NO. 2000-1163

United States of America
First Circuit Court of Appeals

UNITED STATES OF AMERICA,

Appellee,

v.

DANIEL BURGOS

Defendant/Appellant

BRIEF OF APPELLANT

APPEAL FROM CONVICTION IN THE MASSACHUSETTS DISTRICT COURT

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STATEMENT OF JURISDICTION

The First Circuit Court of Appeals has jurisdiction of this case pursuant to 28 U.S.C. § 1291. The defendant was charged in the Massachusetts District Court with criminal violations of 21 U.S.C. § 846 and 841(a)(1) (attempt to possess with intent to distribute cocaine), and 18 U.S.C. § 1956 (a)(1)(A)(i) (money laundering). In this appeal, however, the defendant's arguments call into question the jurisdiction the District Court with regard to the money laundering charge.

Daniel Burgos was found guilty on August 18, 1999 and was sentenced on January 6, 2000 to 108 months imprisonment, and forfeiture pursuant to 21 U.S.C. § 853, in the United States District Court for the District of Massachusetts (*Frank H. Freedman*, J.).

STATEMENT OF ISSUES

1. Can a criminal defendant be convicted of and sentenced for possession with intent to distribute cocaine when the government failed to prove any detectable amount of cocaine?

2. Can a criminal defendant be convicted of money laundering when the government failed to allege and prove that the transaction affected interstate commerce?

3. Should the court have severed the defendant's trial when the evidence necessary for the government's money laundering case was inadmissible on the drug charge, forced the defendant to concede he was a drug dealer, no reasonable juror could ignore the evidence of ill-gotten money, and when severing the trials would not have prejudiced the government or the court?

4. Should the court have dismissed the money laundering count because it was filed more than 30 days after the defendant was arrested, in violation of the Speedy Trial Act?

STATEMENT OF FACTS AND STATEMENT OF THE CASE

In February 1999 three Massachusetts police officer served an arrest warrant on one William O'Neil. 8/12/99 *Trn.* at 9; 8/16/99 *Trn.* at 18-19. Mr. O'Neil agreed to help his situation by informing on Daniel Burgos, the defendant here. 8/16/99 *Trn.* at 20.

The officers brought Mr. O'Neil to the local headquarters of the DEA. There, the officers set up a series of phone calls, in which Mr. O'Neil arranged a transaction between himself and Mr. Burgos. 8/12/99 *Trn.* at 9-10, 20-24; 8/16/99 *Trn.* at 31-49. Mr. Burgos showed up at the agreed time and place with a substantial cache of cash, and was thereafter arrested. 8/16/99 *Trn.* at 96.

Mr. Burgos was subsequently indicted with attempt to possess with intent to distribute cocaine, 21 U.S.C. § 846 and 841(a)(1) and money laundering, 18 U.S.C. § 1956 (a)(1)(A)(i). After a jury trial in the District Court in Springfield, Massachusetts (*Frank H. Freedman*, J.), Mr. Burgos was found guilty of both charges. He was sentenced to 108 months imprisonment. This appeal followed.

SUMMARY OF ARGUMENT

Daniel Burgos was convicted of attempt to possess with intent to distribute cocaine, and money laundering; and was also subject to forfeiture.

The defendant first notes that the government offered no evidence of any drugs involved in the transaction leading to the defendant's arrest. Mr. Burgos argues that without such evidence, he cannot be sentenced to any incarceration because the sentencing statute and the sentencing guidelines both demand the government prove a detectable quantity of cocaine. He points out a constitutional defect with the government's failure as well, in that incarceration without proof to the jury beyond a reasonable doubt of any contraband violated the principles recently enunciated in *Apprendi v. New Jersey*. Finally, he argues that without evidence of contraband, the evidence was not sufficient to sustain his conviction.

Second, the defendant turns to his conviction for money laundering. He notes the money laundering statute requires a "transaction" which "affects interstate commerce." Mr. Burgos first notes that the government made no effort to prove the interstate commerce element of money laundering, and that therefore no reasonable jury could have found guilt beyond a reasonable doubt. He also points out that no interstate commerce is alleged in the indictment, and therefor the district court had no jurisdiction and no conviction is possible.

Third, the defendant argues that the drug and money laundering charges should not have been tried together. He notes that evidence necessary for the government's proof of money laundering – roles of cash in Mr. Burgos's house that could not have been legitimately earned – would be excluded as prior bad acts in the drug case had it been tried solo, but forced him to concede he was a drug dealer. He argues that his source of income would not have been an issue had the money laundering trial been conducted separately, and that the jury could not possibly ignore the overwhelming evidence of his ill-got assets. He points out, however, that neither the government nor the court's calendar would have been prejudiced by separate trials because the proof necessary for each count is different and not overlapping.

