UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

UNITED STATES OF AMERICA,	**)**	**CRIMINAL ACTION NO.**
	)	
	)	**1-98-048**
	)	
v.	**)**	
	)	
XXX,	**)**	
	)	
Movant.	**)**	
	)	

MEMORANDUM OF LAW IN SUPPORT OF MOVANT'S PETITION UNDER 28 U.S.C. § 2255

F. CLINTON BRODEN
Broden & Mickelsen
2715 Guillot
Dallas, Texas 75204
214-720-9552
214-720-9594 (facsimile)

Attorney for Movant
XXX

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I. LEGAL BACKGROUND

XXX was charged in one count of a nine count indictment with conspiring to distribute and to possess with intent to distribute cocaine and marijuana, in violation of 21 U.S.C. §846. On October 7, 1998, following a six day jury trial, XXX was convicted on the lone count of the indictment against him. XXX was represented at trial by Merlyn D. Shiverdecker, Esq. His co-defendant, Sheila Neuhausser, was represented at trail by Phillip Pitzer, Esq.

On June 3, 1999, a sentencing hearing was held and XXX was sentenced to 360 months imprisonment, ten years supervised release, a $25,000 fine and a special assessment of $100.

An appeal was taken to the United States Court of Appeals for the Sixth Circuit. XXX was represented on appeal by his co-defendant's trial attorney, Phillip Pitzer, Esq. On February 14, 2001, the Sixth Circuit issued an opinion affirming XXX's conviction and sentence. A Petition for Rehearing *En Banc* was denied by the Sixth Circuit on March 23, 2001 and the Court issued its mandate on April 2, 2001.

XXX filed a *pro se* Petition for Writ of Certiorari with the United States Supreme Court. That Petition was denied on October 1, 2001. A Motion for Rehearing was denied by the Supreme Court on February 19, 2002.

XXX is currently serving his sentence at the FCI Manchester in Manchester, Kentucky.

II. FACTUAL BACKGROUND

A. Trial Evidence

1. Marijuana

There was ample evidence produced by the government at trial that XXX was part of a conspiracy to distribute marijuana in the Southern District of Ohio. The conspiracy first began to unravel when Scott Meyers was stopped by a Nebraska State Trooper in a car registered to Douglas Burgess which contained 123.5 pounds of marijuana. Mr. Meyers, while cooperating with Nebraska law enforcement, admitted that he was transporting the marijuana for Mr. Burgess and that he suspected that Burgess was working for "Randy" in Cincinnati. *See* Tr. 9/29/98 at 46-47.

At trial, Mr. Burgess testified that he had been buying marijuana from XXX since 1993. *See* Tr. 10/1/98 at 48. Beginning in 1997, Mr. Burgess made several automobile trips to California at the behest of XXX to obtain marijuana to be driven back to Ohio. *Id.* at 57-58. The marijuana was packed in large, black duffel bags and, when it arrived back in Ohio, it was taken to a farm and broken down into smaller amounts for resale. *Id*. at 62-64, 85. On the occasions that Mr. Burgess assisted in breaking down the marijuana, XXX, James McCarty and a person named "Ted" also participated. *Id*. at 64. Mr. Burgess testified that, in July 1997 and unbeknownst to XXX, he recruited Mr. Meyers to assist him in making the trips to California. *Id*. at 95-96. Mr. Burgess also testified that XXX assisted him in purchasing a vehicle for making these marijuana runs to California. *Id*. at 65.[1] In total, Mr. Burgess was involved in eight trips to California to pick up marijuana including the one which led to Mr. Meyer's arrest. *Id*. at 118.

James McCarty and Ted Dunlap also testified at trial. Mr. McCarty testified that he would purchase the marijuana brought back from California from XXX to sell to his numerous customers. Mr. McCarty testified that he knew Mr. Burgess drove the marijuana to Ohio from

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[1] This testimony was corroborated by Keith Johnson, the manager of the used car lot where the car was purchased. *See* Tr. 9/29/98 at 5-9

California and that, upon Mr. Burgess's return, he (Mr. McCarty) would meet with Mr. Burgess or XXX to divide the marijuana. *Id*. at 12-15. The marijuana was packed in large, black duffel bags. †*Id*. The marijuana would be taken to a farm where Ted Dunlap worked and it would be broken up. *Id*. at 16. Mr. McCarty kept a "black book" of monies paid to XXX. *Id.* at 21-25., 27-31. Mr. McCarty admitted he had other sources, in addition to XXX, for obtaining marijuana. *Id*. at 11, 26.

Mr. Dunlap, who worked for Mr. McCarty, testified that he and Mr. McCarty and, occasionally, XXX would break down the marijuana for resale at an abandoned horse farm which was located next to a golf course where he (Mr. Dunlap) worked as a grounds keeper. *See* Tr. 10/1/98 at 14, 92.[2] Mr. Dunlap also mentioned that Mr. Burgess was present on at least one occasion when the marijuana was broken up. *Id*. at 97. Mr. Dunlap testified that the marijuana was located in black duffle bags when it arrived at the horse farm. *Id*. at 97.

Mary Hofmeister, a police officer and narcotics dog handler, testified that, upon the search of the residence of XXX and his co-defendant wife, black duffel bags similar to the bags containing marijuana that were seized from Mr. Meyers in Nebraska were located in the Neuhausser's garage and that a narcotics dog alerted on the bags. *See* Tr. 9/29/98 at 75.

2. Cocaine

The evidence supporting the government's allegation that XXX conspired to distribute cocaine was as scarce as the evidence that supported its allegation that he conspired to distribute marijuana was overwhelming. Indeed, 99.9% of the "cocaine evidence" came simply from the testimony of Mr. McCarty.

Mr. McCarty testified that, as early as 1995, he was obtaining kilos of cocaine from XXX. *See* Tr. 9/28/98 at 17, 20. He testified that XXX told him that the cocaine came from Florida. *Id*. at 15, 37. The cocaine was allegedly transported inside the hollow portion of the

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[2] Mr. Dunlap testified that XXX assisted in the breaking down of marijuana on four occasions. *See* Tr. 10/1/98 at 93.

tailgate panel of XXX's pickup truck. *Id*. at 17-20. Mr. McCarty also testified that the monies paid to XXX, as reflected in his "black book," contained payments made for cocaine purchases from XXX in addition to payments made for the marijuana purchases. *Id.* at 21-25., 27-31.

