ain't break in that police car.

17:59 VD: Mmm Hmm?

18:00 GL: We ain't do none of that shit, bro. Motherfucking – Damn little Lionel and them crying and shit, bruh.

18:13 VD: (Unintelligible)

18:17 GL: Conspiracy of what? We ain't have no firearms, bruh.

18:21 VD: Yea that's true.

18:23 GL: Y'all came to us about robbing a motherfucker with 20 birds-- 25 bricks or better. I didn't come looking for y'all.

18:31 VD: I ain't -- I ain't -- we ain't never think about of nothing like that

18:36 GL: You feel what I'm saying? Like I ain't – I ain't come looking for y'all. So how in the fuck—what in the fuck do y'all likely got -- how -- what -- what -- that's all I want to know. What -- is my charges? They say firearm. That's bullshit.

18:48 VD : Mm-hmm.

18:49 GL: It wasn't nothing on me.

18:50 VD: Mm-hmm

18:51 GL: And I like I tell Leroy bruh, you better call anybody and tell them that they received the firearms off you, bruh. You feel what I'm saying? You got that, bruh. That's why -- I knew he shouldn't have took that shit. And that's why I said bruh -- well it ain't bout nothing bruh.

19:09 VD: Like I was telling you bruh.(Unintelligible)

19:15 GL: I'm telling you, bruh.

19:17 VD: He ain't get that did he

19:18 GL: Huh?

19:19 VD: (Unintelligible)

19:22 GL: They probably fuck us up (Unintelligible) give us a dumb ass attempted burglary. Then what? Then what? man – what address?

19:33VD: Yea?

19:35 GL: You feel what I'm saying? What? Then what

19:37 VD: We ain't know no address or anything. (Unintelligible)

19:44 GL: Who?

19:45 VD: I thought (Unintelligible) he was driving like that

19:48 GL: Nah.

19:50 VD: (Unintelligible)

19:58 (Unintelligible) ATF bruh. 20:23 GL: They look they expected -- (20:35) They, they, they, they expected, they expected more guns bruh. I know they did. They expected everybody to have a gun. (20:58) They can't really even do nothing to Lionel and them.

20:59 VD: Mm-hmm

21:02 GL: You feel what I'm saying? They can't do shit to Lionel and them, bruh.

21:05 VD: Mm-hmm.

21:38 GL: These handcuffs so tight as fuck, bruh. (21:55) I know all they gon' do is probably run us for warrants.

22:00 VD: (Unintelligible)

22:07 GL: I got a domestic down there in (Unintelligible) PAPD might come get me. (Unintelligible)

22:17 VD: (Unintelligible)

22:28 GL: I'm hotter than a bitch. They ain't got the air on?

22:56 VD: (Unintelligible)

22:59 GL: Hmm?

23:00 VD: (Unintelligible)

23:02 GL: Mm-hmm

23:07 VD: (Unintelligible)

23:09 GL: Hmm?

23:10 VD: (Unintelligible)

23:12 GL: I knew we was fucked.

23:15 VD: (Unintelligible)

23:31 GL: (Unintelligible). What is my charges? Firearm? I ain't have no firearm.

23:39 VD: Mmm Hmm.

23:40 GL: Leroy Baines had the firearms. You know -- like don't even try me like that

23:47 VD: Man, everybody wasn't even going in that house.

23:50 GL: Yea, yea, right.

23:51 VD: Cause ain't nobody had no firearms -- Everybody didn't have a firearm (Unintelligible)

23:53 GL: Yea, I ain't -- I ain't had nothing -- I ain't had nothing on me.

23:57 VD: (Unintelligible)

23:58 GL: Only thing they can say I did was start talking, you feel what I'm saying? Like saying -- "Let's do it. Fuck it, like but -- come on, let's do it." Shit, I got kids. I got -- you feel me? That's what -- what else can they say?

24:11 VD: Man, we ain't really want do it. They brought it to us, you feel me? (24:33) You see (Unintelligible)

24:34 GL: Hmm?

24:35 VD: You ain't see where he put that (Unintelligible) at when he took it out my pocket (Unintelligible).

24:40 GL: I don't know where he put it at, bruh. I just seen him talking to you. I know you ain't getting ready put shit on me bro.

