IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CASE NO. 03-30481

UNITED STATES OF AMERICA
Plaintiff-Appellee

v.

XXX
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA

BRIEF OF DEFENDANT-APPELLANT

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

Attorney for Appellant
XXX

<u>**CERTIFICATE OF INTERESTED PERSONS**</u>

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualifications or recusal.

The Appellant, **XXX**, was tried and sentenced by **Donald E. Walter**, United States District Court Judge for the Western District of Louisiana. The Honorable **Roy S. Payne,** United States Magistrate Judge for the Western District of Louisiana, also conducted proceedings in this case.

The Appellant was represented below by **Victoria M. Cranford**. The Appellant is represented on appeal by **F. Clinton Broden**, a partner in the law firm of **Broden & Mickelsen**.

The Appellee, the United States of America, was represented below by **Lidell Smith**, Assistant Untied States Attorney for the Western District of Louisiana and is represented on appeal by **Josette L. Cassiere**, Assistant Untied States Attorney for the Western District of Louisiana.

F. Clinton Broden

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is both requested and necessary. Many of the issues raised herein require the Court to be completely conversant with all of the facts adduced at the three day trial as well as the facts adduced at the two hearings held on XXX'S new trial motion. Oral argument will significantly aid the Court in juxtaposing the facts adduced at the trial and the hearings with the issues raised herein.

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STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1291 as an appeal from a final judgment entered by the United States District Court for the Western District of Louisiana. Furthermore, jurisdiction to review the sentence imposed in this case is invoked pursuant to 18 U.S.C. §3742(a) as an appeal of a sentence imposed under the Sentencing Reform Act of 1984.

STATEMENT OF THE ISSUES

I. Whether the inability of the defendant to call two witnesses at trial, witnesses that the District Court found to be material, justified a new trial and/or resulted in the denial of his Sixth Amendment right to compulsory process and/or resulted from ineffective assistance of counsel.

II. Whether the government's closing argument, in which it argued that a conspiracy conviction could be based solely upon the defendant's purchase of crack cocaine to feed his personal drug habit, was plain error.

III. Whether the District Court erred in refusing to review presentence reports related to two key government witnesses.

IV. Whether hearsay sentencing information allegedly provided by a cooperating witness- a witness whose credibility was rejected by a jury and whose trial testimony was inconsistent with the sentencing information- bears a sufficient indicia of reliability upon which to base a life imprisonment sentence.

V. Whether 21 U.S.C. § 841(b)(1)(A) is unconstitutional.

VI. Whether it offends the Due Process Clause to the United States Constitution to hold a defendant responsible for thirty times more drugs for sentencing purposes than the amount alleged against him in the indictment.

STATEMENT OF THE CASE

A. Proceedings Below

XXX, along with James Calvin Bryant, was charged in a four count superseding indictment filed on May 23, 2002. XXX was charged in **Count One** with conspiracy to distribute and possession with the intent to distribute five kilograms or more of cocaine and fifty grams or more of cocaine base in violation of 21 U.S.C. §§ 841(a)(1)and 846; he was charged in **Count Two** with possession with the intent to distribute a detectable amount of cocaine on November 15, 2002 in violation of 21 U.S.C. §§ 841(a)(1); and he was charged in **Count Three** with being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). *See* Excerpts at 3.[1] XXX was not charged in **Count Four** and **Count Three** was dismissed prior to trial. *See* Rec. I:185-88.

A jury trial was held from September 23, 2002-September 25, 2002. *See* Excerpts at 1. On September 26, 2002, the jury found XXX guilty of Count 1 and not guilty of Count 2 *Id*. at 4.

XXX filed a new trial motion on October 16, 2003. *Id*. at II:315a-322.[2] Hearings were held on that motion on December 19, 2002, December 20, 2002 and January 23, 2003. The motion was denied by written order on March 10, 2003. *See* Excerpts at 6.

XXX was sentenced, on April 24, 2003, to life imprisonment, five years supervised release and a $100 special assessment. *See* Excerpts. at 5.

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[1] Citations to the Record ("Rec.") are to volume number:page number. Citations to the Record Excerpts ("Excerpts") are to Tab number.

[2] The Court had granted an extension, on October 4, 2002, extending the time by which XXX could file a new trial motion to October 16, 2003. *See* Rec. at II:312a.

On May 1, 2003, XXX filed a timely notice of appeal. *Id.* at 2.

B. Statement of the Facts

1. Trial testimony

XXX was a father figure to Earl Buchanan. *See* Rec. at V:206. Buchanan's mother was addicted to crack cocaine and XXX took him in off the street and raised him. *Id*. at VI:273.

William Green, a special agent with the Drug Enforcement Agency, was the government's first witness at trial. Agent Green testified that Earl Buchanan was arrested on March 8, 2000 [sic.].[3] *See* Rec. at IV:138. On March 12, 2001, XXX came to the DEA offices and offered to provide assistance to the DEA for consideration in Buchanan's case. *Id*. During that visit, Agent Green testified that XXX told him about a cocaine source, David Sosa, that he knew from the Houston or valley area of Texas. *Id*. at IV:139. XXX allegedly told Agent Green that he had dealt with Sosa in late 1999 and early 2000 and had bought approximately one to two kilograms of cocaine every two weeks for a two month period from Sosa and that, in September/October 2000, he had purchased "several keys" of cocaine from Sosa. *Id*. at IV:140.

XXX had several meetings with Agent Green and attempted to set up a five-ten kilogram cocaine purchase from Sosa in order to get consideration for Buchanan. Despite several alleged attempts, XXX was not able to purchase cocaine from Sosa. *Id*. at IV:140-46. Agent Green had sent another informant, Freddie Young, to XXX'S house with a tape recorder to assist in recording Sosa on tape talking about a cocaine deal. *Id*. at V:176-77. At one point, Agent Green alleged that XXX told him that he had "already set up the 10 kilogram cocaine deal with Mr. Sosa" thirty days prior to coming in to meet with him

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[3] Buchanan was actually arrested on March 8, 2001.

(Agent Green) for the first time. *Id*. at IV:147. According to Agent Green, XXX told him that this was to be his last deal before "retirement." *Id*. at IV:148-49.[4]

Earl Buchanan testified that he was selling drugs for XXX. He would sell powder cocaine and crack cocaine. He testified that he became aware that XXX was involved in drug trafficking toward the end of 1998. *Id*. at V:208. From the end of 1998 to the end off 1999 or the first part of 2000, XXX alleged purchased drugs from Shirley Preston. He would purchase one or two kilograms of cocaine at a time from Preston and he did this once a month "sometimes longer." *Id*. at V:208-10. Buchanan testified that, from the early part of 2000 up until the time he (Buchanan) was arrested in March of 2001, XXX purchased cocaine from David Sosa. He allegedly purchased a kilogram or two at a time and it was also purchased at a time interval once a month or sometimes longer. *Id*. at V:212-13. In total, Buchanan alleged that XXX purchased five kilograms of powder and one kilogram of crack from Sosa. *Id*. at V:213.[5] Buchanan claimed that the cocaine he delivered to the informant on November 15, 2000 had been given to him by XXX. *Id*. at V:216. Nevertheless, during this time period, Buchanan admitted

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[4] Agent Green also testified about two undercover purchases the DEA made from Earl Buchanan. The first was for a small amount of cocaine in early 1999. *See* Rec. at V:181. The second was on November 15, 2000. An informant was given $10,000 to purchase a half a kilogram of cocaine, however, Buchanan tricked the informant and only delivered a quarter kilogram. *Id*. at V:182-192.

[5] Simple math reveals the inconsistencies in Buchanan's testimony. Buchanan alleged that, from early 2000 to March 2001 (approximately fifteen months), XXX purchased one or two kilograms of cocaine almost every month from Sosa, yet he estimated the total purchased from Sosa was only five kilograms of powder cocaine and one kilogram of crack cocaine.

that he was also purchasing drugs from David Ashley and that XXX had nothing to do with Ashley. *Id*. at V:214.