Mr. McCarty's testimony was suspect. First, he was testifying pursuant to a plea agreement. Second, he was caught in several lies at trial. For example, prior to trial, he told the government's case agent, Charles Stieglemeyer, that he and Mr. Dunlap delivered cocaine to XXX's home on January 30, 1998. *See* Tr. 10/5/98 at 223. Nevertheless, Mr. Dunlap denied this event stating that he had never been to XXX's home. *See* Tr. 10/1/98 at 24-25. More importantly, it was established through passport stamps that XXX and his wife were vacationing outside the United States on January 30, 1998. Likewise, Mr. McCarty's "black book" allegedly reflecting drug monies he had paid to XXX, did not support the alleged purchases of cocaine. Mr. McCarty testified that, in the year 1997, he had paid XXX $290,350 in drug monies. *See* Tr. 9/29/98 at 30, 59 and Government's Exhibit 1.2. However, he also testified that, at the time, he was making multi kilo purchases of cocaine at $30,000 per kilo and multi 100-125 pound purchases of marijuana at $1,200 per pound from XXX. *See* Tr. 9/28/98 at 7, 11, 29; Tr. 9/29/98 at 63.[3] It does not take a degree in mathematics to see that the numbers do not work.

In direct contrast to Mr. McCarty, Mr. Burgess testified that he knew nothing about XXX being involved in cocaine. *See* Tr. 10/1/98 at 110. Ted Dunlap admitted that, just as he helped Mr. McCarty break up the marijuana, he helped Mr. McCarty break up the cocaine. Nevertheless, unlike the marijuana, Mr. Dunlap testified that XXX had "nothing to do with

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[3] At sentencing, XXX was held responsible for delivering fifty-two kilos of cocaine to Mr. McCarty at a price of $1,560,000 and 875 lbs of marijuana at a price of $1,050,000 for a total of $2,610,000 in 1997 alone! *See* PSR at ¶ 27.

cocaine" and that he had never seen XXX in the presence of any cocaine in his life. *Id* at 7-8, 13.[4] Despite the fact that the government had tapped Mr. McCarty's phone, no phone conversations took place between Mr. McCarty and XXX involving cocaine. *See* Tr. 10/5/98 at 250…..

The only other arguable evidence that XXX was involved in cocaine, other than the testimony and hearsay statements of James McCarty, was a swab test performed on the tailgate of Sheila Neuhausser's pickup that tested positive for the presence of a substance in the "caine" family. *See* Tr. 10/5/98 at 175, 199; Tr. 10/6/98 at 325. Nevertheless, the government's case agent candidly admitted that the positive test could have resulted from several legal substances. *See* Tr. 10/5/98. at 200-01. Such evidence would not even support an indictment. *Cf. United States v. Cooper*, 121 F.3d 130, 131-32 (3rd Cir 1987).

3. Plea Agreements

Mr. Burgess, Mr. Dunlap and Mr. McCarty testified at trial pursuant to plea agreements. All are named in the same conspiracy count of the indictment with Mr. and Mrs. Neuhausser. All three plea agreements were made know to the jury. *See* Tr. 9/28/98 at 43-48; 10/1/98 at 25-26, 110-11. The government made it clear to the jury that Mr. Burgess was permitted to plead guilty to the conspiracy count in which XXX was charged despite the fact that Mr. Burgess was only alleged to be involved in a *marijuana* conspiracy with the co-defendants. *Id*. at 110. Indeed, at Mr. Burgess's plea, allegations related to cocaine were struck from the charges against him. *See also* PSR at ¶ 22.

B. Jury Instructions

With regard to the one count against XXX, the jury was *not* instructed in accordance with the Sixth Circuit's pattern jury instructions for alleged violations of 21 U.S.C. § 846. Instead, the jury was instructed as follows:

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[4] Mr. Dunlap testified that, on one occasion, Mr. McCarty told him that a bag of cocaine that they were breaking up had been ripped in the tailgate of XXX's truck. *See* Tr. 10/1/98 at 102.

DEFINITION OF THE CRIMES CHARGED

The defendants in this case have been charged in an indictment attached as Appendix A.

Intent to Distribute and Distribution of Marijuana and Cocaine

Count One charges that the defendants did, knowingly and intentionally, unlawfully combine, conspire, confederate, and agree with each other and other persons to posses with intent to distribute and to distribute marijuana and cocaine, Schedule I and II Controlled Substances, in violation of 21 U.S.C. § 841(a)(1) and 21 U.S.C. § 846. The defendants have plead not guilty to Count One.

Title 21 U.S.C. § 841(a)(1) makes it a crime for anyone to knowingly or intentionally posses a controlled substance with intent to distribute it.

Marijuana and cocaine are controlled substances within the meaning of the law.

For you to find the defendants guilty of 21 U.S.C. § 841(a)(1), you must be convinced that the government has proved beyond a reasonable doubt:

(1) That defendants knowingly possessed controlled substances;

(2) That the substances were in fact marijuana and cocaine; and

(3) That defendants possessed the substances with the intent to distribute them.

To "possess with 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.

Conspiring to Distribute Marijuana and Cocaine

Count One also charges that the defendants violated Title 21 U.S.C. § 846, which makes it a crime for anyone to conspire with someone else to commit a violation of certain controlled substances laws of the United States.

A "conspiracy" is an agreement between two or more persons to join together to accomplish some unlawful purpose. It is a kind of "partnership in crime" in which each member becomes the agent of every other member.

> For you to find defendants guilty of violating 21 U.S.C. § 846, you must be convinced that the government has proved beyond a reasonable doubt:
>
> (1) That two or more persons, directly or indirectly, reached an agreement to possess with intent to distribute marijuana and cocaine;
>
> (2) That defendants knew of the unlawful purpose of the agreement; and
>
> (3) That defendants joined in the agreement willfully, that is, with the intent to further its unlawful purpose.
>
> One 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 the other alleged conspirators. If one or both defendants understood the unlawful nature of a plan or scheme and knowingly and intentionally joined in that plan or scheme on one occasion, that is sufficient to convict either one or both of them for conspiracy, even if the defendants did not participate at earlier stages in the scheme, and even if they only played minor roles in the conspiracy.

No objection was made by trial counsel to the clearly erroneous jury charge.

C. Sentencing

At sentencing, this Court held XXX responsible for seventy-six kilograms of cocaine. *See* PSR at ¶ 27. This amount was apparently obtained from the Government's Sentencing Memorandum. In that Memorandum, the government cited the testimony from Ted Dunlap that, in 1995 and 1996, he and Mr. McCarty were processing one or two kilograms per month and that in 1997 they were processing one or two kilograms per week. *See* Gov't Memorandum at 3-4.[5] Using the low end, the government arrived at seventy-six kilograms ((1 kg x 24 months) + (1 kg x 52 weeks) =76 kg). *Id.* The problem with this argument, of course, is it assumes that all of the cocaine that Mr. Dunlap and Mr. McCarty were processing was part of the instant conspiracy and foreseeable to XXX. Nevertheless, Mr. McCarty testified at trial that he did *not* receive all of his cocaine from XXX. *See* Tr. 9/29/98 at 137.

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[5] In reality, Mr. Dunlap testified that, in 1997, it "averaged about one kilo per week" of cocaine. *See* Tr. 10/1/98 at 16.