24:50 VD: yea, that's what I'm saying. (Unintelligible) (25:06) What the fuck is all this? He took – He took all the (Unintelligible) put everything in my back Pocket.

25:11 GL: Mm-hmm. (25:15) How many bags you got?

25:17 VD: Three

25:23 GL: They ain't got shit on us, bro. I know they don't, bruh. (25:33) They ain't got nothing on us.

25:35 VD: (Unintelligible)

25:36 GL: Hmm?

25:40 VD: (Unintelligible)

25:41 GL: Hmm? (25:48) hold up the sheriff pulling behind us. Oh he in the car go 'head, go 'head. Keep trying. (26:12) Keep going

26:14 VD: (Unintelligible)

26:15 GL: Nah (27:43) (Unintelligible)

27:49 VD: shit

27:50 GL: You dropped it bruh? I'm bout – I'm bout to (Unintelligible) put this shit on me man

27:57 VD: (Unintelligible)

27:58: GL: Well How

28:00 VD: (Unintelligible)hold it.

28:02 GL: (Unintelligible)

28:21 VD: (Unintelligible)

28:22 GL: They talking about Lionel how they only sixteen years old.

28:25 VD: Hmm?

28:26 GL: They talking about Lionel only sixteen years old. (29:01) (Unintelligible). (29:41) (Unintelligible) bitch. (30:14) you got um out? (30:24) where you got um at?

30:25 VD: (Unintelligible)

30:29 GL: My shits too tight, bruh. I'm not fonna put – I can't even reach it from here. (Unintelligible) Nothing I could probably reach. How many in there? How many in there?

30:48 VD: Its three in there (Unintelligible)

30:54 GL: Make sure you don't choke (Unintelligible) (31:47) (Unintelligible) Bond again, bruh.

31:53 VD: Mm-hmm

32:24 GL: You alright bruh

32:25 VD: Mm mm

32:26 GL: Why

32:27 VD: (Unintelligible)

32:28 GL: Hmm?

32:29 VD: (Unintelligible). (33:24) (Unintelligible).

33:26 GL: What

33:27 VD: (Unintelligible)

33:30 GL: What

33:31 VD: (Unintelligible)

33:39 GL: I don't understand shit you saying bruh.

33:42 VD: (Unintelligible)

33:44 GL: Huh?

33:45 VD: (Unintelligible)

33:46 GL: Oh, that ball head dude. Nah, that ain't mike. (33:55) You swallowed all that shit

34:28 GL: What do they got on me, bro?

34:30 VD: Mm-mm.

34:59 GL: You Choking?

35:00 VD: Mm-mm.

35:08 GL: Why we just sitting here? Is you choking bruh? Is you choking?

35:14 VD: (Unintelligible)

35:29 GL: Why you even bring that shit for. Look at these niggas, this nigga got coke on him.

35:40 VD: Who Lionel?

35:42 GL: Nah Slim. (37:16) They might be waiting for somebody to come pick us or summtin Ain't it? Hmm?

37:22 VD: I don't know.

37:25 GL: Somebody in that truck, bro.

38:43 VD: (Unintelligible)

38:47 GL: Yeah, (Unintelligible) (38:04) It hot as shit bruh. Now I'm getting mad. Fuck.

38:08 VD: (Unintelligible)

39:50 GL: I'm done with this shit.

40:41 VD: Where you say (Unintelligible) Hmm?

40:44 GL: He over there. (40:57) you all right, bruh? You alright

41:00 VD: Mm-hmm

41:02 GL: Where (Unintelligible) know they gon open yo mouth, aint it.

41:04 VD: Mm-hmm (Unintelligible) I'm sucking weed out them thangs. I got most of it out

41:17 GL: (Unintelligible) what I'm Saying. (45:35) You think they trying to hit our house too?

41:37 VD: (Unintelligible) So.

41:39 GL: What

41:40 VD: (Unintelligible)

42:14 GL: Man, I mean. (Unintelligible) if Leroy had all the guns (Unintelligible) All of them gon' come back clean. Even if not so, they were always in his possession. You feel me?

42:32VD: Mm-hmm. 42:45 (Unintelligible) Truck right there

42:48 GL: Hmm?

