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The Honorable G. Wix Unthank
United States District Court Judge
Eastern District of Kentucky
Main & Huffman Streets
Federal Courthouse
Pikeville, Kentucky 41501-01139

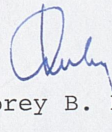
Dear Judge Unthank:

I think of you and your staff often and hope this letter finds all of you doing well. Even though I was in east Kentucky during the harsh winter months, nonetheless, I have many pleasant and fond memories of the time I spent there. I previously advised you and advise again that I am especially grateful for your kindness and your gentlemanliness.

I understand from E. J. Walbourn that you were interested in having a copy of the brief we filed on behalf of Edgar Jones. Accordingly, I am enclosing a copy.

With best wishes, I am,

Very truly yours,



Aubrey B. Harwell, Jr.

ABHJr/jl

Enclosure

cc: Albert F. Moore, Esquire

For the reason stated above, Edgar Jones submits that the uncontradicted evidence introduced at trial in the form of affidavits and other pleadings establishes that the government attorneys were guilty of demonstrated and long-standing prosecutorial misconduct which requires dismissal of the underlying indictment in this case. In addition, the action of the district court in refusing to grant an evidentiary hearing on the motion to dismiss and in summarily overruling the motion without having received any response from the United States was error which requires the reversal of defendant's conviction and a remand of this case to the district court with orders to conduct an evidentiary hearing into the allegations of prosecutorial misconduct.

- IV. THE LOWER COURT'S ERRONEOUS, PREJUDICIAL INSTRUCTION ON THE LABOR ACTIVITIES' EXEMPTION TO A HOBBS ACT PROSECUTION DEPRIVED THE APPELLANT OF HIS PRIMARY DEFENSE AND, IN EFFECT, DIRECTED A VERDICT AGAINST HIM BY IMPROPERLY LIMITING AND INCORRECTLY DEFINING THE SCOPE OF LEGITIMATE LABOR OBJECTIVES, REQUIRING REVERSAL OF HIS CONVICTION.
- V. THE COURT-ORDERED SEATING ARRANGEMENT AT TRIAL WHICH REQUIRED EDGAR JONES TO BE SEATED FAR AWAY FROM HIS COUNSEL RENDERED ANY MEANINGFUL COMMUNICATION BETWEEN ATTORNEY AND CLIENT IMPOSSIBLE DURING TRIAL PROCEEDINGS AND DENIED EDGAR JONES THE EFFECTIVE ASSISTANCE OF COUNSEL, DUE PROCESS OF LAW AND THE RIGHT TO A FAIR TRIAL THEREBY REQUIRING REVERSAL OF HIS CONVICTION.
- VI. THE ADMISSION INTO EVIDENCE OF A PREJUDICIAL AND INFLAMMATORY SUMMARY EXHIBIT WITHOUT THE PROPER FOUNDATION, A DETERMINATION OF THE ADMISSIBILITY OF THE UNDERLYING DOCUMENTS OR A CAUTIONARY INSTRUCTION TO THE JURY ON THE SUMMARY'S PROPER USE VIOLATED RULE 1006 OF THE FEDERAL RULES OF EVIDENCE AND DEPRIVED THE APPELLANT OF A FAIR TRIAL REQUIRING REVERSAL OF HIS CONVICTION.
- VII. THE DISTRICT COURT ERRED IN ADMITTING "PRIOR CONSISTENT STATEMENTS" OF WITNESSES TO THE EXTREME PREJUDICE OF EDGAR JONES.
- VIII. THE REFUSAL OF THE DISTRICT COURT TO PERMIT THE DEFENDANTS TO INTRODUCE TESTIMONY CONCERNING THE ABILITY OF A LOCAL UNION TO ENGAGE IN ORGANIZING ACTIVITIES DEPRIVED EDGAR JONES OF A FAIR TRIAL AND OPERATED TO HIS EXTREME PREJUDICE.

The Appellant, Edgar Jones, pursuant to Rule 28(i) of the Federal Rules of Appellate Procedure, hereby adopts by reference the arguments contained in the brief of Appellants Kenneth Rowland, Teddy Kinney and German Stumbo, Court of Appeals Numbers 84-5523,

84-5524 and 84-5525, in regard to issues IV and V set forth above. Appellant further hereby adopts by reference the arguments contained in the brief of Appellant Mose Meade, Court of Appeals Number 84-5511, in regard to issues VI, VII and VIII which are also set forth above.

CONCLUSION

For all of the foregoing reasons, Edgar Jones respectfully requests this Court to reverse his conviction.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been forward by first class mail, postage prepaid, to the Honorable Thomas L. Self, Assistant United States Attorney, P. O. Box 1490, Lexington, Kentucky 40591, William D. Kirkland, Esquire, McBrayer, McGinnis, Leslie & Kirkland, 300 State National Bank Building, P. O. Box 1100, Frankfort, Kentucky 40602, and E. J. Walbourn, III, Esquire, Hermansdorfer & Templeton, Suite 200, Galloway Building, 1200 Bath Avenue, P. O. Box 68, Ashland, Kentucky 41105-0068. Dated this the 25th day of October, 1984.

Albert F. Moore

No. 84-5474

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA
Plaintiff-Appellee

v.

EDGAR JONES
Defendant-Appellant

On Appeal from the
United States District Court For The
Eastern District of Kentucky
Pikeville Division
Criminal Case No. 83-8

REPLY BRIEF ON BEHALF OF EDGAR JONES

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OF KENTUCKY AT
LEXINGTON

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ARGUMENT

1. THE GOVERNMENT'S ARGUMENT ON THE PROSECUTORIAL MISCONDUCT ISSUE SHOULD BE REJECTED SINCE THE TRIAL JUDGE ABUSED HIS DISCRETION IN FAILING TO HOLD AN EVIDENTIARY HEARING AND THE APPELLANTS HAVE MET THE REQUIREMENTS FOR DISMISSAL OF THE INDICTMENT.

As to the prosecutorial misconduct issue, this appeal presents no real dispute as to the governing legal principles; the parties agree that "on a showing of demonstrated and longstanding prosecutorial misconduct" which prejudices a criminal defendant, an indictment is subject to dismissal. See Brief on Behalf of the United States at 40 (hereinafter referred to as "Govt's Brief"), citing United States v. Morrison, 449 U.S. 361, 364-367 (1981), United States v. Hasting, 461 U.S. 499, 505-507 (1983), and United States v. Adamo, 742 F.2d 927, 942 (6th Cir. 1984). However, the Appellant strongly disagrees with the government's assertion that those requirements have not been met in the instant case.

With all due respect, counsel for the government entirely misunderstands the thrust of Appellant's argument and, it is respectfully submitted, misapplies the principles enunciated by this Court in United States v. Adamo, 742 F.2d 927 (6th Cir. 1984). Furthermore, the government's attempt to portray the prosecution's misconduct as "inadvertent" simply flies in the face of the evidence contained in the record before the Court.

The Appellant is not asking this Court to reverse his conviction because the prosecution was untimely in producing Brady material or because the Assistant United States Attorney did not introduce exculpatory evidence before the grand jury as the government argues in its brief. See Govt's Brief at 40-44. Counsel for the Appellant is fully aware of the case law which provides that the prosecutor is under no obligation to present exculpatory or impeaching evidence to a federal grand jury. See e.g., United States v. Ruyke, 524 F.2d 1133 (6th Cir. 1975), cert. denied, 425 U.S. 934 (1976).

Rather, the Appellant is seeking a reversal based upon the clear misconduct of the prosecution in violating a court imposed deadline for producing exculpatory evidence, knowingly misrepresenting to both the trial judge and to defense counsel that all of the consensually monitored tape recordings had been given to defense lawyers, holding back at least two crucial tape recordings until near the end of trial which contained damaging impeachment material relating to the key government witnesses, violating virtually every model code of professional conduct which sets forth standards pertaining to the production of Brady material and the conduct of a prosecutor in a criminal trial, apparently affirmatively misleading the grand jury which indicted the Appellants by

allowing witnesses, one of whom the Assistant United States Attorney himself admitted was a liar, testify before the grand jury, and knowingly permitting Phillip Booth to commit perjury at trial by testifying that he was intoxicated on December 2 and 3, 1983, at the time he gave two sworn statements to defense investigators which exonerated Edgar Jones from any wrongdoing in the Ray-Mac matter. See Brief of Appellant Jones at 42-44.* /

Although there is no duty imposed upon a prosecutor to present exculpatory or impeachment evidence to the the grand jury, there most certainly is an obligation to avoid knowingly using prejured testimony before the grand jury or at any point in the prosecution of a case. United States v. Adamo, 742 F.2d 927, 940 (6th Cir. 1984), adopting the rationale of United States v. Basurto, 497 F.2d 781, 785-86 (9th Cir. 1974). The use of such perjured testimony is a violation of the Due Process Clause of the Fifth Amendment and thus

* / The uncontradicted evidence in the record belies the government's attempt to characterize the prosecution's trial conduct as "unfortunate", "inadvertent", and "proper". As clearly demonstrated in the Appellant's initial brief, Assistant United States Attorney Thomas L. Self was well aware of his obligations to produce Brady material before trial, including the tape recordings, and it strains credulity for the government to imply that he was unaware of the contents of those recordings or that "logistical" problems were to blame for their untimely production. See Brief of Appellant Jones at 42-44.

constitutes an error of constitutional magnitude. See United States v. Adamo, supra, 742 F.2d at 939-40, quoting, United States v. Basurto, supra, 497 F.2d at 785-86. Whenever the prosecutor learns of any perjury committed before the grand jury, he may do one of several things: (1) personally weigh the untainted evidence supporting the government's case and decide if the evidence is such that a jury of twelve is likely to unanimously find that the evidence establishes guilt beyond a reasonable doubt; or (2) resubmit the untainted evidence to the grand jury to determine if thirteen grand jurors still find probable cause; or (3) decide that the untainted evidence is insufficient to warrant pursuing the prosecution further and move to dismiss the indictment; or (4) go to trial but refrain from using any of the tainted evidence in presenting the government's case. United States v. Adamo, 742 F.2d 927, 941 (6th Cir. 1984). This latter alternative was approved by the Court in Adamo since it "insured that there was no 'prejudice' or 'actual undermining of [the appellant's right to] a fair trial'". United States v. Adamo, supra, 742 F.2d at 941, quoting, United States v. Nembhard, 676 F.2d 193, 200 (6th Cir. 1982), cert. denied, 104 S.Ct. 90 (1983).

Here, the prosecutor chose none of the alternatives outlined by this Court in Adamo. Furthermore, the Assistant

United States Attorney did not meet his obligation of "presenting to the grand jury testimony that he [believed] to be true" as claimed in the government's brief. See Govt's Brief at 43. In truth and point of fact, the prosecutor admitted to defense counsel that Phillip Booth was a liar. See Brief of Appellant Jones at 43. No such statement would have been made if the prosecutor actually entertained a belief that Phillip Booth was credible or his testimony truthful.

Instead of following the dictates of Adamo, the prosecutor allowed Phillip Booth and other key government witnesses to testify before both the grand jury and at trial, knowing that nothing Phillip Booth said could be believed and further knowing that the other witnesses, Pearl Booth and Phillip Dale Moore, were not worthy of belief. This flagrant disregard for the truth, coupled with the obvious concealment of Brady material, the misrepresentations to the district court and defense counsel regarding the production of exculpatory evidence and the violation of a court-imposed deadline for producing Brady material constituted prosecutorial misconduct which should have resulted in dismissal of the indictment. See Levin v. Clark, 408 F.2d 1209, 1211 (D.C. Cir. 1967) (convictions must not be obtained through prosecutorial misconduct which violates civilized

notions of fairness and thereby taints the entire criminal process). */

As to the requirement that the accused demonstrate prejudice as a result of a prosecutor's misconduct when seeking the dismissal of an indictment, the Appellant submits that he did suffer prejudice by virtue of the prosecutor's improper actions. One very great prejudice is the fact that the Appellant was indicted on the basis of what clearly appears to be the perjured testimony of the key government witnesses against him. Unfortunately, the prejudice to Appellant resulting from the other acts of prosecutorial misconduct is difficult, if not impossible, to specify since the trial judge improperly refused to conduct an evidentiary hearing as requested. **/ However, there is certainly nothing

*/ The government has not addressed or attempted to distinguish the cases of United States v. Samango, 607 F.2d 877 (9th Cir. 1977), or United States v. Phillips Petroleum Co., 435 F. Supp. 510 (N.D. Okla. 1977), cited at page 50 of the Appellant's brief. It is respectfully submitted that these authorities provide further support for the Appellant's argument that the prosecution committed misconduct in the instant case and that the indictment should have been dismissed.

**/ Thus, Appellant was placed in an untenable position of being required to establish prejudice as an element of his prosecutorial misconduct claim, but prevented from effectively doing so by the action of the trial court. The denial of Appellant's motions to dismiss the indictment for prosecutorial misconduct was an abuse of discretion and constitutes an additional ground for reversal of the Appellant's convictions.

which could be more prejudicial to a defendant than the government knowingly putting on witnesses to lie under oath for the purpose of obtaining a conviction. This is precisely what Appellant contends the government did and his conviction, therefore, should be reversed and the indictment dismissed.

Finally, the government's argument that the district court did not abuse its discretion in failing to hold an evidentiary hearing is without merit. Govt's Brief at 45. In United States v. Wilson, 715 F.2d 1164 (7th Cir. 1983), cert. denied, 104 S.Ct. 434 (1983), cited by the government to support its contention, the defendants claimed, inter alia, that the prosecution had improperly leaked certain prejudicial information to the press and they moved to dismiss the indictment or, in the alternative, for an evidentiary hearing. Id. at 1169. However, there was absolutely no foundation for the defendant's allegations. The government attorneys denied disclosing the information; specific indications in the news articles showed that no information had been provided by government attorneys; and evidence established that the "leaks" did not occur until after the information had been released to defense counsel. Id. at 1169. With no basis for the allegations of misconduct, the Seventh Circuit found that the district court had not abused its discretion in refusing

to hold an evidentiary hearing. United States v. Wilson, supra, 715 F.2d at 1169.

Here, on the other hand, the defendants introduced ample evidence to establish a "concrete basis" supporting an inference of misconduct so as to entitle them to an evidentiary hearing. See In Re November 1979 Grand Jury, 616 F.2d 1021, 1027 (7th Cir. 1980); Matter of the Special April 1977 Grand Jury, 587 F.2d 889, 892 (7th Cir. 1978); In Re Hunter, 520 F. Supp. 1020, 1022 (W.D. Mo. 1981). Indeed, the uncontradicted evidence before the Court, in the form of affidavits, portions of hearing transcripts and other documents, was never challenged by the government and no counter-affidavits were ever filed on its behalf. The district court could not simply reject the appellant's misconduct motions in the absence of any denial of the misconduct by the government. See United States v. Sweig, 316 F. Supp. 1148, 1154 (S.D. N.Y. 1970).

2. THE DISTRICT COURT IMPROPERLY LIMITED THE CROSS-EXAMINATION OF KEY GOVERNMENT WITNESSES THEREBY DEPRIVING APPELLANTS OF THEIR SIXTH AMENDMENT RIGHT OF CONFRONTATION AND ABUSING ITS DISCRETION.

In the brief filed on behalf of the Appellee, the government argues that the district court acted properly in

curtailing the cross-examination of three key prosecution witnesses who testified against the Appellants at trial. Although the government concedes that the district court precluded cross-examination of these crucial witnesses into several areas, it contends that the witnesses were sufficiently cross-examined to comply with the requirements of the Sixth Amendment and that the trial judge correctly invoked his discretion in refusing to allow further questioning. See Govt's Brief at 65-67. The government's arguments are without merit.

The Appellants agree that a trial court has discretion to restrict the scope and length of cross-examination, see e.g., United States v. LaRiche, 549 F.2d 1088, 1096 (6th Cir. 1977), cert. denied, 430 U.S. 987 (1977); however, that discretion does not extend so far as to justify the limitations placed on cross-examination by the court in this case.

The government's argument apparently ignores the well-settled rule that "cross-examination of a witness in matters pertinent to his credibility ought to be given the largest possible scope." United States v. Partin, 493 F.2d 750, 763 (5th Cir. 1974), quoting McConnell v. United States, 393 F.2d 404, 406 (5th Cir. 1968). As stated in Appellant's

initial brief, when the witness being subjected to cross-examination is a "star witness", or was an accomplice or participant in the crime for which the defendant is being prosecuted, the importance of cross-examination is necessarily magnified. See Brief of Appellant Jones at 30, citing United States v. Brown, 546 F.2d 166, 170 (5th Cir. 1977). It has repeatedly been held that when the government's case turns on the credibility of a witness, then "[d]efense counsel . . . must be given a maximum opportunity to test the credibility of the witness". Burr v. Sullivan, 618 F.2d 583, 587 (9th Cir. 1980), quoting United States v. Brady, 561 F.2d 1319, 1320 (9th Cir. 1977). (emphasis supplied). See also United States v. Crumley, 565 F.2d 945, 949 (5th Cir. 1978); United States v. Mayes, 556 F.2d 245, 248 (5th Cir. 1977).

Obviously, the trial court did not allow defense counsel the largest possible scope in cross-examining Pearl Booth, Phillip Booth and Phillip Dale Moore. See Brief of Appellant Jones at 30-35. Quite to the contrary, the court refused to allow cross-examination into such crucial credibility matters as five arson and insurance fraud schemes engaged in by the witnesses, the drug-taking habits of Phillip Dale Moore at the time of the events in question, the lawless conduct and gun carrying practices of Pearl Booth (elicited to

rebut testimony introduced by the government that Pearl Booth was the loving mother of a sick child who carried a gun only for personal protection), Pearl Booth's hallucinations, losses of memory and the statements she made to a counselor that she would "get even" with anyone who made her life miserable, the sworn inconsistent statements of Phillip Booth which completely exonerated Edgar Jones from any wrongdoing in regard to Ray-Mac, and a prior armed conflict between the owners of Coal Mac with members of the United Mine Workers of America at Shelbyanna, Kentucky.

The action of the trial court in precluding defense counsel from probing into these areas on cross-examination prevented the cross-examination of these key government witnesses from reaching the threshold level sufficient to satisfy the Confrontation Clause of the Sixth Amendment. See e.g., United States v. Elliott, 571 F.2d 880, 908 (5th Cir. 1978), cert. denied, 439 U.S. 953 (1978); United States v. Callahan, 551 F.2d 733, 737 (6th Cir. 1977) (Sixth Amendment right of confrontation denied where defense counsel was prevented from cross-examining the government's chief witness as to his credibility and the veracity of his testimony on a required element of the charged offense).