XXX's counsel objected to the drug amount determination and argued to the Court that, given that Mr. McCarty had other sources for obtaining cocaine, the Court must determine if the amounts attributable to XXX were part of the conspiracy *and* foreseeable to XXX. *See* Sentencing Tr. at 23-24. The Court simply relied upon the *Pinkerton* law of conspiracy in overruling the objection:

> Isn't it true that in a conspiracy case they are responsible for what happens in the conspiracy where they know about--so long as they were in it and act in furtherance of it, whether they know about some of the specific acts that occurred.

Id. at 24.

D. Direct Appeal

In XXX's initial brief on appeal, his appellate attorney, Phillip Pitzer, raised four points of error. The first point was that the indictment in this case was constructively amended when the jury was instructed that XXX could be found guilty on the basis that he either possessed with the intent to distribute a controlled substance or that he conspired to possess with the intent to distribute a controlled substance. *See* Final Brief of appellant XXX. The second point was that it was error to instruct the jury that "one may become a member of a conspiracy without full knowledge of the details of the unlawful scheme." *Id.* Both of these arguments were included at the insistence of XXX. *See* Attachment A (Declaration of XXX ("XXX Dec.") at ¶ 5; Attachment B (November 12, 1999 letter from Philip Pitzer to Randall R. Neuhausser).

At oral argument, Mr. Pitzer dropped these first two arguments from the appeal. *See United States v. Neuhausser*, 241 F.3d 460, 464 n. 2 (6th Cir. 2001). Mr. Pitzer did this despite the fact that XXX made it clear that he wanted these issues prosecuted on appeal. *See* XXX Dec. at ¶ 8; Attachment C (March 15, 2001 letter from XXX to Clerk of the United States Court of Appeals for the Sixth Circuit); Attachment D (April 17, 2001 letter from XXX to Phillip Pitzer); Attachment E (April 10, 2001 letter from XXX to Clerk of the United States Court of Appeals for the Sixth Circuit).

Inexplicably, although it was raised at XXX sentencing, no issue was raised on appeal regarding this Court's failure to conduct a U.S.S.G. § 1B1.3 analysis in determining the amount of cocaine attributable to XXX under U.S.S.G. § 2D1.1.

E. Newly Discovered Evidence

The defense has recently obtained evidence from two key witnesses at trial. The first is a Declaration from Ted Dunlap. *See* Attachment F (Declaration of Ted Dunlap ("Dunlap Dec.")). The Declaration is consistent with his trial testimony in that he states that he "never [saw] Randy Neuhausser around any cocaine, never talked [with him] about cocaine, or [sic.] weighed any cocaine with him." *Id*. More importantly, however, it identifies Mr. McCarty's cocaine source as Tom Hugh from Florida. *Id*. Mr. Dunlap explains, "I worked with James McCarty up to 1998, breaking and weighing up marijuana and cocaine. I would also store it for McCarty. I subsequently knew McCarty's sources of supply for both cocaine and marijuana as we would break up and weigh the drugs at the Ford Road farmhouse." *Id*. Mr. Dunlap also states that, while incarcerated with Mr. McCarty, Mr. McCarty admitted that he fabricated the testimony that XXX was involved in cocaine in order to obtain a more favorable plea agreement. *Id*.

Most significantly, XXX's brother and sister, Richard Neuhausser and Kris Tabor, interviewed Mr. McCarty about his trial testimony on three occasions in June and July of this year. *See* Attachment G (Declaration of Richard Neuhausser ("Richard Neuhausser Dec.")) at ¶ 2; Attachment H (Declaration of Kris Tabor ("Tabor Dec.") at ¶ 2. During the interviews, McCarty admitted to fabricating his testimony regarding XXX's participation with cocaine, but did so under pressure from the government. Richard Neuhausser Dec. at ¶ 3; Tabor Dec. at ¶ 3. Nevertheless, Mr. McCarty refuse to sign a Declaration to that effect for fear of being prosecuted for perjury. Richard Neuhausser Dec. at ¶ 4; Tabor Dec. at ¶ 4**.** Thereafter, Mr. Richard Neuhausser and Ms. Tabor made a surreptitious recording of another interview with Mr. McCarty. Richard Neuhausser Dec. at ¶ 5; Tabor Dec. at ¶ 5**.** On the tape, Mr. McCarty is clearly heard saying, "Randy didn't have nothing to do with the cocaine part of the aspect, he

was the marijuana man in the whole damn deal...." *See* Attachment I (Transcript of tape recording of conversation among Richard Neuhausser, Kris Tabor, and James McCarty) at 3.

III. DISCUSSION

A. XXX's Conviction which Rests Upon the Perjured Testimony of James McCarty is Unconstitutional

The United States Court of Appeals for the Sixth Circuit has previously noted that, in this circuit, "related, if not identical, claims may be pursued under both Rule 33 and § 2255." *Johnson v. United States,* 246 F.3d 655, 660 (6th Cir. 2001).[6]

As noted above, there was almost no evidence to connect XXX to James McCarty's cocaine dealings, except the word of James McCarty. None of the other alleged co-conspirators had *any* knowledge of XXX dealing in cocaine. Likewise, there were no discussions of cocaine between XXX and Mr. McCarty during the monitored telephone conversations which took place as a result of the wiretap authorization for Mr. McCarty's telephones.

Moreover, as also noted above, Mr. McCarty was caught in a blatant lie regarding the cocaine allegations in which he told the government's case agent, Charles Stieglemeyer, that he and Mr. Dunlap delivered cocaine to XXX's home on January 30, 1998 despite the fact that Mr. Dunlap denied ever having been to XXX's home and despite the fact that XXX and his wife were vacationing outside the United States on January 30, 1998. Likewise, in a mathematical impossibility, Mr. McCarty testified that, in the year 1997, he had paid XXX *only* $290,350 in drug monies, however, he also testified that, at the time, he was making multi kilo purchases of cocaine at $30,000 per kilo and multi 100-125 pound purchases of marijuana at $1,200 per pound from XXX.

Now Mr. Dunlap has identified Tom Hugh as Mr. McCarty's source for cocaine. The defense is also pursuing evidence that this fact was made know to Agent Charles Stieglemeyer prior to trial. In any event, just as Mr. Dunlap was able to identify XXX as Mr. McCarty's

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[6] XXX will be filing a motion pursuant to Fed. R. Crim. P. 33 that is identical to Issue I raised herein in the event it is determined that the issue is more appropriately raised under that rule.

marijuana supplier, so too was he perfectly positioned to know Mr. McCarty's cocaine supplier. This Court would have to ask itself how it could sanction a verdict based, in part, on Mr. Dunlap's testimony that XXX supplied his boss, James McCarty with marijuana, but then turn a deaf ear to Mr. Dunlap's identification of an individual other than XXX as his boss' cocaine supplier.