42:49 VD: There go that truck right there.

42:51 GL: What truck?

42:52 VD: The one you said somebody was in it

42:54 GL: Where at

42:56 VD: In front of me heading around (Unintelligible)

43:27 GL: (Unintelligible) I said somebody was in this whit truck over here, this Denali bruh.

43:36 VD: Hmm?

43:37 GL: This white truck over here.

43:38 VD: Mm-hmm

44:05 GL: (Unintelligible)

44:37 VD: (Unintelligible)

44:39 GL: They can't -- If they got the guns off -- say if they got the guns off me, they can't give me conspiracy with a gun?

44:47 VD: Mm-hmm.

44:48 GL: Can they?

44:49 VD: If they ain't get the gun?

44:50 GL: Yeah. Unless somebody say it ain't theirs. But they got them all of him.

44:55 VD: Mm-hmm.

45:47 GL: (Unintelligible) The door locked.

45:52 VD: (Unintelligible) somewhere to spit right fast. (46:00) (Unintelligible) Crack no window

46:43 GL: Here they come bruh.

46:49 VD: (Unintelligible)

46:50 GL: (Unintelligible) Come around

48:35 UM: Hey, Steve? Hey, Just want to let yo know we're en route with (Unintelligible), okay? No, no. No Problem. I just want to let you know (Unintelligible) in case you guys looking for us we're en route.

No problem. See you in a bit. Thanks. (49:13) You guys I don't if anybody told you yet but basically we're dropping you to the federal courthouse.

49:16 GL: Yeah.

49:17 UM: And someone's gonna talk to you there, okay?

49:18 GL: Oh yeah.

49:19 UM: And explain what's going on

49:20 GL: Okay. How was your day besides work?

49:27 UM: What's that?

49:28 GL: How was your day besides work?

53:24 UM: Aw... There's right up here on the right but I don't know if it's still open. If not that one, there's one on--.

53:31 UM: There's right one Broward, Jay. Get off 95 near the PD.

53:36 UM: I'm good.

53:38 UM: I mean, thank you.

53:39 UM: Okay.

54:25 VD: (Coughing)

01:02:53 GL: You alright lil bruh.

01:02:55 VD: (Unintelligible)

01:11:35 GL: Hmm? (01:13:39) (Unintelligible) all bullshit. Nothing was accomplished.

01:15:58 UM: (Unintelligible)

01:17:22 UM: (Unintelligible). Give me a second.

01:17:24 GL: All right.

01:17:39 VD: (Belching/Stomach growling), aw man

01:17:44 GL: Hmm? (Unintelligible)

01:17:45 VD: I feel sick.

01:17:46 GL: Mm Hmm.

01:17:48 VD: Where we at

01:17:49 GL: (Unintelligible)

01:18:05 VD: (Belching/Stomach growling) (Unintelligible)

01:18:20 GL: (Unintelligible)robbery (Unintelligible)

01:18:30 VD: (Unintelligible)

01:18:36 UM: Step out brother.

01:18:37 UM: Lynch and Mr. Daniels, right?

01:18:40 GL: Yes, sir. What you'd say? What you'd say?

01:18:43 UM: What's your last name?

01:18:44 GL: Lynch

01:18:45 UM: Lynch?

01:18:46 GL: yea

01:18:47 UM: Daniels, right?

00:00:51 AV: let's get this thing out

00:00:53 UM: (Unintelligible)

00:00:54 UM: Want me to get you guys that?

00:01:22 The time is approximately 10:32. Special Agent Van Vliet. I'll stop the recorder. Also in this Marked Unit 4376 was Mr. Lynch and Mr. Daniels.

CERTIFICATION OF TRANSCRIPTS

I, Vernon Daniels, hereby certify that personally listened to the enhanced audio sound recording numerous times and thoroughly went through the enhanced audio sound recording and accurately transcribed the enhanced version of the audio sound recording to the best of my knowledge and memory.

Vernon Daniels
VERNON DANIELS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

VERNON DANIELS,

Movant,

vs.

UNITED STATES OF AMERICA,

Respondent.