Buchanan hoped to have his sentence reduced pursuant to Fed. R. Crim. P. 35 for his testimony against XXX. *Id*. at v:235-38; Defendant's Exhibit 4. The defense introduced a letter Buchanan wrote while in prison, complaining that XXX did not assist him financially after his arrest. *Id*. at V:251; Defendant's Exhibit 5. The letter written by Buchanan also talked about how drug defendants are able to get their sentences reduced for testifying against other defendants. *See*, *e.g, Id.* at V:262 ("Ain't nobody keeping it real. I mean ain't nobody doing 20 years when they can tell on the next man and do 5 years.").[6]

Gregory Byrd also testified as a government witness at trial. He testified that, in 1998, XXX would buy drugs from him on credit. *Id*. at V:288. Nevertheless, toward the end of 1998 to early 1999, Byrd allegedly began buying drugs from XXX. *Id*. at V:289. Byrd testified that he and XXX "did business" for about a year, but they stopped doing business in 2000 because that was when XXX started using Buchanan to sell his drugs. *Id*. at V:290-91.[7] Byrd testified that his purchases were limited to powder cocaine. *Id*. at V:291. Byrd testified that some of these transactions occurred at XXX'S house, but his description of the house and the lack of a pet dog in the house was entirely inconsistent with the actual house and the pet dog in the house that would make his presence known to

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[6] Interestingly, Buchanan also testified that he had delivered up to two kilograms of powder cocaine to XXX'S co-defendant, John Calvin Bryant, at the behest of XXX. *See* Rec. at V:218-19. The jury obviously rejected that testimony when it acquitted Mr. Bryant.

[7] Recall that Buchanan claimed that he began selling drugs for XXX in late 1998 (*see* Rec. at 208-210), yet Byrd claimed that he did "business" with XXX in 1998 and 1999 and only stopped in 2000 because that was when Buchanan started selling drugs for XXX.

all visitors. *Compare Id*. at V:297-98 *with* VI: 394-97 and VI:461-63 and VI:481-83. Byrd admitted that he was previously incarcerated in the same jail pod as Buchanan and Vincent Crawford. *Id*. at V:299.[8]

Vincent Crawford also testified. He claimed to have been in the drug business with XXX between 1998-2000. *Id*. at V:311. He claimed that he purchased powder cocaine from XXX seven or eight times and the amounts ranged from two and one-quarter ounces to eight and one-half ounces. *Id*. at V:313-315.[9] Cranford testified that, at times, XXX would direct him to Buchanan to purchase cocaine. *Id*. at V:317. Crawford received complete immunity for his testimony. *Id*. at V:323-325. He also hoped to get consideration in state court for his testimony against XXX. *Id*. at V:33034.

The defense called several witnesses. Russell Jones was a trustee in the jail pod in which Buchanan was held and worked in the law library of the jail and ran a Bible study. *Id*. at VI:426-30. Buchanan had told him that "all of his people would go down with him and he didn't mind fabricating some stuff to do what he had to do." *Id*. at VI:431. Buchanan told Jones that he was willing to fabricate evidence because he was mad at "his people" for not hiring him an attorney when he was arrested. *Id*. at VI:433.

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8 Byrd also testified that, on occasion, when XXX was out of drugs, XXX took him to John Bryant and, on four or five occasions, he purchased cocaine from Bryant through XXX. *See* Rec. at V:293-96. Again, the jury acquitted Mr. Bryant of all charges.

9 Interestingly, Crawford testified that the cocaine allegedly available from XXX was of poor quality while Byrd testified that the cocaine allegedly available from XXX was of good quality. *Compare* Rec. at IV:313-14 *with* Rec. at IV:295.

Scott Holloway had shared a cell with Vincent Crawford. *Id*. at VI:455. Crawford told him that Ray West was the *only* person to ever supply him with drugs. *Id*. at VI:457-58.

Richard Scroggins, XXX' second cousin, testified that he had been incarcerated with Greg Byrd. *Id*. at VI:460, 463. Richard Scroggins had previously worked as a confidential informant with three different state and local government agencies. *Id*. at VI:466-68. Byrd told Richard Scroggins that he also got his drugs from Ray West. *Id*. at VI:461.

Bobbie Kirkendoll, like Buchanan, was "adopted" by XXX. *Id*. at VI:470-74. Buchanan got Kirkendoll started in the drug business. *Id*. at VI:474-75. When XXX learned of this, he kicked both of them out of the house. *Id*. at 475, 480. Kirkendoll testified that Buchanan had told him that David Ashley was his drug supplier and never mentioned any other supplier. *Id*. at VI:476, 479. Kirkendoll testified that, while XXX was addicted to crack cocaine, he did not sell drugs. *Id*. at VI:479-80. He further testified that "it's illogical for a crack addict to be dealing drugs in large quantities, or any quantity at all, because they smoke up everything they have, because you're addicted." *Id*. at VI:480.[10]

<u>2. Closing argument</u>

During the closing argument, the government made the following argument, contrary to law, without objection:

> And if Mr. XXX is a drug addict, where, ladies and gentlemen, where was he getting the drugs? For him to get cocaine necessarily means that he's involved in cocaine trafficking. There's two people

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[10] *See also* Testimony of William Bryant called by co-defendant James Bryant at Rec. VI:399 ("[I]t's very difficult for an addict to be productive selling drugs or make money selling drugs, because he would use up most of his benefit."). William Bryant also testified that XXX used crack cocaine but did not sell drugs. *Id*. at VI:398.

> in that conspiracy right there: the person he got the drugs from and himself.

Rec. at VI:564.

3 New trial motion

Prior to the defense presenting its case, XXX'S trial attorney announced that two defense witnesses had not reported to court despite the fact that they were served with subpoenas. *See* Rec. at VI:380-83. One non-appearing witness was identified as James Thomas and it was later determined that the other non-appearing witness was Freddie Young. *Id*. at VI:381. The trial attorney informed the Court that she believed government agents interfered with the witnesses' attendance. *Id*. at VI:383-84. The Court cautioned the attorney from making accusations without support. *Id*. at VI:384. Moreover, the Court refused to delay the trial at all in order for the witnesses to comply with the previously served subpoenas and refused to takes steps, such as the issuance of a bench warrant, to compel their attendance. *Id*. at VI:381-83. ("[I]f he's not here, we're going on.")

Following the trial, XXX moved for a new trial, pursuant to Fed. R. Crim. P. 33, based upon the non-appearance of Young and Thomas. *Id*. at II:315a-320. XXX argued that a new trial was required in the "interest of justice." *Id* at II:422-30. More specifically, the defense argued that the government's actions contributed to the non-appearance of the witnesses and, therefore, denied XXX'S his Sixth Amendment right to present a defense and to compulsory process. XXX'S trial attorney also argued that the Court erred in denying a continuance when the witnesses did not appear at trial and, alternatively, that, if she had not asked for a continuance, it was ineffective assistance on her part because these two witnesses were "the most crucial part of the defense trial strategy." *Id*. at II:426-27. In addition, during the hearing on the motion, XXX also pointed out to the District Court that the two non-appearing witnesses had given exculpatory

evidence to the government that it did not share with the defense resulting in a *Brady* violation. *Id*. at XI:241.[11]

Throughout and following the hearings on the new trial motion, Judge Walter made clear that he found that the testimony of the two non-appearing witnesses was material. *See* Rec. at XI:185-86, 190; II:445.

a. Freddie Young

Freddie Young had served as a confidential informant with various government agencies, including the DEA, from approximately 1992-2001. *Id*. at IX:50-57. Often he was paid for his services. *Id*. at IX:53, 55.