Most importantly, Mr. McCarty was surreptitiously tape recorded admitting that XXX's role in any conspiracy was limited to marijuana dealings. Of course, this is completely in line with all of the other co-conspirators' trial testimony. The fact that Mr. McCarty has admitted to committing perjury at trial when he did not know his statements were being recorded add a high indicia of reliability to his admission of perjury.

Given that Mr. McCarty's uncorroborated testimony amounted to 99.9% of the evidence that XXX was involved in Mr. McCarty's cocaine dealings, this newly discovered evidence justifies a new trial in this matter.

B. The Jury Instructions Given in this Case Violated XXX's Right to Due Process.

When a jury instruction offends established notions of due process as to deprive a defendant of a constitutionally fair trial, the defendant can raise issues related to the instruction for the first time on collateral review. *Cupp v. Naughton*, 414 U.S. 141 (1973).

The Court did not use the Sixth Circuit's Pattern Jury Instructions in this case in charging the jury on what the government was required to prove in order to establish a violation of 21 U.S.C. § 846 as charged in Count 1 of the indictment. For example, Pattern Jury Instruction 3.03 requires the government to prove, *inter. alia.*, that a defendant knew the conspiracy's "main purpose" before a defendant can be convicted of the conspiracy.[7] The jury instructions actually used by the Court are set forth above. In sum, the jury was instructed as follows:

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[7] Because of the different penalties involved in drug cases, it is not enough for a defendant to know that a conspiracy's "main purpose" is to distribute "drugs," "narcotics," or "controlled substances." As set forth below, if a defendant is charged with conspiring to distribute marijuana and cocaine and believes the conspiracy's "main purpose" is distributing only marijuana, a conviction is improper.

• The jury was told that it could convict XXX on Count 1 if he knew about the marijuana portion of the conspiracy alleged in Count 1 but did not know of the cocaine portion of the conspiracy. ("One 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 the other alleged conspirators." (emphasis added)).

• The jury was told that it could convict XXX on Count 1 if he possessed a controlled substance with the intent to distribute it **or** if he conspired to possess a controlled substance with the intent to distribute it. ("Count One **also** charges that the defendants violated Title 21 U.S.C. § 846...." (emphasis added)).[8]

•The jury was told that it could convict XXX on Count 1 even if he did not join the conspiracy set forth in the indictment as long as his wife joined the conspiracy. ("If **one** or both defendants understood the unlawful nature of a plan or scheme and knowingly and intentionally joined in that plan or scheme on one occasion, **that is sufficient to convict either one or both of them for conspiracy**, even if the defendants did not participate at earlier stages in the scheme, and even if they only played minor roles in the conspiracy...." (emphasis added)).

1. "One 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 the other alleged conspirators."

To put these jury instructions into context, it is important to note that, on appeal, the United States Court of Appeals for the Sixth Circuit distinguished this case from its decision in *United States v. Dale*, 178 F.3d 429 (1999) because the jury was instructed that the charge against XXX was conspiring to possess with the intent to deliver marijuana *and* cocaine as opposed to marijuana *or* cocaine. *Neuhausser*, 241 F.3d at 469. This might be a valid distinction *but for* the other problems in the jury instructions not raised on appeal or dropped from the appeal. Indeed, although the jury was told that XXX was charged with conspiring to possess

[8] To further the confusion, the jury instructions contained two pages on the law of constructive possession. Such instructions would only be necessary if XXX had, in fact, been charged with the substantive offense of possession. For example, the jury was told: "The law recognizes two kinds of possession--actual possession and constructive possession. Either one of these, if proved by the government is enough to convict." It was also told, "The government must prove the defendants had actual or constructive possession of the controlled substances, and knew that they did, for you to find them guilty of *this* crime." (emphasis added).

with the intent to deliver marijuana *and* cocaine, it was also told that it could convict XXX even if he did not have "full knowledge of all of the details of the unlawful scheme." In other words, under the jury instructions given, if XXX knew his co-conspirators were distributing marijuana but did not know they were distributing cocaine (a very likely possibility given that Mr. McCarty is the *only* one who claimed that XXX was involved with cocaine), the jury could still have convicted him of Count 1. This possibility completely destroys the foundation upon which the Sixth Circuit based its decision on direct appeal. *Cf. Newman v. United States*, 817 F.2d 635, 638 (10th Cir. 1987) (Conviction reversed in 2255 proceeding where defendant charged in multi-object conspiracy and jury told "evidence in this case need not establish that all means or methods set forth in the indictment were agreed upon.").

This problem was compounded by the government's closing argument. For example, the government informed the jury during closing, "You know that McCarty, Burgess, Dunlap, Meyers and the Neuhaussers conspired to distribute drugs....That's what you have to find. Do your jobs. Be responsible about this." *See* Tr. 10/7/98 at 549-50. *See also, id.* at 473. Nevertheless, the jury knew that Mr. Burgess was able to plead guilty to Count 1 despite having no involvement with cocaine whatsoever. *See* Tr. 9/28/98 at 110. Thus, the jury knew that Mr. Burgess was guilty of the conspiracy charged in Count 1 of the indictment- the same Count charging XXX with the conspiracy- without Mr. Burgess agreeing to have anything to do with cocaine. Likewise, the government freely used the words "narcotics" or "drugs" during the closing argument, implying that it was of no relevance whether the jury found XXX involved with cocaine as long as it found him involved with "narcotics" or "drugs." *See.* Tr. 10/7/98 at 473-74, 479-80, 546, 549-50 (Government uses the words "drugs" or "narcotics" instead of marijuana and cocaine *twenty* times in closing argument).[9]

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[9] The jury was also told that it could convict XXX if he joined the conspiracy on only "one occasion." While this is generally a correct statement of conspiracy law, this instruction can cause obvious confusion in a multi object conspiracy. Again, the jury was lead to believe that

2. "Count One also charges that the defendants violated Title 21 U.S.C. § 846...."

With regard to the second erroneous portion of the instructions identified above, it should be noted that "it is settled that a conspiracy to commit a crime is a distinct offense from the commission of the crime." *United States v. Frazier*, 880 F.2d 878, 884 (6th Cir. 1989), *cert. denied,* 493 U.S. 1083,6 (1990). *See also, United States v. Colon,* 268 F.3d 367, 377 (6th Cir. 2001) ("[T]he elements of simple possession are not identical to the elements...of conspiracy to possess with intent to distribute or distribute or to distribute cocaine."). Therefore, it is extremely troubling that the Court implied that Count 1 contained both a substantive count *and* a conspiracy count by stating that "Count One ***also*** charges that the defendants violated Title 21 U.S.C. § 846.....(emphasis added)." In fact, Count 1 charged XXX with conspiring to violate 21 U.S.C. § 841, in violation of 21 U.S.C. § 846, but it was just **one** charge. If the government had proven that XXX possessed marijuana and/or cocaine with the intent to distribute it, but did not prove that he joined the conspiracy set forth in the indictment (either because there was not sufficient proof of a conspiracy or because there were multiple conspiracies), under a *correct* charge of the law it would have acquitted XXX. Nevertheless, under the Court's charge, it would have convicted XXX.[10]

3. "If one or both defendants understood the unlawful nature of a plan or scheme and knowingly and intentionally joined in that plan or scheme on one occasion, that is sufficient to convict either one or both of them for conspiracy, even if the

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if XXX joined the coconspirators on "one occasion" (†*e.g.* to distribute marijuana), it was sufficient to convict him of the conspiracy.