CASE NO. 11-62564-CIV-DIMITROULEAS
(08-60024-CR-DIMITROULEAS)

FINAL JUDGMENT AND ORDER DENYING MOTION TO VACATE

THIS CAUSE is before the Court on Movant Daniels' November 23, 2011 Memorandum Brief with a November 22, 2011 Affidavit signed by Vernon Daniels and a September 11, 2011 Affidavit signed by Geary Lynch. [DE-1]. The Court has considered the Government's December 22, 2011 Response [DE-9], the Government's December 27, 2011 Response [DE-10] and Vernon Daniels' December 30, 2011 Reply [DE-13]. The Court has conducted an evidentiary hearing held on March 20 and 26, 2012, receiving testimony from Geary Lynch, Vernon Daniels' and Eric Cohen, and having considered exhibits, and having presided over the trial of this cause, heard arguments of counsel, reviewed two Pre Sentence Investigation Reports (PSIR), and determined credibility of witnesses, finds as follows:

1. On January 29, 2008, Daniels, along with Co-Defendants Geary Lynch and Leroy Barnes, was indicted and charged with Conspiracy to Commit Hobbs Act Robbery, Conspiracy to Possess with Intent to Distribute Five Kilograms or More of Cocaine, Attempted Possession with

¹At the evidentiary hearing held on March 20 and 26, 2012, Daniels testified in a mumbling manner. A number of times, he had to be asked to repeat his answers.

Intent to Distribute Five or More Kilograms of Cocaine, Conspiracy to Possess a Firearm in Furtherance of a Crime of Violence and a Drug Trafficking Crime, and Carrying and Using a Firearm in Relation to a Crime of Violence and a Drug Trafficking Crime. [CR-DE-21]. The crimes occurred between December 12, 2007 and January 16, 2008. On December 7, 2007, Agent Connors met with Geary Lynch about robbing a stash-house. Lynch stated that he was interested and "This is how I make my money". [CR-DE-144-1, pp. 157, 161]. Lynch said that there would be no witnesses as he would kill anyone at the stash house. [CR-DE-144-1, pp. 164-165]. Lynch said he would be accompanied by "Leroy" who had previously committed robberies with him. [CR-DE-1]. Agent Connors indicated that he wanted to meet Lynch's associates so that they would not mistakenly harm him during the proposed robbery. On December 19, 2007 Agent Connors met with Lynch, Larry Barnes and Vernon Daniels to further discuss the robbery.² Lynch indicated that "we interested". [CR-DE-144-1, pp. 171-173]. Daniels was present nodding when Lynch said "our whole thing is to put a bullet in them." [CR-DE-144-6, p. 180]. At a meeting on January 15, 2008, Lynch and Barnes said that Daniels would be involved in the robbery. Daniels was one parking space away. [CR-DE-144, pp. 191, 194]. On January 16, 2008, Lynch, Barnes and Daniels met with Agent Connors. Daniels participated in the discussions. [CR-DE-144-1, pp. 212, 220-221]. Daniels was arrested on January 16, 2008 and signed a Miranda rights waiver on January 17, 2008 at 12:15 A.M. He also signed and initialed a written statement on January 17, 2008.

2. On April 8, 2008, Leroy Barnes pled guilty [CR-DE-45] pursuant to a plea agreement.

²The informant was not present at this meeting. [CR-DE-144, p. 168]. As Agent Connors explained the robbery plans, Daniels was standing there acknowledging what was being said. [CR-DE-144-1, p. 169]. He didn't walk away. [CR-DE-144-1, p. 179].

[CR-DE-47]. On April 10, 2008, Geary Lynch pled guilty [CR-DE-48] pursuant to a plea agreement. [CR-DE-50]. On April 11, 2008, Daniels signed a plea agreement [Gov't Exh. #7]. However, instead of pleading guilty at the hearing, Daniels requested a substitution of counsel.

3. On April 17, 2008, this Court granted Daniels' ore tenus motion to substitute counsel. Daniels was dissatisfied with prior appointed counsel, partially because Daniels had not been able to listen to four hours of tape recordings. [CR-DE-134]. Eric Cohen was appointed to replace G.P. Della Fera as CJA counsel. [CR-DE-53].