Young got involved in this case at the behest of the DEA. *Id*. at IX:57. He confirmed Agent Green's trial testimony that he had been given a tape recorder by Agent Green in order to assist XXX in taping a conversation with David Sosa. *See* Rec. at IX:74. He also confirmed that XXX agreed to assist the DEA in order to help Earl Buchanan. *Id*. at IX:76-78. Young had told Agent Green that XXX did not deal drugs. *Id*. at IX:83. Young testified that XXX did not know David Sosa directly and that he (Young) had told DEA Agent Lee Scott of this fact. *Id*. at IX:78. Young also told Agent Scott that it was John Bryant who was close to Sosa and XXX was simply trying to use that connection in order to assist Buchanan. *Id*. Bryant, in fact, had introduced Buchanan to Sosa. *Id*. at IX:105. Young stated that XXX obtained Sosa's phone numbers from Bryant. *Id*. at IX:97.

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[11] For example, James Thomas, at the behest of the DEA, had made a tape recording of an attempt to purchase drugs from XXX but XXX told him the he did not sell drugs. The tape was turned over to the DEA but, apparently, never produced to the defense. *See* Rec. at XI:179-80, 241.

While Freddie Young was acting as a go-between with the DEA and XXX, he was also communicating with Earl Buchanan who would call Young collect from jail. *Id*. at IX:98, 100-02. Buchanan told him that he had been obtaining his drugs from David Ashley and Sosa. *Id*.at IX:103-04. Conversely, Buchanan told him that XXX never purchased drugs from Sosa. *Id*. at IX:105. Moreover, Buchanan told him that XXX never supplied him with drugs. *Id*. at IX:106.

Nevertheless, Buchanan later told Freddie Young that the DEA was not interested in his (Buchanan's) cooperation unless it was against XXX. *Id*. at IX:98 Buchanan initially told DEA agents that XXX did not deal drugs but the DEA "didn't want to hear that." *Id*. According to what Buchanan told Young, the DEA told Buchanan that the only way his sentencing exposure could be reduced would be to give incriminating information regarding XXX. *Id*. at IX:99. Buchanan did tell Young that he was mad at XXX for not helping him hire a private attorney after his arrest. *Id*. at IX:909.

Mr. Young had been subpoenaed to testify as a defense witness at XXX'S trial. *Id*. at IX:47-48. He was told to report to the trial on Wednesday, September 25, 2002 by XXX'S trial lawyer because that was when the defense would begin its case. *Id*. at IX:49, 111. On that Tuesday, DEA Agent Scott called Young and asked him if he had outstanding arrest warrants. *Id*. at IX: 48. When Young said "no," Agent Scott asked if he was sure and *laughingly* told him that, if he did have outstanding warrants, he would be arrested at the door of the courthouse. *Id*. at IX:48, 59, 112-115. Young explained that, while Agent Scott did not explicitly state that he knew of an outstanding warrant, it was "more like he saying that he knowed I had a warrant and I was gonna be arrested." *Id*. at IX:114. Agent Scott also emphasized that it was not the prosecution that had subpoenaed Young to the trial and implied that, therefore, Young could ignore the defense subpoena. *Id*. at 59-60; XI:250-51. He was also told by Agent Scott that

he would be prosecuted for perjury if he testified at the trial. *Id*. at XI: 252, 256-58.[12]

The Wednesday morning when he was supposed to appear at trial, an official with the Caddo Parish Sheriff's Department, Otis Litton, came to Young's house looking for Young and left a card. *Id*. at IX:60-61, 69-70; Defendant's Exhibit D-2. When Young called Litton, he was told that there was a warrant out for his arrest. *Id*. at IX:62-64.[13] Litton also told Young that they had his picture at the front door of the federal courthouse and that he would be arrested if he showed up for XXX'S trial. *Id*. at IX:65, 70. Young did not comply with the subpoena from XXX'S trial counsel for fear of being arrested when he arrived to testify. *Id*. at IX:65, 71. One witness also testified that, during the trial, a member of the United States Marshal Service burst into the defense witness room looking for Young. *Id*. at XI:221-27.[14]

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12 Curiously, the government never called Agent Scott to testify at any of the three days of the new trial hearing to deny Young's allegations.

13 It was later learned that the warrant related to failure to pay child support and when Young turned himself into the court the warrant was recalled. *See* Rec. at IX:66-67.

14 It was confirmed through several witnesses that, on the Monday morning of trial, court security officers working the magnetometer at the entrance to the federal courthouse were given a picture of Freddie Young and a copy of a Caddo Parish warrant and told to arrest Young when he arrived at the federal courthouse and detain him for the United States Marshal Service. *Id*. at IX:3-8, 25, 32-35, 38-43. The warrants coordinator for the United States Marshal Service had been told that Young would possibly be in the courthouse during trial although, conveniently, he did not remember how he got this information. *Id*. at IX:45.

Interestingly, when it was pointed out to one of the court security officers that he had been in court on the Wednesday when the non-appearance of the two defense witnesses occurred

b. James Thomas

After being arrested on state drug charges, Thomas had been asked by DEA Agent Russell Sarpy to attempt to buy drugs from various members of the Scroggins family (including Earl Buchanan) in order to "work off" his charges. *Id*. at XI:170-73. Thomas did arrange to purchase cocaine from Buchanan that culminated in the November 15, 2002 sale set forth in Court 2 of the indictment and he was paid $1,000 for his work. *Id*. at XI:182-84. On the other hand, Thomas told the agent that XXX did not sell drugs, but he was told to make a call to XXX anyway in an attempt to purchase drugs. *Id*. at XI:175, 189. When Thomas called XXX, XXX told him, "You know I don't do that...." *Id*. at XI:175, 179. A recording of this phone call was made. *Id*. at XI:179-80.

Like Freddie Young, James Thomas had been subpoenaed as a defense witness for XXX and told to appear in court on the Wednesday of trial. *Id*. at XI:160-61. That Tuesday, there was a message left on Thomas' mobile phone voice mail from a phone number with a 676 prefix telling him that he would be arrested on a warrant for an assault and battery charge if he "step[ped] foot on federal property" for XXX'S trial because there was a picture of him at the door of the federal courthouse. *Id*. at XI:161-62, 188, 200. While he did not recognize the voice on the voice mail, he had given his mobile phone number to four different DEA agents while working as a DEA confidential informant. *Id*. at XI:162-63. He had previously received phone calls from the agents and they came from a 676 prefix. *Id*. at XI:166-67, 194. In fact, he had never received a call from anyone else other than a narcotics agent from a 676 prefix number. *Id*.

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and he was asked why he did not inform the court or the defense about the warrant waiting at the front door of the courthouse for Young, his only response was that it was "not his place" to do so. *Id*. at IX:26.

at XI:191. Young testified that, after receiving that message, he did not show up in court for fear of being arrested. *Id*. at XI:167.

c. Court's Ruling

In denying the new trial motion, the District Court again confirmed that it found the testimony of Freddie Young and James Thomas would have provided to be material. *See* Rect. at II:445. The District Court then focused solely on the issue of whether XXX'S proved that "the government [had] anything to do with Young [sic.] and/or Thomas' failure to appear at trial." *Id*. Finding that XXX had not proven the government's complicity in the non-appearances, it denied the motion. *Id*. at II:445-48.

Significantly, the Court focused solely on the government's culpability in Young's and Thomas' non-appearance and did not address the questions of whether a new trial was appropriate in the "interest of justice" or whether a new trial was appropriate as a result of ineffective assistance of counsel in failing to request a continuance to allow Young and Thomas to appear.

4. Sentencing

XXX'S life sentence was based only upon alleged statements made by Earl Buchanan.

For example, the drug amount used to establish XXX'S sentence was over 1.5 kilograms of crack cocaine (placing him in the highest drug category under U.S.S.G. § 2D1.1(c)(1)). *See* Rec. at XIII:17. The only support for this amount was the testimony of Agent Green at sentencing:

> Q. And what, if anything, did [Buchanan] tell you concerning drug trafficking activities involving the defendant?
>
> A. He gave us quite a bit of information. The main information that he gave us was that he had trafficked in at least 10 kilograms of cocaine over several years, and he quantified that -- he estimated that

> 7 kilograms of that was powder cocaine and approximately 3 kilograms of that would be crack cocaine or cocaine base.