[10] This is no different than any other conspiracy case. For example, if a person is charged solely with conspiring to rob a bank in violation of 18 U.S.C. § 371, it is not enough for the government to prove the defendant robbed the bank, the government must prove that the defendant conspired to do so as part of the conspiracy alleged in the indictment. It would be error to imply that the defendant was *also* charged with robbing the bank if all he was charged with was conspiring to rob the bank.

defendants did not participate at earlier stages in the scheme, and even if they only played minor roles in the conspiracy...."

Finally, with regard to the third erroneous portion of the instructions, the jury was told that if Sheila Neuhausser "understood the unlawful nature of [the] plan or scheme" that involved Messrs. Meyers, Burgess, Dunlap and McCarty, this was "sufficient" to convict XXX. Obviously, this is not the law. The instruction allowed the jury to convict XXX if *he* did not join the conspiracy at all or if *he* joined only a marijuana conspiracy. Once again, the latter possibility turns the Sixth Circuit's decision on XXX's appeal completely on its head.

4. Conclusion

In short, a jury trying to make sense of the Court's instruction would have: 1) convicted XXX for the conspiracy charged in the indictment even if he had no idea that the conspiracy involved cocaine (after all Meyers and Burgess were able to plead guilty to the conspiracy despite having no idea that the conspiracy involved cocaine); 2) convicted XXX if he had not joined the conspiracy set forth in the indictment but simply possessed marijuana or cocaine with the intent to distribute it; and/or 3) convicted XXX if he had not joined the conspiracy set forth in the indictment as long as it found that his wife joined that conspiracy. "[S]crutiny of the verdict from the vantage standpoint of the charge leads inevitably to speculation...[where] twelve people untutored in the law were left to their own" to apply the erroneous instructions. *Glen v. United States*, 420 F.3d 1323 (D.C. Cir. 1969).

The evidence against Mr. Neuhausser regarding connection with marijuana was overwhelming. In contrast, the evidence regarding his connection with cocaine consisted of almost entirely the suspect testimony of James McCarty. The sole reason from XXX electing to go to trial was because he would not accept a plea bargain which required him to admit that he was involved with cocaine. *See* XXX Dec. at ¶ 4. Therefore, it was crucial for XXX that the jury be able to distinguish between involvement in a marijuana conspiracy and involvement in a cocaine conspiracy. Certainly jury instructions which permitted XXX to be convicted for a *cocaine* conspiracy about which he had no knowledge or which permitted him to be convicted of

a substantive charge even though he was charged *only* with conspiracy, violated his due process rights by denying him a fair trial. Given that, this Court should award XXX a new trial.

C. XXX Received Ineffective Assistance of Counsel on Appeal, When His Appellate Attorney Dropped an Issue Related to the Jury Instructions.

An appellate attorney provides ineffective assistance of counsel on appeal by failing to raise a claim that would have had a reasonable probability of success on appeal. *See Bowen v. Foltz*, 763 F.2d 191, 194 n.3 (6th Cir. 1985). *See also, Mapes v. Coyle*, 171 F.2d 408, 427-28 (6th Cir. 1999) (Setting forth considerations that ought to be taken into account in determining whether an attorney on appeal was ineffective).

Courts have repeatedly held that counsel is ineffective when they fail to object to confusing jury instructions regarding the offense charged. *See, e.g., Lucas v. O'Dea*, 179 F.3d 412, 418-419 (6th Cir. 1999); *Mapes*, 171 F.3d at 427-29; *Luchenbrug v. Smith*, 79 F.3d 388, 392-93 (4th Cir. 1996); *Gray v. Lynn*, 6 F.3d 265, 268-69 (5th Cir. 1993).

On direct appeal, XXX's appellate attorney, Phillip Pitzer, raised Point of Error Number II based upon the insistence of XXX. The point of error stated: "[T]he District Court's instruction 'one may become a member of a conspiracy without full knowledge of the details' allowed the jury to convict appellant on the basis he conspired to distribute marijuana, cocaine or both." Nevertheless, as set forth above, Mr. Pitzer dropped this point of error from consideration at the oral argument against the express wishes of XXX.

In point of fact, XXX's appeal collapsed once this issue was withdrawn from consideration. As explained earlier, the Sixth Circuit distinguished this case from its decision in *Dale* because the jury was instructed in this case that the charge against XXX was conspiring to possess with the intent to deliver marijuana *and* cocaine as opposed to marijuana *or* cocaine. *Neuhausser*, 241 F.3d at 469. Given the wealth of case law, cited by the Sixth Circuit, which also made this same distinction, this distinction should hardly have come as a surprise to Mr. Pitzer. *Id.* at 470, *citing, United States v. Green*, 180 F.3d 216 (5th Cir.), *cert. denied*, 528 U.S. 1054 (1999); *United States v. Watts*, 950 F.2d 508 (8th Cir. 1991), *cert. denied*, 503 U.S. 911

(1992) and *United States v. Banks*, 78 F.3d 1190, 1203 (7th Cir.), *vacated and remanded on other grounds*, 519 U.S. 990 (1996).[11]

Nevertheless, what made the instant case more similar to *Dale* and dissimilar to *Green, Watts* and *Banks* was the instruction to the jury that "[o]ne may become a member of a conspiracy without full knowledge of all of the details of the unlawful scheme...." In short, although the Sixth Circuit was correct that the jury was told that XXX was charged with marijuana *and* cocaine, it was also told it could convict XXX if he knew about the marijuana and *not* the cocaine. Unfortunately, when Mr. Pitzer dropped Point of Error II from the direct appeal, he lost the opportunity to make this clear to the Court of Appeals. For, if the jury could have convicted XXX of Count 1 simply because he joined the marijuana conspiracy without full knowledge that it was also a cocaine conspiracy, XXX would have been entitled to relief under both *Dale* and *Apprendi v. New Jersey*, 530 U.S. 466 (2000).[12]

In short, against the explicit instructions from XXX, Mr. Pitzer dropped from his appeal an issue that would clearly have entitled XXX to relief.[13] Therefore, XXX is entitled to an out of time appeal on this issue. *Page v. United States*, 884 F.2d 300, 301 (D.C. Cir. 1989) ("Relief does not require the district court to issue orders to the court of appeals. District courts may

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[11] In fact, a few weeks prior to Mr. Pitzer filing XXX's Proof Brief and several months before filing XXX Final Brief, XXX made Mr. Pitzer aware of the *Banks* case and the possibility it could be used to distinguish *Dale*. *See* Attachment J. (November 18, 1999 letter from Randy to Phil).