4. On May 19, 2008, Daniels filed a Motion to Suppress Statements [CR-DE-62]. He alleged that he was under the influence of marijuana and ecstacy when he made the statements. Moreover, he alleged that he swallowed drugs while in the rear of a police car awaiting transport after his arrest. The Court held a hearing on May 23, 2008 and received testimony from Agent Connors and the Defendant. The Court determined credibility of witnesses. Daniels testified that he consumed four baggies of marijuana, each laced with ecstacy, while in the police car, causing him to black out. The Court found the statements to have been voluntarily made and denied the suppression motion. [CR-DE-75].

5. The trial commenced on May 27, 2008. When the jury recessed to begin their deliberations, the court commended both counsel for their trial abilities. The court indicated that it hoped Daniels was satisfied with Mr. Cohen's representation as the Court thought that he had done a fine job. Daniels did not disagree. [CR-DE-142-7, p. 153]. On May 30, 2008, Daniels was convicted on all counts. [CR-DE-84].

6. On June 18, 2008, Lynch was sentenced to 90 months in prison. [CR-DE-104].

7. On August 7, 2008, Daniels was sentenced to 180 months in prison. [CR-DE-116].

8. On September 23, 2009, the Eleventh Circuit Court of Appeals affirmed. [CR-DE-150]. U.S. v. Daniels, 345 Fed. Appx. 514 (11th Cir. 2009). On November 29, 2010, the U.S. Supreme Court denied certiorari. [CR-DE-155]. Daniels v. U.S., 131 S. Ct. 635 (2010). The Government's response omitted reference to the petition for certiorari, which tolled the statute of limitations period, so that this petition was timely filed.

9. Under the mailbox rule, the motion is timely filed. Daniels contends that trial counsel was ineffective in handing the motion to suppress. He should have called Geary Lynch to testify. He should have hired an expert to enhance the audio sound recording in an effort to establish that Daniels had swallowed drugs. Finally, he should have called an expert to explain the effect that the ingested drugs would have had on Daniels. Second, Daniels contends that trial counsel was ineffective in not utilizing an entrapment defense. Third, Daniels contends that counsel misadvised him about testifying. Fourth, Daniels contends that trial counsel was ineffective in stipulating that he attended a December 19, 2007 meeting with the undercover agent. Fifth, Daniels contends that trial counsel should have objected to multiple predicate acts being the same for Counts IV and V. Sixth, Daniels complains that a special verdict form should have been requested so that there could have been a finding as to what weapon was used. Seventh, Daniels complains that double jeopardy prevents convictions on both counts IV and V as the same predicate offenses are alleged in both. Eighth, Daniels complains about cumulative errors. Ninth, Daniels contends that the Government withheld favorable evidence. Daniels contends that he wanted to plead guilty after the motion to suppress.

10. First, Daniels contends that trial counsel was ineffective in handling the Motion to Suppress. Daniels contends that Geary Lynch should have been called as a witness. Moreover,

Daniels complains that an expert should have been hired to enhance the audio sound recording to establish that Daniels had swallowed drugs. Additionally, Daniels contends that an expert should have been called to explain the effect that ingested drugs (three bags of marijuana, laced with ecstasy) would have had on him. Finally, Daniels contends that counsel was ineffective in not negotiating a plea bargain after the Court denied the motion to suppress. Daniels testified that he believed the plea offer to be seven (7) years in prison. However, the plea agreement signed by him on April 11, 2008, indicated that "the court has the authority to impose any sentence within and up to the statutory maximum ... and that the defendant may not withdraw the plea solely as result of the sentence imposed. [Gov't Exh. #7, p. 3]. Further, the plea agreement indicated that any prediction or estimate of the eventual sentence was not binding on the court. [Gov't Exh. #7, p. 4]. Daniels contentions both that he thought the Motion to Suppress to be disparate and that he was looking at a seven (7) year sentence on the plea offer are not credible. Daniels concedes that trial counsel had told him before the motion to suppress that the prosecutor had indicated that if Daniels went forward with his motion to suppress that she would withdraw all plea offers, and he would have to go to trial. [CR-DE-156, p. 24]. Cohen's testimony, that he advised Daniels to plead guilty but that Daniels was adamant about going to trial, was credible. Daniels complains about ineffective assistance of counsel in three respects:

A. Daniels contends that trial counsel should have called Geary Lynch to testify at the Motion to Suppress Hearing held on May 23, 2008. However, on that date, Lynch had not yet been sentenced. Part of Lynch's plea agreement contemplated a three (3) level reduction for acceptance of responsibility. [CR-DE-50]. Moreover, pursuant to the plea agreement, the Government would be relieved of any responsibility to make such a recommendation if Lynch

was found to have done certain actions, including making false statements or misrepresentations to any governmental entity or official. Lynch's proposed testimony at a motion to suppress may have caused the government to withhold a recommendation for a three (3) level reduction for acceptance of responsibility. At the time that Lynch signed his affidavit on September 11, 2011 and at the time of his testimony at the evidentiary hearing, Lynch had been sentenced and had received the benefit of acceptance of responsibility; other than a possible perjury charge, there were no negative consequences to Lynch's testifying after sentencing. Cohen also reasonably believed that Lynch might be seeking substantial assistance. The Court finds that it is highly speculative that Lynch would have offered testimony favorable to Daniels at a suppression hearing held prior to his sentencing. Cohen reasonably concluded, after talking with Lynch's counsel, Tim Day, that Lynch's testimony would have been adverse to Daniels. Moreover, had Lynch testified, he would have been impeached with a prior robbery³ conviction. He could also have been impeached with his prior inconsistent statement to police at the time of his arrest on January 16, 2008, wherein he stated both that Daniels was involved in the scheme to rob cocaine and that he was not under the influence of drugs when he gave his statement to law enforcement. Finally, Lynch's credibility would have been affected by his admission that he previously did robberies and planned to leave no witnesses to this one.

Alternatively, assuming Lynch would have testified at the motion to suppress that Daniels ingested drugs in the police car, that testimony, even if believed by the court⁴, would not have

³Lynch testified that he had a prior robbery conviction; however, his PSIR only indicated prior convictions for Aggravated Assault, Simple Assault, and Resisting Arrest.

⁴That testimony requires the Court to believe that a police officer had searched Daniels, found drugs on him and put them back in Daniels' pocket. [CR-DE-75, p. 1, n. 1]. Moreover,

changed the Court's ruling, denying the motion to suppress. The Court determined credibility of witnesses at the hearing [CR-DE-75]; Daniels and Agent Connors, a ten year veteran of ATF, testified. The Court found that Daniels knowingly, intelligently, and voluntarily waived his rights and made a knowing, intelligent and voluntary statement. [CR-DE-122, p. 65]. In the order denying the Motion to Suppress, the Court found that about two hours after his arrest (and alleged ingestion of drugs) that Daniels was clear and alert in his answers. [CR-DE-75, p. 2]. He even made a correction in the written statement. Based on the totality of circumstances, the Court found the statement to be admissible and denied the Motion to Suppress. [CR-DE-75, p. 3]. In arriving at that conclusion, the court considered Agent Connors testimony. Agent Connors testified: that Daniels answers were clear, [CR-DE-122, p. 13]; that Daniels was alert and clear in his responses to the questions, [CR-DE-122, p. 16]; that Daniels indicated that he was not under the influence of any drugs or alcohol at the time and then initialed his answer. [CR-DE-122, p. 16]; that Daniels' demeanor was alert, and he seemed to understand what was going on.⁵ [CR-DE-122, p. 17]; and that he walked steady. [CR-DE 122, p. 17]. A defense counsel's decision not to call a witness is usually a virtually unchallengeable decision of trial strategy. U.S. v. ORR, 636 F. 3d 944, 955 (8th Cir.) cert. denied, 132 S. Ct. 758 (2011). These strategic decisions should seldom be second guessed. Hall v. Thomas, 611 F. 3d 1259, 1293 (11th Cir. 2010). A court's reluctance to second guess trial counsel's strategy is even greater when the decisions have been

the Court questioned why the ingestion of ecstacy pills and marijuana would later require a finding of an involuntary waiver of rights or an involuntary statement, two or three hours later. [CR-DE-122, p. 61]. At the March 20, 2012 hearing, Daniels testified that he had ingested 3-4 ecstacy tablets.