In addition to violating the Appellant's confrontation rights by its actions, the district court also clearly abused its discretion by limiting the cross-examination of these important government witnesses. As this Court held in United States v. Garrett, 542 F.2d 23, 25 (6th Cir. 1975):

It is well settled that the extent to which a witness may be cross-examined is a matter to be determined by the trial courts in exercise of its sound discretion. However, a limitation on cross-examination which prevents a person charged with a crime from placing before the jury facts from which bias, prejudice or lack of credibility of a prosecution witness might be inferred constitutes denial of the right of confrontation guaranteed by the Sixth Amendment.

United States v. Garrett, supra, 542 F.2d at 25 (citations omitted) (emphasis supplied).

In this case, the government's arguments are virtually identical to those made in Garrett: that the district court permitted "extensive" cross-examination of the key prosecution witness, that it permitted enough testimony on matters of impeachment from which defense counsel could argue bias, and that any testimony about the witness' use of narcotics would be "collateral" to the issues in the case and not properly the subject of cross-examination. See Govt's

Brief at 62-66; United States v. Garrett, supra, 542 F.2d at 25-26. */ Here, as in Garrett, this Court should reject the government's arguments. Id. at 26. The trial judge was simply too restrictive in his limitation of cross-examination in this case. The testimony of Pearl Booth, Phillip Booth and Phillip Dale Moore was crucial to the government's case. The jury was entitled to know that the three key witnesses against Edgar Jones and the other Appellants were biased, had poor memories, were taking drugs at the time of the events in question and had committed acts which bore directly on their characters for untruthfulness. It is impossible to know how cross-examination on these matters might have affected the jury's treatment of their testimony if these facts had been known. Therefore, the Court should reverse the convictions of the Appellants and remand this case for a new trial. United States v. Garrett, 542 F.2d 23, 26 (6th Cir. 1976). See also United States v. Ayotte, 741 F.2d 865, 871 (6th Cir. 1984).

*/ It is clear that "bias of a witness is not a collateral issue and extrinsic evidence is admissible to prove that a witness has a motive to testify falsely." United States v. James, 609 F.2d 36, 46 (2d Cir. 1979), cert. denied, 445 U.S. 905 (1980). Several of the matters about which defense counsel was prevented from cross-examining the Booths and Phillip Dale Moore related directly to the bias of these witnesses and therefore were neither "collateral" nor cumulative as asserted by the government. See Govt's Brief at 65-67.

The cases cited by the government in its brief either support the Appellants' position or are distinguishable from the instant matter and do not provide any authority whatsoever for the unduly restrictive limitations imposed on cross-examination by the district court. For example, in Alford v. United States, 282 U.S. 687, 51 S.Ct. 218, 75 L.Ed. 624 (1931), the Supreme Court reversed the conviction of a mail fraud defendant because his counsel had been prevented from questioning an in-custody prosecution witness about his place of residence. Contrary to the government's assertion, the case does not stand for the proposition that a trial court has broad discretion in restricting both the scope and length of cross-examination. See Govt's Brief at 61. Rather, the Court held that the trial court may use reasonable judgment in determining whether a subject, which has been pursued on cross-examination, has been exhausted:

The extent of cross-examination with respect to an appropriate subject of inquiry is within the sound discretion of the trial court. It may exercise a reasonable judgment in determining when the subject is exhausted.

Alford v. United States, supra, 282 U.S. at 694.

The Court further held that a trial judge should not protect a witness from being discredited on cross-examination:

But no obligation is imposed on the court, such as that suggested below, to protect a witness from being discredited on cross-examination, short of an attempted invasion of his constitutional protection from self-incrimination, properly invoked.

Alford v. United States, supra, 282 U.S. at 694.

This is precisely what the district court below attempted to do. A fair reading of the record clearly establishes that the trial judge made every effort to impede the cross-examination of the key government witnesses and that he went out of the way to protect them from being discredited in the eyes of the jury. See Brief of Appellant Jones at 19-24. As a result of the trial Judge's actions, Appellants were unable to thoroughly and effectively cross-examine these witnesses. Thus, Appellants were denied their rights to confront and cross-examine the key witnesses against them in violation of the Sixth Amendment.

United States v. LaRiche, 549 F.2d 1088 (6th Cir. 1977), cert. denied, 430 U.S. 987 (1977), is clearly distinguishable from this case. In LaRiche, this Court affirmed the action of a district court in disallowing defense counsel from cross-examining a government witness in regard to unreported criminal behavior. When questioned about these matters, the witness properly invoked his Fifth Amendment privilege as to the details of his participation. United

States v. LaRiche, supra, 549 F.2d at 1096. Here, however, the witnesses had disclosed their participation in the arson-insurance fraud schemes to Officer Barry McKenzie, a Kentucky State Police Arson Investigator, and had been given immunity from prosecution on these crimes by the government. See Tr. Vol. 30, pp. 103-04; Def. Jones' Tr. Ex. No. 15 at 6; Def. Jones' Tr. Ex. No. 11 at 15. Thus, LaRiche does not control under the facts presented here and cross-examination into these matters should have been permitted. Moreover, questioning on the other issues should have been allowed for the reasons stated in Appellants' initial brief. See Brief of Appellant Jones at 31-37.

The cases of United States v. DeLuca, 692 F.2d 1277 (9th Cir. 1982), United States v. Haimowitz, 706 F.2d 1549 (11th Cir. 1983), cert. denied, 104 S.Ct. 974 (1984), and United States v. Fortes, 619 F.2d 108 (1st Cir. 1980), are likewise distinguishable from the facts of this case. In DeLuca, the Court recognized that a trial court need not permit unending excursions into each and every matter touching on veracity, but it warned the trial judge to use more "judicial restraint" in limiting cross-examination on retrial. United States v. DeLuca, supra, 692 F.2d at 1282-83. Haimowitz, citing the same general rule, specifically found

that the appellant "was able to achieve his desired purpose of impeaching" the witness' testimony despite restrictions placed on cross-examination by the trial court. United States v. Haimowitz, supra, 706 F.2d at 1559. And in Fortes, the restriction on cross-examination precluded inquiry into one very minor incident surrounding the prosecution witness' discharge as a police officer. Further questioning on this issue would have added little, if anything, to the impeachment of the witness. United States v. Fortes, supra, 619 F.2d at 118.

In this case, the trial court did not simply prohibit cross-examination into an isolated matter which had little to do with the credibility of the prosecution witnesses. Nor was the Appellant able to achieve his purpose of impeaching the testimony of the key government witnesses against him. Quite to the contrary, the district court prohibited cross-examination into many, many areas which bore directly on the biases, motives to testify falsely and credibility of the only witnesses who provided a crucial link in the prosecution's case against the Appellants. This Court has not hesitated to reverse convictions where a trial court unduly restricts the cross-examination of important government witnesses, nor should it in this case where the court below virtually gutted

what would have been an effective, full and proper cross-examination. See e.g., United States v. Garrett, 942 F.2d 23 (6th Cir. 1975); United States v. Callahan, 551 F.2d 733 (6th Cir. 1977); United States v. Ayotte, 741 F.2d 865 (6th Cir. 1984).

The other cases relied on by the government in its brief simply are inapplicable to the facts presented herein. None of those cases dealt with a situation where, as here, the district court prevented the cross-examination of key government witnesses in a multitude of areas which directly related to bias, motive to testify falsely, the credibility of witnesses as to elements of the offense charged, general credibility and ability to recall the events in question. See e.g., United States v. Haimowitz, 706 F.2d 1549 (11th Cir. 1983), cert. denied, 104 S.Ct. 974 (1984); United States v. Wood, 695 F.2d 459 (10th Cir. 1982); United States v. Sonntag, 684 F.2d 781 (11th Cir. 1982); United States v. Tracev, 675 F.2d 433 (1st Cir. 1982); United States v. Taylor, 657 F.2d 92 (6th Cir. 1981), cert. denied, 454 U.S. 1086 (1981); United States v. Garcia, 647 F.2d 794 (8th Cir. 1981), cert. denied, 454 U.S. 970 (1981); United States v. Singh, 628 F.2d 758 (2d Cir. 1980); United States v. Hoffa, 349 F.2d 20 (6th Cir. 1965), aff'd., 385 U.S. 293 (1966). Therefore, the

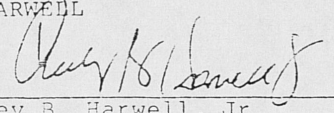
Appellants' convictions should be reversed on the grounds that the district court denied them their rights to confront and cross-examine witnesses against them as guaranteed by the Sixth Amendment in unduly restricting the cross-examinations of Pearl Booth, Phillip Booth and Phillip Dale Moore, and on the further ground that the district court abused its discretion in imposing such limitations.

CONCLUSION

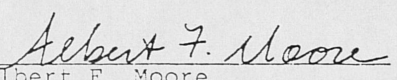
For these reasons, and for the reasons previously stated in Appellant's opening brief, Edgar Jones respectfully submits that this Court should reverse his conviction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been forwarded by first class mail, postage prepaid, to the Honorable Robert J. Erickson, Attorney, Appellate Section, Criminal Division, Department of Justice, P.O. Box 899, Ben Franklin Station, Washington, D.C. 20044-0899, the Honorable Thomas L. Self, Assistant United States Attorney, P. O. Box 1490, Lexington, Kentucky 40591, William D. Kirkland, Esquire, McBrayer, McGinnis, Leslie & Kirkland, 300 State National Bank Building, P. O. Box 1100, Frankfort, Kentucky 40602, and E. J. Walbourn, III, Esquire, Hermansdorfer & Templeton, Suite 200, Galloway Building, 1200 Bath Avenue, P. O. Box 68, Ashland, Kentucky 41105-0068. Dated this the 14 day of February, 1985.

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October 25, 1984

Thomas L. Self
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Dear Mr. Self:

Re: United States of America v. Edgar Jones
Appeal No. 84-5474

Pursuant to the provisions of Rule 10 of the Rules for the United States Court of Appeals for the Sixth Circuit, I have enclosed two (2) copies of the brief prepared on behalf of Edgar Jones in the referenced criminal action.

I am in the process of compiling a joint appendix and would appreciate your advising me at the earliest possible date of portions of the transcript or record which you would like to include therein.

Please call me if you have any questions.

Sincerely,

Albert F. Moore
Albert F. Moore

✓ Enclosures

AFM:jam

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No. 84-5474

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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EASTERN DISTRICT
OF KENTUCKY
LEXINGTON

UNITED STATES OF AMERICA
Plaintiff-Appellee

v.

EDGAR JONES
Defendant-Appellant

On Appeal from the
United States District Court For The
Eastern District of Kentucky
Pikeville Division
Criminal Case No. 83-8

BRIEF ON BEHALF OF DEFENDANT-APPELLANT

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No. 84-5474

UNITED STATES COURT OF APPEALS
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STATEMENT OF ISSUES PRESENTED FOR REVIEW

- I. DID THE DISTRICT COURT DEPRIVE EDGAR JONES OF HIS SIXTH AMENDMENT RIGHT OF CONFRONTATION AND ABUSE ITS DISCRETION BY IMPROPERLY LIMITING THE CROSS-EXAMINATION OF KEY GOVERNMENT WITNESSES AGAINST HIM?
- II. DID THE TRIAL COURT COMMIT REVERSIBLE ERROR IN REFUSING TO INSTRUCT THE JURY ON EDGAR JONES' THEORY OF THE DEFENSE?
- III. DID THE TRIAL COURT ERR IN FAILING TO HOLD AN EVIDENTIARY HEARING ON THE MOTION OF EDGAR JONES TO DISMISS THE INDICTMENT ON THE GROUNDS OF PROSECUTORIAL MISCONDUCT AND FURTHER ERR IN FAILING TO EXERCISE SUPERVISORY CONTROL IN DISMISSING THE INDICTMENT?
- IV. DID THE LOWER COURT'S ERRONEOUS, PREJUDICIAL INSTRUCTION ON THE LABOR ACTIVITIES' EXEMPTION TO A HOBBS ACT PROSECUTION DEPRIVE THE APPELLANT OF HIS PRIMARY DEFENSE AND, IN EFFECT, DIRECT A VERDICT AGAINST HIM BY IMPROPERLY LIMITING AND INCORRECTLY DEFINING THE SCOPE OF LEGITIMATE LABOR OBJECTIVES, REQUIRING REVERSAL OF HIS CONVICTION?
- V. DID THE COURT-ORDERED SEATING ARRANGEMENT AT TRIAL WHICH REQUIRED EDGAR JONES TO BE SEATED FAR AWAY FROM HIS COUNSEL RENDER ANY MEANINGFUL COMMUNICATION BETWEEN ATTORNEY AND CLIENT IMPOSSIBLE DURING TRIAL PROCEEDINGS AND DENY EDGAR JONES THE EFFECTIVE ASSISTANCE OF COUNSEL, DUE PROCESS OF LAW AND THE RIGHT TO A FAIR TRIAL THEREBY REQUIRING REVERSAL OF HIS CONVICTION?
- VI. DID THE ADMISSION INTO EVIDENCE OF A PREJUDICIAL AND INFLAMMATORY SUMMARY EXHIBIT WITHOUT THE PROPER FOUNDATION, A DETERMINATION OF THE ADMISSIBILITY OF THE UNDERLYING DOCUMENTS OR A CAUTIONARY INSTRUCTION TO THE JURY ON THE SUMMARY'S PROPER USE VIOLATE RULE 1006 OF THE FEDERAL RULES OF EVIDENCE AND DEPRIVE THE APPELLANT OF A FAIR TRIAL REQUIRING REVERSAL OF HIS CONVICTION?
- VII. DID THE DISTRICT COURT ERR IN ADMITTING "PRIOR CONSISTENT STATEMENTS" OF WITNESSES TO THE EXTREME PREJUDICE OF EDGAR JONES?
- VIII. DID THE REFUSAL OF THE DISTRICT COURT TO PERMIT THE DEFENDANTS TO INTRODUCE TESTIMONY CONCERNING THE ABILITY OF A LOCAL UNION TO ENGAGE IN ORGANIZING ACTIVITIES DEPRIVE EDGAR JONES OF A FAIR TRIAL AND OPERATE TO HIS EXTREME PREJUDICE SO AS TO REQUIRE A REVERSAL OF HIS CONVICTION?

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STATEMENT OF THE CASE

On June 6, 1983, a Grand Jury in the Eastern District of Kentucky returned a ten-count indictment against Edgar Jones and nineteen (19) other defendants. Count I of the indictment alleged that Mr. Jones and the other defendants conspired to obstruct, delay and affect commerce by extortion in violation of 18 U.S.C. § 1951. Specifically, the indictment charged that it was a part of the conspiracy that the defendants and eight (8) unindicted co-conspirators would obtain and agree to obtain the property of a competitor, the Ray Mac Coal Company, by consent, such consent being induced by the wrongful use of threatened and actual force, violence and fear.

The next four counts of the indictment, counts II through IV, each alleged substantive violations of the Hobbs Act which occurred, respectively, on February 17, 1982, February 18, 1982, February 21, 1982, and February 26, 1982. These counts each charged Edgar Jones with aiding and abetting violations of the Hobbs Act. The remaining five counts of the indictment, counts VI through X, charged fourteen (14) of the defendants with a violation of 18 U.S.C. § 924(c) (carrying a firearm unlawfully during the commission of a felony); four (4) defendants with a violation of 18 U.S.C. § 844(i) (malicious destruction or attempted destruction of real or personal property used in interstate commerce by means of an explosive device); four (4) defendants with a violation of 26 U.S.C. § 5861(f) (making a firearm in violation of the National Firearms Act), and four (4) defendants with a violation of 26 U.S.C. § 5861(d) (receiving or possessing a firearm which is not registered to him in the National Firearms Registration and Transfer Record). Edgar Jones was not named in Counts Six through Ten of the indictment as either a principal offender or aider and abettor.

On November 14, 1983, the trial court conducted a "mini-hearing" under the authority of United States v. Enright for the purpose of determining (1) whether a conspiracy existed among the defendants as alleged in the indictment, (2) the parties to any such conspiracy, and (3) what statements, if any, were made during the course and in furtherance of the alleged conspiracy. The trial court entered an Order on November 18,

1983, in which he found the existence of a "conspiracy between the named defendants and the unindicted co-conspirators" (Docket Entry at 8, hereinafter D.E.). However, the trial judge set aside his finding as erroneous on November 21, 1983 (D.E. at 8).

The jury trial of the defendants began on January 9, 1984, the Honorable G. Wix Unthank presiding. At the conclusion of the government's proof on March 13, 1984, Edgar Jones moved for a judgment of acquittal, submitting that the government had failed to establish the essential elements of conspiracy to violate the Hobbs Act, that the government had failed to establish a prima facie case of aiding and abetting any substantive violations of the Hobbs Act against him and that the proof introduced at trial was at variance with the charges contained in the indictment and constituted an impermissible amendment to the indictment. The motion was denied by the trial court (Tr. Vol. 30, p. 131). Mr. Jones also filed proposed jury instructions asking the court to inform the jury about the law as to several applicable legal principles including Mr. Jones' theory of the defense and the Enmons doctrine (Def. Jones' Prop. Jury Inst. Nos. 48, 69). The trial court refused to give the requested instructions (Tr. Vol. 44, pp. 116-186), and the defense objected to the court's ruling both before and at the conclusion of the jury charge (Tr. Vol. 41, pp. 63-98; Tr. Vol. 8, p. 7; Tr. Vol. 44, p. 184).

The jury returned its verdict against Edgar Jones on April 9, 1984. Mr. Jones was acquitted of the charges contained in Counts II, III and V of the indictment (Tr. Vol. 46, p. 12), and found guilty of the charges contained in Counts I and IV (Tr. Vol. 46, p. 12). Sentencing followed on May 25, 1984. The court sentenced Mr. Jones to the custody of the Attorney General for a term of three years on Count I and three years on Count IV, to be served consecutively. The execution of the sentence as to Count IV was suspended, with Mr. Jones to be placed on probation for a period of two years immediately following his release from custody regarding Count I. No fine was imposed by the court. (Tr. of Sentencing Hearing, pp. 44-47). Edgar Jones was allowed to remain on his bond pending appeal. He filed his notice of appeal on May 25, 1984.

STATEMENT OF THE FACTS

A. The Labor Dispute With The Ray-Mac Coal Company.

During the first three weeks of February, 1982, a number of labor-related incidents occurred in Floyd County, Kentucky, which resulted in the return of Indictment No. 83-8 on June 6, 1983. Those incidents included a shooting at a picket line which had been formed at the entrance to the Ray-Mac Coal Company on Bill Hall Branch in Floyd County, Kentucky, a shooting from the hills surrounding the Ray-Mac Coal Company on Wednesday, February 17, 1982, another shooting from the hills on Thursday, February 18, 1982, the destruction of a coal auger on February 21, 1982, and the destruction of a coal tipple leased by Coal-Mac Sales, Inc. on February 26, 1982.