Rec. at XIII:9. **Of course at trial, when Buchanan was placed under oath and subject to cross examination, the only estimates he gave regarding crack cocaine amounts was his testimony that XXX purchased "about" one kilogram of crack from David Sosa and that the conspiracy involved over fifty grams of crack.** *See* Rec. at V:211, 213.

Likewise, XXX'S offense level was enhanced by four levels under U.S.S.G. §3B1.1(a) for being a leader of a drug organization with five or more participants (*see* Rec. at XIII:17), however, the only support in the record that XXX was a leader of any drug organization was from the testimony of Buchanan. Finally, XXX'S offense level was enhanced by two levels under U.S.S.G. §3C1.1 based upon Earl Buchanan's claim, made for the first time on redirect examination at trial, that XXX'S offered him financial support not to testifyfalsely at the trial. *See* Rec. at XIII:17, V:278-79.[15]

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[15] By the time of sentencing, that changed to an allegation that XXX attempted to get Buchanan to "take the charges" for him. *See* Rec. at XIII:17; Presentence Report at ¶ 32.

SUMMARY OF THE ARGUMENT

I. The Testimony of Freddie Young and James Thomas was Material, but XXX was Denied the Benefit of Such Testimony For Several Reasons, Each of which Rise to the Level of Reversible Error.

Young and Thomas did not appear at trial, despite the fact that they were served with subpoenas in advance of trial, because they were told that warrants for their arrest were waiting at the door of the federal courthouse should they appear as defense witnesses. Likewise, Young was informed by a DEA task force member that he *would* be prosecuted for perjury if he testified for XXX. When Young and Thomas did not appear on the morning they were scheduled to testify, the District Court refused to issue bench warrants to compel their appearance and XXX'S trial attorney did not request a continuance in order to locate the witnesses. Following the trial, XXX'S moved for a new trial in the "interest of justice" which was denied by the District Court. The District Court found that the testimony of Young and Thomas would have been "material" but also found the government was not complicit in their non-appearance.

First, it is impossible to read the record of the new trial hearing and not conclude, by a preponderance of the evidence, that the government was not complicit in the non-appearance of Young and Thomas (especially in light of the unrebutted testimony that Young was told by a DEA task force agent that he *would* be prosecuted for perjury if he testified), therefore, the District Court's findings in this regard constituted clear error. Second, XXX was denied his Sixth Amendment right to compulsory process when the District Court refused to enforce the properly issued defense subpoenas served on Young and Thomas by issuing bench warrants. Third, XXX'S trial counsel admitted she was ineffective for failing to move for a continuance following the non-appearance of Young and Thomas. Finally, the District Court mistakenly believed that XXX'S new trial

motion rose and fell on the determination of whether or not the government was complicit in the non-appearance of Young and Thomas. In fact, the new trial motion required the District Court to determine if a new trial was required in the "interest of justice" regardless of the government's complicity in the non-appearances. Here, XXX was denied material testimony which the District Court found could have made a difference between an acquittal and life imprisonment through no fault of his own, but, instead, through the fault of witness intimidation (regardless of the perpetrator), the refusal of the District Court to enforce properly served witness subpoenas, and the admitted ineffectiveness of his trial counsel.

II. The Government's Closing Argument that A Conspiracy Conviction Could be Based Solely Upon a Buyer-Seller Relationship Was Plain Error.

It is well settled in every judicial circuit that proof of a buyer-seller agreement, without more, is not sufficient to tie a buyer to a conspiracy. The government's closing argument to the contrary in this case constituted error and, given that its proposition is so well established, the error was plain. Moreover, the prejudice suffered by XXX'S could not be clearer. The jury, by its verdict acquitting XXX of Count 2 and acquitting co-defendant Bryant completely, was obviously very suspect of the government's case. Nevertheless, the government's argument allowed the jury to ignore the testimony of the government's witnesses and still use, albeit improperly, XXX'S own concessions regarding his crack cocaine habit against him in order to convict him of Count 1.

III. The District Court Erred in Refusing to Review the Presentence Reports Related to Two Key Government Witnesses.

This Court held in *United States v. Carreon*, 11 F.3d 1225 (5th Cir. 1994) that, when a defendant requests access to presentence reports for government

witnesses, it is error for the District Court not to review the reports for *Brady* and *Giglio* material.

IV. The Hearsay Sentencing Information Allegedly Provided by Earl Buchanan- a Witness Whose Credibility was Rejected by the Jury and Whose Trial Testimony Was Inconsistent with the Sentencing Information- Did Not Bear a Sufficient Indicia of Reliability Upon which to Base a Life Imprisonment Sentence.

XXX'S life sentence was based entirely upon information provided by Earl Buchanan. Mr. Buchanan was a witness whose testimony was rejected in part, if not in whole, by a jury. Moreover, the hearsay sentencing information he allegedly provided regarding the drug amounts was inconsistent with his sworn, trial testimony. Also inconsistent was the sentencing information he allegedly provided regarding the obstruction of justice enhancement which differed from his trial testimony and was not contained in any debriefing notes. At the sentencing hearing, the government argued that debriefing notes took precedent over trial testimony for drug amounts, and that trial testimony (which changed at the sentencing) took precedent over debriefing notes for an obstruction of justice enhancement. It is simply inconceivable that a life sentence could be based solely upon the testimony of a witness like Earl Buchanan.

V. Although the Argument has Previously been Rejected by this Court, 21 U.S.C. § 841(b)(1)(A) is Unconstitutional.

Although XXX acknowledges his argument is foreclosed by this circuit's precedent, he submits that 21 U.S.C. § 841(b)(1)(A) is unconstitutional in light of the decision by the United States Supreme Court in *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

VI. Although the Argument has Previously been Rejected by this Court, it Violates the Due Process Clause to the United States Constitution to Hold a

Defendant Responsible for Thirty Times more Drugs for Sentencing Purposes than the Amount Alleged Against him in an Indictment.

Although XXX again acknowledges his argument is foreclosed by this circuit's precedent, he submits that it violates the Due Process Clause to the United States Constitution to hold him responsible for sentencing purposes for one and one-half kilograms of cocaine base when he was only charged in the indictment with possessing and possessing with the intent to distribute over fifty grams- a thirty fold increase.

ARGUMENT

To put many of the below arguments in perspective, it bears noting how extremely close this case was. The primary witnesses against XXX were Earl Buchanan, Gregory Byrd, and Vincent Crawford.[16] Nevertheless, despite the fact that Buchanan alleged that XXX provided him cocaine to deliver on November 15, 2000 (*see* Rec. at V:214), the jury acquitted XXX of Count 2. Similarly, Buchanan testified that XXX conspired with co-defendant John Bryant (*id.* at V:218-19), yet the jury acquitted Bryant of conspiracy. Likewise, Byrd also testified that XXX conspired with Bryant (*id.* at V:293-96), but, apparently, the jury rejected Byrd's testimony when it acquitted Bryant. Finally, Byrd's testimony was inconsistent with Crawford's testimony (*see supra.* note 9) and both told other persons that Ray West was their drug supplier. *Id.* at VI:457-58; VI:461.

It is, in fact, interesting to note that the parties and the Court appeared to believe this case would end in a mistrial with the jury unable to reach a verdict. *Id*. at VII:583-84.

I. The Testimony of Freddie Young and James Thomas was Material, but XXX was Denied the Benefit of Such Testimony For Several Reasons Each of which Rise to the Level of Reversible Error.

As noted above, in connection with XXX'S new trial motion, the District Court repeatedly made clear that it found the testimony of Freddie Young and

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[16] It is true that Agent Green testified to alleged admissions made by XXX, but, as set forth above and below, that testimony was called into question by James Thomas' testimony at the new trial hearing.

James Thomas- testimony the jury never got to hear- to be material. *See* Rec. at XI:185-86, 190; II:445. Indeed, with regard to Thomas, Judge Walter commented that "[y]ou have indicated to me sufficiently that he could have been a very important witness" and that his testimony "could have made a difference" at trial. *Id*. at XI:185, 190.

