APPENDIX A

GEORGE HOUSTON, Petitioner,
UNITED STATES OF AMERICA, Respondent.
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA,
TAMPA DIVISION
418 Fed. Appx. 891
Case No. 8:12-CV-561-T-24TBM,
8:09-CR-379-T-24TBM
February 12, 2014, Decided
February 12, 2014, Filed

Counsel

George Houston, Jr. (8:12-cv-00561-SCB-TBM), Plaintiff, Pro se, Miami, FL.

For USA (8:12-cv-00561-SCB-TBM), Defendant: James C. Preston, Jr., LEAD ATTORNEY, US Attorney's Office – FLM, Tampa, FL.

For USA (8:09-cr-00379-SCB-TBM All Defendants), Plaintiff: James C. Preston, Jr., LEAD ATTORNEY, US Attorney's Office – FLM, Tampa, FL.

Judges: WILLIAM J. CASTAGNA, SENIOR UNITED STATES DISTRICT JUDGE.

Opinion

Opinion by: WILLIAM J. CASTAGNA

ORDER

This cause comes on for consideration of Petitioner's Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (Cv-D-1; Cr-D-190), as amended (Cv-D-7), the United States' Response in Opposition to Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 (Cv-D-16), Petitioner's reply (Cv-D-18), and Petitioner's motion styled "Motion for Leave to Supplement and Amend his Section 2255 Motion Pursuant to 28 U.S.C. § 2255(f)(1) Filed on June 21, 2012, with Additional Supporting Authorities, Facts and Law from the Supreme Court's Recent Decision of *Alleyne v. United States*, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (decided 2013)" (Cv-D-19).

Petitioner, his son Everrick Houston, and Lorenzo Carnes were charged with conspiracy to possess with the intent to distribute five kilograms or more of cocaine in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A)(ii) and 846. Petitioner retained attorney Mark Rodriguez to represent him. Petitioner appeared before the Court December 3, 2009, for a change of plea hearing. (Cr-D-92, 192.) Petitioner ultimately chose not to change his not guilty plea and to proceed to trial. Everrick Houston pled guilty on December 4, 2009, three days prior to the trial. The trial of Petitioner and co-defendant Carnes commenced on December 7, 2009. Everrick Houston testified against Petitioner and Carnes. Several other co-conspirators also testified. On December 11, 2009, a jury found Petitioner and Carnes guilty of

the charge. On March 4, 2010, the Court sentenced Petitioner to a term of imprisonment of 240 months.

Attorney Ciaravella was allowed to withdraw, and attorney Ryan Truskoski was appointed to represent Petitioner on appeal. Petitioner sent Truskoski correspondence and proposed appellate issues. (Cv-D-1, p. 32.) Truskoski advised Petitioner that there was only one possible meritorious issue. (*Id.*) Specifically, the issue on appeal was whether this Court abused its discretion by admitting into evidence Petitioner's 1992 conviction for distribution of cocaine base. The Eleventh Circuit found that the error, if any, was harmless because the other evidence of Petitioner's guilt, including the testimony of the undercover DEA agent, co-defendant Everrick Houston, co-conspirator Joey Dunlap, and the tape and video recording of the meetings with the confidential informant, was overwhelming. Petitioner's conviction was therefore affirmed. *United States v. Houston*, 418 Fed. Appx. 891 (11th Cir. 2011) (per curiam).

Petitioner timely filed his § 2255 motion raising various claims. (Cv-D-1.) Petitioner's original motion presents his claims in a confusing and disjointed manner. Having carefully reviewed the motion and memorandum, the Court finds Petitioner raises the following claims: (1) the Court lacked jurisdiction over the case; (2) his conviction is void because he was entrapped; (3) his counsel failed to raise these two claims on appeal despite his request that he do so; (4) his counsel's performance was constitutionally ineffective in failing to raise a *Batson* challenge during jury selection and

preserve it for appellate purposes; and (5) his counsel failed to raise certain issues on appeal as instructed by Petitioner.

On April 20, 2012, Petitioner filed a motion seeking to amend his § 2255 motion to include two additional ineffective assistance of counsel claims. (Cv-D-7.) Specifically, Petitioner claims his counsel failed to: (1) object to the testimony of Everrick Houston and Lorenzo Carnes as violative of *Bruton*; and (2) file a motion to suppress. The Court granted the motion to amend and allowed the original § 2255 motion to be amended to include these two additional claims.

The Government responds that most of Petitioner's claims are procedurally barred because they were not raised on direct appeal. The Government also argues that Petitioner's jurisdictional arguments are contrary to existing precedent. With regard to the entrapment claim, the Government contends that there was no proof at trial establishing entrapment. The Government argues that defense counsel was not constitutionally ineffective in failing to raise a *Batson* challenge as his co-counsel unsuccessfully raised the claim. The Government continues that Petitioner's claim of ineffective assistance of counsel in failing to raise viable claims on appeal is vague. Finally, the Government argues that there was no *Bruton* error and no basis to file a motion to suppress.

Petitioner filed his reply to the Government's response reiterating his claims. (Cv-D-18.) On August 7, 2013, Petitioner filed a second motion to amend or

supplement his § 2255 motion based on *Alleyne v. United States*, ___ U.S. ___, 133 S. Ct. 2151, 2155, 186 L. Ed. 2d 314 (2013). (Cv-D-19.) Petitioner contends that the Government failed to charge his prior drug offenses in the Indictment and submit them to a jury for determination and, as such, his sentence should not have been enhanced pursuant to 21 U.S.C. § 851. To date, the Government has not responded to that motion.

INEFFECTIVE ASSISTANCE OF COUNSEL

Claims of ineffective assistance of counsel require a showing of the two-prong test as set forth by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In order to succeed under the *Strickland* test, a movant has the burden of proving: (1) deficient performance by counsel; and (2) prejudice resulting therefrom. *Id.* at 687.

The first prong of the *Strickland* test requires the Court to determine whether trial counsel performed below an "objective standard of reasonableness," while viewing counsel's challenged conduct on the facts of the particular case at the time of counsel's conduct. 466 U.S. at 688, 690. Notably, there is a strong presumption that counsel rendered adequate assistance and made all significant decisions with reasonable and competent judgment. *Id.*

A counsel's performance is deficient if, given all the circumstances, his or her performance falls outside of accepted professional conduct. *Strickland*, 466 U.S.

at 690. "Judicial scrutiny of counsel's performance must be highly deferential," and "counsel cannot be adjudged incompetent for performing in a particular way in a case, as long as the approach taken "might be considered sound trial strategy." *Chandler v. United States*, 218 F.3d 1305, 1313-14 (11th Cir. 2000) (en banc) (quoting *Strickland*, 466 U.S. at 689 and *Darden v. Wainwright*, 477 U.S. 168, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986)). Rather, for counsel's conduct to be unreasonable, a petitioner must show that "no competent counsel would have taken the action that his counsel did take." *Chandler*, 218 F.3d at 1315.