In January and February of 1982, Edgar Jones was President of the JRM Coal Company, Inc. (hereinafter referred to as "JRM"), a Kentucky corporation engaged in the mining and shipping of coal in and around the Floyd County, Kentucky, area. Although the corporation itself had begun using independent contractors in 1979 or 1980 and therefore was not a party to the Bituminous Coal and Wage Agreement of 1981, the companies performing subcontract mining services for JRM were parties to that contract which had been sponsored by the United Mine Workers of America (Tr. Vol. 37, pp. 12-13, 23, 34-36, 48-49). The two coal loading facilities or "tipples" which JRM used to load coal onto trains for shipment, one of which was located in Floyd County and the other in Martin, were parties to the union contract (Tr. Vol. 37, pp. 56-57).

On September 29, 1980, JRM became a party to a contract with the John McCall Coal Company, Inc. (hereinafter referred to as "John McCall") and the South Carolina Electric & Gas Company (hereinafter referred to as "South Carolina Electric"). John McCall was a coal brokerage firm based in Bluefield, West Virginia, and had acted as the agent for JRM in selling coal to utilities and other coal users. South Carolina Electric was a utility company located in Columbia, South Carolina, which purchased the coal

produced by JRM. The agreement between these parties was a long-term arrangement under which JRM was obligated to ship approximately 7,500 tons of coal per week to South Carolina Electric for a five (5) year period. The contract expressly contained a provision whereby South Carolina Electric could renew the contract at its option for two (2) additional five (5) year terms (Govt. Ex. No. 138, ¶ 2). It also contained a force majeure clause which excused performance by JRM in the event of labor disputes, strikes, equipment breakdowns and numerous other contingencies (Govt. Ex. No. 138, ¶ 13) (Tr. Vol. 37, pp. 66-71, 75-76)

The business relationship between JRM and South Carolina Electric was excellent. JRM had been meeting its obligations under the contract and was doing so in February of 1982. According to the testimony of Carson Akers, an Executive Vice-President of JRM, JRM was never in fear of losing its contract to supply coal to South Carolina Electric. The shipments of coal from JRM to South Carolina Electric had always been of good quality and timely (Tr. Vol. 37, pp. 72-73). Moreover, the force majeure clause had successfully been invoked by JRM in the past during the coal miners strike of 1981 and a flash flood, and could be relied upon by JRM in the event of some unforeseen contingency which prevented JRM from meeting its weekly shipments of coal to South Carolina Electric (Tr. Vol. 37, pp. 77-78).

In February of 1982, several independent companies performed subcontract mining services for JRM which, in turn, purchased coal from these entities on a price per ton basis for shipment to South Carolina Electric. Among these companies were included the Bryan Coal Company and the Calamity Coal Company, which were owned and operated by Phillip and Pearl Booth, both of whom appeared at trial as key witnesses for the government (Tr. Vol. 37, pp. 49-56). The evidence introduced at trial established that the Floyd County area in which JRM mined and tipped its coal had been a stronghold of the United Mine Workers of America for many years. Of 360 union coal companies within a

five county area, most of those were located in Floyd and Pike Counties (Tr. Vol. 14, p. 88). The only work available in the McDowell area was coal mining (Tr. Vol. 32, p. 138).

The Ray-Mac Coal Company (hereinafter referred to as "Ray-Mac") was a partnership engaged in the strip-mining of coal within the State of Kentucky. In February of 1982, the business was owned by Frank Justice, Jim McGhee and Raymond Barker. Although the proof at trial was not clear, Ray-Mac had some relationship to Coal-Mac Sales, Inc., and the Mac Mining Company, two separate coal mining entities owned in part by Frank Justice, Marvin Lynn Parrish and Jim McGhee (Tr. Vol. 13, p. 8). Coal-Mac apparently was a sales company which operated tipples and purchased coal from truck mines including the Mac Mining Company. Coal-Mac sold coal on the "spot market" by offering the coal for sale to various purchasers each month through a bidding process and often shipped coal to customers outside the State of Kentucky (Tr. Vol. 13, pp. 14-15). The Mac Mining Company was a partnership which owned all of the equipment used in the mining of coal by Ray-Mac. All three companies were treated separately for accounting purposes and were located at the same office in Pikeville, Kentucky (Tr. Vol. 12, pp. 45-47; Tr. Vol. 13, p. 23)

One of the government's theories at trial was that JRM and Ray-Mac were competitors in the coal business. However, the evidence clearly established otherwise. Coal-Mac sold only "compliance coal" which was low in sulphur (Tr. Vol. 13, pp. 17-18). JRM, on the other hand, shipped non-compliance coal which was high in sulphur and could be used only by coal users whose plants were equipped with "scrubbers" (Tr. Vol. 37, pp. 37, 69, 75). Moreover, Coal-Mac sold coal on a spot market basis (Tr. Vol. 13, pp. 14-15), while JRM had a long-term contract with South Carolina Electric (Tr. Vol. 37, pp. 66-68). The government also argued that Edgar Jones was underbid by Ray-Mac on his contract with South Carolina Electric. This theory was refuted not only by a vice-president of JRM (Tr. Vol. 37, pp. 79-81), but also by the president of Coal-Mac (Tr. Vol. 13, pp. 101, 106, 107-108). The proof showed that South Carolina Electric purchased no coal from

Coal-Mac in January, February or March of 1982, despite the fact that Coal-Mac had submitted bids to that utility. The proof further showed that Coal-Mac offered South Carolina Electric no long-term quotes for coal during that period of time (Tr. Vol. 13, pp. 101-114). In fact, the president of Coal-Mac admitted that JRM was not competing with Coal-Mac in February of 1982 to sell coal to coal users on the spot market (Tr. Vol. 13, p. 108).

After mining coal in Pike County for a number of months, Ray-Mac relocated its strip-mining operation to the McDowell, Floyd County area which had traditionally been union territory (Tr. Vol. 11, p. 7; Tr. Vol. 11, p. 43). Ray-Mac, Coal-Mac and Mac Mining were strictly non-union operations (Tr. Vol. 13, p. 49). It was the policy of those businesses to exclude unions altogether (Tr. Vol. 12, p. 43). Frank Justice, one of the owners of Ray-Mac, admitted at trial that Ray-Mac was a new non-union operation that had moved into a historically very strong union area (Tr. Vol. 12, p. 43). Although Ray-Mac, Coal-Mac and Mac Mining employed some 180 workers, not one employee was a member of the United Mine Workers of America (Tr. Vol. 13, p. 130).

Indeed, the anti-union sentiments of those businesses had manifested themselves prior to February of 1982 when employees of Mac Mining Company engaged in an armed conflict with members of the United Mine Workers of America in Shelbyanna, Kentucky, in May of 1981 (Tr. Vol. 13, pp. 162-166). At that time, the employees of Coal-Mac or Mac Mining armed themselves with Uzi's which were Israeli made weapons, carried in modified form by the United States Secret Service (Tr. Vol. 13, pp. 162-166). At trial, defense counsel attempted to cross-examine owners of Coal-Mac about the Shelbyanna incident, which was clearly relevant to the issue of the "reasonable fear" element of a Hobbs Act violation. However, the trial court refused to allow any questions into the area and the evidence was placed into the record by avowal (Tr. Vol. 13, pp. 162-166).

The presence of Ray-Mac, a non-union coal company mining coal in the McDowell area of Floyd County, caused a great deal of unrest and concern among the coal miners

and especially among members of Local 5967 of the United Mine Workers of America in McDowell, Kentucky. When Mr. Ernie Justice, President of District 30 of the United Mine Workers of America, requested Edgar Jones in January of 1982 to help him in an effort to encourage independent truck drivers who hauled coal from JRM's subcontract mines to join the UMWA, the truck drivers voiced their discontent about the fact that Ray-Mac, a non-union company, had moved into union territory and was mining coal (Tr. Vol. 14, pp. 109-110). The evidence established that after the incidents at Ray-Mac in February of 1982, some coal mines which had been union terminated their affiliation with the UMWA because District 30 had made no effort to organize Ray-Mac (Tr. Vol. 14, p. 110).

The discontent of coal miners in the McDowell area with the UMWA's apparent lack of concern about Ray-Mac had a substantial basis in fact. As early as the fall of 1981, the International UMWA had conducted a mine organizing survey in regard to Ray-Mac. The purpose for the survey was to determine the feasibility of holding a National Labor Relations Board sponsored election at that mine to vote on whether or not the employees should join the union. Four organizers from the International conducted the survey and a recommendation that all of Ray-Mac's mines should be organized was submitted to the International organizing committee. However, the International took absolutely no action on the recommendation. One member of the survey team testified at trial that they kept waiting to receive an approval of the recommendation but never received any word (Tr. Vol. 31, pp. 64-75). The frustration of the union coal miners in McDowell became too much to bear. Finally, members of Local 5967 of the United Mine Workers of America decided that action needed to be taken in regard to Ray-Mac. Therefore, on Saturday, February 13, 1982, members of Local 5967 called a special meeting in McDowell and a vote was taken to set up a picket line at Ray-Mac the following Monday morning (Tr. Vol. 33, pp. 12-13; Tr. Vol. 31, pp. 116-120; Tr. Vol. 32, pp. 140-142).

Accordingly, on Monday, February 15, 1982, several members of Local 5967 gathered at the entrance to the Ray-Mac strip mine near McDowell, Floyd County,

Kentucky. As coal trucks arrived at the Ray-Mac job site, some of the union officials advised the truckers that the union was trying to organize Ray-Mac and asked the drivers not to haul any more coal (Tr. Vol. 33, pp. 14-17). The evidence at trial was conflicting as to whether or not the truck drivers were threatened (Tr. Vol. 33, pp. 14-17; Tr. Vol. 17, pp. 10-11). The evidence was clear, however, that the purpose for the picket line was to encourage Ray-Mac employees to join the union and to organize Ray-Mac (Tr. Vol. 33, pp. 12-17; Tr. Vol. 17, pp. 10-11; Tr. Vol. 8, pp. 140-143; Tr. Vol. 31, pp. 118-122).

At about 10:15 a.m., Raymond Barker, foreman and part owner of Ray-Mac, heard that men were walking a picket line at the mine site entrance so he drove down to speak with them. It was agreed that one of the union officers could talk to the Ray-Mac employees about joining the United Mine Workers of America at the end of the shift and Mr. Barker returned to his job (Tr. Vol. 11, pp. 25-27). Later the Ray-Mac employees told the union coal miners that they did not want to join the union, then left and went back up to the strip-mining job to work (Tr. Vol. 33, p. 18; Tr. Vol. 11, p. 29). The confrontation between the picketing coal miners and Ray-Mac employees on Monday was peaceful (Tr. Vol. 12, p. 40).

After meeting with employees of Ray-Mac, the picketing miners left the area in front of the Ray-Mac mine to persuade other area coal miners to join their cause (Tr. Vol. 33, p. 20). Drexall Hall and Teddy Kinney, two union officials of Local 5967, went down to the JRM offices and told Edgar Jones what was happening at Ray-Mac. The officers explained to Mr. Jones that the union had decided to organize Ray-Mac. The union officials stayed at the JRM offices only a few minutes before leaving to visit other mines in the area (Tr. Vol. 33, pp. 20-21). The meeting with Drexall Hall and Teddy Kinney was when Edgar Jones first learned of the picket line at Ray-Mac, although Phillip Booth, one of the alleged unindicted co-conspirators and a key government witness against Edgar Jones at trial, testified that he was the first person to inform Edgar Jones that the union had set up a picket line at Ray-Mac (Tr. Vol. 23, p. 257).

On Monday night, a large group of individuals, including some of the defendants, met at the home of Phillip and Pearl Booth. The men drank beer and allegedly discussed shutting down Ray-Mac. Similar meetings occurred at the Booths' residence on Tuesday and Wednesday nights. (Tr. Vol. 17, pp. 137-139; Tr. Vol. 21, pp. 6-8, 50-56, 86-88). It was also at the Booths' home where guns and ammunition were ordered, paid for, and eventually delivered to picketing miners. (Tr. Vol. 19, pp. 6-9, 45-61, 86-88). Edgar Jones never attended these meetings nor did he visit the Booths' residence at any time. (Tr. Vol. 19, pp. 7-8).

The picket line was re-formed on Tuesday morning, February 16, 1982. By this time, both the picketing coal miners and Ray-Mac employees were armed with pistols, rifles and shotguns. (Tr. Vol. 33, pp. 24-28; Tr. Vol. VIII, pp. 10-13). Many of these weapons were owned by Phillip Booth who had delivered them to the miners on Tuesday morning. (Tr. Vol. 19, pp. 8-10). At trial, witnesses from both groups testified that the reason for possessing the weapons was for their personal protection. (Tr. Vol. 33, pp. 24-28; Tr. Vol. VIII, pp. 10-13; Tr. Vol. XV, p. 13; Tr. Vol. X, pp. 14-15; Tr. Vol. XI, pp. 31-42). Several coal trucks had already driven up to the Ray-Mac mine site by the time the picket line was formed. (Tr. Vol. XV, pp. 13-14). When the trucks had been loaded with coal, Raymond Barker, the job foreman, had two Ray-Mac employees join him in a Chevrolet Suburban carry-all truck to escort the loaded coal trucks down the hill to the Ray-Mac entrance (Tr. Vol. XI, pp. 42-70). This "convoy" of Ray-Mac trucks was heavily armed. (Tr. Vol. XI, pp. 42; Tr. Vol. XII, pp. 8-10; Tr. Vol. VIII, p. 10). As the convoy started off the hill toward the Ray-Mac mine entrance, the Chevrolet Suburban carry-all truck was in the lead followed by three coal trucks and a pickup truck driven by Abner Justice (Tr. Vol. XI, p. 70). The coal truck drivers carried weapons and at least two of the trucks contained riders armed with shotguns (Tr. Vol. XV, p. 21; Tr., Vol. 22, p. 24). Abner Justice was armed with an AR-15 rifle (Tr. Vol. 13, pp. 6-7).

The Chevrolet Suburban loaded with armed riders pulled out of the mine site onto the main road. As it did so, the men in the Suburban waved at the picketing miners, then pulled over to the side and got out (Tr. Vol. XI, p. 71). The Suburban was followed by a coal truck driven by Danny Blanton. Just as Danny Blanton's truck approached the picketing miners, Blanton accelerated the truck as if he were going to run over the union men (Tr. Vol. 18, pp. 146-148). The proof as to who first began shooting was conflicting. There was testimony at trial that the miners fired first (Tr. Vol. XVIII, pp. 147-149; Tr. Vol. 12, p. 14), that Phillip Booth fired the first shot (Tr. Vol. 22, p. 20) and that no one knew who fired the first shot (Tr. Vol. XI, p. 72; Tr. Vol. XV, p. 19; Tr. Vol. VIII, pp. 17-19; Tr. Vol. XVII, pp. 68-70; Tr. Vol. 13, pp. 8-10).

At that point, a shooting spree involving Ray-Mac employees and picketing coal miners broke out which lasted about five minutes (Tr. Vol. XI, p. 73; Tr. Vol. 12, pp. 12-18; Tr. Vol. 24, pp. 40-44). The end result of this fire fight was that the picketing coal miners were chased off the hill. Some of the coal miners were so scared at the superior fire power of Ray-Mac that they backed automobiles down the road to get away (Tr. Vol. XVIII, pp. 153-154). The only people injured in the exchange of gunfire were Ricky Moore, a coal miner, and Phillip Booth (Tr. Vol. 24, pp. 46-67; Tr. Vol. XIX, p. 10). That evening, a union meeting was held in McDowell and the members agreed that they would not go back up on the picket line until someone went into the hills above Ray-Mac to see where the Ray-Mac employees had been shooting down at the men on the picket line that morning. Some of the men present at the meeting volunteered to go into the hills on Wednesday morning and keep watch on the Ray-Mac employees (Tr. Vol. 32, p. 152).

On Wednesday, February 17, 1982, several defendants and others went into the hills surrounding the Ray-Mac strip-mining operation armed with rifles. The testimony as to the purpose for this activity differed. The government's witnesses testified that the reason for going into the hills was to fire shots at the mine site in order to scare the employees and encourage them to join the union (Tr. Vol. 25, p. 53). Defense witnesses

testified that the purpose for going into the hills was to see if Ray-Mac personnel were armed and determine if it was safe to set up another picket line (Tr. Vol. 32, p. 14, 152).

In any event, shots were fired in the direction of the Ray-Mac mining site on Wednesday and Ray-Mac employees shot guns at the men in the hills (Tr. Vol. 12, pp. 22-23). No one was injured in the exchange of gunfire (Tr. Vol. IX, pp. 27, 32-37; Tr. Vol. VIII, pp. 22-26, 28-33). One government witness testified that it was so foggy that the men in the hills could not see the Ray-Mac mine site or anything else from their location (Tr. Vol. XXI, pp. 25, 32, 35-36). On Thursday, February 18, 1982, a shooting incident similar to the one on Wednesday occurred (Tr. Vol. XXI, pp. 28-36; Tr. Vol. 25, pp. 21-25). Again, no one was injured as a result of this incident (Tr. Vol. IX, p. 32).

Subsequently, on Sunday, February 21, 1982, a coal auger owned by Mac Mining and used at the Ray-Mac strip-mining operation was damaged by an explosion. An individual named Ed R. "Panhandle" Moore, who was named in the indictment as an unindicted co-conspirator but had been killed prior to the trial in an unrelated incident had been in charge of damaging the auger (Tr. Vol. 23, pp. 86-90). Some dynamite had also been placed on a bulldozer located at the Ray-Mac mining site, but the dynamite did not detonate (Tr. Vol. 23, pp. 102-103, 105; Tr. Vol. 21, p. 50).

The last incident of labor-related violence was the destruction of a coal tipple or loading facility leased by Coal-Mac. The tipple was located in the Simpson's Branch area of Floyd County and was the tipple at which coal mined by Ray-Mac was loaded onto trains (Tr. Vol. XIII, pp. 23, 53-56). On Friday, February 26, 1982, Ed. R. "Panhandle" Moore told his son, Basil Ray Moore, and one of the defendants to get into a truck because they had "a little job to do" (Tr. Vol. 26, p. 57). The three men drove to a service station, picked up some old tires and dropped them off at the coal tipple. After dark, the tires were wired to the tipple, diesel fuel was spread on the structure by Ed Moore, and the tipple was set on fire (Tr. Vol. 26, pp. 57-61). Basil Ray Moore, Panhandle's son and an alleged unindicted co-conspirator, testified that he did not know what his father had in

mind when he told him they had "a little job to do" but thought it might be a job fixing fences or cutting timber (Tr. Vol. 26, pp. 72-73). He further testified that it would have been suicide to turn back because Panhandle would have killed them on the spot (Tr. Vol. 26, p. 75). Ed R. "Panhandle" Moore had a reputation for being hot-tempered and would cut a man's throat over a drink of whiskey (Tr. Vol. 26, pp. 75-76; Tr. Vol. 18, p. 55; Tr. Vol. 19, p. 79).