Young had assisted XXX'S attempts to cooperate with the DEA and would have contradicted Agent Green's testimony. Moreover, Buchanan told Young of his true drug sources and also told Young that XXX never supplied him with drugs. Thomas, while working as a DEA informant, attempted to buy drugs from XXX but XXX repeatedly asserted that he did not deal drugs. Moreover, Thomas provided DEA with a recording of the phone call in which XXX denied being a drug dealer after he (Thomas) had attempted to purchase drugs from him.

The only question is who is to blame for XXX being denied the benefit of these very important witnesses at trial whose testimony, individually and/or collectively, could have transformed XXX'S life sentence into an acquittal. Was it the government when it scared Young and Thomas from appearing at trial? Was it Judge Walter when he refused to issue bench warrants when Thomas and Young failed to appear at trial pursuant to defense subpoenas? Or, was it the defense attorney who failed to move for a continuance when Young and Thomas did not appear?

A. A new trial should have been granted in the "interest of justice" to allow the jury to hear from material witnesses who, for whatever reason, did not testify at trial.[17]

As noted above, following his conviction on Count 1, XXX moved for a new trial based upon the non-appearance of Young and Thomas. *Id*. at II:315a-

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[17] The denial of a motion for new trial is reviewed for abuse of discretion. *See, e.g., United States v. Brechtel*, 997 F.3d 1108, 1120 (5th Cir.), *cert. denied*, 510 U.S. 1013 (1993).

320. XXX argued that a new trial was required in the "interest of justice." *Id* at II:422-30. Ultimately, the District Court denied XXX a new trial because it found that he had not established that the government was responsible for the non-appearances. *See* Rec. at II:445-48. As set forth below, XXX submits that such a finding was clearly erroneous. However, even accepting this finding, the District Court never resolved the question of whether a new trial was, nevertheless, required in the "interest of justice."

1. Government interfered with defense witnesses.

Young testified that, soon after he was identified as a defense witness, Agent Scott called him and *laughingly* told him that, if he had outstanding warrants, he would be arrested at the door of the courthouse. *Id*. at IX:48, 59, 112-115. Young explained that, it was "more like [Agent] Scott saying that he knowed I had a warrant and I was gonna be arrested." *Id*. at IX:114. And, of course, there was a warrant issued against Young. A warrant which, coincidentally, sent a Sheriff to his home the day he was suppose to testify and sent United States Marshals bursting into the defense witness room at the courthouse to find this child support scofflaw. *Id*. at IX:60-61, 69-70; XI:221-27. One might wonder how the Sheriff divined that Young was going to be testifying in federal court on September 25, 2002. *Id*. at IX:65, 70.

Moreover, Young was told by Agent Scott that he *would* be prosecuted for perjury if he testified at the trial. *Id*. at XI: 252, 256-58. In other words, Young was not told that, if he testified falsely, he *could* be prosecuted for perjury, but, that, if he testified as a defense witness, he *would* be prosecuted for perjury. Agent Scott also emphasized to Young that it was not the prosecution that had subpoenaed Young to the trial and implied that, therefore, Young could ignore the defense subpoena. *Id*. at 59-60; XI:250-51.

The government never produced Agent Scott at the new trial hearing to rebut this testimony.

Coincidentally, Thomas told a similar tale. The same day that Agent Scott talked to Young, there was a message left on Thomas' mobile phone voice mail from a phone number with a 676 prefix telling him that he would be arrested on a warrant for an assault and battery charge if he "step[ped] foot on federal property" for XXX'S trial because there was a picture of him waiting at the door of the federal courthouse. *Id*. at XI:161-62, 188, 200. He had previously received phone calls from the DEA agents and they came from a 676 prefix. *Id*. at XI:166-67, 194. In fact, he had never received a call from anyone else other than a narcotics agent from a 676 prefix number. *Id*. at XI:191. Could it really be, as the District Court suggested during the new trial hearing, that somebody from the social security office, the VA or Senator Landrieu's office made the call from the 676 government prefix informing Thomas of the warrant so he would not attend the trial? *Id*. at XI:191.[18]

It is well settled that government coercion of a defense witness that results in the witness not testifying violates a defendant's Sixth Amendment right to compulsory process. *See, e.g., United States v. Vavages*, 151 F.3d 1185 (9th Cir. 1998); *United States v. Ouimette*, 798 F.2d 47 (2d. Cir. 1986), *cert. denied*, 488 U.S. 863 (1988); *United States v. Hammond,* 598 F.2d 1008, 1012-13 (5th Cir. 1979). A defendant is required to demonstrate such interference only by a preponderance of the evidence. *Vavages*, 151 F.3d at 1188.

Moreover, while perjury warnings by prosecutors are not *per se* improper (*id.* at 1189), it would appear that a warning that a person *could* be prosecuted *if*

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[18] Both Young and Thomas made clear that the intimidation caused them to disobey their respective subpoenas. *See* Rec. at IX 65, 71; XI:167

they testified falsely is a far cry from a promise they *will* be prosecuted if they testify at all. *Cf. id.* at 1190. ("Among the factors courts consider in determining the coercive impact of perjury warnings are the manner in which the prosecutor or judge raises the issue, the language of the warnings, and the prosecutor's or judge's basis in the record for believing the witness might lie.").[19] Indeed, the Ninth Circuit recently visited this distinction in *Vavages*:

> We are first concerned by the prosecutor's articulation of his belief that Manuel's alibi testimony would be false. *The prosecutor combined a standard admonition against perjury - that Manuel could be prosecuted for perjury in the event she lied on†the stand - with an unambiguous statement of his belief that Manuel would be lying if she testified in support of Vavages' alibi.* The prosecutor contends that there was nothing wrong with the latter statement, and the statement indeed can be viewed simply as an articulation of the obvious. After all, it should be evident to a defense witness and her counsel that the government does not believe testimony that contradicts its case-in-chief, and the threat of a perjury prosecution does not seem especially greater simply because the prosecutor articulates this belief. We cannot disregard this prosecutor's conduct, however, where the additional statement served as no more than a thinly veiled attempt to coerce a witness off the stand. It does not require much of an interpretative gloss on the prosecutor's warning to conclude that unless Manuel changed her testimony or refused to testify at all, she *would* be prosecuted for perjury and suffer any attendant

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[19] *See also, United States v. Gloria*, 494 F.2d 477, 484-85 (5th Cir. Tex.), *cert. denied* 419 U.S. 995 (1974) ("The warning to Frey by the District Court and the prosecutor that he was subject to a perjury charge should his testimony materially differ from his prior plea were not improper or misleading. Gloria's reliance on *Webb v. Texas*, 409 U.S. 95, 93 S. Ct. 351, 34 L. Ed. 2d 330 (1972), is misplaced. In *Webb,* prejudice was found in threatening the witness with certain prosecution if he testified. That prejudice is not present in this case because Frey was merely advised of the *possibility* of prosecution *if* his testimony materially differed from his prior plea, not that he would be prosecuted if he testified." (emphasis added))

> consequences. As the district court found, "[the prosecutor's] warnings were intimidating and were intended to stifle testimony which he believed would be perjurious in the defense of Mr. Vavages."
>
> We do not mean to suggest that†a prosecutor should *never* articulate his belief that a witness is lying. Rather, we disapprove of such conduct where the prosecutor lacks any substantial basis in the record for believing the witness is lying. That Manuel's testimony would have contradicted the testimony of the government's own witnesses does not form a sufficient basis for the prosecutor's warning. Rather, unusually strong admonitions against perjury are typically justified only where the prosecutor has a more substantial basis in the record for believing the witness might lie - for instance, a direct conflict between the witness' proposed testimony and her own prior testimony. Because Manuel's alibi testimony would have been entirely consistent with her own prior statements and would not have conflicted with any past testimony, the prosecutor lacked this substantial basis for believing Manuel would perjure herself.

Id. (first emphasis added, second in original) (citations omitted).