⁵The Intake Health Screening Report is also inconsistent wth Daniels being under the influence of drugs or alcohol. [Gov't Exh. #6].

made by an experienced criminal defense attorney. Rhode v. Hall, 582 F. 3d 1273, 1282 (11th Cir. 2009) cert. denied, 130 S. Ct. 3399 (2010). The court has heard Lynch's testimony and concludes that calling Lynch as a witness in the Motion to Suppress would not have affected the Court's ruling; no prejudice has been shown.

116b4 B. Daniels speculates that hiring an audio sound expert would have established that he was choking as recorded on the tape. Even if this speculative allegation were sufficient, the court would have still denied the Motion to Suppress. Hall, 611 F. 3d at 1291. The mere ingestion of drugs does not necessarily destroy the voluntariness of a rights waiver or the voluntariness of a statement. See, U.S. v. Smith, 606 F. 3d 1270, 1275-77 (10th Cir. 2010). Daniels did not appear to the jail paramedic to be under the influence of drugs when he was presented to the jail on January 16 or 17, 2008. The court accepts that there were choking type sounds on the tape; an audio expert would not have affected the outcome of this case.

C. Daniels speculates that an expert could have been called to explain the effect that drugs would have had on him. Even if such testimony had been produced, the Court had the benefit of Agent Connors' credible testimony about Daniels' condition at the time of the statement. The Court found Daniels' testimony about blacking out and having no recollection of events surrounding his confession to lack credibility. Daniels had the presence of mind to add to the written statement that "I assume" that they were going to sell the cocaine. He initialed that correction. [Gov't Exh. #5]. No prejudice has been shown.

11. Second, Daniels contends that trial counsel was ineffective in not using an entrapment defense. Daniels contends that he was told by trial counsel that he would have to admit to having committed the crime to utilize an entrapment offense. As the court indicated in

the charge conference, the court probably would have given an entrapment instruction had Daniels testified that he was forced into committing the crime by the informant or Agent Connors. However, getting an instruction and prevailing before the jury on that issue are two different considerations. Daniels contends that Cohen would not listen to his account of the informant's activities. Cohen's contrary testimony was more credible. Daniels concludes that trial counsel should have used an entrapment defense and not a mere presence defense. However, Daniels conceded that Lynch told him about the robbery scheme in December, 2007. He later agreed to participate. The court finds Eric Cohen's testimony on this issue to be credible. Cohen credibly testified that Daniels never asked to use a different defense. The fact that a defense was unsuccessful does not prove that counsel was ineffective in selecting that defense. Ward v. Hall, 592 F. 3d 1144, 1164 (11th Cir.) cert. denied, 131 S. Ct. 647 (2010). Moreover, had an entrapment defense been used, the Government may have been able to call Geary Lynch to testify that Daniels sold drugs for Timothy Hylton. Mr. Cohen's decision to forego an entrapment defense in favor of another that counsel reasonably perceived to be more meritorious is not deficient performance. Williams v. Allen, 598 F. 3d 778, 790 (11th Cir. 2010) cert. denied, 131 S. Ct. 906 (2011). Finally, no prejudice has been shown as there is no likelihood that the jury would have acquitted based on an entrapment defense.

12. Third, Daniels contends that trial counsel misadvised him about testifying. Daniels contends that he was told that if he testified that the jury would hear about his prior arrest; The Court finds that allegation to lack credibility. Moreover, he did not explain why a marijuana arrest would cause him to forgo testifying for fear of the jury finding out about that arrest. Indeed, a jury would not have been told about prior arrests if Daniels testified in his own defense.

Additionally, the court had a colloquy with Daniels during the trial in which he indicated that it was his decision not to testify. [CR-DE-142, pp. 76-78]. Daniels also contends that trial counsel misadvised him about testifying: that the Government would call co-defendants to impeach his testimony. The Government certainly had that option. Again, the Court conducted a colloquy with Daniels about his right to testify. [CR-DE-142, pp. 76-78]. He decided not to testify. Finally, Daniels complains that he was nervous because he had not been properly prepared to testify. That conclusory allegation is insufficient upon which to base any relief and is belied by his having previously testified in the motion to suppress.