The Supreme Court has consistently held that "as a matter of law, counsel's conduct . . . cannot establish the prejudice required for relief under the second [prong] [o]f the *Strickland* inquiry." *Nix v. Whiteside*, 475 U.S. 157, 175, 106 S. Ct. 988, 89 L. Ed. 2d 123 (1986). This admonition emphasizes the stringent requirement that if a petitioner does not satisfy both prongs of the Strickland test, "he will not succeed on an ineffective assistance claim." *Zamora v. Dugger*, 834 F.2d 956, 958 (11th Cir. 1987). *See also Weeks v. Jones*, 26 F.3d 1030, 1037 (11th Cir. 1994). Therefore, a court may resolve a claim of ineffective assistance of counsel based solely on lack of prejudice without considering the reasonableness of the attorney's performance. *Waters v. Thomas*, 46 F.3d 1506, 1510 (11th Cir. 1995) (citing *Strickland*, 466 U.S. at 697).

With regard to the second prong, the petitioner must show there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the

proceeding would have been different." *Strickland*, at 694-95. A reasonable probability is a probability "sufficient to undermine confidence in the outcome." *Id.* at 694. A petitioner must show a "substantial, not just conceivable, likelihood of a different result." *Cullen v. Pinholster*, ___ U.S. ___, 131 S. Ct. 1388, 1403, 179 L. Ed. 2d 557 (2011) (citation omitted).

With the foregoing standard in mind, the Court turns to Petitioner's claims.

I. LACK OF JURISDICTION

Petitioner first claims that the Court lacked jurisdiction over the case. Petitioner asserts that his drug offenses were state crimes and should have been left to the local authorities to prosecute. He also contends that the offenses did not occur on Federal property. He attacks the constitutionality of Titles 18 and 21 and contends that they violate Article III, Section 2 of the Constitution as well as the Fifth, Eighth, Tenth, and Fourteenth Amendments, article I Section 8, clause 17, and the Establishment Clause. Petitioner also claims his counsel was ineffective in failing to raise these jurisdictional claims.

All of Petitioner's jurisdictional arguments are utterly frivolous. The Court had subject matter jurisdiction over Petitioner's case pursuant to 18 U.S.C. § 3231 which gives the federal courts original jurisdiction over "all offenses against the laws of the United States." The Superseding Indictment charged drug offenses that are against the laws of the United States: 21 U.S.C.

§§ 841(a)(1), (b)(1)(A)(ii) and 846. The Supreme Court has found that the Controlled Substances Act [sic] a valid exercise of Congressional power. *Gonzales v. Raich*, 545 U.S. 1, 9, 125 S. Ct. 2195, 162 L. Ed. 2d 1 (2005); *see also United States v. Lopez*, 459 F.2d 949 (5th Cir. 1972)[1] (the court upheld Congress' power to enact 21 U.S.C. § 841(a)). Furthermore, the Eleventh Circuit has repeatedly rejected claims attacking the constitutionality of the Government's power to regulate trafficking. *United States v. Jackson*, 111 F.3d 101 (11th Cir. 1997). Additionally, the offenses need not occur on federal property for Congress to have authority to criminalize the conduct. *Smith v. United States*, Nos. 2:09-Cv-11-FtM-29DNF, 2:07-cr-19-FtM-29DNF, 2011 U.S. Dist. LEXIS 139019, 2011 WL 6013805, at *2 (M.D. Fla. Dec. 2, 2011) (the district court found that subject matter existed over the defendant's case in which the indictment charged violation of 21 U.S.C. § 841(a)(1), and "this is the beginning and end of the jurisdictional inquiry.) (citation omitted); *Garcia v. United States*, Nos. 2:07-Cv-221-FtM-29DNF, 2:04-cr-16-FtM-29DNF, 2009 U.S. Dist. LEXIS 84666, 2009 WL 2781636, at *3-4 (M.D. Fla. Aug. 28, 2009) (the court found that the drug offenses charged did not need to be committed on federal property in order for Congress to criminalize the conduct). Thus, this Court had subject matter jurisdiction pursuant to § 3231. *United States v. Quinto*, 264 Fed. Appx. 800 (11th Cir. 2008) (per

[1] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc), the Eleventh Circuit held that all decisions made prior to October 1, 1981, by the former Fifth Circuit are binding precedent in the Eleventh Circuit.

curiam) (district court had subject matter jurisdiction over defendant charged with drug offenses in violation of 21 U.S.C. §§ 846 and 841); *United States v. Brown*, 227 Fed. Appx. 795, 798 (11th Cir. 2007) (per curiam). Consequently, Petitioner's jurisdictional claims are without merit.

Petitioner's Tenth Amendment claim is also frivolous. Courts have repeatedly found that 21 U.S.C. § 841 does not violate the Tenth Amendment. *Rinaldi V. Zickefoose*, 532 Fed. Appx. 64, 65 n.3 (3d Cir.) (per curiam), *cert. denied*, 134 S. Ct. 442, 187 L. Ed. 2d 312 (2013); *Thompson v. Holder*, 480 Fed. Appx. 323, 325 (5th Cir. 2012) (per curiam) ("the CSA does not violate the Tenth Amendment"), *cert. denied*, 133 S. Ct. 586, 184 L. Ed. 2d 385 (2013); *United States v. Bouman*, 52 Fed. Appx. 280, 281 (7th Cir. 2002) (the court noted that it had held that the provisions of 21 U.S.C. § 841 do not violate the Tenth Amendment); *United States v. Wacker,* 72 F.3d 1453, 1475 (10th Cir. 1995).

Petitioner's reliance on *Bond v. United States*, 131 S. Ct. 2355, 180 L. Ed. 2d 269 (2011) is misplaced. *Bond* did not determine that any statute at issue in this case was a violation of the Tenth Amendment. *Turner v. United States*, 2012 U.S. Dist. LEXIS 123543, 2012 WL 3848653, at *25 (N.D. Ala. Aug. 30. 2012), citing *United States v. Schumaker*, 479 Fed. Appx 878, 885 (11th Cir.), *cert. denied*, 133 S. Ct. 387, 184 L. Ed. 2d 229 (2012).