B. The Investigation and Indictment.

Within a short time after the coal auger was damaged at Ray-Mac, federal authorities began an investigation into the activities at the Ray-Mac mine. Dennis L. McAllister, Special Agent with the Bureau of Alcohol, Tobacco and Firearms (hereinafter referred to as "ATF") and chief case agent, testified that he began an investigation into the Ray-Mac matter on February 21, 1982, when he responded to a reported bombing in the McDowell area of Floyd County, Kentucky (Tr. Vol. 16, p. 60). Working in conjunction with Kentucky State Police detectives, McAllister and other ATF agents visited the Ray-Mac mine site, took photographs and collected numerous pieces of physical evidence (Tr. Vol. 16, pp. 37-38, 52, 54, 57; Tr. Vol. 15, pp. 4, 64-65). Much of the evidence accumulated during the investigation was eventually introduced into evidence at trial. The ATF also introduced Special Agent Richard Kemp to the McDowell area in an undercover capacity. His alias was Rick Camper and he purported to be a "hit man" from Cleveland, Ohio, who was interested in illegally purchasing dynamite from Floyd County residents (Tr. Vol. 22, pp. 169, 172, 180; Tr. Vol. 18, pp. 46-47).

In his role as Rick Camper, Agent Kemp purchased dynamite and blasting caps from Phillip Dale Moore, Basil Ray Moore, Jake Moore and Phillip and Pearl Booth. These individuals were charged with violating federal laws, pled guilty and later cooperated with federal authorities in the Ray-Mac investigation (Tr. Vol. 22, pp. 168-175; Tr. Vol. 19, pp. 137-147; Tr. Vol. 26, pp. 67-71; Tr. Vol. 21, pp. 75-79; Tr. Vol. 18, pp. 226, 241-243). The

Booths were especially helpful to the government. After they had been arrested for illegally trading dynamite and blasting caps to Agent Kemp in exchange for two large bales of marijuana, they assisted federal agents in attempting to tape-record incriminating conversations with the various defendants (Tr. Vol. 19, p. 137, 147-152). Although some 99 tape recordings were made by the government, not one was introduced into evidence. They were, however, made a part of the record in this case because the tapes contained Brady material which the government misrepresented to the trial court on more than one occasion had been turned over to defense attorneys earlier for use at trial. The Brady material included such matters as admissions by Phillip Booth and Phillip Dale Moore that they had destroyed the Ray-Mac coal auger and coal tipple and not the defendants (Tr. Vol. 18, pp. 220-226; Tr. Vol. 22, pp. 151-156). These false representations made by the government to the court and defense attorneys formed part of the grounds for motions to dismiss the indictment for prosecutorial misconduct filed on behalf of Edgar Jones on February 20, 1984, and March 14, 1984 (D.E. at 17, Doc. Nos. 400, 401, 402; D.E. at 22, Doc. Nos. 431, 432, 433, 434).

The investigation continued and was ongoing at the time the indictment was returned against the defendants on June 6, 1983. The indictment, consisting of ten counts, charged the existence of a conspiracy involving Edgar Jones, nineteen co-defendants and eight alleged unindicted co-conspirators to obtain property of the Ray-Mac Coal Company by extortion in violation of the Hobbs Act, 18 U.S.C. §1951. Count I of the indictment, the conspiracy count, identified 42 overt acts which were allegedly committed during the course of and in furtherance of the charged conspiracy. Of these, Edgar Jones was named in only eight (Indt., Ct. I, filed 6/6/83; D.E. at 1, Doc. No. 1). Mr. Jones was also charged with substantive violations of the Hobbs Act in Counts II through V of the indictment by aiding and abetting in the shootings from the hills surrounding Ray-Mac on February 17 and 18, 1982, the destruction of the coal auger on February 21, 1982, and destruction of the coal tipple on February 26, 1982 (Indt., Cts. II-V,

filed 6/6/83; D.E. at 1, Doc. No. 1). The jury eventually acquitted Edgar Jones of the charges contained in Counts II, III and V of the indictment (Tr. Vol. 46, p. 12).

C. The Events at Trial.

The trial began on January 9, 1984, and the jury was sworn on January 25, 1984 (Tr. Vol. 7, p. 47). The government's theory of the case, as set forth in various pleadings filed with the trial court, was that Mr. Jones first attempted to cause District 30 of the United Mine Workers of America to organize Ray-Mac to eliminate what Edgar Jones allegedly perceived to be a competitive advantage. Failing this, the government contended that Edgar Jones, from February 15, 1982, to February 26, 1982, planned, initiated, financed, and directed an attempt to force Ray-Mac out of business through acts of violence (Govt's. Memo. in Supp. of Mot. to File Prop. Jury Inst., filed 1/9/84; D.E. at 11; Govt's. Theory of Pros. Charge, filed 4/3/84; Tr. Vol. 41, p. 3). The participants and members of the alleged conspiracy included Edgar Jones, his subcontract miners and foremen, and members of Local 5967 of the United Mine Workers of America. The government argued that there was no legitimate union organizing effort by Local 5967 of the United Mine Workers of America (Govt's. Memo. in Supp. of Mot. to File Prop. Jury Inst., filed 1/9/84; Govt's. Theory of Pros. Charge, filed 4/3/84).

Throughout the course of the trial, Edgar Jones and the other defendants asserted that the activities at Ray-Mac in February of 1982 and the events relating to the coal auger and coal tipple occurred in the course of a legitimate effort by Local 5967 of the UMWA to organize a non-union coal company and merely resulted from efforts to achieve a legitimate union objective. Furthermore, it was part of the defendant's theory that the picketing and other acts at the Ray-Mac mine site was not a conspiracy to assist Edgar Jones in shutting down his alleged competition, but rather a futile, desperate effort by union members and sympathizers to organize Ray-Mac and preserve the prominence of the UMWA in the coal fields of Eastern Kentucky (Def. Jones' Prop. Jury Inst. No. 69, filed

4/3/84). The defendants relied heavily on the decision of the United States Supreme Court in United States v. Enmons, 410 U.S. 396, 93 S.Ct. 1007, 35 L.Ed.2d 379 (1973), which held that "the use of violence to achieve a legitimate union objective" was not within the scope of the Hobbs Act, 18 U.S.C. §1951. All of the defendants at trial argued that the activities at Ray-Mac were exempt from prosecution under the Hobbs Act by virtue of the Enmons doctrine.

At trial, the government called seven alleged unindicted co-conspirators to testify in its case-in-chief against the defendants (Tr. Vol. 17, p. 109; Tr. Vol. 22, p. 5; Tr. Vol. 23, pp. 50, 59, 196; Tr. Vol. 25, p. 21; Tr. Vol. 26, p. 24; Tr. Vol. 11, p. 3). Of these, Pearl Newman Booth, Phillip Gene Booth and Phillip Dale Moore gave particularly damaging (and Appellant contended at trial untruthful) testimony against Edgar Jones. With the exception of one physical exhibit (Govt. Ex. No. 127), it was the testimony of the Booths and Phillip Dale Moore which provided the essential "link" between Appellant Jones and the destruction of the coal auger on February 21, 1982 (Tr. Vol. 17, pp. 154, 156, 193, 209, 212, 214; Tr. Vol. 24, pp. 151-153, 159, 161; Tr. Vol. 22, pp. 30-31, 65-67). The government characterized these witnesses as the "stars" of the government's case against the defendants (Tr. Vol. 7, pp. 52-114). Although Mr. Randy Kehrli, a trial attorney with the United States Department of Justice who assisted in the trial of the case, objected when counsel for Edgar Jones referred to Pearl Booth as one of the government's "star" witnesses (Tr. Vol. 20, p. 89), the fact remains that the Booths and Phillip Dale Moore were the government's most important witnesses against Edgar Jones.

1. The Testimony of Pearl Booth, Phillip Booth and Phillip Dale Moore.

During the direct examination of Pearl Booth, she testified that on Tuesday, February 16, 1982, she went to Edgar Jones office at the JRM Coal Company (Tr. Vol. 17, pp. 151-153). When she arrived, several defendants, her husband, and Phillip Dale Moore

were already present (Tr. Vol. 17, p. 153). These men were allegedly discussing who had been injured during the shoot-out between Ray-Mac employees and picketing coal miners. According to Pearl Booth, all of the men present at this alleged meeting agreed that the picketing miners had not bargained for a fight by Ray-Mac, that they did not expect Ray-Mac to have big guns, and that the coal miners had to have "bigger and better guns" to "stop Ray-Mac" from running (Tr. Vol. 17, p. 153). Edgar Jones allegedly stated at this meeting that Ray-Mac had underbid them so he wanted Ray-Mac shut down and that they needed to acquire more guns and ammunition — whatever it took — presumably to force Ray-Mac out of business (Tr. Vol. 27, p. 154).

Pearl Booth further testified that one defendant, German Stumbo, and Edgar Jones stepped out of the meeting and into another room. The two men allegedly stood outside Mr. Jones' office talking for a while and then German Stumbo left. Edgar Jones rejoined the meeting, which apparently was in the process of breaking up, eventually leaving Pearl Booth and Edgar Jones alone. At this time, Edgar Jones allegedly told Pearl Booth that, "the only way to get at Ray-Mac was through their equipment" (Tr. Vol. 17, pp. 155-156). Mrs. Booth also testified that Edgar Jones made precisely the same statement to her on Wednesday, February 18, 1982, at the JRM offices, although she did not recall who was present at the alleged meeting, what words were used by Mr. Jones, or "exactly . . . what was said at that time" (Tr. Vol. 17, p. 193). In another meeting which apparently occurred earlier in the day on Wednesday, Mrs. Booth recounted that she went back to Edgar Jones' office and found German Stumbo, Jason Moore and Edgar Jones discussing going into the hills surrounding the Ray-Mac strip-mining site. These men were allegedly talking about "the way to get to Ray-Mac was through their equipment by going up in the hills and shooting at it" (Tr. Vol. 17, p. 195). However, she also testified that she didn't know exactly what was said because it was only part of the conversation (Tr. Vol. 17, p. 195).

Finally, Pearl Booth testified that on Thursday, February 18, 1982, she met with Edgar Jones two times at his office. The first meeting allegedly occurred sometime in

the morning and Mrs. Booth claimed that Edgar Jones told her, "the [union] men was trapped in the hills" (Tr. Vol. 17, p. 208). He also allegedly stated that "German Stumbo was an old hand at it and could take care of everything"; "not to worry about Panhandle [Moore] because they was used to the hills"; that "[t]hey was, you know, Timber Rats"; and for the third time that, "the only way they could get at Ray-Mac was through the equipment . . . The equipment had to be done away with" (Tr. Vol. 17, p. 209). The second meeting on Thursday, February 18, 1982, allegedly occurred in the evening and included not only Mrs. Booth, but Phillip Booth as well (Tr. Vol. 17, p. 211). In this second meeting, Pearl Booth testified that Edgar Jones told Phillip Booth to "take a vacation and to have proof where his whereabouts was and to make sure he had proof of it because there was things going to happen that he would get the blame for" (Tr. Vol. 17, p. 212). When Pearl Booth asked what he meant, Edgar Jones allegedly said, "Pearl, the shit is going to hit the fan this weekend" and that the "Timber Rats" were going to "do away" with the equipment (Tr. Vol. 17, p. 212).

The Booths and Phillip Dale Moore also testified extensively against Edgar Jones in regard to his alleged participation in the events which occurred during the week of February 15, 1982, including destruction of the Ray-Mac coal tipple on Friday, February 26, 1982; that it was Edgar Jones who conceived the idea of shutting down the Ray-Mac Coal Company (Tr. Vol. 17, p. 122); that Edgar Jones told them to pull a strike at Ray-Mac (Tr. Vol. 17, p. 124; Tr. Vol. 24, p. 14-15); that Ray-Mac had underbid him on his coal contract with South Carolina Electric (Tr. Vol. 17, p. 124; Tr. Vol. 24, pp. 16, 23); that JRM would be unable to meet the unit train to South Carolina Electric that week (Tr. Vol. 17, p. 124; Tr. Vol. 24, pp. 4-7); and that if Ray-Mac were not shut down, the men would no longer have jobs (Tr. Vol. 17, p. 130; Tr. Vol. 25, p. 18). These "star" witnesses further testified that Edgar Jones advised the Booths to get whatever guns and ammunition were needed to shut down Ray-Mac (Tr. Vol. 17, pp. 153-154; Tr. Vol. 22, p. 30); that Edgar Jones stated the Ray-Mac coal tipple had to be done away with and that

not one lump of coal would be run through the tipple (Tr. Vol. 17, pp. 210, 227-228; Tr. Vol. 24, p. 180).

Not only were the Booths and Phillip Dale Moore "star" witnesses in the government's case against the defendants, they were alleged accomplices as well. The government named each of them as unindicted co-conspirators in the indictment. (Indt., Ct. I, ¶ 2, filed 6/6/83). Furthermore, the government elicited testimony at trial from Pearl Booth which portrayed her as a loving mother with a sick child and as a Deputy Sheriff of Floyd County, Kentucky (Tr. Vol. 17, pp. 118-119). Counsel for Edgar Jones objected to this testimony on the grounds that it was irrelevant and calculated to be outside the scope of proper direct examination. However, the trial court overruled the objection and allowed such testimony to continue (Tr. Vol. 17, p. 119).

Since the Booths and Phillip Dale Moore had given such incriminating testimony against Edgar Jones during their direct examinations, it was absolutely crucial to the defense of Edgar Jones that his counsel be allowed to impeach and discredit their testimony by every proper means available. The only effective method of accomplishing this task was to employ an extensive and vigorous cross-examination of each witness. However, when counsel for Edgar Jones commenced his cross-examination, he was met with repeated baseless objections by the prosecution and erroneous evidentiary rulings by the trial court. After the direct examination of Pearl Booth, Assistant United States Attorney Thomas Self moved the Court in limine that the defense counsel be required to inform the government of all written inconsistent statements upon which Pearl Booth was to be examined and that all matters covered by Rules 404(b), 404 or 609 of the Federal Rules of Evidence concerning which the defense intended to examine Mrs. Booth be disclosed to the court before any questioning thereon (Tr. Vol. 17, pp. 242-243). The motion was strenuously opposed by counsel for Edgar Jones as an improper attempt by the government to "strip" the cross-examination of the key government witnesses (Tr. Vol. 17, p. 243). The court resolved the matter by requiring counsel to approach the bench during

cross-examination if counsel believed that he was on "tenuous ground" (Tr. Vol. 17, p. 246).

Mr. Self then asked the trial court for a ruling on the use of impeachment under Rule 404(b) of the Federal Rules of Evidence, to which the court replied, "What is 404?" (Tr. Vol. 17, p. 247). The court ruled that it would allow defense counsel to proceed at his own risk during the cross-examination and would leave the use of Rule 404(b) matters within counsel's discretion (Tr. Vol. 17, p. 247). However, the trial court apparently had a change of heart during the overnight recess and on the morning of February 21, 1984, before the cross-examination of Pearl Booth began, the court announced that Rule 404(b) was not available for use by the defendants as a vehicle for introducing evidence of other crimes, wrongs or acts of prosecution witnesses to show motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident (Tr. Vol. 18, p. 4).

Mr. Aubrey B. Harwell, Jr., lead counsel for Edgar Jones, then commenced his cross-examination of Pearl Booth. During cross-examination, Mr. Harwell asked her whether the men at her home on Tuesday night were using drugs and the government attorneys objected. The court sustained the objection on the grounds that any further reference to criminal activities would be prejudicial to the government. Counsel for Edgar Jones again objected to the district court's ruling asserting that it would strip counsel of an effective cross-examination of the witness (Tr. Vol. 19, pp. 58-60).

The trial judge further limited the cross-examination of Pearl Booth by refusing to allow counsel for Edgar Jones to examine her in regard to numerous impeachment matters. Instead, the court required counsel to make what it called an "avowal" or offer of proof as to the areas regarding which he intended to question Pearl Booth (Tr. Vol. 19, p. 209; Tr. Vol. 13, pp. 120, 160). These areas included: (1) Pearl Booth's lawlessness, violent conduct and gun-carrying practices to rebut direct testimony elicited by the government that Pearl Booth was the loving mother of a sick child who required

treatments in Lexington, Kentucky, who had been made a Deputy Sheriff of Floyd County, Kentucky so that she could carry a gun for personal protection when driving her child to the hospital (Tr. Vol. 17, pp. 118-119; Tr. Vol. 19, pp. 72-83); (2) Pearl Booth's admissions to undercover agent Richard Kemp that she had lied twice to a judge in a state judicial proceeding (Tr. Vol. 19, p. 135); (3) the fact that Pearl and Phillip Booth had been assessed substantial tax deficiencies in February of 1982 by the Kentucky Department of Revenue and the IRS, the severity of those assessments and the fact that Edgar Jones had refused to loan the Booths money to pay their taxes (Tr. Vol. 19, pp. 183-190); (4) whether Pearl Booth had unsuccessfully attempted to seduce Edgar Jones (Tr. Vol. 19, p. 189); (5) Pearl Booth's involvement in the arson of a home owned by Arlie Potter on January 29, 1981, in which she, her husband Phillip Booth, and Phillip Dale Moore all participated for the purpose of defrauding an insurance company (Tr. Vol. 20, pp. 54-59); (6) the arson of Pearl Booth's residence on Jack's Creek in March of 1980 for the purpose of insurance fraud and her receipt of \$15,150.00 from the Kentucky Insurance Company which had been paid as as a result of a fraudulent insurance claim submitted by the Booths (Tr. Vol. 20, pp. 59-71); (7) Pearl Booth's involvement in the arson of a house trailer in 1980 owned by a lady named Fern Hall (Tr. Vol. 20, pp. 71-72); (8) the arson of a 1977 Lincoln Continental automobile which was owned by Pearl Booth's brother and which she had convinced her husband to destroy by fire for the purpose of fraudulently obtaining insurance proceeds (Tr. Vol. 20, pp. 72-74); (9) Pearl Booth's involvement in the destruction by arson of a black 1981 Cadillac Coupe de Ville purchased by Phillip Booth in April of 1981 from Ken Isaacs Cadillac-Oldsmobile (Tr. Vol. 20, pp. 74-79); (10) statements made by Pearl Booth to a counselor that she would "get even with anybody" who made her unhappy or made her life miserable (Tr. Vol. 20, pp. 83-86); (11) hallucinations from which Pearl Booth had suffered during the last five or six years (Tr. Vol. 20, pp. 88-94); (12) the episodes of memory loss from which Pearl Booth had suffered in the last six or eight years and especially during the time of the incidents at Ray-Mac in February of 1982 (Tr. Vol. 20,

pp. 96-97); and (13) Pearl Booth's consumption of powerful tranquilizing drugs in 1982 and her admission that she had been under the influence of a sedative while testifying during the trial (Tr. Vol. 20, pp. 97-100).