[12] Recall also that the jury was told it could convict XXX of the multi-object conspiracy if he joined the conspiracy on only "one occasion" (*e.g.* to distribute marijuana). *See supra.* note 9.

[13] To the extent the government would be heard to complain that XXX's trial counsel did not complain of the erroneous instruction at trial, XXX would be entitled to relief in collateral proceedings based upon the ineffectiveness of his trial counsel in failing to lodge such an objection.

grant relief. Ineffective assistance may justify vacating and reentering the judgment of conviction, allowing a fresh appeal."). *See also, e.g., Caludio v. Scully*, 982 F.2d 798, 806 (2d Cir. 1992), *cert. denied,* 508 U.S. (1993); *Matire v. Wainwright,* 811 F.2d 1430, 1439 (11th Cir. 1987).

D. XXX's Trial Attorney Rendered Ineffective Assistance of Counsel When He Failed to Object to a Jury Instruction Allowing XXX to be Convicted if the Government Proved Only a Substantive Charge Against XXX and not a Conspiracy and was, Likewise, Ineffective When He Failed to Object to a Jury Instruction Allowing XXX to be Convicted Simply if the Government Proved that Sheila Neuhausser Joined the Conspiracy.

E. XXX's Appellate Attorney Rendered Ineffective Assistance of Counsel When He Failed to Complain on Appeal of a Jury Instruction Allowing XXX to be Convicted if the Government Proved Only a Substantive Charge Against XXX and not a Conspiracy and was, Likewise, Ineffective When He Failed to Complain on Appeal of a Jury Instruction Allowing XXX to be Convicted Simply if the Government Proved that Sheila Neuhausser Joined the Conspiracy.

As noted in Argument II above, the jury in this case was told that it could convict XXX on Count 1 if he possessed a controlled substance with the intent to distribute it **or** if he conspired to possess a controlled substance with the intent to distribute it. Likewise, it was instructed that "[i]f **one** or both defendants understood the unlawful nature of a plan or scheme and knowingly and intentionally joined in that plan or scheme on one occasion, **that is sufficient to convict either one or both of them for conspiracy**, even if the defendants did not participate at earlier stages in the scheme, and even if they only played minor roles in the conspiracy...." (emphasis added). In other words, the jury was told that XXX could be convicted on Count 1 even if he did not join the conspiracy set forth in the indictment as long as his wife joined the conspiracy.

As explained in Argument II *supra.*, jury instructions which permitted XXX to be convicted for a *cocaine* conspiracy about which he had no knowledge or which permitted him to be convicted of a substantive charge even though he was charged *only* with conspiracy, violated his due process rights by denying him a fair trial. Therefore, the denial of his due process rights allows him to complain of the constitutional error regardless of the fact that it was not raised at

the trial or on appeal. Nevertheless, in the event that the Court concludes that the erroneous instructions must have been objected to at trial or on appeal in the first instance, XXX submits that his trial counsel and/or appellate counsel were ineffective for their failure to do so. Therefore, XXX is entitled to either a new trial or an out-of-time appeal.

F. XXX's Appellate Attorney Rendered Ineffective Assistance of Counsel When He Failed to Challenge the Drug Amounts Attributed to XXX Under U.S.S.G. § 2D1.1.

Even if one accepts, in light of the erroneous jury instructions and the suspect credibility of James McCarty, that XXX was involved in the cocaine aspect of the conspiracy, it is also undisputed that Mr. McCarty had sources of cocaine other than XXX. *See* Tr. 9/29/98 at 137. The government introduced absolutely no evidence at trial or sentencing that these other transactions were part of the instant conspiracy or that XXX had any knowledge of the transactions.

Pursuant to U.S.S.G. § 1B1.3(a)(1)(B), XXX can only be held responsible for those drugs that were part of the jointly undertaken activity with Mr. McCarty *and* which were foreseeable to him. *See, e.g., United States v. Jenkins*, 4 F.3d 1338, 1346 (6th Cir. 1992) ("A co-conspirator is not necessarily responsible for the total amount of cocaine involved in the conspiracy for purposes of establishing his base offense level. Rather, a participant is responsible for other conspirators' conduct only if that conduct was reasonably foreseeable to him and in furtherance of the execution of the jointly undertaken criminal activity. U.S.S.G. § 1B1.3, comment."), *cert. denied sub. nom., Warren v. United States*, 511 U.S. 1034 (1994).[14] Indeed, the Sixth Circuit

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[14] *See also,* Application note 2 to U.S.S.G. § 1B1.3 (1992) ("Because a count may be worded broadly and include the conduct of many participants over a period of time, the scope of the criminal activity jointly undertaken by the defendant (the "jointly undertaken criminal activity") is not necessarily the same as the scope of the entire conspiracy, and hence relevant conduct is not necessarily the same for every participant. In order to determine the defendant's accountability for the conduct of others under subsection (a)(1)(B), the court must first

recently held in *United States v. Campbell*, 279 F.3d 392, 400 (6th Cir. 2002) (Sentencing court is required to make particularized findings with respect to both the scope of the defendant's agreement and the foreseeability of his co-conspirators' conduct before holding a defendant accountable for the scope of the entire conspiracy.); *United States v. Orlando*, 281 F.3d 586, 600-01 (6th Cir. 2002) (same).

As explained by the Sixth Circuit in *United States v. Swiney*, 230 F.3d 397 (6th Cir. 2000), U.S.S.G. § 1B1.3(a)(1)(B) responsibility is different from *Pinkerton* responsibility:

> [I]n a 1990 article, William W. Wilkins, Chairman of the United States Sentencing Commission, and John R. Steer, General Counsel for the Commission, explained: †
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> > The remaining portion of the "otherwise accountable" definition in Application Note 1 refers to conspiratorial-type activity within the realm of what is commonly referred to as the "Pinkerton" rule. Two key points should be noted. First, the guidelines specifically employ this doctrine to cover any "criminal activity undertaken †[in concert with others, whether or not charged as a conspiracy."
> >
> > †
> >
> > A second key point regarding construction of the "otherwise accountable" language in concerted activity situations is that this rule is a sentencing rule and not necessarily co-extensive with the Pinkerton rule of co-conspirator liability. Thus, in determining the outer limits of the attribution dimension under this aspect of Relevant Conduct, courts should focus on the language in Application Note 1 addressing conduct of others that was "within the scope of the defendant's agreement"' or "in furtherance of the execution of the jointly-undertaken criminal activity" or "that was reasonably foreseeable by the defendant . . . in connection with the criminal activity the defendant agreed to jointly undertake."' As the note further explains, in a broad conspiracy the relevant conduct considered in constructing the guideline range may not be the same for every defendant in the conspiracy, although each may be equally liable for conviction under Pinkerton.
> >
> > †

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determine the scope of the criminal activity the particular defendant agreed to jointly undertake (i.e., the scope of the specific conduct and objectives embraced by the defendant's agreement).")