Petitioner's claim of ineffective assistance of counsel based on the failure to raise these jurisdictional

issues also fails. Counsel is not ineffective for failing to raise claims "reasonably considered to be without merit." *United States v. Nyhuis*, 211 F.3d 1340, 1344 (11th Cir. 2000).

II. ENTRAPMENT

Petitioner next claims that his conviction is void as he was entrapped. He further claims that his counsel was ineffective in failing to present an entrapment defense. He also argues that his counsel failed to argue that the Government did not establish a conspiracy. In support of his contentions, Petitioner claims that his statement that at a meeting with an undercover officer, Agent Levi Cobarras, on October 8, 2008 that "he is not there to do that anymore" was sufficient to establish that the evidence did not show a conspiracy beyond a reasonable doubt.

The Government argues that there was sufficient evidence to support the jury's finding of a conspiracy beyond a reasonable doubt. It further argues that Petitioner has not demonstrated prejudice because there was no proof at trial establishing entrapment.

Petitioner is incorrect that his counsel failed to argue that the evidence did not establish a conspiracy. At the close of the Government's case, attorney Ciaravella moved for a judgment of acquittal. (Cr-D-164, p. 74.) In doing so, he argued that there was no evidence of any actual agreement by any party. (*Id.*) Carnes' attorney joined in the motion and argued that the evidence did not show a common plan or scheme to actually possess

cocaine. (*Id.* at p. 74-75.) The Court concluded there was sufficient evidence to justify a reasonable jury in returning a guilty verdict and denied the motion. (*Id.* at p. 77, 78.) In closing, Ciaravella argued to the jury that the fact that a deal never occurred showed there was no agreement to possess or distribute cocaine. (Cr-D-178, p. 19-20, 26.)

While Petitioner argues that his October 8, 2008 statement to Cobarras that he "ain't trying to do none of that anymore. Been there done that," established reasonable doubt as to his guilt, Petitioner takes his statement out of context. A review of the transcript of the October 8, 2008 meeting demonstrates that Petitioner told Cobarras that he had been in the drug business but got out after he served a prison sentence. (GX Ia, p. 3.) He stated that while he built boats, he "need[ed] money." (*Id.*) Petitioner went on to negotiate the purchase of cocaine and asked to test the product. (*Id.* at p. 3-16.) Petitioner reiterated he was "strictly in it for the money" and that he was "running a little tight." (*Id.* at p. 18.) He called his son Everrick Houston to come outside to see the cocaine. Everrick Houston then made a phone call and said the person would "do six right now" and then "grab the other four." (*Id.* at p. 18-22.) Petitioner agreed they would meet back at Applebee's in 90 minutes with the cash. (*Id.* at p. 22.)

With regard to Petitioner's claim that he was entrapped, the affirmative defense of entrapment requires: (1) government inducement of the crime; and (2) lack of predisposition on the part of the defendant. *United States v. Sistrunk*, 622 F.3d 1328, 1333 (11th

Cir. 2010). Petitioner fails to show he was induced by the Government or that he was not predisposed to deal in drugs. Specifically, the evidence at trial demonstrated that co-Defendant Carnes recruited Petitioner and introduced him to Sammy. (GX 19d.) At a meeting on October 1, Petitioner suggested Sammy bring a kilogram to test. (GX 20b.)

On October 8, 2008, when Petitioner and his co-defendants met Sammy and Cobarras, who was posing as the supplier, at an Applebee's, Petitioner took the lead in the negotiations. Petitioner complained to Cobarras that he had had trucks parked and ready to load. (Gx Ia, p. 1-2.) Petitioner told Cobarras that he could do "ten today or you can do a little more than that, all I got to do is make some calls." (*Id.* at p. 6.) He explained the buyers would come and "[t]hen we take the machine out, we mark em, make sure everything and all that so then everything be straight." (*Id.* at p. 12.) Petitioner told Cobarras, "now that product you got. I do need it to be tested. Now I mean." (*Id.* at p. 16.) When Cobarras asked Petitioner if he had a knife, Petitioner said "No, because what I usually do I do either bleach or one of them little things you know what I'm saying. But see my son is old school, but he like to put a little bit on and cook it back, that's my son." (*Id.*)

Cobarras said he would show Petitioner one kilogram and asked if Petitioner's son wanted to take a look at it. (*Id.* at p. 17.) As indicated above, Petitioner called his son to come outside. Everrick Houston came out to the car, inspected the cocaine, and, after making a phone call, said they would "do ten." (*Id.* at p. 19-22.)

The men agreed to meet back at Applebee's in an hour in a half and show the cash to Sammy at which point they would be told a separate location to pick up the cocaine. (*Id.* at p. 22.)

Ultimately, Petitioner and his co-defendants did not return to Applebee's with the money. However, on October 28, 2008, Petitioner spoke with Cobarras and agreed to purchase five kilograms. At that time he assured Cobarras that once they completed the first deal, Petitioner could distribute 30 to 40 kilograms a week. (GX 5a, p. 11.)

Given the evidence presented at trial, Petitioner has not shown that entrapment was a viable defense. As such, his counsel cannot be found to have acted deficiently in failing to argue entrapment. Nor has Petitioner demonstrated any prejudice as a result of the failure to raise the affirmative defense.

III. INEFFECTIVE ASSISTANCE OF COUNSEL – *BATSON* CLAIM

Petitioner next claims that his counsel was ineffective in failing to object to a *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), violation and preserve the issue for appeal. Petitioner argues that his counsel should have objected to the Government using a peremptory challenge to strike a potential juror because of his Jamaican descent.

The Government points out that Carnes and Petitioner participated in jury selection as a "unit," and

that co-defendant Carnes' counsel objected when the Government struck the juror. The Government continues that Petitioner fails to raise any other argument his counsel should have made and fails to show a discriminatory purpose behind the strike.

During jury selection, after the Government struck Mr. Hyacinth, Juror Number 112, the attorney for co-defendant Carnes asked for a race neutral reason. (Cr-D-161, p. 78.) The AUSA, in response, noted that he had not struck another African-American juror so race was not an issue. He continued:

> as it relates to Mr. Hyacinth, Judge, I believe he indicated he's from Jamaica. There's going to be evidence in this case where the agents, as well as the informant in this case, pick a country where the informant is to be from and it's Jamaica. So, I don't want to prejudice the Government in any way as it relates to the suggestion that drug dealers are from Jamaica or such and such.
>
> So that is my race neutral reason for striking Mr. Hyacinth. And again, I note Judge, that we had no objection to Mr. Chatman.