Finally, the defendant points out that the money laundering count was filed more than 30 days after he was arrested on the drug charge, in violation of the Speedy Trial Act. Mr. Burgos argues that because he was "arrested" for drugs, the Act applies and the money laundering charge should have been dismissed.

ARGUMENT

I. Because the Government Offered no Evidence of Any Drugs, the Defendant Cannot Be Convicted of or Sentenced for a Drug Crime

A. No Cocaine

The informant, William O'Neil, was arrested on a warrant. 8/12/99 *Trn.* at 9; 8/16/99 *Trn.* at 19. Because he was not arrested while attempting, for instance, to deliver drugs, there were no actual drugs involved in this case. The government admits this. In cross-examination Richard Soto, a DEA agent, testified:

> "Q: Now, you were present at the video store when the arrest was made?
> A: Yes.
> Q: And there was no cocaine or counterfeit – fake cocaine to conduct this transaction; is that correct? In other words, there was no white powder to kind of show anybody to show they were dealing in cocaine; is that correct?
> A: That's correct."

8/16/99 *Trn.* at 113. Thus, even assuming that the defendant Mr. Burgos and the informant Mr. O'Neil arranged a buy of two kilograms of cocaine, *see, e.g.,* PRESENTENCE REPORT at 6, there was no actual cocaine involved in their transaction.

B. Mr. Burgos Cannot Be Sentenced to Imprisonment Without the Government Having Proved a "Detectable Amount" of Cocaine

The conduct of which Mr. Burgos is accused – attempting to possess with intent to distribute cocaine – is criminalized in the first several words of 21 U.S.C. § 841(a). Most of the remainder of the lengthy statute is devoted to sentencing. It specifies substances and amounts, and contains graduated sentences generally commensurate with the seriousness of the drug and the quantity involved in the crime. 21 U.S.C. § 841(b); *United States v. Muniz*, 49 F.3d 36, 39 (1st Cir. 1995) ("In the typical narcotics case, the sentencing guidelines link drug quantity to sentence length.").

Regardless of the type or amount of substance, however, all the penalty sections of 21 U.S.C. § 841 base sentencing upon a "detectable amount" of the drug. The portion of the statute under which Mr. Burgos was sentenced provides:

> "In the case of a violation of subsection (a) of this section involving . . . 500 grams or more of a mixture or substance containing a *detectable amount* of . . . cocaine, its salts, optical and geometric isomers, and salts of isomers . . . such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years, [and] a fine . . . ."

21 U.S.C. § 841(b)(1)(B)(ii) (emphasis added). The Sentencing Guidelines contain the same language:

> "Unless otherwise specified, the weight of a controlled substance set forth in the [drug quantity] table refers to the entire weight of any mixture or substance containing a *detectable amount* of the controlled substance."

U.S. S.G. § 2D1.1(c), note*(A) (emphasis added).

Chapman v. United States, 500 U.S. 458 (1991), is not a remarkable case. In it, the Supreme Court construed the language of 21 U.S.C. § 841 and decided that sentencing for LSD should be based on the weight of the carrier. It wrote: "So long as it contains a *detectable amount*, the entire mixture or substance is to be weighed when calculating the sentence." *Chapman*, 500 U.S. at 459. This circuit's law is the same. *United States v. Stoner*, 927 F.2d 45, 46 (1st Cir. 1991) (mandatory penalty triggered by either net quantity of pure drug or gross quantity of mixture or substance "containing any detectable amount"of drug), *cert. denied*, 502 U.S. 840. That there must be a "detectable amount" cannot, by the language of the statute and guidelines, be seriously disputed. Without it, a defendant cannot be sentenced to incarceration.

Generally in drug prosecutions the government offers evidence of the quantity and composition of the substance in question by forensic testimony or by a laboratory report. In reverse-sting cases, the government generally provides a sample of the drug so that there is some actual narcotic involved in the transaction.

See e.g., United States v. Williams, 109 F.3d 502, 506 (8th Cir. 1997) ("FBI Special Agent Pisterzi obtained five single kilogram packages of cocaine from the DEA lab in Chicago, which he brought to the hotel for use in the reverse sting."). In Mr. Burgos's case, however, the government did not offer to the jury any actual cocaine, testimony as to its alleged composition and weight, or a laboratory report itemizing what a technician found upon examining it. Thus, the government failed to prove any "detectable amount."