At the conclusion of the avowal, the district court directed counsel for Edgar Jones to "recapitulate" each area of questioning and state to the court how the questions were relevant and probative (Tr. Vol. 20, p. 100). Mr. Harwell explained that each area of questioning was proper by reason of several evidentiary rules and legal decisions including Rules 404(b), 405(b), 608(b), 609 and 611 of the Federal Rules of Evidence (Tr. Vol. 20, pp. 101-110). Mr. Edwin J. Walbourn, another defense attorney, implored the court to read Davis v. Alaska (Tr. Vol. 19, pp. 73-83). The court was obviously unfamiliar with the holding of that decision (Tr. Vol. 19, pp. 73-83).

Initially, the trial judge had ruled that all of the matters described above were collateral and could not be inquired into during the cross-examination of Pearl Booth (Tr. Vol. 19, pp. 73-83, 209). During a bench conference, the judge changed his mind and remarked that he would allow counsel for Edgar Jones to question Pearl Booth about the instance where she admitted that she had lied in a judicial proceeding (Tr. Vol. 19, p. 211-212, 135; Tr. Vol. 20, pp. 39-42). At another bench conference, the trial judge indicated that he had again changed his mind in regard to one of his previous rulings and advised counsel for Edgar Jones that he could ask Pearl Booth if she had any romantical attachment to Edgar Jones (Tr. Vol. 19, pp. 206-207). The trial judge also ruled that it would "read" to the jury Pearl Booth's responses to questions about the taxes which she and her husband owed to the Kentucky Department of Revenue and to the IRS (Tr. Vol. 20, pp. 48-52). The court then stated that it would permit the government attorneys to conduct re-direct examination on the tax matter in the presence of the jury (Tr. Vol. 20, p. 53). Counsel for Edgar Jones objected to this procedure on the grounds that to allow the government to conduct a live re-direct examination and to only read the witness' responses from the transcript would be unfair (Tr. Vol. 20, p. 53). The court responded by

stating, "That is the way I will permit it. The avowal to be read to the jury regarding the tax matter. Let's go on to the next matter" (Tr. Vol. 20, pp. 53). The district court also reversed itself and stated that it would tell the jury that out of their presence an inquiry was made of Mrs. Booth with regard to alleged instances of arson and fraud and that she invoked the Fifth Amendment privilege in regard to those matters (Tr. Vol. 20, p. 110). According to the trial court, "That is as far as we will go" (Tr. Vol. 20, p. 110). This "admonition" was to be given by the court to the jury upon the conclusion of all evidence relating to Pearl Booth (Tr. Vol. 20, p. 115). The trial judge then announced to counsel that he would permit the attorneys to re-examine Mrs. Booth about the tax matter and inquire into the extent of Mrs. Booth's drug-taking habits in 1982 (Tr. Vol. 20, p. 116). Mr. Harwell exercised this option on behalf of Edgar Jones and asked Mrs. Booth numerous questions about the drugs she was taking in February of 1982 (Tr. Vol. 20, pp. 119-124).

Subsequently, during the re-cross-examination of Pearl Booth by Mr. Harwell, he elicited testimony that she and Phillip Booth had paid a bribe to a Kentucky Motor Vehicle Commission official in exchange for his assistance in having the revoked driver's license of Phillip Booth reinstated (Tr. Vol. 20, pp. 198-208). When Mr. Harwell began questioning Mrs. Booth as to the details of this incident, she invoked the Fifth Amendment and refused to answer. This was done in the presence of the jury (Tr. Vol. 20, p. 208). At the conclusion of Pearl Booth's testimony, counsel approached the bench to determine when the trial court intended to admonish or instruct the jury about Mrs. Booth's invocation of the Fifth Amendment when cross-examined about arson and insurance fraud (Tr. Vol. 20, p. 219). In response to this inquiry, the district court refused to give the admonition as it had earlier promised, stating that, "Since you got the last thing in, I'm not even going to say anything to them That is the way the ball bounces" (Tr. Vol. 20, pp. 219-220).

The district court also limited the cross-examination of Phillip Booth and Phillip Dale Moore. As to the witness Phillip Booth, the trial court required counsel for Edgar Jones to make another "avowal" as to certain areas of his cross-examination including: (1)

his participation in the arson and insurance fraud scheme regarding the Arlie Potter home on January 29, 1981 (Tr. Vol. 19, pp. 137-147); (2) his participation along with that of Pearl Booth in the arson of the Booths' residence at Jack's Creek on March 21, 1980, for the purpose of insurance fraud (Tr. Vol. 19, pp. 147-150); (3) his burning of the 1977 Lincoln Continental automobile for Pearl Booth's brother (Tr. Vol. 19, pp. 150-151); (4) his participation in the commission of arson and insurance fraud in regard to a 1981 black Cadillac Coupe de Ville on April 16, 1981 (Tr. Vol. 19, pp. 151-153); and (5) the payment of a bribe to a Kentucky Transportation Department employee named Gary Martin to obtain the reinstatement of Mr. Booth's revoked driver's license (Tr. Vol. 19, pp. 153-155). Phillip Booth invoked the Fifth Amendment and refused to answer any questions propounded to him about these incidents. The trial court refused to allow any of the cross-examination of Phillip Booth during the avowal to be conducted in the presence of a jury on the grounds that it was inadmissible by reason of Rule 608 of the Federal Rules of Evidence, that the jury had heard a sufficient amount of impeachment and bias evidence as to Mr. Booth and that to permit such cross-examination would direct the attention of the jury from the "real issues" of the trial in violation of Rule 403 of the Federal Rules of Evidence (Tr. Vol. 19, pp. 155-156).

In addition to the limitations imposed on cross-examination into these five areas, the trial court further limited the cross-examination of Phillip Booth by refusing to allow Mr. Harwell to question Booth about two sworn inconsistent statements which he had given to Mr. Hank Hillin, a private investigator and former FBI agent employed by Neal & Harwell. These statements were totally contradictory to the direct testimony of Phillip Booth and completely exculpated Edgar Jones from any wrongdoing concerning the incidents at Ray-Mac (Tr. Vol. 18, pp. 260-284; Tr. Vol. 19, pp. 5-7, 9-14; Def. Jones' Ex. Nos. 16, 18). The district court also refused to allow Mr. Harwell to question Phillip Booth about an affidavit he had signed on March 1, 1982, which was also wholly

contradictory to Mr. Booth's testimony on direct and exculpated Edgar Jones (Tr. Vol. 19, pp. 8-14; Def. Jones' Ex. No. 19).

The trial judge similarly limited cross-examination of Phillip Dale Moore regarding (1) Mr. Moore's admissions to an undercover agent concerning his drug-taking habits (Tr. Vol. 23, pp. 7-10) and (2) his participation along with that of Phillip and Pearl Booth in burning down Arlie Potter's home on January 28, 1981, for the purpose of insurance fraud (Tr. Vol. 23, pp. 14-23). The court ruled that none of these matters would be permitted to be heard by the jury (Tr. Vol. 23, p. 26). The refusal of the district court to allow any cross-examination of Phillip Dale Moore regarding his drug-taking habits was wholly inconsistent with his ruling regarding the drug habits of Pearl Booth, as the court had allowed cross-examination of Pearl Booth into that area (Tr. Vol. 20, pp. 97-100; Tr. Vol. 19, pp. 73-83, 209; Tr. Vol. 20, p. 116).

2. The Appointment of ATF Agent Dennis L. McAllister
As An "Agent" Of The Federal Grand Jury.

During the testimony of Special Agent Dennis McAllister, a controversy arose over the proposed introduction into evidence of certain documents which one of the defendants had produced to the grand jury. The prosecution advised the trial court that it intended to call Special Agent McAllister "for the limited purpose as an agent of the grand jury" to introduce checks and letters which had been subpoenaed by the grand jury from Local 5967 of the United Mine Workers of America (Tr. Vol. 14, pp. 214-224).

The government advised the trial court and defense counsel that Special Agent McAllister had been made an "agent" of the federal grand jury which indicted the defendants and had acted as a custodian of documents produced to the grand jury (Tr. Vol. 14, pp. 214-224). This procedure of having the chief case investigator appointed as an "agent" of the grand jury was strenuously objected to on the grounds that no authority existed for such an appointment and that the secrecy requirements of Rule 6(e) of the Federal Rules of Criminal Procedure had possibly been violated (Tr. Vol. 14, pp. 214-224).

The court overruled the objections and allowed the documents into evidence (Tr. Vol. 14, p. 261). The transcript of the grand jury proceedings relating to Special Agent McAllister and his appointment to the office of grand jury agent were made a part of the record for purposes of appeal (Tr. Vol. 16, pp. 113-115).

Shortly after learning of Agent McAllister's appointment, which was discovered on February 7, 1984, counsel for Edgar Jones filed a motion to dismiss the indictment for prosecutorial misconduct, a supporting memorandum of law and the affidavit of Albert F. Moore, one of Mr. Jones' trial attorneys (D.E. at 17, Doc. Nos. 400, 401, 402). The motion alleged, inter alia, that the government had been guilty of prosecutorial misconduct in the form of the possible use of perjured testimony to secure the indictment against the defendants, the intentional concealment of tape recordings containing exculpatory information, a failure to disclose other exculpatory statements made by alleged co-conspirators, repeated misrepresentations to the trial court and to defense counsel regarding the non-existence of Brady material, the use of prejudicial remarks in the presence of the jury and a failure to comply with court orders concerning the production of witness' statements, Jencks Act material and exculpatory information. The motion further alleged that the government possibly violated the grand jury secrecy requirements of Rule 6(e) of the Federal Rules of Criminal Procedure by having Special Agent Dennis L. McAllister appointed as an "agent" of the grand jury (Mot. of E. Jones to Dis. Indt. for Pros. Mis., filed 2/20/84, pp. 1-2; D.E. at 17, Doc. No. 400). These pleadings included a statement made by Assistant United States Attorney Thomas L. Self to Mr. Jones' attorneys on February 7, 1984, clearly indicating that Phillip Booth was a liar and not worthy of belief (Mem. of Law in Supp. of Mot. to Dis. Indt., filed 2/20/84, D.E. at 17, Doc. No. 401; Affdt. of A.F. Moore, filed 2/20/84 at 13; D.E. at 17, Doc. No. 402).

The motion to dismiss requested that the trial court conduct an evidentiary hearing to determine the nature and extent of what appeared to be serious prosecutorial misconduct which implicated the integrity of the criminal justice system (Mot. of E. Jones

to Dis. Indt. for Pros. Mis., filed 2/20/84 at 2). Despite this request, and the serious allegations of misconduct contained in the pleadings, the trial court summarily denied the defendant's motion on the morning of February 21, 1984 (Tr. Vol. 18, p. 5). Absolutely no evidentiary hearing was held or other inquiry made to determine the important issues raised by the motion. In fact, the trial court denied the motion without having received any response whatsoever from the government. Indeed, the United States never filed a counter-affidavit explaining the conduct of the prosecuting attorneys nor did the prosecutors even deny the allegations of misconduct.

A similar motion was filed by counsel for Edgar Jones on March 14, 1984 (D.E. at 431). As with the first motion, counsel also filed a supporting memorandum of law and two affidavits reciting facts which constituted grounds for the motion (D.E. at 22, Doc. Nos. 432, 433, 434). The second motion to dismiss alleged that the prosecuting attorneys had been guilty of misconduct by failing to disclose to defense counsel prior material acts of misconduct committed by Phillip Booth, Pearl Booth and Phillip Dale Moore of which the government knew or should have known, as required by Brady v. Maryland, 373 U.S. 83 (1963), and that the government had knowingly allowed Phillip Booth to commit perjury at trial by testifying that he was intoxicated on December 2 and 3, 1983, at the time he gave two sworn statements to defense investigators which exonerated Edgar Jones from any wrongdoing in regard to the events at the Ray-Mac mine in February of 1982 (Mot. of E. Jones to Dis. Indt. & for Sanctions, filed 3/14/84 at 2-5; D.E. at 22, Doc. No. 431). This motion was presented both in writing and orally to the trial court and the government denied the allegations of misconduct. The trial judge overruled the motion without requiring any counter-affidavits or further evidence from the United States. The government filed no written response to the motion (Tr. Vol. 40, pp. 42-46).

ARGUMENT

I. THE DISTRICT COURT DEPRIVED EDGAR JONES OF HIS SIXTH AMENDMENT RIGHT OF CONFRONTATION AND ABUSED ITS DISCRETION BY IMPROPERLY LIMITING THE CROSS-EXAMINATION OF KEY GOVERNMENT WITNESSES AGAINST HIM.

The Appellant submits that the record in this case unequivocally demonstrates that the district court impermissibly limited the cross-examination of the key government witnesses against him to such a degree that it deprived Edgar Jones of his Sixth Amendment right of confrontation as guaranteed by the United States Constitution and constituted an abuse of discretion. As stated previously, Pearl Booth, Phillip Booth and Phillip Dale Moore were alleged accomplices of Edgar Jones and key government witnesses against him at trial. Their testimony provided the connection between Edgar Jones and destruction of the Ray-Mac coal auger which was crucial to the prosecution's case (St. of Facts at 16).

It was absolutely essential to the defense of Edgar Jones that his counsel impeach their testimony by conducting a vigorous and searching cross-examination of these important witnesses since it was part of the defense theory that whatever violence at Ray-Mac which was not attributable to a legitimate organizing effort by Local 5967 was committed by the Booths and their associates without the knowledge or participation of Edgar Jones (Open. St. of Harwell, Jan. 25, 1984 at 20-26). However, when counsel for Edgar Jones began cross-examining these witnesses the district court literally gutted what would have been an effective cross-examination by refusing to allow questioning into areas designed to establish bias, untruthfulness, inability to observe events and lack of credibility (St. of Facts at 20-25).

The Sixth Amendment to the United States Constitution mandates that a criminal defendant has the right "to be confronted with the witnesses against him". U.S. Const. amend. VI. The Supreme Court has repeatedly emphasized that its "cases construing the

[confrontation] clause hold that a primary interest secured by it is the right of cross-examination." Davis v. Alaska, 415 U.S. 308, 315, 94 S.Ct. 1105, 39 L. Ed.2d 347 (1974), quoting Douglas v. Alabama, 380 U.S. 415, 418, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965). The right of cross-examination is an essential safeguard of factfinding accuracy in an adversary system of justice and "the principal means by which believability of a witness and the truth of his testimony are tested". Davis v. Alaska, *supra*, 415 U.S. at 316. The right to confront witnesses guaranteed by the Sixth Amendment includes the right to cross-examine witnesses to show their possible bias or self-interest in testifying. Chipman v. Mercer, 628 F.2d 528, 530 (9th Cir. 1980), quoting Burr v. Sullivan, 618 F.2d 583, 586 (9th Cir. 1980). Indeed, the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination. Davis v. Alaska, *supra*, 415 U.S. at 315-316.

Although a trial court normally has discretion concerning the scope of cross-examination, see United States v. LaRiche, 549 F.2d 1088, 1096 (6th Cir. 1977), *cert. denied*, 430 U.S. 987 (1977) and 434 U.S. 966 (1977), a certain threshold level of cross-examination is constitutionally required and in such cases the discretion of the trial judge is obviously circumscribed. As the court in United States v. Elliott, 571 F.2d 880 (5th Cir. 1978), *cert. denied*, 439 U.S. 953 (1978) observed:

[W]hile the scope of cross-examination is within the discretion of the trial judge, this discretionary authority to limit cross-examination comes into play only after there has been permitted as a matter of right sufficient cross-examination to satisfy the Sixth Amendment.

Id. at 908, quoting United States v. Bass, 490 F.2d 846, 858 n. 12 (5th Cir. 1974). *Accord*, Greene v. Wainwright, 634 F.2d 272, 275 (5th Cir. 1981); Chipman v. Mercer, 628 F.2d 528, 530 (9th Cir. 1980); United States v. Callahan, 551 F.2d 733, 737 (6th Cir. 1977); United States ex rel. Santiago v. Vincent, 423 F. Supp. 103, 106 (S.D. N.Y. 1976), *aff'd*, 573 F.2d 1295 (2d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978).

This court has recently declared that where a trial court has limited but not totally precluded cross-examination as to motive, "the issue is whether the jury was otherwise in

possession of sufficient information concerning formative events to make a 'discriminating appraisal' of a witness' motives and bias". United States v. Touchstone, 726 F.2d 1116, 1123 (6th Cir. 1984), citing United States v. Campbell, 426 F.2d 547, 550 (2d Cir. 1970); United States v. Mahler, 363 F.2d 673, 677 (2d Cir. 1976); Flemmi v. Gunter, 410 F. Supp. 1361, 1371 (D. Mass. 1976). However, in making such a "discriminating appraisal", a defendant is entitled to present the jury with facts from which bias, prejudice or lack of credibility might be inferred. A limitation on cross-examination which prevents a person charged with a crime from placing before the jury facts from which bias, prejudice or lack of credibility of a prosecution witness might be inferred constitutes denial of the right of confrontation guaranteed by the Sixth Amendment. United States v. Garrett, 542 F.2d 23, 25 (6th Cir. 1975). See also United States v. Ayotte, No. 83-1035, slip op. at 9-10 (6th Cir. Aug. 24, 1984); United States v. Leja, 568 F.2d 493 (6th Cir. 1977), cert. denied, 434 U.S. 1074 (1978).

Furthermore, it is well settled that "cross-examination of a witness in matters pertinent to his credibility ought to be given the largest possible scope". United States v. Partin, 493 F.2d 750, 763 (5th Cir. 1974), quoting McConnell v. United States, 393 F.2d 404, 406 (5th Cir. 1968). See also United States v. Crumley, 565 F.2d 945, 949 (5th Cir. 1978); United States v. Mayer, 556 F.2d 245, 248 (5th Cir. 1977). This is especially true where a prosecution witness has had prior dealings with the prosecution or other law enforcement officials, so that the possibility exists that his testimony was motivated by a desire to please the prosecution in exchange for the prosecutor's actions in having some or all of the charges against the witness dropped, United States v. Onori, 535 F.2d 938 (5th Cir. 1976), securing immunity against prosecution for the witness, United States v. Dickens, 417 F.2d 958 (8th Cir. 1969), or attempting to assure that the witness receives lenient treatment in sentencing, Beaudine v. United States, 368 F.2d 417 (5th Cir. 1966), quoted in United States v. Mayer, 556 F.2d 245, 248-49 (5th Cir. 1977).