(*Id.* at 78-79.)

The AUSA further explained that there would be evidence introduced during trial about drug dealers from Jamaica and that he did not want to take the chance of offending Hyacinth. (*Id.* at 80-82, 93.) The Court found an appropriate basis for the strike and, as

such, implicitly found that the strike was not racially motivated. (*Id.* at 93.)

Petitioner fails to demonstrate he was prejudiced by his counsel' [sic] failure to pursue the Batson issue during voir dire or on appeal. He does not assert any argument his counsel should have made that was not made by co-counsel; nor has he shown there is a reasonable probability the issue would have been successful on appeal.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL IN FAILING TO RAISE MERITORIOUS ISSUES AS DIRECTED BY PETITIONER

Petitioner next claims that his appellate counsel was ineffective in failing to raise issues on appeal as instructed by Petitioner. He states, "[o]n appeal, counsel could have raised issues pertinent to the conviction as well as the sentence imposed," and that counsel could have "readily determined that there existed viable claims sufficient for review." (Cv-D-1, p.14.)

Petitioner fails to identify any specific appellate issues he sought his attorney to raise. Nor has he identified any meritorious issue was available. Vague, conclusory, or speculative allegations that lack factual substantiation are not sufficient to support an ineffective assistance of counsel claim. *Tejada v. Dugger*, 941 F.2d 1551, 1559 (11th Cir. 1991). Furthermore, Petitioner has not shown any prejudice resulting from his appellate counsel's failure to raise unidentified claims

on appeal. For these reasons, Petitioner's claim is rejected.

V. INEFFECTIVE ASSISTANCE OF COUNSEL - *BRUTON*

Petitioner claims that his trial counsel was ineffective in failing to object to the testimony of Everrick Houston and Lorenzo Carnes. Petitioner contends this testimony was admitted in violation of *Bruton*.

Petitioner misunderstands the *Bruton* doctrine. In *Bruton v. United States*, 391 U.S. 123, 135-36, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968), the Supreme Court held that in a joint trial, the admission of a post-arrest statement by a non-testifying co-defendant that incriminates the defendant violates the Confrontation Clause. Notably, "*Bruton* is only violated where a statement is offered of a *non-testifying* codefendant." *United States v. Horton*, 522 Fed. Appx. 456, 461 (11th Cir. 2013) (per curiam) (citing *Bruton*, 391 U.S. at 135-36.) *Bruton*, however, is not violated when, as here, a co-defendant testifies at trial and is available for cross-examination.

A review of the trial transcript shows that the Government did not offer into evidence any post-arrest statement made by Everrick Houston. While Everrick Houston testified at trial, Petitioner's trial counsel was not ineffective in failing to object to that trial testimony as it did not violate *Bruton*. While attorney Ciaravella opted not to cross-examine Everrick Houston (Cr-D-163, p. 107, 1. 7), Petitioner has not demonstrated any

prejudice as a result of that strategic decision. Carnes' attorney thoroughly cross-examined Everrick Houston. (*Id.* at p. 102-22.) While doing so, he attacked Everrick Houston's credibility by pointing out that he was a convicted felon and hoped to get a reduced sentence in exchange for his testimony. (*Id.*, at p. 107-110, 120-21.) Petitioner fails to identify any line of questioning that was not inquired of by Carnes' attorney. Nor does Petitioner specify any particular questions his counsel should have asked Everrick Houston.

Further, there was no *Bruton* violation with regard to the introduction into evidence of co-defendant Carnes' post-arrest statement. Parts of Carnes' post-arrest statement made to law enforcement on August 10, 2009, were introduced into evidence at trial through the testimony of Agent Cobarras. (Cr-D-164, p. 26-27.) Prior to Agent Cobarras' testimony, however, attorney Ciaravella agreed that AUSA Perry had sanitized Carnes' statement to resolve the *Bruton* issue. (Cr-D-163, p. 7.) Carnes' redacted statement was made a Court exhibit. (CX 2.) Ciaravella did not object to Agent Cobarras testifying in accordance with the sanitized statement. (Cr-D-163, at p. 160-62.)

Agent Cobarras testified that Carnes told him he went to Applebee's to meet with someone who was going to invest in the boat company. (Cr-D-164, p. 26.) According to Cobarras, later in the interview, Carnes told Cobarras that he was at Applebee's to discuss the possibility of purchasing drugs and that he needed money to make ends meet. Cobarras testified that Carnes told him he wanted to get the investor to invest in his

business, but needed the money to get his boats out. (*Id.* at p. 27.)

Agent Cobarras' testimony regarding Carnes' statement, as sanitized, did not directly inculpate Petitioner. Alternatively, even if the admission of that testimony were in violation of *Bruton*. Petitioner has not demonstrated prejudice resulting from his counsel's failure to object to the testimony. A *Bruton* violation is harmless error where the properly admitted evidence of guilt is overwhelming such that the prejudicial admission of a co-defendant's statement is insignificant by comparison. *United States v. Petit*, 841 F.2d 1546, 1556-57 (11th Cir. 1988). As indicated by the Eleventh Circuit, the other evidence of Petitioner's guilt was overwhelming. *See Houston*, 418 Fed. Appx. at 893.

Petitioner also claims his counsel should have moved to sever Petitioner's trial from that of Carnes and should have raised the issue on appeal. Generally, however, persons indicted together should be tried together. *United States v. Cobb*, 185 F.3d 1193, 1196 (11th Cir. 1999) (citation omitted); *United States v. Cassano*, 132 F.3d 646, 650-651 (11th Cir. 1998). This is particularly true in conspiracy cases. *United States v. Baker*, 432 F.3d 1189, 1236 (11th Cir. 2005). Severance of co-defendants' trial may be granted if a single trial would prejudice a defendant. Fed.R.Crim.P. 14(a). However, mutually antagonistic defenses are not per se prejudicial such that severance is required. *Zafiro v. United States*, 506 U.S. 534, 537, 113 S. Ct. 933, 122 L. Ed. 2d 317 (1993).

In order to be entitled to severance pursuant to Rule 14(a), a defendant must meet the heavy burden of showing that a joint trial will result in "specific and compelling prejudice." *United States v. Liss*, 265 F.3d 1220, 1228 (11th Cir. 2001). "Compelling prejudice occurs when the jury is unable to separately appraise the evidence as to each defendant and render a fair and impartial verdict." *Id.* (citation omitted.)