13. Fourth⁶, Daniels criticizes trial counsel for stipulating that he attended a December 19, 2007 meeting. In his memorandum, Daniels concedes that he was present at the meeting, but contends that he could not hear what was being said. [CR-DE-156, pp. 17-18]. Agent Connors conceded that the tape recording of that meeting contains only one instance of Daniels' speaking and that portion was unintelligible. [CR-DE-142, pp. 11-12]. Yet, Connors also testified that Daniels was present during the conversation, made eye-contact, nodded, participated in the conversation, standing one foot away. [CR-DE-14, pp. 177-180; CR-DE-142, pp. 12-14]. The issue was not Daniels' presence at the meeting, but his participation. The complained about stipulation caused no harm to Daniels; Connors' credible testimony constituted damaging testimony. Finally, Daniels contends that trial counsel was ineffective in stipulating that he attended a December 19, 2007 meeting. Assuming such a stipulation exists, no prejudice can be shown as Agent Connors clearly placed Daniels at that meeting. [CR-DE-144, pp. 168-169, 179].

⁶The remaining issues were not addressed in the evidentiary hearing, but will be addressed here.

14. Fifth, Daniels contends that trial counsel should have objected to predicate acts being the same for Counts IV, (Conspiracy to Carry a Firearm in Relation to a Crime of Violence) and Count V (Carrying a Firearm in Relation to a Crime of Violence). However, separate convictions are permissible for conspiracy and the substantive crime. No prejudice has been shown.

15. Sixth, Daniels contends that a special verdict form should have been used to identify what weapon was used: a Glock, a .38 caliber S&W, or a .40 caliber S&W. However, it would not matter which weapon or weapons were used as there is no difference in the sentence depending on the weapon used in this case. Daniels was in constructive possession of all weapons used. Additionally, he as responsible for the foreseeable acts of his co-defendants.

16. Seventh, Daniels contends that double jeopardy bars a conviction on both Counts IV and V. However, a defendant can be convicted of both a conspiracy to commit a crime and the substantive crime itself. Iannelli v. U.S., 420 U.S. 770, 777 (1975). Wharton's Rule, an narrow exception to that legal principal, does not apply here as Carrying a Firearm in Relation to a Crime of Violence does not require the participation of two or more persons. U.S. v. McNair, 605 F. 3d 1152, 1215 (11th Cir. 2010).

17. Eighth, Daniels claims about cumulative errors fails as none of his individual claims has merit. Poindexter v. Quarterman, 537 F. 3d 511, 525 (5th Cir. 2008) cert. denied, 555 U.S. 1219 (2009).

18. Ninth, Daniels contends that the Government withheld favorable evidence. Here, no Brady violation has been shown.

Wherefore, Daniels Motion to Vacate [DE-1] is Denied. The Clerk shall close this case and deny any pending motions as moot.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 30th day of March, 2012.


WILLIAM P. DIMITROULEAS
United States District Judge

Copies furnished to:

Robin Waugh, AUSA

Philip R. Horowitz, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

VERNON DANIELS,

Plaintiff,

CASE NO. 11-62564-CIV-DIMITROULEAS
(08-60024-CR-DIMITROULEAS)

vs.

UNITED STATES OF AMERICA,

Respondent.

**FINAL JUDGMENT FOR RESPONDENT; ORDER DENYING CERTIFICATE
OF APPEALABILITY**

THIS CAUSE is before the Court upon the Final Judgment and Order Denying Motion to Vacate, signed today on March 30, 2012. Accordingly, pursuant to Rule 58(a) Fed. R. Civ. Proc. and Rule 11(a), Section 2255 Proceedings, it is

ORDERED AND ADJUDGED as follows:

1. Judgment is entered on behalf of Respondent, against the Movant, Vernon Daniels.
2. On consideration of a Certificate of Appealability, the Court will deny such certification as this Court determines that Petitioner has not shown a violation of a substantial constitutional right. The Court notes that pursuant to Rule 22 (b)(1), Fed. Rules App. Proc. Petitioner may now seek a certificate of appealability from the Eleventh Circuit Court of Appeals.
3. The Clerk shall close this case and deny any pending motions as moot.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this
30th day of March, 2012.



WILLIAM P. DIMITROULEAS
United States District Judge

Copies furnished to:

Robin Waugh, AUSA

Philip R. Horowitz, Esquire