Mr. Burgos's case is not like the conspiracy cases in which a defendant, standing convicted in relation to a certain quantity, is held responsible for the greater amount involved in the conspiracy. *See e.g., United States v. Lindia*, 82 F.3d 1154 (1st Cir. 1996); *United States v. Fisher*, 3 F.3d 456 (1st Cir. 1993). Here, the government did not charge Mr. Burgos with a conspiracy; and even in the conspiracy cases, there are *some* drugs involved. *Id.* Thus there can be no conspiracy-type sentencing piggy-backing.

Mr. Burgos's case is also unlike the non-conspiracy cases in which a defendant, standing convicted in relation to a certain quantity actually transacted, is held responsible for a greater amount involved in the defendant's entire course of conduct. *See e.g., United States v. Williams*, 109 F.3d 502 (8th Cir. 1997). Here, the government did not offer any evidence of any detectable amount, and thus there

is no actual quantity upon which a greater amount can be piggy-backed.

Because sentencing requires proof of a "detectable amount," Mr. Burgos's sentence is illegal. This court construes the law regarding sentencing *de novo*. *United States v. Muniz*, 49 F.3d 36 (1st Cir. 1995); *United States v. Sepulveda*, 15 F.3d 1161 (1st Cir. 1993), *cert. denied*, 516 U.S. 1223 (1994). While Mr. Burgos's conviction may stand, his case must be remanded for re-sentencing, with no possibility of incarceration.

C. Mr. Burgos Cannot Be Constitutionally Sentenced to Any Term of Imprisonment

In its recent decision, the United States Supreme Court determined that a defendant cannot be constitutionally sentenced beyond the maximum provided in a criminal statute, without the facts necessary for the enhanced sentence having been proven to a jury beyond a reasonable doubt. *Apprendi v. New Jersey*, __ U.S. __, 120 S.Ct. 2348 (2000).

Mr. Burgos was sentenced to a term within the maximum provided for two kilograms of cocaine, assuming that amount was proven to the jury. Because no *detectable amount* was proven, however, the statutory maximum penalty for a sale of two kilograms of cocaine is irrelevant. The maximum term of imprisonment for no cocaine is zero, but Mr. Burgos was sentenced to considerably more.

Accordingly, Mr. Burgos's sentence is unconstitutional. Thus, while Mr. Burgos's conviction may stand, his case must be remanded for re-sentencing, with no possibility of incarceration.

D. With No Evidence of a Controlled Substance, a Detectable Quantity, or Possession, Mr. Burgos Cannot Be Convicted

The statute pursuant to which Mr. Burgos was convicted, provides that:

> "[I]t shall be unlawful for any person knowingly or intentionally . . . to manufacture, distribute, or dispense, or *possess* with intent to manufacture, distribute, or dispense, a *controlled substance*."

21 U.S.C. § 841(a)(1) (emphasis added). The indictment charges Mr. Burgos's with:

> "knowingly and intentionally attempt[ing] to *possess* with intent to distribute a quantity of a mixture or substance containing a *detectable amount* of cocaine."

SUPERSEDING INDICTMENT, *Addendum* at 5 (emphasis added).

The crime of possession with the intent to distribute has four essential elements. The government must prove beyond a reasonable doubt that the defendant (1) knowingly, (2) possessed, (3) contraband, (4) with an intent to distribute it. *See e.g., United States v. Innie*, 7 F.3d 840, 844 (9th Cir. 1993).

It is insufficient to sustain a conviction on appeal, if, based on the totality of the evidence at trial, a rational juror could not find all of the elements of the

charged offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307 (1979); *United States v. Henson*, 945 F.2d 430 (1st Cir. 1991).

The government need not prove any particular *amount* of a controlled substance to gain a conviction. *United States v. Lindia*, 82 F.3d 1154 (1st Cir. 1996). *Existence* of the contraband, as well as the defendant's *possession* of it, however, are essential elements. In *United States v. Gonzales*, 65 F.3d 814 (10th Cir. 1995), for instance, the defendant was charged with possession with intent to distribute marijuana. The court found that because the defendant never actually or constructively possessed the drug, which was in the trunk of a car to which the defendant had no claim or keys, the defendant could not be guilty of possession. *Gonzales*, 65 F.3d at 818-19. Likewise, there can be no possession when there are no drugs, and there can be no drug crime when there are no drugs.

This case is not like the distribution cases, for which possession is not an element. *United States v. Sepulveda*, 102 F.3d 1313, 1317 (1st Cir. 1996); *United States v. Tejada*, 886 F.2d 483, 490 (1st Cir. 1989). Here, Mr. Burgos was charged with possession with intent to distribute, not distribution alone.

As noted, the government in Mr. Burgos's case neither attempted nor succeeded in proving the existence of any controlled substance, or any detectable amount of cocaine. Thus, no rational juror could find that Mr. Burgos possessed a

controlled substance, or a detectable amount of cocaine based on the evidence presented. Accordingly, Mr. Burgos's drug conviction must be reversed.