> This potential differentiation among co-conspirators is consistent with the multiple purposes of sentencing articulated in the Sentencing Reform Act. . . .
> . . . .
> †
> Thus, in applying the Relevant Conduct guideline, the Commission intended that courts would, in necessary instances, make differing determinations among co-conspirators. If the Pinkerton rule of conviction liability were strictly mirrored at sentencing, the result might be different.
>
> William W. Wilkins & John R. Steer, Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines, 41 S.C. L. Rev. 495, 508-10 (1990). Thus, it is clear that the Sentencing Guidelines have modified the Pinkerton theory of liability so as to harmonize it with the Guidelines' goal of sentencing a defendant according to the "seriousness of the actual conduct of the defendant and his accomplices." Id. at 502.

Swiney, 230 F.3d 403-405.

In this case, XXX objected to the cocaine amounts attributable to him and argued that amounts that Mr. McCarty were getting from other suppliers were neither part of the jointly undertaken activity nor foreseeable. *See, e.g,* Sentencing Tr. at 23-24. †As noted above, the government simply cited the testimony of Ted Dunlap that, in 1995 and 1996, he and Mr. McCarty were processing one or two kilograms per month and that in 1997 the were processing one or two kilograms per week. *See* Gov't Memorandum at 3-4. Nevertheless, this did not answer XXX's objection, because Mr. Dunlap had absolutely no way of distinguishing whether the cocaine he was processing with Mr. McCarty came from XXX or one of Mr. McCarty's other suppliers. Indeed, Mr. Dunlap testified that XXX had "nothing to do with cocaine" and that he had never seen XXX in the presence of any cocaine in his life. *Id* at 7-8, 13. *See* also Dunlap Dec. (attachment F hereto).[15] As also noted above, the Court simply relied upon a

[15] Recall that even Mr. McCarty testified that, in the year 1997, he had paid XXX only $290,350 in drug monies and he allegedly purchased cocaine at $30,000 per kilogram. *See* Tr. 9/29/98 at 30, 59 and Government's Exhibit 1.2.

Pinkerton analysis to hold XXX responsible for all of Dunlap's and McCarty's cocaine. *See* Sentencing Tr. at 24. This contravenes the Sixth Circuit's holding in *Swiney.*

Mr. Pitzer could have pointed to numerous cases on appeal to support a challenge to the drug amounts on appeal but he failed to raise this issue. *See, e.g,, United States v. Obiukwu*, 17 F.3d 816, 821-22 (6th Cir. 1994) ("Under U.S.S.G. § 1B1.3, however, a conspirator is not automatically charged with responsibility for all the narcotics funnelled through the conspiracy; quantities handled by other conspirators are attributed to a defendant only if the conduct of the other conspirators was "reasonably foreseeable" to the defendant and was within the scope of the criminal activity the defendant agreed jointly to undertake."); *United States v. Meacham,* 27 F.3d 94, 217 (6th Cir. 1994) ("Under the Sentencing Guidelines, particularized sentencing is mandated, and 'differentiation between co-conspirators is required.'"); *United States v. Milledge*, 109 F.3d 312, 315-318 (6th Cir. 1997); *United States v. Ferguson*, 23 F.3d 135, 142 (6th Cir.), *cert. denied sub. nom., Shackelford v. United States,* 413 U.S. 900 (1994); *Jenkins*, 4 F.3d at 1347; *United States v. Medina*, 992 F.2d 573, 589-591 (6th Cir. 1993).

As discussed earlier, an appellate attorney provides ineffective assistance of counsel on appeal by failing to raise a claim that would have had a reasonable probability of success on appeal. *See Bowen,* 763 F.2d at 194 n.3. There is simply no way to square the evidence adduced to support the drug figure in this case (*i.e.* the testimony of Ted Dunlap regrading *McCarty's* drugs) or the Court's reliance on a *Pinkerton* standard and the requirements of the Sixth Circuit.[16] Therefore, there seems to be little question that this issue would have had a reasonable probability of success on appeal. Likewise, given that it is likely that XXX's guidelines would

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[16] For example, if one uses the $290,350 and assumes that it was all cocaine purchased at $30,000 per kilo, that meant that XXX should have been held responsible for approximately 10 kilograms of cocaine in 1997 instead of the 52 kilograms that was attributed to him. This would reduce XXX's guideline range from 360-Life to 262-327. If the Court were to sentence him again at the low end of his guideline range, it would reduce his sentence by more than eight years.

have been reduced, he suffered prejudice due to counsel's failure to raise it on appeal. *See Glover v. United States*, 121 S.Ct. 696, 700-01 (2001).[17]

G. XXX Received Ineffective Assistance of Counsel on Appeal When His Appellate Counsel Dropped the Issue Related to a Constructive Amendment to the Indictment.

On direct appeal, XXX's appellate attorney, Phillip Pitzer, raised Point of Error Number I. Like Point of Error Number II, Point of Error Number I was raised based upon the insistence of XXX. The point of error stated: "[T]he District Court constructively amended the indictment by instructing the jury that appellant could be found guilty on the basis he possessed and/or possessed with the intent to distribute marijuana where the indictment charged conspiracy to distribute marijuana and cocaine." Unfortunately, like Point of Error Number II, Mr. Pitzer dropped Point of Error Number I from consideration at the oral argument against the express wishes of XXX.

The prejudicial effect this instruction had on XXX's trial is set forth in Arguments II and IV *supra.* in the context of faulty jury instructions. Nevertheless, this faulty instruction, in particular, served to cause a constructive amendment to the charges against XXX and, therefore, relief is available on this ground as well.[18]

To properly analyze this argument, it must again be noted that the United States Court of Appeals for the Sixth Circuit has made it abundantly clear that "the elements of simple possession are not identical to the elements...of conspiracy to possess with intent to distribute or

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[17] Even if the same 360 month sentence was possible in the new guideline range, XXX would still be entitled to resentencing. *See United States v. Lavoie*, 19 F.3d 1102, 1104 (6th Cir. 1994).

[18] To the extent the government would be heard to complain that XXX's trial counsel did not complain of the erroneous instruction at trial, XXX would be entitled to relief in collateral proceedings based upon the ineffectiveness of his trial counsel in failing to lodge such an objection. *See O'Dea*, 179 F.3d at 416-419.

to distribute cocaine." *Colon*, 268 F.3d at 377 (6th Cir. 2001). Nevertheless, the Court's jury instruction would lead a reasonable jury to conclude that XXX was charged with both the substantive offense of simple possession with the intent to distribute and conspiracy to possess with the intent to distribute. As discussed above, the jury was instructed on the elements of the substantive charge and then told that XXX was *also* charged with conspiracy. Similarly, under the Definition of the Crimes Charged there are two bold faced sections: **Intent to Distribute and Distribution of Marijuana and Cocaine** and **Conspiring to Distribute Marijuana and Cocaine**.