When the witness being subjected to cross-examination is the "star witness", or was an accomplice or participant in the crime for which the defendant is being prosecuted, the importance of cross-examination is necessarily magnified. United States v. Brown, 546 F.2d 166, 170 (5th Cir. 1977), citing Beaudine v. United States, 368 F.2d 417, 424 (5th Cir. 1966). It has repeatedly been held that when the government's case turns on the credibility of a witness, then "[d]efense counsel . . . must be given a maximum opportunity to test the credibility of the witness". Burr v. Sullivan, 618 F.2d 583, 587 (9th Cir. 1980), quoting United States v. Brady, 561 F.2d 1319, 1320 (9th Cir. 1977). See also United States v. Crumley, 565 F.2d 945, 949 (5th Cir. 1978); United States v. Mayer, 556 F.2d 245, 248 (5th Cir. 1977). Such wide latitude in cross-examination is generally allowed in order to give opposing counsel the maximum opportunity to test the witness' credibility by exploring the motivation for testifying. Gordon v. United States, 344 U.S. 414, 73 S.Ct. 369, 97 L.Ed. 447 (1953); United States v. Brown, 546 F.2d 166, 170 (5th Cir. 1977).

Not only is a criminal defendant entitled to elicit facts from a prosecution witness on cross-examination which tend to show the witness' biases or motivations for testifying, but he is entitled to impeach and discredit the witness as well. Noting that its earlier decisions had described cross-examination as the "greatest legal engine ever invented for the discovery of truth", the Supreme Court stated in Ohio v. Roberts, 440 U.S. 56, 63 n. 6, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), that "one critical goal of cross-examination is to draw out discrediting demeanor to be viewed by the fact-finder". "[T]he cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit the witness". Davis v. Alaska, 415 U.S. 308, 316, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974).

While the cross-examination of Pearl Booth, Phillip Booth and Phillip Dale Moore should have been given "the largest possible scope", see United States v. Partin, 493 F.2d 750, 763 (5th Cir. 1974), the trial court improperly prohibited counsel from cross-examining them on matters which directly related to bias, their motives to testify falsely

and their untruthfulness. First, cross-examination as to all of the arsons and insurance fraud schemes in which the witnesses were involved should have been permitted in accordance with Rule 608(b) of the Federal Rules of Evidence. That rule provides, in pertinent part, that:

(b) **Specific instances of conduct.** Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crimes provided in Rule 609 . . . may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness

Fed.R.Evid., Rule 608(b).

It is inconceivable how the trial court could have found, as it did, that arson for the purpose of fraudulently obtaining insurance proceeds was not "probative of truthfulness or untruthfulness" as provided in Rule 608(b). In common human experience, acts of deceit, fraud, cheating or stealing have been universally regarded as conduct which reflects adversely on a person's honesty and integrity. See Gordon v. United States, 383 F.2d 936, 940 (D.C. Cir. 1967), cert. denied, 390 U.S. 1029 (1968). An act of deception which reflects upon a witness' character for truthfulness is properly subject to inquiry during cross-examination under Rule 608(b) of the Federal Rules of Evidence. See United States v. McClintic, 570 F.2d 685, 690-91 (8th Cir. 1978). Thus, the trial court clearly erred in ruling that cross-examination as to these matters was not permissible under Rule 608(b).

The trial court further erred in refusing to allow cross-examination of Phillip Dale Moore as to his drug-taking habits. The court had made a similar ruling earlier in the trial regarding the drug habits of Pearl Booth, but had changed its mind and allowed cross-examination into that area (Tr. Vol. 20, pp. 97-100; Tr. Vol. 19, pp. 73-83, 209; Tr. Vol. 20, p. 116). It is proper to explore the drug addiction of a witness in order to attack his credibility and capability to observe the events in question. United States v. Sampol, 636 F.2d 621, 666 (D.C. Cir. 1980); United States v. Fowler, 465 F.2d 664, 668 (D.C. Cir. 1972).

In Wilson v. United States, 232 U.S. 563, 567, 34 S.Ct. 347, 58 L.Ed. 728 (1914), the Supreme Court ruled that the trial court had improperly denied cross-examination of an admitted drug user to determine whether her power of recollection had been impaired. Evidence of drug use at the time of trial or at the time of the alleged criminal offense is clearly relevant to the matter of a witness' credibility as a possible indication of a drug-related impairment in his ability accurately to recollect and relate factual occurrences while testifying. See United States v. Banks, 520 F.2d 627, 630 (7th Cir. 1975); United States v. Butler, 481 F.2d 531, 535 n. 5 (D.C. Cir. 1973).

Third, the trial court erroneously denied counsel for Edgar Jones the opportunity to cross-examine Pearl Booth in the presence of the jury regarding her lawlessness and the shooting incidents in which she had been involved. The government had elicited testimony from Pearl Booth on direct examination, over defense counsel's objection, that she was the mother of a sick child and was a Deputy Sheriff for Floyd County, Kentucky (Tr. Vol. 17, pp. 118-119). The obvious purpose for this testimony was to create an impression in the minds of the jurors that Pearl Booth was a good mother, a law enforcement official, a law-abiding citizen and someone who carried a gun only for personal protection when she drove her sick child to Lexington, Kentucky, for treatments. In truth and point of fact, Pearl Booth was an outlaw — a woman who improperly invoked her "law enforcement" powers to suit her needs, a person who had engaged in shoot-outs with other individuals and a person who had shot the finger from her husband's hand during a marital dispute (Tr. Vol. 20, pp. 80-83).

Edgar Jones was entitled to have his counsel rebut Pearl Booth's direct testimony by cross-examining her about these instances of violence. Evidence of Pearl Booth's prior acts of violence and participation in these shoot-outs was proper as impeachment by contradiction. By painting a picture of Pearl Booth as a good, law-abiding person, the government invited cross-examination concerning her previous conduct. United States v. McClintic, 570 F.2d 685, 691 (8th Cir. 1978). See also United States v. Glasser, 443 F.2d

994, 1002 (2d Cir. 1971), cert. denied, 404 U.S. 854 (1971); United States v. Reddington, 433 F.2d 997, 998 (4th Cir. 1970); United States v. Batts, 558 F.2d 513 (9th Cir. 1977). Therefore, such evidence should have been admitted by the trial court and its exclusion constituted error.

The trial court further improperly limited the cross-examination of Pearl Booth concerning her hallucinations, losses of memory and the statements she made to a counselor that she would "get even" with anyone who made her life miserable. These matters are directly related either to her ability to accurately recollect and relate factual occurrences about the alleged offense or to Mrs. Booth's bias against Edgar Jones for allegedly forcing her out of the coal business. The jury should have been informed of all matters concerning Pearl Booth's credibility to aid in their determination of the truth. As the Court held in United States v. Partin, 493 F.2d 750 (5th Cir. 1974):

It is just as reasonable that a jury be informed of a witness's mental incapacity at a time about which he proposes to testify as it would be for the jury to know that he then suffered an impairment of sight or hearing. It all goes to the ability to comprehend, know and correctly relate the truth.

United States v. Partin, *supra*, 493 F.2d at 762.

The Partin case reversed the conviction of the defendant as a result of the trial court's failure to permit cross-examination into a government witness' mental defects or treatments.

Similarly, in United States v. Lindstrom, 698 F.2d 1154 (11th Cir. 1983), the court reversed the convictions of two defendants who had been charged with mail fraud and conspiracy to commit mail fraud. The court held that:

At trial the defense sought to show that the key witness for the government was not credible, arguing that her motive for initiating and pursuing the investigation of Bay Therapy was based on hatred of the appellants. Lindstrom and Slater argued to the district court that this witness was carrying out a vendetta against them because she had not received her promised percentage of Bay Therapy when the business was sold. Appellants further sought to impeach the witness' credibility by demonstrating that her alleged vendetta resulted from a continuing mental illness, for which she had been periodically treated and confined. . . .

The trial court, fearing that the defense would attempt to put the witness herself on trial, stated:

I think we should discuss, too, the extent of the cross-examination of this witness in regard to these activities. I am trying to think this through. I am not fully convinced it's a 608-B question, although I think it's akin to that. But any questions along this line probably would go further than what seems to be envisioned by 608-B, because you're testing the witness's credibility is what you are attempting to do, I would suppose. So within reason, there are two or three properly framed questions I'm going to allow you to at least let this jury know about the fact that this witness has had some mental and emotional problems in the past. I'm not going to allow the defense to try this witness, so to speak. . . .

These rulings by the district court constituted an abuse of discretion contradicting Supreme Court and former fifth circuit authority on the right of confrontation in general and the right to examine the psychiatric history of adverse witnesses in particular. . . . We find the district court committed reversible error in unconstitutionally depriving appellants of their Sixth Amendment guarantee of the right to confrontation and cross-examination.

United States v. Lindstrom, *supra*, at 1161-1164.

Perhaps the most egregious error committed by the trial court was refusing to allow counsel for Edgar Jones an opportunity to cross-examine Phillip Booth about the affidavits he executed on March 1, 1982, December 2, 1982, and December 3, 1982, which contradicted Booth's direct testimony and contained statements exculpating Edgar Jones from any criminal involvement in the Ray-Mac incidents. Instead of allowing counsel for Edgar Jones to question Phillip Booth about these statements, the court inexplicably and improperly allowed portions of the three statements to be read to the jury by defense witnesses (Tr. Vol. 36, pp. 147-151; Tr. Vol. 32, pp. 179-187, 190-202, 215-216; Tr. Vol. 36, pp. 151-134). Under Rule 613 of the Federal Rules of Evidence, extrinsic evidence of prior inconsistent statements of witnesses is admissible only if the witness is afforded an opportunity to explain or deny making the prior statements. United States v. Williams, 668 F.2d 1064, 1068-69 (9th Cir. 1981); United States v. Lay, 644 F.2d 1087, 1090 (5th Cir. 1981). The trial court's refusal to allow cross-examination of Phillip Booth in regard to the three prior inconsistent sworn statements, whether resulting from a misunderstanding

of applicable case law or of the Federal Rules of Evidence, was clearly error. More important than violating evidentiary rules, the trial court's action deprived Edgar Jones of his Sixth Amendment rights of confrontation and cross-examination.

Edgar Jones was entitled, as a matter of constitutional right, to have his counsel examine Phillip Booth about Booth's exculpatory prior inconsistent statements. A witness' testimony regarding his prior inconsistent statements is relevant to the credibility of the witness. See Saladino v. Winkler, 609 F.2d 1211, 1214 (7th Cir. 1979). See also United States v. Williams, 668 F.2d 1064, 1070 (9th Cir. 1981); Patterson v. McCarthy, 581 F.2d 220, 221 (9th Cir. 1978). The trial court, by adopting the unusual and improper procedure of requiring defense counsel to introduce the prior inconsistent sworn statements of Phillip Booth through various defense witnesses without first permitting counsel to examine the witness himself about these inconsistencies, deprived Edgar Jones of the valuable right of cross-examining the witness about these matters. The effect of the inconsistencies upon the demeanor of the witness was withheld from the jury and served to substantially and prejudicially weaken the cross-examination of Phillip Booth.

An additional error committed by the trial court which operated to deny Edgar Jones of his right to confront and cross-examine key witnesses against him was the use of an improper "avowal" or voir dire procedure. The trial court required counsel for Edgar Jones to question the Booths and Phillip Dale Moore outside the presence of the jury regarding virtually all of the crucial areas on which counsel intended to impeach the witnesses. The court referred to this procedure as an "avowal" (Tr Vol. 19, p. 208) and counsel objected to the procedure (Tr. Vol. 17, p. 246; Tr. Vol. 19, p. 212).

The trial court's use of the "avowal" or voir dire was improper. In United States v. Bohle, 445 F.2d 54 (7th Cir. 1971), the trial judge required defense counsel to question a key prosecution witness about impeachment matters outside the presence of the jury and then prohibited defense counsel from questioning the witness about those matters while

the jury was present. The Seventh Circuit reversed the defendant's conviction holding that:

However, we fail to see what interest is to be served by making opposing counsel and the witness privy to the specific impeaching information. There are certainly interests to be protected by an opposite rule. In the instant case, for example, the witness was permitted time by the voir dire procedure to consider her answer to eliminate any reaction of surprise to the alleged impeaching material out of the presence of the jury.

Such a practice would appear to have a strong tendency to undermine the function of confronting the witness with the question in the first place. The loss to the jury of the witness's initial and immediate response is accompanied by the loss of one potentially significant aspect of credibility determination. In the usual case, we can see no point in thus weakening the right to an effective cross-examination by the use of the voir dire procedure. . . .

Because we find error in the use of the voir dire procedure in this case, we need not address the problem of whether the court . . . should have given defense counsel some additional time to secure the presence of any necessary impeaching witness who may not have been immediately available. . . .

We cannot now say that there was no prejudice in preventing further attack on the credibility of her testimony concerning the critical fact of Bohle's appearance and actions at the time of the offense.

United States v. Bohle, *supra*, 445 F.2d at 75.

The trial court's action in requiring counsel for Edgar Jones to question the key government witnesses during an avowal as to impeachment matters was nearly identical to the procedure condemned as improper in Bohle. It weakened the cross-examination of the witnesses by permitting them to consider the questions which would be asked of them and to formulate answers to those questions. The loss of surprise in the witness' immediate responses to impeachment questions further deprived Edgar Jones of the right to an effective cross-examination of the witnesses against him.

Finally, the trial court further erred and deprived Edgar Jones of his confrontation rights by prohibiting defense counsel from cross-examining one of the owners of Coal Mac about engaging in an armed conflict with members of the UMWA at Shelbyanna, Kentucky

in May of 1981 (St. of Facts at 7). When counsel attempted to conduct such an examination at trial, the court refused to permit the examination to be performed in the presence of the jury (Tr. Vol. XIII, pp. 118-119) and counsel placed the evidence in the record by way of avowal (Tr. Vol. XIII, pp. 160-166).

The fact that the alleged victim of the Hobbs Act extortion in this case had previously engaged in a shoot-out with members of the UMWA and kept an armory of sophisticated weapons at its office in Pikeville was directly relevant and probative on the issue of the "reasonable fear" element of the offense charged. As this court recognized in United States v. Billingsley, 474 F.2d 63 (6th Cir. 1973), cert. denied, 414 U.S. 819 (1973), "extortion is an essential element of the Hobbs Act and to prove extortion, it is essential to show that there was a generation of fear in the victim. The reasonableness of actual or anticipated fear is a vital element in these cases" Id. at 66. Where a trial court's restriction prevents defense counsel from cross-examining important government witnesses as to their credibility and the veracity of their testimony on a required element of the charged offense, the defendant has been denied his Sixth Amendment right of confrontation. See e.g., United States v. Callahan, 551 F.2d 733, 737 (6th Cir. 1977); United States v. Garrett, 542 F.2d 23, 26 (6th Cir. 1975).

In United States v. Ayotte, No. 83-1035, slip op. (6th Cir. Aug. 24, 1984), this court recently reversed the conviction of a criminal defendant because the district court had refused to allow defense counsel to question a key prosecution witness about omissions from the witness's grand jury testimony and from a written report prepared by the witness. Id. at 9-10. Here, the district court's action in limiting the cross-examination of important government witnesses was far more damaging and prejudicial than that in Ayotte since the court refused to allow cross-examination into many proper areas while Ayotte involved a restriction into only one such area.

Appellant submits that this court should not speculate as to whether the jury, as sole judge of the credibility of the prosecution witnesses, would have accepted his defense

theory that their testimony was false and not worthy of belief. The jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place on the witness's testimony which provided "a crucial link in the proof . . . of petitioner's act". Davis v. Alaska, 415 U.S. 308, 317, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). The areas upon which counsel for Edgar Jones should have been permitted to cross-examine the Booths, Phillip Dale Moore and officials of Coal-Mac in the presence of the jury related directly to their credibility, honesty and to an element of the charged offense. Even though the witnesses may have invoked their Fifth Amendment privilege and refused to answer questions about these matters, that alone may have been sufficient for the jury to have totally discredited or disbelieved their testimony and acquitted Edgar Jones. Indeed, the jury must have discredited much of their testimony since Edgar Jones was acquitted of the charges contained in counts II, III and V of the indictment (D.E. at 28).

Although Edgar Jones was denied the right of effective cross-examination by the trial court which "would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it", Davis v. Alaska, *supra*, 415 U.S. at 317-318, he was also greatly prejudiced by the trial court's actions. As the Supreme Court held in Alford v. United States, 282 U.S. 687, 51 S.Ct. 218, 75 L.Ed. 624 (1931):

Prejudice ensues from a denial of the opportunity to . . . put the weight of [a witness'] testimony and his credibility to a test, without which the jury cannot fairly appraise them. To say the prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial.

Alford v. United States, *supra*, 282 U.S. at 692 (citations omitted).

The trial court also clearly abused its discretion in limiting the cross-examination of the government witnesses. See e.g., Greene v. Wainwright, 634 F.2d 272 (5th Cir. 1981); United States v. Hitchmon, 609 F.2d 1098 (5th Cir. 1979); United States v. Leja, 568 F.2d 493 (6th Cir. 1977). Since it simply cannot be concluded beyond a reasonable doubt that

the error in limiting cross-examination was harmless, United States v. Ayotte, No. 83-1035, slip op. at 9-10 (6th Cir. Aug. 24, 1984), the conviction of Edgar Jones should be reversed.

II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN REFUSING TO INSTRUCT THE JURY ON EDGAR JONES' THEORY OF THE DEFENSE.

During the course of the trial, the trial court requested from each attorney a proposed jury instruction setting forth the defendants' theory of the defense and, in the case of the United States, the theory of the prosecution. Accordingly, on April 2, 1984, counsel for Edgar Jones submitted to the trial court defendant Jones' proposed jury instruction No. 69 which contained his theory of the defense (D.E. at 26, Doc. No. 460-A). The United States tendered its theory of the prosecution instruction at the Rule 30 conference on April 3, 1984 (Tr. Vol. 41, p. 3). After all counsel had been given an opportunity to review and state objections to the jury instructions prepared by the trial court, counsel for Edgar Jones inquired as to whether or not the court intended to charge the jury on the respective theories of the case. The trial judge, without explanation, replied that he was not going to give them (Tr. Vol. 41, pp. 124-125).

The theory of the defense instruction submitted to the trial court on behalf of Edgar Jones contained a description of his position as to each of the overt acts listed in the indictment in which he was named. For example, the government had alleged in overt act 1 of the indictment that on or about January 4, 1982, Edgar Jones met with Ernie Justice, the president of UMWA District 30, and attempted to get District 30 to organize Ray-Mac (Indt. Overt Act 1 at 5; D. E. at 1, Doc. No. 1). The testimony of Ernie Justice at trial, however, was in direct conflict with the allegations made by the United States. Mr. Justice testified that the reason he visited Edgar Jones' office on January 4, 1982, was to talk to truck drivers who hauled coal for JRM into joining the United Mine Workers of America (Tr. Vol. XIV, pp. 14-16). He further testified that he initiated the meeting, not

Edgar Jones, and that Edgar Jones did him a favor by agreeing to have the truck drivers meet with Justice at the JRM offices (Tr. Vol. XIV, at pp. 107-108).