Petitioner fails to show prejudice resulting from his counsel's failure to file a motion to sever and raise the issue on appeal. Petitioner's defense was that there was not sufficient evidence to prove beyond a reasonable doubt that Petitioner had an agreement with others to distribute cocaine. Carne's [sic] defense was he had no intention of purchasing or distributing cocaine; rather, he was playing a role as directed by the CI Sammy to get an investor in the boat company. These defenses were not so antagonistic to one another as to create undue, compelling prejudice. *Howard v. United States*, Nos. 2:11-cv-298-FtM-29; 2:08-cr-66-FtM-29DNF, 2012 U.S. Dist. LEXIS 95748, 2012 WL 2865745, at *6 (M.D. Fla. July 11, 2012) (the court found no ineffective assistance of counsel in failing to seek severance where petitioner's defense that there was no proof he was given the drugs by his co-defendant to hand to the undercover officer was not so antagonistic with his co-defendant's defense of insufficient evidence as to create undue, compelling prejudice.) Furthermore, the Court instructed jury to consider each defendant and evidence against them separately. "[C]autionary instructions to the jury to consider the evidence separately are

presumed to guard adequately against prejudice.'" *United States v. Francis*, 131 F.3d 1452, 1459 (11th Cir. 1997) (citation omitted). Consequently, Petitioner has failed to demonstrate his counsel's failure to move for severance or raise the issue on appeal prejudiced his case.

VI. INEFFECTIVE ASSISTANCE OF COUNSEL – MOTION TO SUPPRESS

Petitioner claims his counsel was ineffective in failing to file a motion to suppress the audio and videotapes based on entrapment and that Petitioner was not a participant to the conspiracy. Petitioner claims that, had a motion to suppress been filed and ultimately denied, he could have pled guilty and received acceptance of responsibility and a reduced sentence prior to the Government filing a notice of enhanced sentence pursuant to 21 U.S.C. § 851. He argues that his sentence may have been less than 240 months.

Petitioner fails to demonstrate that his counsel provided ineffective assistance in failing to file a motion to suppress. In this regard, entrapment is an affirmative defense and does not provide a legal basis to suppress evidence. *United States v. Spratt*, Nos. Cr. 06-00080-CB, Cv. 09-00242-CB, 2011 U.S. Dist. LEXIS 100897, 2011 WL 3924174, at *7 (S.D. Ala. Sept. 7, 2011) ("the Court is unaware of any legal authority for suppressing evidence based on entrapment"); *United States v. Donaldson*, No. 4:10-CR-047-01-HLM, 2011 U.S. Dist. LEXIS 45142, 2011 WL 1597685, at *6 (N.D.

Ga. April 26, 2011) ("an entrapment defense, regardless of its merits at trial, is not a valid basis for the suppression of evidence"). Further, whether the evidence demonstrated that Petitioner conspired to possess with the intent to distribute cocaine was a question of fact for the jury and also does not provide a basis to suppress the evidence.

Additionally, Petitioner fails to demonstrate prejudice. While he claims he could have pled guilty without the § 851 enhancement, a review of the criminal file shows that Petitioner was arrested and had an initial appearance on the criminal complaint on August 10, 2009. (Cr-D-8.) Three days later, on August 13, 2009, the Government filed its Indictment against Petitioner as well as an Information and Notice of Prior Conviction Pursuant to 21 U.S.C. § 851. (Cr-D-12, 13.) Petitioner provides no evidence that the Government would have withdrawn the section 851 notice in the event Petitioner had agreed to plead guilty. Notably, Petitioner appeared on December 3, 2009, to enter a guilty plea pursuant to a written plea agreement. (Cr-D-92; 192.) Nothing in the record reflects that the Government intended on withdrawing the section 851 notice in exchange for Petitioner's entry of a guilty plea. In any event, Petitioner, however, ultimately decided to proceed with trial and stated as such in open court. (*Id.* at p., 11.)

VII. PETITIONER'S SECOND MOTION TO SUPPLEMENT/AMEND

Petitioner seeks to amend his § 2255 motion a second time. He argues that *Alleyne*, in which the Supreme Court held that "[a]ny fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury," requires that his sentence be vacated because his prior convictions were not charged in the indictment and proven to a jury beyond a reasonable doubt. 133 S. Ct. 2151, 2155, 186 L. Ed. 2d 314 (2013).

Petitioner's argument is foreclosed by *Almendarez-Torres v. United States,* 523 U.S. 224, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998). In *Almendarez-Torres*, the Supreme Court held that, for sentencing enhancement purposes, a defendant's prior conviction does not have to be alleged in the indictment or submitted to a jury and proven beyond a reasonable doubt. 523 U.S. 224, 226-27, 239-40, 118 S. Ct. 1219, 140 L. Ed. 2d 350. Notably, *Alleyne* did not overrule *Almendarez-Torres. See Alleyne*, 133 S. Ct. at 2160 n.1 (noting that "[i]n *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998), we recognized a narrow exception to this general rule for the fact of a prior conviction. Because the parties do not contest that decision's vitality, we do not revisit it for purposes of our decision today.")

The Eleventh Circuit recently rejected a similar claim relating to the sentencing court finding predicate ACCA convictions to enhance a defendant's sentence.

United States v. Flowers, 531 Fed. Appx. 975 (11th Cir. 2013) (per curiam). In *Flowers*, the court explained:

> Flowers's reliance on *Alleyne* is unavailing. *Alleyne* did not address prior-conviction sentencing enhancements. Instead, *Alleyne* merely extended the rationale of *Apprendi*, which itself noted that the Sixth Amendment did not require "the fact of a prior conviction" to be submitted to a jury and proved beyond a reasonable doubt. See *Apprendi*, 530 U.S. at 490, 120 S. Ct. at 2362-63 ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (emphasis added)); see *also Almendarez-Torres v. United States*, 523 U.S. 224, 247, 118 S. Ct. 1219, 1233 (1998) (holding that, for sentencing enhancement purposes, a defendant's prior conviction need not be alleged in the indictment or submitted to the jury and proved beyond a reasonable doubt). In fact, the *Alleyne* Court explicitly stated that it was not revisiting "the narrow exception to this general rule for the fact of a prior conviction." *Alleyne*, 570 U.S. at ___, 133 S. Ct. at 2160 n. 1. *Flowers* has not shown that his ACCA-enhanced fifteen-year mandatory minimum violated his Sixth Amendment rights. *Flowers*, 531 Fed. Appx. at 984.