In sum, the District Court's findings completely ignore Young's testimony that he was told he *would* be prosecuted for perjury if he appeared as a defense witness. Second, its finding that XXX did not prove the government's complicity with regard to the warrant threats was clearly erroneous. It is simply impossible to review the testimony of Young and Thomas and not conclude, by a preponderance of the evidence, that the government's fingerprints were all over the warrants waiting at the door of the *federal* courthouse.[20]

2. "Interest of Justice"

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[20] The District Court intimated that the government might not be bound by the actions of Agent Scott, a member of the DEA task force (*see* Rec. at II:446) -- clearly, it would be. *See generally, United States v. Ramirez,* 174 F.3d 584, 588 (5th Cir. 1999).

Even more troubling, however, is the District Court's belief that XXX'S new trial motion rose and fell on the determination of whether or not the government was complicit in the non-appearance of Young and Thomas. The District Court was only required, under Fed. R. 33 (b)(2) to determine if a new trial was warranted in the "interest of justice" because the new trial motion was filed within seven days (extended) from the verdict. *See United States v. Smith,* 331 U.S. 469 (1947) (Judge granting new trial in criminal case under authority of Rule 33 need assign no reason other than that it is required in interest of justice.); *United States v. Pinkney*, 543 F.2d 908, 916, n. 56 (D.C. Cir. 1976).

Here, the "interest of justice" certainly warranted a new trial. First, the District Court acknowledged the obvious, that the testimony of Young and Thomas was "material" and could have produced an acquittal. Second, Young and Thomas were intimidated from offering this material testimony. While, as set forth above, it would appear obvious to any impartial observer that the federal government was complicit in this intimidation, what matters for the "interest of justice" question is the fact that XXX certainly was not, himself, to blame for their non-appearance. Indeed, even intimidation by state officials of a material witness (it is clear that Sheriff Litton was prepared to arrest Young on the child support warrant the day he was set to testify rather than allow him to come to court, testify and then arrest him), should support a new trial under an "interest of justice" standard. Third, as set forth below, the District Court refused to assist the defense in compelling the appearances of Young and Thomas.

In short, "justice" requires the jury having the full story. Here, for whatever reason (but, in any event, a reason outside of XXX'S control), the jury was denied the full story and, as a result, reached a verdict that could have been different had they had the full story. Certainly then a new trial was warranted in the "interest of justice."

B. XXX was denied compulsory process when the District Court refused to compel the attendance of Young and Thomas, both of whom had been properly subpoenaed and whose testimony was material.

XXX'S defense attorney properly subpoenaed Freddie Young and James Thomas to trial. They were told to appear on Wednesday, September 25, 2002 when it was determined that the defense would begin its case. *See* Rec. at VI:380-84. When neither Thomas nor Young appeared on the 25th, the District Court accused the defense attorney of engaging in "last-minute actions" and refused to issue bench warrants. *Id*. at VI:381-82.[21] It is true that, during this exchange, XXX'S defense attorney did not mention Young by name, but she did mention Thomas by name and briefly explained the importance of his testimony:

> His name is James Thomas known on the street as Li'l James. He was referred to in testimony of Special Agent Clifton (sic) Simmons, the undercover agent who conducted the buy on November 15, 2000. James Thomas was the confidential informant of the government who acted as the go-between between Earl Buchanan, and his testimony is completely and totally exculpatory as to what Agent Simmons testified to, and I think his is crucial to my case. I think he is afraid-- [District Court cuts off defense counsel]

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[21] The District Court does not identify what "last-minute actions" it believed took place and it is difficult to identify any. Indeed, defense counsel properly subpoenaed the witnesses in advance of trial, spoke to them on the day the trial was to start in order to ensure their willingness to attend, and told them to report to the trial on the day the defense was to begin the presentation of its case. *See* Rec. at VI:380-83.

Likewise, the District Court also stated that it would take anywhere for a day to a week to execute a bench warrant (*id.* at VI:382), although it offers no support for this proposition. Indeed, the District Court could have directed the United States Marshall Service to locate the witnesses and bring them before the Court *instanter*.

Id. at VI:382.

"Although a decision to issue a bench warrant to compel the appearance of a witness lies within the trial judge's discretion, that discretion is constrained by the defendant's Sixth Amendment right to compulsory process....Once the defendant has alleged facts that, if true, demonstrate the necessity of the witness' testimony, the court is obligated to lend its authority in compelling the sought-after witness' appearance." *United States v. Simpson*, 992 F.2d 1224, 1230 (D.C. Cir.) (citations omitted), *cert. denied*, 510 U.S. 906 (1993). Indeed, the Sixth Amendment's right to compulsory process is a hollow right unless a trial court is required to enforce properly executed trial subpoenas.

Simpson is almost directly on point. "On the second, and final, day of trial, Simpson requested that the trial court issue bench warrants for three witnesses who had been subpoenaed but were not present in court to testify. In requesting the bench warrants, Simpson argued that one of the witnesses in particular, Melvin Dixon ("Dixon"), who was an eyewitness to his encounter with the police, would provide essential exculpatory testimony." *Id*. at 1229. The District Court denied the request stating that it "just [had] trouble seeing how [it could] put the case in a deep freeze" while it waited for a bench warrant to be executed. *Id*. The Court of Appeals found that Simpson had been denied his Sixth Amendment right to compulsory process. *Id*. at 1230. Significantly, it also noted:

> [T]he record does not support a finding that the District Court denied Simpson's request because it was untimely. For one thing, Dixon had been subpoenaed to testify, so the request for his appearance was not an afterthought. In addition, the day when Dixon and the other witnesses failed to appear was the first day on which they were scheduled to testify. Until that time, there was no cause for Simpson to request judicial intervention.

Id. (citations omitted).

Similarly, in the instant case, Thomas and Young were both properly subpoenaed in advance of trial. Likewise, as soon as judicial intervention was warranted following their non-appearance on "the first day on which they were scheduled to testify," XXX immediately explained the importance of Thomas' testimony to the District Court and requested bench warrants. Indeed, it was explained to the Court that Thomas had conducted cocaine transactions with Buchanan (similar to the witness in *Simpson*, Thomas was an eyewitness) and that his testimony was crucial to the defense. All of this, however, fell on deaf ears. It is obvious that, no matter how crucial the testimony of Thomas or Young, the District Court would not have assisted XXX in enforcing the previously served subpoenas.

In sum, at least one reason that XXX was denied evidence that the District Court has now conceded "could have made a difference" was because the District Court itself denied XXX the compulsory process provided under the Sixth Amendment to the United States Constitution. This denial requires that XXX be granted a new trial.

C. Trial counsel was ineffective when she failed to request a continuance following the non-appearance of Young and Thomas.[22]

Although the general rule in this circuit is that a claim of ineffective assistance of counsel cannot be resolved on direct appeal when the claim has not been raised before the district court, there are, in fact, rare cases where the record allows the Court to evaluate the merits of such a claim. *United States v. Higdon*, 832 F.2d 312, 313-14 (5th Cir. Tex. 1987), *cert. denied*, 484 U.S. 1075 (1988).

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[22] Ineffective assistance of counsel claims are mixed questions of law and fact which are reviewed *de novo*. *See, e.g., Johnson v. Scott*, 68 F.3d 106, 109 (5th Cir.), *cert. denied sub. nom.*, *Johnson v. Johnson,* 517 U.S. 1122 (1996).

This is such a rare case.[23] Indeed, the defense counsel in this case apparently believed that she did request a continuance following the non-appearance of Young and Thomas. *See* Rec. at XI:9-19; II:426-27. Nevertheless, no continuance request is found in the record.[24] More importantly, defense counsel conceded ineffectiveness before the District Court in connection with XXX'S new trial motion:

> If the court believes that counsel for the defendant Scroggins did not request a continuance, then counsel was ineffective, given the importance of these two witnesses, and defendant should, once again, be granted a new trial. These two witnesses were the most crucial part of the defense trial strategy. Not to have requested a continuance would have been ineffective on the part of defense counsel, and defendant therefore, did not receive a fair trial.