Accordingly, the theory of defense jury instruction submitted on behalf of Edgar Jones set forth his theory or explanation of the January 4, 1982, meeting with Ernie Justice as follows:

Specifically, it is the theory of Edgar Jones that while he met with Mr. Ernie Justice on or about January 4, 1982, that meeting was called at the request of Mr. Justice so that Mr. Justice, in his capacity as president of District 30 of the United Mine Workers of America, could speak with truck drivers who hauled coal from contract mines of the JRM Coal Company, Inc., in an attempt to persuade the contract truck drivers to join United Mine Workers of America. Edgar Jones takes the position that that meeting was not scheduled for him to attempt to get District 30 to organize the Ray-Mac Coal Company, although he did echo the sentiments of men there that Ray-Mac should be unionized.

(Def. Jones' Proposed Jury Instruction No. 69 at 2).

Throughout the course of the proceedings below, Edgar Jones maintained his innocence of the charges made against him. It was his defense theory that the activities at Ray-Mac in February of 1982 occurred in the course of a legitimate effort by Local 5967 of the United Mine Workers of America to organize a non-union coal company and merely resulted from efforts to achieve a legitimate union objective (Open. State. of Harwell, Jan. 25, 1984, pp. 12-17). It was also the theory of Edgar Jones that any violent acts which were not incidental to the union organizing effort were committed by Phillip Booth, Pearl Booth and their associates without the knowledge or participation of Mr. Jones (Open. State. of Harwell, Jan. 25, 1984, pp. 20-26). The proof overwhelming supported this theory as even the Booths themselves admitted at trial that meetings occurred at their residence during the week of February 15, 1982, that they purchased weapons and ammunition used in the strike on their own initiative, and that Edgar Jones never directed them to buy specific weapons or reimbursed the Booths for any monies expended on guns or ammunition (Tr. Vol. XVIII, pp. 132-134, 141, 155, 163-164, 172-175, 188, 200-201; Tr. Vol. 19, pp. 7-9, 19-20, 45-48, 51-54, 72, 86-88, 116, 123-126).

The law is well settled in this Circuit that it is reversible error for a trial court to refuse to present adequately a defendant's theory of defense. United States v. Garner, 529 F.2d 962, 970 (6th Cir. 1976), cert. denied sub. nom. Brown v. United States, 426 U.S. 922 (1976). A criminal defendant is entitled to have a jury instruction on any defense which provides a legal defense to the charge against him and which has "some foundation in the evidence, 'even though the evidence may be weak, insufficient, and inconsistent, or of doubtful credibility.'" United States ex rel. Peery v. Sielaff, 615 F.2d 402, 403 (7th Cir. 1979), citing United States v. Garner, supra. See also United States v. Swallow, 511 F.2d 514, 523 (10th Cir. 1975), cert. denied, 423 U.S. 845 (1975); J. Cissel, Federal Criminal Trials §12-5 (1983).

In this case, the trial court committed reversible error in refusing to give the theory of defense jury instruction proposed by Edgar Jones. The instruction set forth in clear and concise terms the defense theories of Edgar Jones that (1) the activities at Ray-Mac in February of 1982 resulted from efforts by Local 5967 of the UMWA to organize a non-union mine; and (2) that Edgar Jones played no part in the violence at Ray-Mac, which resulted solely from the conduct of key government witnesses.

As demonstrated by the record in this case, the evidence introduced at trial through the government's own witnesses supported these defense theories and both theories provided legal defenses to the charges made against Edgar Jones. See United States v. Enmons, 410 U.S. 396, 401, 93 S.Ct. 1007, 35 L.Ed.2d 379 (1973) (the Hobbs Act does not apply to the use of force to achieve legitimate labor ends); United States v. Richardson, 596 F.2d 157, 162 (6th Cir. 1979) (mere knowledge, approval of or acquiescence in the object or purpose of a conspiracy, without an intention and agreement to cooperate in the crime, is not sufficient to make one a conspirator); United States v. Warledo, 557 F.2d 721, 729 (10th Cir. 1977) (the particular defendant whose guilt or innocence is being considered must have acted knowingly, willfully and unlawfully); United States v. Shelton,

573 F.2d 917, 919 (6th Cir. 1978), cert. denied, 439 U.S. 827 (1978) (conspiracy requires proof that the defendant was involved in the planning of the crime).

Therefore, all of the prerequisites necessary to the giving of a jury instruction setting forth Edgar Jones' theory of defense were met in this case and the trial judge was required, as a matter of law, to do so. At the very least, the trial judge should have reviewed the proposed theory of defense instruction and modified its terms or suggested modifications which would have conformed the instruction to his interpretation of the law. See e.g., United States v. Thetford, 676 F.2d 170, 178 (5th Cir. 1982), cert. denied, ___ U.S. ___, 103 S.Ct. 790, 74 L.Ed.2d 996 (1983); United States v. Blane, 375 F.2d 249, 252 (6th Cir. 1967). Since the trial judge flatly refused to give the requested instruction, or any theory of defense instruction whatsoever, Edgar Jones respectfully submits that his conviction should be reversed and the case remanded for a new trial.

III. THE TRIAL COURT ERRED IN FAILING TO HOLD AN EVIDENTIARY HEARING ON THE MOTION OF EDGAR JONES TO DISMISS THE INDICTMENT ON THE GROUNDS OF PROSECUTORIAL MISCONDUCT AND FURTHER ERRED IN FAILING TO EXERCISE SUPERVISORY CONTROL IN DISMISSING THE INDICTMENT.

Approximately six weeks into the trial, counsel for Edgar Jones became aware of certain acts of misconduct on the part of the prosecuting attorneys. At a pretrial hearing on September 12, 1983, Assistant United States Attorney Thomas L. Self represented to both the district court and to defense counsel that he was going to make "every single one of the tapes that pertain to this case available" to defense counsel for review to determine if the tape recordings made by federal agents during the course of the Ray-Mac investigation contained Brady material or other exculpatory information (Affdt. of A.F. Moore, filed Feb. 20, 1984, pp. 2-3; D.E. at 17, Doc. No. 402).

Subsequently, at another pretrial hearing on October 20, 1983, Mr. Self further represented to the trial court that he had given counsel for Edgar Jones the tapes made by the ATF during the Ray-Mac investigation "that involved the defendants, that contain the statements of the defendants." (Affdt. of A.F. Moore, filed Feb. 20, 1984 at 3-4). Mr. Self then mailed some forty-six (46) cassette tapes which, based on the representations of Mr. Self at the pretrial hearings, counsel for Edgar Jones believed to be copies of all tape recorded conversations pertaining to this case. Eight (8) additional tapes were later mailed to Mr. Aubrey B. Harwell, Jr., lead counsel for Edgar Jones, by Mr. Self (Affdt. of A.F. Moore, filed Feb. 20, 1984 at 4-5).

After having been in trial for several weeks, Mr. Harwell determined that other tape recordings existed which had not been disclosed by the prosecution and he filed a renewed Brady motion seeking the production of those tapes. In response, Mr. Self admitted in open court that the government possessed additional tape recordings which had not been disclosed to defense counsel as he had previously represented. Even though those tape recordings had been in the possession of the government for many months, Mr. Self told the district court that they contained no Brady material (Affdt. of A.F. Moore, filed Feb. 20, 1984 at 4-9). This representation was absolutely false. The new tape recordings which had previously been concealed by the government attorneys contained such Brady material as admissions by two key government witnesses that they were responsible for destruction of the Ray-Mac coal auger and coal tipple (Affdt. of A.F. Moore, filed Feb. 20, 1984 at 12-16). When Mr. Self was confronted with the admission of Phillip Booth that he had destroyed the coal auger and Mr. Harwell asked him if that admission did, in fact, constitute Brady material Mr. Self replied, "unless you know Phillip Booth the way we know him. If you knew Phillip Booth like we do, then you wouldn't think anything he said was Brady" (Affdt. of A.F. Moore, filed Feb. 20, 1984 at 13).

Upon discovering these facts and additional acts of prosecutorial misconduct, including the appointment of Special Agent Dennis L. McCallister as an "agent" of the

federal grand jury, counsel for Edgar Jones filed a motion to dismiss the indictment and supporting documents on February 20, 1984. The motion to dismiss requested that the trial court conduct an evidentiary hearing to determine the nature and extent of what appeared to be serious prosecutorial misconduct which implicated the very integrity of the criminal justice system (Mot. of Jones to Dismiss Indt. for Pros. Mis., filed Feb. 20, 1984 at 2). Despite this request and the serious allegations of misconduct contained in the pleadings, the trial court summarily denied the motion on February 21, 1984 (Tr. Vol. 18, p. 5). (St. of Facts at 26-27)

Counsel for Edgar Jones filed a second motion to dismiss, supporting affidavits and a memorandum of law on March 14, 1984, alleging that the government had knowingly allowed Phillip Booth to commit perjury at trial by testifying that he was intoxicated on December 2 and 3, 1983, at the time he gave two sworn statements to defense investigators which exonerated Edgar Jones from any wrongdoing in regard to the events at Ray-Mac (Mot. of Jones to Dismiss & for Sanc., filed March 14, 1984, pp. 2-5; D.E. at 22, Doc. Nos. 431-434). This motion was also presented orally to the trial court and the government denied the allegations of misconduct in open court. The judge overruled the motion without requiring any counter-affidavits or further evidence from the United States. The government filed no written response to the motion (Tr. Vol. 40, pp. 42-46).

A. The Prosecutor Has A Duty To Adhere To The Highest Standards Of Professional Behavior And Refrain From All Improper Methods Of Conduct For The Purpose Of Obtaining A Wrongful Conviction.

A prosecutor has the obligation to be scrupulously honest in his dealings with the trial court and defense counsel. As the Supreme Court observed in Berger v. United States, 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 1314 (1935):

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence

suffer. He may prosecute with earnestness and vigor — indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger v. United States, *supra*, 295 U.S. at 88.

United States Attorneys are expected to adhere to the highest standards of professional behavior and be worthy of complete trust and confidence. United States v. Johnston, 690 F.2d 638, 643 (7th Cir. 1982). These high duties imposed upon a prosecutor are embodied in virtually every model code of conduct which has been promulgated to set forth standards governing the conduct of lawyers who prosecute. See e.g., Model Rules of Professional Conduct, Rule 3.8 (Adopted by the ABA House of Delegates on Aug. 2, 1983); ABA Standards for Criminal Justice §§ 3-1.1, 3-3.5, 3-3.6, 3-3.11 (2d ed. 1980); ABA Model Code of Professional Responsibility, D.R. 7-103(a), D.R. 7-103(b). One of the duties imposed upon a prosecuting attorney is that he is both legally and ethically bound to promptly disclose to defense counsel, at the earliest feasible opportunity, the existence of evidence which tends to negate the guilt of the accused or which would tend to reduce punishment. See ABA Standards for Criminal Justice § 3-3.11 (2d ed. 1980) (Official Commentary adopts the definition of exculpatory material contained in Brady v. Maryland, 373 U.S. 83 (1963) and urges the disclosure of all material that is even possibly exculpatory, citing United States v. Agurs, 427 U.S. 97, 108, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1975)). Obviously, the intentional concealment of exculpatory material, misrepresentations to a federal district judge regarding the existence of such material and similar false representations of the existence of such material to defense attorneys by a federal prosecutor do not comport with the requirements of the law or professional ethics.

- B. The Government Misled The Grand Jury By Presenting The Possibly Perjured Testimony Of Phillip Booth, Pearl Booth And Phillip Dale Moore On Critical Issues Without Informing The Grand Jury That Their Testimony Was Not Credible.

Count I of the indictment charged Edgar Jones with conspiracy to violate the Hobbs Act and alleged in overt acts 36 and 37 that German Stumbo, Ed Moore, Jake Moore,

Teddy Kinney, Mose Mead, Kenneth Rowland and Philman Caudill blew up a coal auger belonging to the Ray-Mac Coal Company in furtherance of the alleged conspiracy. Court IV charged that Edgar Jones aided and abetted German Stumbo, Teddy Kinney, Mose Mead and Kenneth Rowland in violating the Hobbs Act by destroying the coal auger referred to in overt act 37 (Indt., filed 6/6/83; D.E. at p. 1, Doc. No. 1). It was on these very charges that Edgar Jones was convicted (Tr. Vol. 46, pp. 11-12).

The issue of who actually destroyed the coal auger was a critical element for the government to establish before the grand jury in order to obtain an indictment against Edgar Jones, for if the grand jury did not believe that the auger was destroyed by the defendants as charged, the government's case on that issue would have failed and in all likelihood no indictment would have been issued against Edgar Jones. The government's evidence regarding destruction of the coal auger came from Phillip Booth, Pearl Booth Phillip Dale Moore, Jake Moore and Philman Caudill. The alleged connection between Edgar Jones and the destruction of the coal auger, however, was in the form of testimony from Phillip Booth, Pearl Booth and Phillip Dale Moore. The grand jury testimony of the other government witnesses including Jake Moore and Philman Caudill did not implicate Edgar Jones in any way in the destruction of the coal auger.

What the government knew, but did not reveal to the grand jury, was that the testimony of the Booths and Phillip Dale Moore was probably false. At the time of their testimony before the grand jury, the government was in possession of undercover surveillance tapes containing statements of Phillip Booth and Phillip Dale Moore. On tape-recording No. 24, Phillip Booth told Special Agent Richard Kemp that he was responsible for destroying the coal auger by placing 47 sticks of dynamite under that piece of equipment and blowing it up (E. Jones Ex. Nos. 7-8, filed 2/20/84). Furthermore, Phillip Dale Moore, in a conversation with Special Agent Kemp at Wheelwright, Kentucky, admitted that he was solely responsible for burning the coal tipple and that he received \$5,000.00 for the job (E. Jones Ex. Nos. 7-8, Filed 2/20/84; NAGRA dated 3/19/83 at Wheelwright, Ky).

In addition, the government knew that Phillip Booth was a liar and not worthy of belief — Mr. Self had so advised counsel for Edgar Jones — and it had to know that Pearl Booth and Phillip Dale Moore were likewise habitual liars. Phillip Booth had given a sworn affidavit to Mr. Gary Johnson, a Prestonsburg attorney on March 1, 1982, which completely exonerated Edgar Jones in the Ray-Mac matter (E. Jones Ex. No. 19). Moreover, the government was aware of the extensive criminal records of Pearl Booth and Phillip Dale Moore involving crimes of dishonesty and of the fact that Moore had admitted under oath in an earlier trial prosecuted by Mr. Self that he was a liar. Yet, the government allowed these "witnesses" to testify before the federal grand jury which indicted Edgar Jones without asking them to explain prior inconsistent statements or otherwise informing the grand jury that their credibility was at least suspect, if not altogether nonexistent.

The prior inconsistent statements of the Booths and Phillip Dale Moore were by themselves sufficient to alert the government to the substantial probability that those witnesses would not and were not telling the truth to the federal grand jury. The government's failure to draw the grand jury's attention to problems with the Booth's and Moore's credibility could have been nothing but deliberate. The Booths initially testified before the grand jury on November 1, 1983, and Moore testified on January 3, 1983. The government thus had at least five months to review the witnesses' testimony, to confront them with inconsistent evidence in order to discern whether or not they had perjured themselves, and to alert the grand jury to the problems with the witnesses' testimony regarding the "crucial issues". Instead, the government ignored the possibility of perjury and — perhaps to avoid creating additional inconsistent statements — allowed the questionable testimony to remain explained.

The ability of the federal grand jury in this case to assess the credibility of conflicting testimony on crucial issues was blocked by the government's decision not to inform the grand jury of the substantial probability that the Booths and Moore had

committed perjury when testifying before the grand jury. Had the grand jury known that such testimony conflicted directly with prior statements made by the witnesses, it likely would have found that the Booths and Moore could not be believed and would have refused to indict Edgar Jones for his alleged participation in the destruction of the Ray-Mac coal auger.

This distortion of the grand jury process constituted prosecutorial misconduct. As the Supreme Court has stated, the "most valuable function" of the grand jury is "to stand between the prosecutor and the accused, and to determine whether the charge was founded upon credible testimony or was dictated by malice or personal ill-will". Hale v. Henkel, 201 U.S. 43, 59, 26 S.Ct. 370, 50 L.Ed. 652 (1906); see Wood v. Georgia, 370 U.S. 375, 390 82 S.Ct. 1364, 8 L.Ed.2d 569 (1960). The grand jury assumes constitutional stature by the Fifth Amendment's command that no federal prosecution shall occur unless on "presentment or indictment of a Grand Jury". United States v. Calandra, 414 U.S. 338, 343, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974), quoting Costello v. United States, 350 U.S. 359, 361-62, 76 S.Ct. 406, 100 L.Ed. 397 (1956). That mandate was included in the Constitution precisely because "the Founders thought the grand jury so essential to basic liberties". United States v. Calandra, *supra*, 415 U.S. at 343.

However, the ability of the grand jury to "stand between the prosecutor and the accused" disappears if the prosecutor presents the grand jury with perjured evidence. Today, the grand jury relies upon the prosecutor to initiate and prepare criminal cases and to investigate witnesses who come before it. The prosecutor is present while the grand jury hears testimony; he calls and questions the witnesses and draws the indictment. With that great power and authority there is a correlative duty, that is not to permit a person to stand trial when he knows that perjury permeates the indictment. United States v. Basurto, 497 F.2d 781, 785 (9th Cir. 1974).

In United States v. Basurto, 497 F.2d 781 (9th Cir. 1974), the defendant was charged with conspiracy to import and distribute marijuana. Prior to the commencement of the

defendant's trial, the government's key witness, William Barron, informed the prosecution that all his grand jury testimony concerning the defendant's conspiratorial activities was perjured. The prosecutor informed defendant's counsel of Barron's perjury, but failed to notify the court or the grand jury. At the trial's conclusion, the defendant was convicted on the conspiracy charge. On appeal, a panel of the Ninth Circuit reversed the defendant's conviction, holding that:

[T]he Due Process Clause of the Fifth Amendment is violated when a defendant has to stand trial on an indictment which the government knows is based partially on perjured testimony, when the perjured testimony is material, and when jeopardy has not attached. Whenever the prosecutor learns of any perjury committed before the grand jury, he is under a duty to immediately inform the court and opposing counsel — and, if the perjury be material, also the grand jury — in order that appropriate action may be taken.