Given the foregoing, Petitioner is not entitled to relief as to this claim, and, as such, his motion to supplement is denied.

EVIDENTIARY HEARING

Lastly, as to Petitioner's request for an evidentiary hearing, Petitioner has failed to demonstrate the need for such a hearing. The Court need not conduct an evidentiary hearing where it is evident from the record that the petitioner was not denied effective assistance of counsel. *Diaz v. United States*, 930 F.2d 832, 834 (11th Cir. 1991). Based on the foregoing analysis, the Court does not find that an evidentiary hearing is warranted.

It is therefore ORDERED that:

(1) Petitioner's Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (CV-D-1; CR-D-426) is DENIED.

(2) Petitioner's motion styled "Motion for Leave to Supplement and Amend his Section 2255 Motion Pursuant to 28 U.S.C. § 2255(f)(1) Filed on June 21, 2012, with Additional Supporting Authorities, Facts and Law from the Supreme Court's Recent Decision of *Alleyne v. United States*, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (decided 2013)" (D-19) is DENIED.

(3) The Clerk is directed to enter judgment in favor of the Government and CLOSE the civil case file.

CERTIFICATE OF APPEALABILITY AND LEAVE TO APPEAL *IN FORMA PAUPERIS* DENIED

IT IS FURTHER ORDERED that Petitioner is not entitled to a certificate of appealability. A prisoner

seeking a motion to vacate has no absolute entitlement to appeal a district court's denial of his petition. 28 U.S.C. § 2253(c)(1). Rather, a district court must first issue a certificate of appealability (COA). *Id.* "A [COA] may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." *Id.* at § 2253(c)(2). To make such a showing, a petitioner "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," *Tennard v. Dretke*, 542 U.S. 274, 282, 124 S. Ct. 2562, 159 L. Ed. 2d 384 (2004) (quoting *Slack v. McDaniel* 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000)), or that "the issues presented were 'adequate to deserve encouragement to proceed further,'" *Miller-El v. Cockrell*, 537 U.S. 322, 335-36, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n. 4, 103 S. Ct. 3383, 77 L. Ed. 2d 1090 (1983)). Petitioner has not made the requisite showing in these circumstances. Finally, because Petitioner is not entitled to a certificate of appealability, he is not entitled to appeal in *forma pauperis*.

DONE AND ORDERED at Tampa, Florida this 12th day of February, 2014.

/s/ William J. Castagna
WILLIAM J. CASTAGNA
SENIOR UNITED STATES
DISTRICT JUDGE

APPENDIX B

B-8

Instructions to the Jury

At this time I will explain the Superseding Indictment which charges one offense called a "count." I will not read it to you at length because you will be given a copy of the Superseding Indictment for reference during your deliberations.

In summary, Count One charges that the Defendants knowingly and willfully conspired together to possess with intent to distribute 5 kilograms or more of a mixture and substance containing a detectable amount of cocaine.

As to Count One, you will note that the Defendants are not charged in that Count with committing a substantive offense; rather, they are charged with having conspired to do so.

O-87

Title 21, United States Code, Section 846 makes it a separate Federal crime or offense for anyone to conspire or agree with someone else to do something which, if actually carried out, would be a violation of Section 841(a)(1). Section 841(a)(1) makes it a crime for anyone to knowingly possess cocaine with intent to distribute it.

So, under the law, a "conspiracy" is an agreement or a kind of "partnership in criminal purposes" in

which each member becomes the agent or partner of every other member.

In order to establish a conspiracy offense it is *not* necessary for the Government to prove that all of the people named in the Superseding Indictment were members of the scheme, *or* that those who *were* members had entered into any formal type of agreement. Also, because the essence of a conspiracy offense is the making of the scheme itself, it is not necessary for the Government to prove that the conspirators actually succeeded in accomplishing their unlawful plan.

What the evidence in the case *must* show beyond a reasonable doubt is:

First: That two or more persons in some way or manner, came to a mutual understanding to try to accomplish a common and unlawful plan, as charged in the Superseding indictment;

Second: That the Defendant, knowing the unlawful purpose of the plan, willfully joined in it; and

Third: That the object of the unlawful plan was to possess with intent to distribute cocaine, as charged.

To "possess with the intent to distribute" simply means to possess with intent to deliver or transfer possession of a controlled substance to another person, with or without any financial interest in the transaction.

A person may become a member of a conspiracy without full knowledge of all of the details of the unlawful scheme or the names and identities of all of the other alleged conspirators. So, if a Defendant has a general understanding of the unlawful purpose of the plan (including the nature and anticipated weight of the substance involved) and knowingly and willfully joins in that plan on one occasion, that is sufficient to convict that Defendant for conspiracy even though the Defendant did not participate before and even though the Defendant played only a minor part.

Of course, mere presence at the scene of a transaction or event, or the mere fact that certain persons may have associated with each other, and may have assembled together and discussed common aims and interests, does not, standing alone, establish proof of a conspiracy. Also, a person who has no knowledge of a conspiracy, but who happens to act in a way which advances some purpose of one, does not thereby become a conspirator.

The Defendants are charged in the Superseding Indictment with conspiracy to possess with intent to distribute a certain quantity or weight of the alleged controlled substance. However, you may find any Defendant guilty of the offense if the quantity of the controlled substance for which he should be held responsible is less than the amount or weight charged. Thus the verdict form prepared with respect to each Defendant, as I will explain in a moment, will require, if you find any Defendant guilty, to specify on the verdict your unanimous finding concerning the weight of

the controlled substance attributable to the Defendant.

B-9.1

You will note that the Superseding Indictment charges that the offense was committed "on or about" a certain date. The Government does not have to prove with certainty the exact date of the alleged offense. It is sufficient if the Government proves beyond a reasonable doubt that the offense was committed on a date reasonably near the date alleged.

The word "knowingly," as that term is used in the Superseding Indictment or in these instructions, means that the act was done voluntarily and intentionally and not because of mistake or accident.

The word "willfully," as that term is used in the Superseding Indictment or in these instructions, means that the act was committed voluntarily and purposely, with the specific intent to do something the law forbids; that is with bad purpose either to disobey or disregard the law.

B-10.3

The case of each Defendant and the evidence pertaining to each Defendant should be considered separately and individually. The fact that you may find any one of the Defendants guilty or not guilty should not affect your verdict as to any other Defendant.

I caution you, members of the Jury, that you are here to determine from the evidence in this case

whether each Defendant is guilty or not guilty. Each Defendant is on trial only for the specific offense alleged in the Superseding Indictment.