Id. at II:427. In short, XXX'S trial counsel conceded that Young and Thomas *were* the defense strategy and it was poor defense strategy not to request a continuance to locate these witnesses.

A failure to request a continuance to present material defense witnesses can support an ineffective assistance claim. *See, e.g., Walker v. Lockhart,* 807 F.2d 136 (8th Cir. 1986); *Code v. Montgomery*, 799 F.2d 1481, 1485 (11th Cir. 1986). Here, XXX'S defense counsel admitted, and the District Court found, that the testimony of Young and Thomas was material and "could have made a difference." In short, it was deficient performance for XXX'S defense counsel not to request a continuance following the non-appearance of these two material

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[23] With that said, it should be noted that an ineffective assistance claim was presented in XXX'S new trial motion (*see* Rec. at II:427), but the claim was ignored by the District Court when denying that motion. Thus, the claim *was* in fact raised before the District Court.

[24] Undersigned counsel listened to the backup tape of the portion of the trial where trial counsel believes a continuance was requested and did not find such a request.

witnesses and, given the fact that the testimony of these two witnesses "could have made a difference," XXX'S was undeniably prejudiced by his counsel's error.

II. The Government's Closing Argument that A Conspiracy Conviction Could be Based Solely Upon a Buyer-Seller Relationship Alone Was Plain Error.

The defense, throughout the trial, candidly conceded that XXX had a severe addiction to crack cocaine. In fact, the defense embraced XXX'S addiction and attempted to show that it was "illogical for a crack addict to be dealing drugs in large quantities, or any quantity at all, because they smoke up everything they have, because you're addicted." *See* Rec. at VI:480. *See also id.* at VI:398-99.

Nevertheless, the government, in its closing, turned XXX'S concession on its head and provided the jury a way in which it could use XXX'S concession to convict him of the conspiracy charged in Count 1:

> And if Mr. XXX is a drug addict, where, ladies and gentlemen, where was he getting the drugs? For him to get cocaine *necessarily* means that he's involved in cocaine trafficking. There's two people in that conspiracy right there: the person he got the drugs from and himself.

Rec. at VI:564 (emphasis added). In short, the jury was told that it was free, if not duty bound, to convict XXX of Count 1 simply because he purchased crack cocaine from another to support his personal habit. In other word, he was "necessarily" part of a cocaine conspiracy.

The prosecutor knew or should have known that it is black letter law that "proof of a buyer-seller agreement, without more, is not sufficient to tie a buyer to a conspiracy." *United States v. McKinney,* 53 F.3d 664, 672 (emphasis added), *cert. denied*, 516 U.S. 901 (1995). *See also, United States v. Thomas*, 12 F.3d 1350, 1365 (5th Cir.), *cert. denied*, 114 S. Ct. 2119 (1994). Unfortunately, however, XXX'S trial attorney did not object to the government's argument and,

therefore, on appeal, the Court will review for plain error. *See, e.g., United States v. Flores-Chapa*, 48 F.3d 156 (5th Cir. 1999). The plain error test is a three pronged test. "First, there must be error, next, that error must be plain, and finally, the error must affect substantial rights." *Id*. at 159.

Obviously the government's argument is contrary to the law and is undoubtedly error. Moreover, the law that a buyer-seller relationship does not "necessarily" establish a conspiracy is well established in every judicial circuit, and, therefore, an unadorned argument to the contrary certainly rises to the level of plain error in which the trial judge was derelict in countenancing it and the prosecutor was derelict in making it, even without the defense attorney's objection. *Id*. at 161 (citations omitted).

The only question that remains is whether the error affected XXX'S substantial rights. In order to affect "substantial rights," an error must generally be prejudicial. *Id*. Here, there is a strong indication of prejudice. As noted above, the jury, by its verdict acquitting XXX of Count 2 and acquitting co-defendant Bryant completely, was obviously very suspect of the government's case. Nevertheless, the government offered the jury a method, albeit a highly improper method, in which it could ignore the testimony of the government's witnesses and still be required to convict XXX of Count 1, a conviction which eventually resulted in his life imprisonment sentence. In sum, the prejudice suffered by XXX'S could not be clearer.

III. The Trial Court Erred when it Refused to Review the Presentence Reports of Earl Buchanan and Gregory Byrd Prior to Trial.

Prior to trial, XXX requested the government produce the presentence reports related to Earl Buchanan and Gregory Byrd prepared in connection with their federal court prosecutions. *See* Rec. I:70-71. As noted above, both

Buchanan and Byrd were key government witnesses against XXX. The District Court denied the motion without reviewing the reports *in camera. Id*. at I:191.

This Court confronted the exact same situation in *United States v. Carreon*, 11 F.3d 1225, 1238 (5th Cir.) ("Most of the government witnesses testifying against Melendez were coconspirators in the Melendez organization who had themselves been subjected to various criminal charges. Melendez requested access to the PSRs of these witnesses in order to acquire any exculpatory or impeachment information under Brady and Giglio."). Relying upon *United States v. Jackson* 978 F.2d 903, 908-09 (5th Cir. 1992), *cert. denied*, 508 U.S. 945 (1993), the Court held that, upon a defendant's motion for access to the presentence reports, it was error for the District Court not to review the reports *in camera. Id*.

The remedy for this violation is set forth in *Carreon*. This Court must remand the case to the District Court to: 1) conduct an i*n camera* inspection and make appropriate findings as to whether the PSRs of the government witnesses contained any material *Brady* or *Giglio* information, and 2) compare those findings against the evidence at trial to determine whether the failure to provide this information was harmless error. *Carreon*, 11 F.3d at 1238.

IV. The Hearsay Sentencing Information Allegedly Provided by Earl Buchanan- a Witness Whose Credibility was Rejected by the Jury and Whose Trial Testimony Was Inconsistent with the Sentencing Information-Did Not Bear a Sufficient Indicia of Reliability Upon which to Base a Life Imprisonment Sentence.[25]

XXX life sentence was based solely upon information provided by Earl Buchanan. Buchanan allegedly told Agent Green that XXX trafficked in three kilograms of crack cocaine and Agent Green testified to this at sentencing. *See*

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[25] How sentencing guidelines are interpreted are questions of law reviewed *de novo* and factual findings under the sentencing guidelines are reviewed for clear error. *See, e.g., Carreon*, 11 F.3d at 1230.

Rec. at XIII:8-9. This resulted in a base offense level of 38. *See* Presentence Report (the "PSR") at ¶ 38.[26] Buchanan's testimony also resulted in a four level leadership enhancement. *See Id.* at ¶ 31; Addendum to the Presentence Report (the "Addendum") at pg. 6. Another two level enhancement was added for obstruction of justice based upon Buchanan's alleged claim that XXX tried to get him "to 'take the charges' so [he] could get away with being prosecuted for any criminal behavior..." *See* PSR at ¶ 32.

For information to be considered for sentencing purposes, it must have a "sufficient indicia of reliability to support its probably accuracy." U.S.S.G. § 6A1.3. In the instant case, it is clear that the jury, by acquitting XXX of Count 2 and completely acquitting Bryant, had serious questions regarding Buchanan's reliability. Moreover, the jury, unlike the sentencing judge, was denied the testimony of Freddie Young and James Thomas which further undermined, if not totally destroyed, Buchanan's credibility.