United States v. Basurto, 497 F.2d at 785-86. Noting that the use of false testimony to obtain criminal convictions goes against "any concept of ordered liberty", United States v. Basurto, *supra*, 497 F.2d at 786, citing Napue v. Illinois, 360 U.S. 264, 269, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959), the Basurto majority concluded, on constitutional grounds, that reversal of a conviction is required:

[W]hen the government allows a defendant to stand trial on an indictment which it knows to be based in part upon perjured testimony. The consequences to the defendant of perjured testimony given before the grand jury are no less severe than those of perjured testimony given at trial, and in fact may be more severe. The defendant has no effective means of cross-examining or rebutting perjured testimony given before the grand jury, as he might in court.

United States v. Basurto, *supra*, 497 F.2d at 786. The Basurto rationale has been followed in a number of federal decisions. See e.g., United States v. Hogan, 712 F.2d 757 (2d Cir. 1983); United States v. Ciambrone, 601 F.2d 616 (2d Cir. 1979); United States v. Smith, 552 F.2d 257 (8th Cir. 1977); United States v. Guillette, 547 F.2d 743 (2d Cir. 1975), *cert. denied*, 434 U.S. 839 (1977); United States v. Goldman, 451 F. Supp. 518 (S.D. N.Y. 1978) *aff'd.*, 573 F.2d 1297 (2d Cir. 1978); United States v. Gallo, 394 F. Supp. 310 (D. Conn. 1975).

The Sixth Circuit has also recently recognized the validity of Basurto. In United States v. Adamo, No. 82-3001, slip op. (6th Cir. Aug. 22, 1984), this court indicated that it was in agreement with the basic ethical philosophy of the Ninth Circuit's Basurto decision as it requires the prosecutor to avoid knowingly using perjured testimony at any point in the prosecution of a case. Id. at 20. The court refused to adopt, however, that portion of Basurto which required the prosecutor, upon learning of material perjury before the grand jury, to seek a superseding indictment or suffer the sanction of having the indictment quashed. Id. at 20. The court rejected the prosecutorial misconduct claim in Adamo because the prosecutor chose not to use the allegedly tainted evidence in presenting the government's case at trial. Id. at 22. In this case, on the other hand, the prosecutor chose the opposite alternative and not only allowed the case to proceed on the indictment which was based on possible perjury, but called the same witnesses at trial to commit what Appellant believes to have been additional perjury. Thus, the "prejudice" and "actual undermining of [the appellant's right to] a fair trial" which was absent in Adamo because of a prosecutor's intelligent decision exists in this case. Id. at 22.

Dismissal of the indictment in this case would have been appropriate even if the grand jury testimony of the Booths and Phillip Dale Moore were not perjured. Although prosecutors do not have a duty to present exculpatory evidence to the grand jury, see United States v. Ruyle, 524 F.2d 1133, 1136 (6th Cir. 1975), cert. denied, 425 U.S. 934 (1975), in egregious circumstances the failure of a prosecutor to permit the grand jury to assess fully the credibility of the key government witnesses will constitute misconduct sufficient to require dismissal of the indictment. See United States v. Samango, 607 F.2d 877, 884 (9th Cir. 1979); United States v. Provenzano, 440 F. Supp. 561, 565 (S.D. N.Y. 1977); United States v. Phillips Petroleum Co., 435 F. Supp. 610, 619-20 (N.D. Okla. 1977). In Samango, for example, the government obtained an indictment by presenting the indicting grand jury with testimony of a witness named Granat who had been taken before a previous grand jury. Although the prosecutor knew of Granat's history of drug abuse and

knew there were substantial reasons to doubt Granat's credibility, he did not so inform the grand jury. The court noted that Granat's testimony provided "the only evidence" against several co-conspirators. The importance of Granat's testimony combined with the manner in which it was presented, persuaded the court that the prosecutor had committed error that, inter alia, "operated to the defendant's prejudice by producing a biased grand jury." United States v. Samango, supra, 607 F.2d at 884. Accordingly, the Ninth Circuit affirmed dismissal of the indictment by the district court. See also United States v. Phillips Petroleum Co., 435 F. Supp. 610, 621 (N.D. Okla. 1977); United States v. Provenzano, 445 F. Supp. 561, 566 (S.D. N.Y. 1977). This case falls within the holdings of Samango and Phillips Petroleum. In all three cases, the government relied upon testimony which there was reason to believe was false. More importantly, in each case the government failed to inform the grand jury of the substantial reasons to believe that the testimony of the key witnesses was not credible. This misconduct obviously prejudiced the grand jury's consideration of the indictment against Edgar Jones since it was the testimony of those three witnesses which provided the evidentiary link between Edgar Jones and destruction of the Ray-Mac coal auger. By allowing the grand jury to hear only a controlled portion of the witness' story, the government improperly lightened its burden of demonstrating probable cause to believe that the defendant conspired to and did in fact violate the Hobbs Act.

C. The Prosecution Was Guilty Of Prosecutorial Misconduct In Having Special Agent Dennis McAllister Appointed As An "Agent" Of The Grand Jury.

During the testimony of Dennis McCallister, a Special Agent employed by the ATF and chief case agent in the Ray-Mac investigation, it was discovered that he had been appointed as an "agent" of the federal grand jury which indicted the defendants (Tr. Vol. 14, pp. 214-224). This was strenuously objected to on the grounds that no authority existed for such an appointment and that the secrecy requirements of Rule 6(e) of the Federal Rules of Criminal Procedure had possibly been violated. The trial court overruled the

objections and allowed the documents offered by McCallister into evidence (Tr. Vol. 14, pp. 214-224, 261).

There is no legal authority which specifically provides for the appointment of the chief law enforcement officer in a federal investigation as an "agent" of the grand jury. Although Rule 6(e)(3)(A)(ii) of the Federal Rules of Criminal Procedure permits the disclosure of "matters occurring before the grand jury" to such governmental personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of his duties, see e.g., United States v. Lartey, 716 F.2d 955, 964 (2d Cir. 1983), there is no procedure for the appointment of an "agent" of the grand jury. In fact, the appointment of such "agents" has been strongly condemned by the few courts which have dealt with the issue.

In United States v. Anderson, 577 F. Supp. 223 (D.C. Wyoming 1983), several defendants had been charged with conspiracy to defraud the government and related offenses, including income tax evasion and obstruction of justice, in violation of 18 U.S.C. §371, 26 U.S.C. §7201, 26 U.S.C. §7206 (2) and 18 U.S.C. §1503. They moved to dismiss the indictment on the grounds, inter alia, of prosecutorial misconduct. The court granted the motion, finding that the pattern of conduct on the part of the government had breached the integrity of the grand jury system. One of the primary grounds supporting dismissal of the indictment was the appointment of law enforcement officers as "special agents of the grand jury". As to that conduct, the district court held as follows:

Another piece of the pattern of government conduct that impaired the grand jury's ability to act independently was the extensive use of law enforcement officers as 'special agents of the grand jury.' The grand jury transcripts I have read do not reveal how this pooh-bah office was conferred upon the agents involved. Nonetheless, various government investigative agents described themselves as 'grand jury agents' during the course of interviews of potential grand jury witnesses. In these instances, they identified themselves with credentials from the IRS and then hastened to explain in Mikado fashion that they were not there on behalf of the agency but on behalf of the grand jury and the U.S. Attorney.

United States v. Anderson, supra, 577 F.2d at 232. The district court went on to explain

that the appointment of law enforcement agents as agents of the grand jury undermined the independence of the federal grand jury:

The most important function of a grand jury is to stand between the prosecuting authorities and the suspect as an unbiased evaluator of evidence. That function cannot be maintained or understood by society when citizens are confronted by law enforcement agents who claim to be alter egos of the grand jury. . . . A grand jury that has become identified in the eyes of lay witnesses before it with law enforcement agencies is not functioning independently of the prosecution. Such identification can only undermine public confidence that the grand jury is performing its constitutional function to check the power of the government.

United States v. Anderson, *supra*, 577 F.2d at 232 (citations omitted). The court concluded by observing that:

Such a lawless procedure, like the use of law enforcement officers as 'special grand jury agents' cannot help but destroy the public perception of the grand jury as an independent democratic institution protecting the constitutional rights of individuals and checking the prosecutorial power of the federal government.

United States v. Anderson, *supra*, 577 F. Supp. at 234.

Similarly, in United States v. Kilpatrick, 575 F. Supp. 325 (D. Colorado 1983), a defendant who had been convicted of obstruction of justice, moved for dismissal or a new trial on the grounds of prosecutorial misconduct. As support for the motion, the defendant alleged, among other things, that the prosecuting attorneys caused an IRS special agent to be sworn as an "agent" of the grand jury. The district court strongly criticized this unauthorized procedure and, in granting the motion for a new trial, held as follows:

Perhaps the thing which disappoints me the most is the forgetfulness of the grand jury itself in going along with having two IRS agents in charge of the IRS investigation sworn as 'agents of the grand jury'. Yet, I can understand, as Justice Sutherland said in Berger v. United States, that grand jurors rely on Justice Department lawyers for their legal advice. They should do this, but because I empanelled the first of these two grand juries, I know what those jurors were told, and I strongly suspect that the second grand jury was told about the same thing. I orally, and on the record, stressed that a grand jury has a duty to protect the innocent and I emphasized that a grand jury is an independent

body, separate and apart from investigative agencies and that grand juries are not an arm of the prosecution but instead, they have a duty to examine the government's case carefully. I didn't tell them that they couldn't appoint IRS agents as their own 'agents', because it never occurred to me that there could be such a blurring of the 'investigative agency', 'prosecuting attorney' and 'grand juror' functions.

United States v. Kilpatrick, supra, 575 F. Supp. at 327. The court further held that Rule 6(e) of the Federal Rules of Criminal Procedure did not permit the grand jury to have an "agent" Id. at 329-330, and concluded by observing that the good intentions of the prosecuting attorney did not excuse the impropriety of appointing a federal law enforcement investigator as an "agent" of the grand jury. United States v. Kilpatrick, supra, 575 F. Supp. at 327-330.

At trial, it became readily apparent that McAllister's appointment as "agent" of the grand jury was purely a creation of the prosecution having absolutely no authority under Rule 6(e) of the Federal Rules of Criminal Procedure or elsewhere in the law. The grand jury never requested that McAllister serve as its "agent". Instead, he was conferred the office of "grand jury agent" at the request of Thomas L. Self, an Assistant United States Attorney:

MR. SELF: Mr. Foreman, one further thing, because of the records of this Grand Jury, a lot of records have been obtained; I'd ask you, if you would, to make Mr. McAllister an agent of this Grand Jury for the purpose of retention of the physical documents in the course of this investigation, and for the purpose of obtaining voluntary compliance with subpoenas [sic].

[Oath administered to Mr. McAllister to serve as an Agent of the Grand Jury to assist in this Grand Jury's investigation, and retention of records].

(Stumbo Ex. No. 3, G.J. Test. of D.L. McAllister, dated 10/4/82, p. 23).

Special Agent McAllister could cite no authority for his status as what one defense attorney called a "triple agent", but stated that it was "common practice" (Tr. Vol. 14, pp. 257-258). After his appointment as "agent" of the grand jury, McAllister continued in his role as chief law enforcement investigator and reported his results back to the grand jury

from time to time as a witness (Stumbo Ex. No. 3, G.J. Test. of D.L. McAllister, dated 1/3/83 and 6/6/83). He continued to investigate, gather documents and otherwise obtain information to be used against the defendants — not simply as a witness or an ATF agent — but as an "agent" of what was supposed to have been an independent grand jury. Special Agent McAllister's "promotion" from a law enforcement officer employed by the ATF to the office of "agent" of the grand jury caused a "blurring" of the investigation and grand jury functions. Assistant United States Attorney Thomas L. Self encouraged the "blurring" of the distinctions between the grand jury's function from that of an arm of the United States Attorney's Office by referring to McAllister as the grand jury's assistant on one of the McAllister's visits to the grand jury (Stumbo Ex. No. 3, G. J. Test. of D. L. McAllister dated 6/6/83 at 1; G.J. Test. of D. L. McAllister dated 1/3/83 at 6).

The appointment of Special Agent McAllister as an agent of the grand jury, for the obvious purpose of making it appear to the grand jury that McAllister was not merely a witness but its very own agent, was highly improper and contrary to recent pronouncements of the Supreme Court requiring the independence of the federal grand jury. The historical and constitutional function of the grand jury has been that of "an investigative body 'acting independently of either prosecuting attorney or judge', whose mission is to clear the innocent, no less than to bring to trial those who may be guilty." United States v. Dionisio, 410 U.S. 1, 16-17, 93 S.Ct. 764, 35 L.Ed.2d 67 (1973) (citations and footnotes omitted). The basic constitutional purpose of the grand jury has, in recent years, been steadily eroded by practices which compromise the grand jury's independence and separate identity. One federal judge has remarked:

This great institution of the past has long ceased to be the guardian of the people for which purpose it was created at Runnymede. Today it is but a convenient tool for the prosecutor — too often used solely for publicity. Any experienced prosecutor will admit that he can indict anybody at any time for almost anything before any grand jury.

Campbell, J., Delays in Criminal Cases, 55 F.R.D. 229, 253 (1972).

The grand jury can retain its proper place in the American system of justice only so long as federal courts invoke their supervisory powers to reflect the court's fundamental concern for protecting the integrity of the judicial process, particularly the function of the grand jury, from unfair or improper prosecutorial conduct. See United States v. Chanen, 549 F.2d 1306, 1309 (9th Cir. 1977), cert. denied, 434 U.S. 825 (1977). Other federal courts have not hesitated to do so, see e.g., United States v. Udziela, 671 F.2d 995, 998-999 (7th Cir. 1982), cert. denied, 457 U.S. 1135 (1982), and neither should this court. The circumstances in this case, especially in light of the appointment of the chief investigative agent as an agent of the grand jury, demonstrate a real probability that the secrecy requirements of Rule 6(e) of the Federal Rules of Criminal Procedure were violated.

D. The Government Was Guilty Of "Demonstrated And Long-standing" Prosecutorial Misconduct Sufficient To Warrant Dismissal Of The Indictment And The District Court Erred In Refusing To Conduct The Evidentiary Hearing Requested In Order To Determine The Nature And Extent Of Such Misconduct.

This court has recently held that in order for an appellate court to order the dismissal of an indictment as part of its supervisory powers, there must be a "showing of demonstrated and long-standing prosecutorial misconduct" as well as a showing of "prejudice to the defendant". United States v. Smith, 687 F.2d 147, 153 (6th Cir. 1982), cert. denied, 459 U.S. 1116 (1983), quoting United States v. Nembhard, 676 F.2d 193, 199-200 (6th Cir. 1982). Taking as true the allegations contained in Edgar Jones' motion to dismiss, and it is submitted that they must be assumed to be true since the government never denied those allegations, the standard for dismissal of the indictment on the grounds of governmental misconduct has been met in the instant matter.

The misconduct of the prosecuting attorneys apparently began in this case while the matter was still under consideration by the grand jury and continued throughout the course of the trial. It consisted of the possible use of perjured testimony to secure the indictment against the defendants, the use of perjured testimony at trial, the appointment

of the chief law enforcement agent as an "agent" of the grand jury, and the probable breach of the grand jury secrecy requirements of Rule 6(e) of the Federal Rules of Criminal Procedure. In addition, Assistant United States Attorney Thomas L. Self misrepresented to both the district court below and to defense attorneys that he had turned all tape recordings made during the course of the investigation over to defense counsel and had given the defense attorneys all Brady material as ordered by the court. These representations were absolutely false and the prosecutor admitted they were false at trial. (See Mem. of Law in Supp. of Mot. of E. Jones to Dismiss Indt. for Pros. Mis., filed Feb. 2, 1984, pp. 38-40).

These acts of misconduct, when coupled with the use of prejudicial remarks by the prosecution at trial and their failure to obey court orders regarding the production of discovery materials to defense counsel, established "demonstrated and long-standing prosecutorial misconduct" sufficient to warrant a dismissal of the indictment. Perhaps there were further acts of misconduct by the government which would provide additional grounds for dismissal. Unfortunately, counsel for Edgar Jones and the other defense attorneys were given no opportunity to develop this additional evidence by the district judge. Instead of conducting an evidentiary hearing to determine the nature and extent of the prosecutorial misconduct, the trial judge summarily overruled the defendant's motions to dismiss without so much as requiring a written response from the United States. At the very least, the district court should have conducted a hearing, as was done in United States v. Lamoureux, 711 F.2d 745, 747 (6th Cir. 1983), to inquire into the basis for the motion to dismiss and determine its merits.

Once a defendant presents to the district court a "concrete basis" supporting an inference of misconduct, he is entitled to an evidentiary hearing. See e.g., Matter of the Special April 1977 Grand Jury, 587 F.2d 889, 892 (7th Cir. 1978); In Re November 1979 Grand Jury, 616 F.2d 1021, 1027 (7th Cir. 1980); In Re Hunter, 520 F. Supp. 1020, 1022 (W.D. Mo. 1981). Furthermore, a district court cannot reject a defendant's misconduct

motion as a matter of law in the absence of any denial of the misconduct by the government. See United States v. Sweig, 316 F. Supp. 1148, 1154 (S.D. N.Y. 1970). Nevertheless, the district court did exactly that in this matter and afforded Appellant no hearing whatsoever.

As to the requirement that the defendant establish prejudice resulting from the prosecutorial misconduct, see United States v. Smith, *supra*, 687 F.2d at 153, there can be little doubt that the use of perjured testimony to obtain an indictment is prejudicial to those who are subsequently indicted. In this case, the testimony of the alleged perjurers, Phillip Booth, Pearl Booth and Phillip Dale Moore, provided the testimonial link between Edgar Jones and destruction of the Ray-Mac coal auger. Had these individuals not testified before the grand jury or had they testified truthfully, it is probable that Edgar Jones would never have been indicted for any alleged participation in the destruction of the coal auger. Unlike the situation presented in United States v. Blanton, 700 F.2d 298, 311-312 (6th Cir. 1983), *vacated*, United States v. Allen, 703 F.2d 981 (6th Cir. 1983), *modified*, 719 F.2d 815 (1983), *cert. denied*, ___ U.S. ___, 104 S.Ct. 1592, 80 L.Ed.2d 125 (1984), the testimony of the Booths and Phillip Dale Moore before the grand jury was material and related specifically to the alleged acts for which Edgar Jones was convicted. Accordingly, Edgar Jones was prejudiced by the use of alleged perjured testimony before the grand jury.

The prejudice to Edgar Jones resulting from the other acts of governmental misconduct is more difficult to articulate since the district court afforded defendant Jones no opportunity to develop evidence on those matters. The refusal to conduct an evidentiary hearing and summary denial of defendant's motion to dismiss unfairly operated to preclude defendant Jones from establishing the necessary facts to prove additional prejudice. This refusal on the part of the district judge was an abuse of discretion and a denial of due process of law. It also constitutes an additional ground for reversal of the defendant's conviction.