Also, the question of punishment should never be considered by the jury in any way in deciding the case. If a Defendant is convicted the matter of punishment is for the Judge alone to determine later.

B-11

Any verdict you reach in the jury room, whether guilty or not guilty, must be unanimous. In other words, to return a verdict you must all agree. Your deliberations will be secret; you will never have to explain your verdict to anyone.

It is your duty as jurors to discuss the case with one another in an effort to reach agreement if you can do so. Each of you must decide the case for yourself, but only after full consideration of the evidence with the other members of the jury. While you are discussing the case do not hesitate to reexamine your own opinion and change your mind if you become convinced that you were wrong. But do not give up your honest beliefs solely because the others think differently or merely to get the case over with.

Remember, that in a very real way you are judges – judges of the facts. Your only interest is to seek the truth from the evidence in the case.

APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA	:	
v.	:	Case No. 8:09-CR-379-T-24TBM
GEORGE HOUSTON, JR. a/k/a "Junior"	:	

VERDICT

Count One of the Indictment:

As to the offense of conspiring to possess with intent to distribute a mixture and substance containing a detectable amount of cocaine, in violation of 21 U.S.C. § 846:

> We, the Jury, find the defendant, **GEORGE HOUSTON, JR., a/k/a "Junior"** (check one):
>
> Not Guilty_____ Guilty ___X___

If you found the defendant "GUILTY," answer the following question:

> We, the Jury, having found the defendant "GUILTY" of the offense charged in Count One of the Indictment, further unanimously find with respect to that count that Defendant conspired to possess with intent to distribute cocaine in the amount(s) shown *(place an X in the appropriate blank)*:

(i) weighing 5 kilograms or more X

(ii) weighing 500 grams or more but less than 5 kilograms _____

(iii) weighing less than 500 grams _____

SO SAY WE ALL, this 11th day of December, 2009.

/s/ Ronny Rivera
FOREPERSON

APPENDIX D

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

VS.

GEORGE HOUSTON, JR. and LORENZO CARNES,

Defendants. /

CASE NO: 8:09-CR-379-T-24TEM

Tampa, Florida
December 11, 2009
9:30 a.m.

VERDICT
TRANSCRIPT OF JURY TRIAL PROCEEDINGS
BEFORE THE HONORABLE
WILLIAM J. CASTAGNA
UNITED STATES DISTRICT JUDGE

APPEARANCES:

Counsel for Plaintiff:

MATTHEW H. PERRY, ESQUIRE
U. S. Attorney's Office
400 N. Tampa Street
Suite 3200
Tampa, Florida 33602
(813) 274-6000
matthew.perry@usdoj.gov

Counsel for Defendant Houston:
MARK W. CIARAVELLA, ESQUIRE
1110 N. Florida Avenue
Tampa, Florida 33602
(813) 221-1640
mwc@ciaravella.com

Counsel for Defendant Carnes:
GRADY C. IRVIN, JR., ESQUIRE
MS. DAPHNE GAYLORD-BRANHAM
Irvin Law Firm, LLC
1207 N. Himes Avenue
Suite 4
Tampa, Florida 33607
(813) 554-3282
grady@irvinattorneys.com

[2] *Court Reporter:*
CLAUDIA SPANGLER-FRY, RPR, CM
Official Court Reporter
801 North Florida Avenue
15th Floor
Tampa, Florida 33602
(813) 301-5575
cookiefry@aol.com

[3] *PROCEEDINGS*

December 11, 2009

* * *

THE BAILIFF: Judge, Mr. Irvin is in the elevator on is way up.

THE COURT: All right.

Counsel, Mr. Bohlig advised me that the jury has reached a verdict. Bring in the jury, Mr. Bohlig.

(Jury in at 4:53 p.m.)

Ladies and gentlemen, have you reached a verdict?

THE FOREMAN: Yes, Your Honor, we have.

THE COURT: Please present your verdict to Mr. Bohlig. He'll present it to the Court for examination.

(Brief pause.)

Madam Clerk, publish the verdicts, please.

Defendants, please rise.

THE CLERK: United States of America versus George Houston, Jr., Case Number 8:09-CR-379-T-24TBM.

Count 1 of the Indictment, as to the offense of conspiring to possess with intent to distribute a mixture and substance containing a detectable amount of cocaine, in violation of 21 USC, Section 846, we, the jury, find the Defendant, George Houston, Jr., a/k/a Junior, guilty.

We, the jury, having found the Defendant guilty of the offense charged in Count 1 of the Indictment, further [4] *unanimously find with respect to that count that the Defendant conspired to possess with intent to distribute cocaine in the amount shown. Checked is weighing five kilograms or more. Signed by the foreperson, Ronny Rivera.*

United States of America versus Lorenzo Carnes, Case Number 8:09-CR-379-T-24TBM.

Count 1 of the Indictment, as to the offense of conspiring to possess with intent to distribute a mixture and substance containing a detectable amount of cocaine, in violation of 21 USC, Section 846, we, the jury, find the defendant, Lorenzo Carnes, guilty.

We, the jury, having found the Defendant guilty of the offense charged in Count 1 of the Indictment, further unanimously find with respect to that count the Defendant conspired to possess with intent to distribute cocaine in the amount shown. Checked is weighing five kilograms or more. Signed by the foreperson, Ronny Rivera.

THE COURT: There is a procedure known as the polling of the jury in which the Clerk asks each juror individually if the verdicts as read are, in fact, the verdicts of that juror, and the juror makes appropriate response.

So, I'll ask, Ms. Thomas, that you poll the jury.

THE CLERK: Yes, Your Honor.

Ms. Jackson, are these your verdicts?

JUROR JACKSON: Yes.

[5] *THE CLERK: Ms. Fracentese, are these your verdicts?*

JUROR FRACENTESE: Yes.

THE CLERK: Mr. La Vassor, are these your verdicts?

JUROR LA VASSOR: Yes.

THE CLERK: Mr. Waywood, are these your verdicts?

JUROR WAYWOOD: Yes.

THE CLERK: Ms. Delatorres, are these your verdicts?

JUROR DELATORRES: Yes.

THE CLERK: Mr. Shepard, are these your verdicts?

JUROR SHEPARD: Yes.

THE CLERK: Ms. Cerboni, are these your verdicts?

JUROR CERBONI: Yes.

THE CLERK: Mr. Black, are these your verdicts?

JUROR BLACK: Yes.

THE CLERK: Mr. Maher, are these your verdicts?