Even more significant are the inconsistencies. For example, the conclusion that XXX trafficked in three kilograms of crack cocaine was based solely upon Agent Green's testimony at sentencing as to information allegedly provided to him by Buchanan in a debriefing. *See* Rec. at XIII:9. Nevertheless at trial**,** when Buchanan was placed under oath and subject to cross examination, the only estimates he gave regarding crack cocaine amounts was that XXX purchased "about" one kilogram of crack from David Sosa and that the conspiracy involved over fifty grams of crack. *Id.* at V:211, 213. Likewise, the obstruction of justice enhancement based upon XXX allegedly attempting to get Buchanan to "take the

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[26] The PSR did contain drug amounts apparently unrelated to Buchanan; however, the District Court did not consider these amounts in setting the base offense level and, instead, relied only upon Buchanan's information. *See* Rec. at XIII:6-8.

charges" for him was markedly different than Buchanan's claim, made for the first time or during *redirect* examination at trial, that XXX offered him financial support *not to testify* at the trial. *Id*. at V:278-79. Not surprisingly, this alleged attempt to get Buchanan not to testify was never recorded in any of the case agent's debriefing notes. *Id*. at 279. **Apparently the government tried to have it both ways, using debriefing notes over trial testimony for drug amounts but trial testimony (that changed at the sentencing) over debriefing notes for an obstruction of justice enhancement.**

In sum, XXX'S <u>life sentence</u> was based *entirely* upon: 1) a witness whose testimony was rejected in part, if not in whole, by a jury; 2) hearsay sentencing information regarding drug amounts allegedly provided by the witness that was inconsistent with his sworn, trial testimony and; 3) sentencing information regarding obstruction of justice which differed from the trial testimony when the trial testimony itself was an afterthought allegation not contained in any debriefing notes. This should trouble *any* court.

Several cases are instructive. In *United States v. McEntire*, 153 F.3d 424 (7th Cir. 1998), the District Court was faced with a cooperating witness who gave several different estimates regarding the drug amounts for which the defendant should be held responsible:

> The district court relied on Skaggs' testimony and adopted the lower number of the 80-to-100- pounds estimate. However, this was one of four different estimates given by Skaggs. In his proffer, Skaggs stated McEntire received 50 pounds of methamphetamine. He then testified at trial that McEntire received 80 to 100 pounds of methamphetamine. Next came the affidavit disavowing any ability to estimate the amount of methamphetamine McEntire received. Then at the sentencing hearing, Skaggs stated McEntire received much more than 80 to 100 pounds. The district court did not explain why the 80-to-100-pound testimony was credited over the other varying statements.

Id. at 437. The Seventh Circuit held that it was "unconvinced" that "the district court conducted a sufficiently searching inquiry into the contradictory evidence," and remanded for resentencing. *Id*.

In an earlier case, the Seventh Circuit was confronted with a similar situation in which the District Court relied on two contradictory affidavits from a government witness to support a relevant conduct finding as to drug quantity- a witness who testified at trial that he was unable to estimate the quantity of cocaine he had purchased from the defendant. *United States v. Beler*, 20 F.3d 1428, 1430-31 (7th Cir. 1994). The Court held that the District Court, which accepted the drug quantity amount in the witness' second affidavit, should have further explored the factual basis for its drug quantity estimate before accepting the amount as uncontroverted. *Id*. at 1434. *See also*, *United States v. Duarte*, 950 F.2d 1255, 1266 (7th Cir. 1991) (When a sentencing court "relies upon one of two contradictory statements offered by a single witness, it should directly address the contradiction and explain why it credits one statement rather than the other.").

Particularly relevant is the Third Circuit's analysis in *United States v. Brothers*, 75 F.3d 845 (3rd Cir. 1996). In *Brothers*, the District Court had based a defendant's base offense level on a witness' alleged hearsay statements made to an FBI agent rather than a contradictory statement made under oath at a hearing. *Id*. at 849-50. The Third Circuit began by noting: "[W]e should exercise particular scrutiny of factual findings relating to amounts of drugs involved in illegal operations, since 'the quantity of drugs attributed to the defendant usually will be the single most important determinant of his or her sentence.' This mandate is only reinforced when the court seeks to attribute the quantity of drugs to an accomplice." *Id*. at 849 (emphasis added). After this analysis, it remanded for resentencing, finding that "there was simply no occasion" for the District Court to

credit a hearsay statement over another statement made by the same witness under oath when subject to cross-examination. *Id*. at 853.

Here, XXX submits that, as the jury apparently found, Buchanan's statements as a whole lacked a sufficient indicia of reliability.[27] In any event, the District Court certainly erred when it credited the hearsay statements regarding drug amounts reported by Agent Green at the sentencing over Buchanan's trial testimony made under oath when subject to cross-examination.

V. 21 U.S.C. § 841(b)(1)(A) is Unconstitutional

For the reasons set forth in *United States v. Buckland*, 259 F.3d 1157, 1163 (9th Cir. 2001), *rev'd*, 277 F.3d 1173 (*en banc*), *cert. denied*, 535 U.S. 1105 (2002). XXX submits that 21 U.S.C. § 841(b)(1)(A) is unconstitutional in light of the decision by the United States Supreme Court in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). As a result, XXX submits that he should be sentenced in accordance with the provisos of 21 U.S.C. § 841(b)(1)(C).

Nevertheless, XXX recognizes that *Buckland*†has been overruled *en banc* by the Ninth Circuit and is foreclosed in this circuit by *United States v. Slaughter*, 238 F.3d 580 (5th Cir.), *cert denied*, 532 S.Ct. 1045 (2001) and *United States v. Fort*, 248 F.3d 475, 483 (5th Cir.), *cert denied*, 122 S.Ct. 405 (2001). Therefore, XXX raises the issue in order to preserve it in the event he is denied other relief and in the event the United States Supreme Court is asked to review this issue.

VI. The Sentence in this Case Offends the Due Process Clause to the United States Constitution in that XXX was Held Responsible for Drug Amounts Representing a Thirty Fold Increase in the Amount of Cocaine Base Charged in the Indictment.

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[27] XXX acknowledges that a different standard of proof applies at the sentencing portion of the trial. Nevertheless, it should also be noted that the jury made its decision without the benefit of Young's and Thomas's testimony.

As noted above, XXX was charged in the superseding indictment with possessing with the intent to distribute more than five kilograms or more of cocaine and more than fifty grams of cocaine base. The sentencing range for an individual who distributes between five and fifteen kilograms or cocaine or between fifty and 150 grams of cocaine base and who is in criminal history category I (with a four level leadership enhancement pursuant to U.S.S.G. § 3B1.1(a) and a two level obstruction of justice enhancement pursuant to U.S.S.G. § 3C1.1) is 262-327 months imprisonment. Nevertheless, XXX was held responsible for one and one-half kilograms of cocaine base for sentencing purposes and, consequently, his guideline sentencing range was raised to life imprisonment.

The United States Court of Appeals for the Eighth Circuit recognized that a defendant can be denied due process when relevant conduct is so disproportionate that it becomes the 'tail that wags the dog.' *United States v. Wise*, 976 F.2d 393, 401 (8th Cir. 1992) (*en banc*), *cert. denied*, 507 U.S. 989 (1993), *citing*, *McMillan v. Pennsylvania*, 477 U.S. 79, 87-88 (1986). XXX is being held responsible for possessing and distributing thirty times more cocaine base without being afforded a jury determination regarding his guilt or innocence related to these extra drugs. *Cf. Apprendi, supra.*. The resulting increase in his imprisonment range under the United States Sentencing Guidelines violates the Due Process Clause to the United States Constitution.

Again, however, XXX'S argument appears to be foreclosed by the precedent of this Court. *See, e.g., United States v. Keith*, 230 F.3d 784, 786-87 (5th Cir, 2000), *cert denied*, 531 U.S. 1182 (2001); *United States v. Salazr-Flores*, 238 F.3d 672, 673 (5th Cir. 2001) It is, therefore, raised to preserve review by the United States Supreme Court in the event other relief is denied.

CONCLUSION

Based upon the foregoing, this Court should remand this case for a new trial. In the alternative, this Court should remand the case for resentencing.

Respectfully submitted,

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

Attorney for Appellant

XXX

CERTIFICATE OF SERVICE

I, F. Clinton Broden, certify that on, December 4, 2003, I caused two paper copies and one electronic copy of the foregoing Brief of Defendant-Appellant to be mailed by United States mail, postage prepaid, to Josette L. Cassiere, United States Attorney's Office, 300 Fannin Street, Shreveport, Louisiana 71101-3083.

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F. Clinton Broden

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,043 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word Perfect 3.5 for Macintosh in 14 pt. Times New Roman (12 point font for footnotes).

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F. Clinton Broden