The Fifth Amendment to the United States Constitution "guarantees that a criminal defendant will be tried only on charges in a grand jury indictment." *United States v. Reyes*, 102 F.3d 1361, 1364 (5th Cir. 1996). Therefore, only the grand jury may broaden or alter the charges in an indictment. *See Stirone v. United States*, 361 U.S. 212, 215-16 (1960). When the government, through its presentation of evidence and/or its argument, or the district court, though its instructions to the jury, or both, broadens the bases for conviction beyond those charged in the indictment a constructive amendment to the indictment occurs. *United States v. Randall*, 171 F.3d 195, 203 (4th Cir. 1999). A constructive amendment is considered "per se prejudicial because it effects a direct infringement upon [a defendant's] fifth amendment guarantee." *United States v. Ford*, 872 F.3d 1231, 1235 (6th Cir. 1989), *cert. denied*, 495 U.S. 918 (1990). Indeed, "it is the broadening of the indictment that is important-nothing more." *United States v. Floresca*, 38 F.3d 706, 711 (4th Cir. 1994) (*en banc*). When a constructive amendment occurs, it "matters not" that a fact finder could have found the defendant guilty of the offense charged in the indictment. *Id*.

For example, in *United States v. Solis*, 841 F.3d 307 (9th Cir. 1988), the defendants were charged with distributing heroin. "The instruction to the jury included an instruction on distribution and also on possession of heroin-a crime not charged against either defendant." *Id*. at 308. The Court reversed:

> The government...contends that the instructions were merely "superfluous." But there was evidence before the jury that the defendants possessed heroin, and, being told the elements of the crime of possessing heroin, the jury could very well have concluded that it could convict for possession of heroin for distribution. It is true, as the government contends, that the court read the indictment to the jury and the court told the jury that the defendants were on trial "only for the crimes charged in the indictment, not for any other activities." But the court told the jury also, of course, that the jury must follow the instructions, and the instructions indicated that this jury could convict these defendants for possession of heroin for distribution. †

Id.[19]

Similarly, in *Reyes*, the Fifth Circuit was faced with a case in which a defendant was charged with carrying a firearm in relation to the crime of possessing marijuana with the intent to distribute it. *Reyes*, 102 F.3d at 1364. Nevertheless, the jury was instructed it could return a conviction if it found that the defendant carried the firearm in relation with the crime of *conspiracy* to possess marijuana with the intent to distribute it. *Id*. The Court of Appeals found that the District Court's jury instructions constructively amended the indictment:

> We...agree with Reyes that a conspiracy to possess with the intent to distribute marijuana has different elements than does the substantive offense of possession with intent to distribute. We therefore conclude that the district court constructively amended the indictment by modifying an essential element of the charged offense when it instructed the jury that it could convict Ryes under § 924(c)(1) based upon proof that he was guilty of a conspiracy rather than a substantive offense.

Id. at 1365. Indeed, the amendment in *Reyes* was the converse of the amendment in this case and, like in *Reyes* violated the defendant's constitutional rights.

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[19] Likewise, although the jurors in the instant case were told that XXX was "only on trial for the particular crimes charged in the indictment," they were also told that they were bound by their oaths to follow the instructions which informed them that XXX was "also" charged with the substantive crime of possession with the intent to distribute as well as the conspiracy and that either could support a guilty verdict on Count 1.

Finally, in a case very similar to *Reyes,* a defendant was charged with carrying a firearm in connection with the crime of distributing a controlled substance. *Randall*, 171 F.3d at 203 Nevertheless, "the government, through its presentation of evidence and its closing argument, and the district court, through its jury instructions, constructively amended...the indictment by allowing proof of an alternative § 924(c) predicate offense not charged in the indictment-possession with the intent to distribute drugs. *Id*. The Court of Appeals reversed. *Id*. at 210 (The government 'was not allowed though the presentation of its evidence and its argument, and the district court was not allowed through its jury instructions, to broaden the bases of conviction to include the different § 924(c) predicate offense of possession with intent to distribute. *See also, United States v. Willoughby*, 27 F.3d 263 (7th Cir. 1994) (same).[20]

In sum, it is inescapable that the jury instructions in the instant case amended the indictment and led the jury to believe that XXX was charged with the substantive offense of possession. First, under the Definition of the Crimes Charged section in the jury instructions, there are two bold faced subsections, one for the substantive charge and one for the conspiracy charge. Second, the jury was told that XXX was "also" charged with conspiracy. Third, the jury was told that, if the government proved either actual or constructive possession, it was "enough to convict." Finally, it was told that "[t]he government must prove the defendants had actual or

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[20] *See also, Floresca,* 38 F.3d at 710-11 (Where the indictment charged the defendant with one subsection of the witness tampering statute, the district court's instruction on another subsection of the statute resulted in a constructive amendment of the indictment. "The court's instruction was more than just a misstatement of the law applicable to the indicted offense; it stated a distinct, unindicted offense."); *United States v. Jones*, 647 F.2d 696, 698-700 (6th Cir.) (District Court constructively amended the indictment where defendant was charged with making and constructing an unregistered destructive device but district court's instruction permitted the jury to convict the defendants for possession of an unregistered destructive device), *cert. denied*, 494 U.S. 898 (1981).

constructive possession of the controlled substances, and knew that they did, for you to find them guilty of *this* crime." (emphasis added). Clearly, these faulty instructions amended the indictment which allowed XXX to be convicted for a crime not charged by the grand jury. Such an amendment is prejudicial per se. It "matters not" that the jury *could* have convicted him of Count 1 based upon the evidence admitted at trial had the indictment not been amended by the jury instructions.

XXX is entitled to an out of time appeal on this issue.

IV. CONCLUSION

For the foregoing reasons, this Court should grant XXX's Petition Under 28 U.S.C. § 2255. XXX submits that this Court should vacate his conviction and award him a new trial or, in the alternative, allow him an out-of-time appeal on all the issues set forth above.

Respectfully submitted,

F. Clinton Broden
Broden & Mickelsen
2715 Guillot
Dallas, Texas 75204
214-720-9552
214-720-9594 (facsimile)

Attorney for Movant

XXX

CERTIFICATE OF SERVICE

I, F. Clinton Broden, certify that on September 26, 2002, I caused the foregoing document as well as the accompanying Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody to be served by first class mail, postage prepaid, on William E. Hunt, 220 Potter Stewart U.S. Courthouse, 100 East Fifth Street, Cincinnati, Ohio 45202.

_____.....
F. Clinton Broden