JUROR MAHER: Yes.

THE CLERK: Mr. Rivera, are these your verdicts?

JUROR RIVERA: Yes.

THE CLERK: Mr. Chatman, are these your verdicts?

JUROR CHATMAN: Yes.

THE CLERK: Ms. Boerner, are these your verdicts?

JUROR BOERNER: Yes.

THE CLERK: Your Honor, that concludes the polling of the jury.

THE COURT: And with the polling of the jury, ladies [6] *and gentlemen – you may be seated – this brings to a close the service that you can perform for the Court in this case.*

I do want to express my personal appreciation to each of you for the diligent and conscientious attention you've given to the matters that have been presented during the course of this trial. You have made a very significant contribution by your service to our jury trial system and our judicial system. We're grateful to you for that.

You are now discharged.

(Jury discharged at 5:00 o'clock p.m.).

And thank you again, Mr. Hillhouse and Mr. Smith, for our additional service.

ALTERNATE JURORS: Thank you, Your Honor.

(Alternate jurors out.)

THE COURT: You may be seated. The Defendants will come forward with counsel.

George Houston, Jr. and Lorenzo Carnes, based upon the verdict of the jury finding you guilty of the offenses charged in the Superseding Indictment filed against you in criminal case number 8:09-CR-379-T-24TBM, the Court does hereby remand you to the custody of the United States Marshal pending receipt by the Court of the Pre-Sentence Investigation Report.

Do we have a sentencing date, Ms. Thomas?

THE CLERK: Yes, Your Honor. For Mr. Houston, it would be March 4th at 10:30, and for Mr. Carnes, it would be [7] *March 4th at 11:00 o'clock.*

THE COURT: All right.

This will conclude this proceeding.

MR. PERRY: Your Honor, it's a formality. If it please the Court, you did remand Mr. Carnes, but in fact, there was a bond in place for him. He never made the bond, but we would ask as a formality on the record that bond be revoked, the order of bond be revoked.

THE COURT: Yes. If such bond has been made, that bond is revoked, and Mr. Carnes will be remanded to the custody of the United States Marshal.

MR. PERRY: Thank you, Your Honor.

THE COURT: All right.

That will conclude this proceeding.

MR. IRVIN: Thank you.

MR. PERRY: Judge, actually there is one more thing I forgot. Would the Court allow us – I would move at this point in time to take the cocaine back into the custody of the United States, Exhibit 10, and your Courtroom Deputy has put a picture into evidence as a result for the purpose of appeal, but we need to take the controlled substance back, Judge.

THE COURT: Well, I think we already did that, but if you need any further authorization for that purpose, you have it.

MR. PERRY: Okay. Thank you.

[8] *I just didn't want the defense to object. I don't think they will, but thank you, Your Honor.*

THE COURT: All right. Yes.

(Thereupon, the proceedings concluded.)

* * *

CERTIFICATE

STATE OF FLORIDA)
SS
COUNTY OF HILLSBOROUGH)

I, CLAUDIA SPANGLER-FRY, Official Court Reporter for the United States District Court, Middle District, Tampa, Division,

DO HEREBY CERTIFY, that I was authorized to and did, through use of Computer Aided Transcription, report in shorthand the proceedings and evidence in the above-styled cause, as stated in the caption hereto, and that the foregoing pages numbered 1 to 9, inclusive, constitute a true and correct transcription of my shorthand report of said proceedings and evidence.

IN WITNESS WHEREOF, I have hereunto set my hand in the City of Tampa, County of Hillsborough, State of Florida, this 17th day of June, 2010.

CLAUDIA SPANGLER-FRY, Official Court Reporter

By: /s/ CLAUDIA SPANGLER-FRY

[SEAL] Claudia M. Spangler-Fry
Commission #DD557043
Expires August 13, 2010
Bonded Troy Fein – Insurance Inc. –
800-385-7019

APPENDIX E

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

UNITED STATES
OF AMERICA

-vs-

GEORGE HOUSTON, JR.,

Defendant.
_____/

Case No. 8:09-CR-379-T-24TBM
March 4, 2010
Tampa, Florida
10:30 a.m.

TRANSCRIPT OF SENTENCING PROCEEDINGS
BEFORE HONORABLE WILLIAM J. CASTAGNA
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the United States Attorney's Office:

MATTHEW PERRY, ESQ.
400 N. Tampa Street
Suite 3200
Tampa, Florida 33602
813.274.6000

For the Defendant:

MARK CIARAVELLA, ESQ.
1110 North Florida Avenue
Tampa, Florida 33601-3382
813.221.1640

STENOGRAPHICALLY RECORDED
COMPUTER-AIDED TRANSCRIPTION

(ORIGINAL)
(COPY)

* * *

[46] interest with a third-party does not necessarily mean that this was a recruitment. And as we're all aware, Mr. Dunlap did not participate in the transaction. So as far as the two level increase because of a recruitment by the defendant the court will strike that two level increase in the base offense level.

Anything else, Mr. Ciaravella?

MR. CIARAVELLA: Your Honor, we had – we had filed an objection based on a worthless check in the criminal history. There were no guideline points. It was very – Mr. – Mr. Houston doesn't recall it. There are no points assessed, but it is in the record, the public record, and we would simply withdraw that objection because it doesn't affect in any event.

THE COURT: All right. It will not be considered by the court anyway.

MR. CIARAVELLA: Thank you, Your Honor. That concludes our response to the presentence investigation report, Your Honor.

THE COURT: All right. The other matter of import is whether the amount of cocaine involved was a ten kilogram or twenty kilogram transaction. That is obviously a significant aspect of the [47] charge, and based on what has been presented the court concludes

that the only reference to an agreement is with regard to a ten kilogram transaction. The presentence investigation report I think in paragraph thirteen refers to the agreement to deliver ten kilograms of cocaine at twenty-one thousand dollars a kilogram.

There have been, as Mr. Perry has pointed out, repeated references to twenty kilograms or plates or other obvious reference to cocaine, however, none of those fall into the category of having constituted an agreement that anyone would deliver twenty kilograms of cocaine to either of these defendants or both of them jointly.

So the court concludes that whatever agreement was involved was limited to a ten kilogram transaction. That will, of course, affect the guidelines calculation. With a total offense lave of thirty-six that will reduce by two levels the total offense level to thirty-four by eliminating the level increase for recruitment and reducing it further two levels because of the amount involved under 2D1.1, which evolves to a basic offense level of thirty-two, criminal history category of two, and the sentencing range of one hundred thirty-five

* * *