II. The Government Failed to Allege or Prove an Affect on Interstate Commerce in its Money Laundering Case Against Mr. Burgos

For a money laundering conviction, the government must prove the defendant conducted a "financial transaction" which involved the proceeds of a crime, that he knew the money involved was the proceeds of a crime, and that he intended to promote a further crime. 18 U.S.C. § 1956(a)(1)(A)(i); *see United States v. Cruz*, 993 F.2d 164 (8th Cir. 1993). A "financial transaction" means "a transaction which in any way or degree affects interstate or foreign commerce . . . involving one or more monetary instruments." 18 U.S.C. § 1956(c)(4)(A). Cash is a "monetary instrument." 18 U.S.C. § 1956(c)(5)(i).

A. Interstate Commerce is an Essential Element of the Offense

An affect on interstate commerce is an essential element of the crime of money laundering. *United States v. Goodwin*, 141 F.3d 394, 401 (2nd Cir. 1997) ("Because Congress prohibited money laundering only when the individual financial transaction at issue affects interstate or foreign commerce, proof of a nexus with interstate or foreign commerce is an essential element of the crime of money laundering."), *cert. denied*, 118 S.Ct. 1541, *cert. denied*, 119 S.Ct. 190; *United States v. Bell*, 1993 WL 309611(4th Cir. 1993); *United States v. Peay*, 972 F.2d 71, 74 (4th Cir. 1992) ("Proof of some effect on interstate commerce is

essential" to show a money laundering violation).

B. The Government Offered No Evidence of Interstate Commerce

At trial, however, the government made no attempt to prove an affect on interstate commerce. The Government may claim that four pieces of its case prove interstate commerce – use of cash, an arrangement to buy cocaine, a supposed out-of-state supplier, and involvement in the drug trade. But none do.

1. Mr. Burgos Attempted a Wholly Intra-State Cash Transaction

The government offered evidence that Mr. Burgos attempted a cash transaction. There was no allegation or attempt to prove, however, that the transaction was not wholly *intra*-state. After the informant and Mr. Burgos agreed on a time and place for their transaction, the informant traveled from the DEA office in Springfield, Massachusetts, to the Hollywood Video Store, also in Springfield. 8/16/99 *Trn.* at 39-41. Mr. Burgos traveled with his cash, from his home in Springfield, Massachusetts to the Hollywood Video Store, also in Springfield. No part of the transaction occurred outside of Springfield, Massachusetts.

Some effect on interstate commerce, however minimal, must exist. The transportation of crime proceeds on interstate highways, the use of federally-

insured banks, or the use of the federal postal system may sufficiently affect interstate commerce for the money laundering statute to apply. *See e.g., United States v. Kelley*, 929 F.2d 582, 586 (10th Cir. 1991) (money used to buy car made in Michigan but sold in Oklahoma), *cert. denied*, 502 U.S. 926 (1992); *United States v. Gallo*, 927 F.2d 815, 823 (5th Cir. 1991) (transportation of money on interstate highway); *United States v. Peay*, 972 F.2d 71, 74 (4th Cir. 1992) (money deposited in FDIC insured bank), *cert. denied*, 506 U.S. 1071 (1993); *United States v. Eaves*, 877 F.2d 943 (11th Cir. 1989) (developers sent option payments for purchase of property from Atlanta, Georgia, to bank in Jacksonville, Florida), *cert. denied*, 493 U.S. 1077 (1990); *United States v. Koller*, 956 F.2d 1408 (7th Cir. 1992) (use of bank to issue money order); *United States v. Kunzman*, 54 F.3d 1522, 1526-27 (10th Cir. 1995) (transactions involving FDIC insured banks); *United States v. Garcia-Abrego*, 141 F.3d 142 (5th Cir. 1998) (funds transported across Mexican border). *C.f. United States v. Dimeck*, 24 F.3d 1239, 1247 (10th Cir. 1994) (interstate transport of money *not* constitute transaction to bring conduct within money laundering statute).

But the mere *intra*-state use of cash does not create a sufficient nexus to interstate commerce. G. Richard Strafer, *Money Laundering: The Crime of the*

'90s, 27 AM. CRIM. LAW. REV. 149, 195 (1989) ("the mere transfer of cash from one person to another does not, without considerably more, affect interstate or foreign commerce"); *see Smith v. Ayres*, 845 F.2d 1360, 1366 (5th Cir. 1988) (dismissing RICO claim because phone calls were intra-state).

In *United States v. Grey*, 56 F.3d 1219, 1223-26 (10th Cir. 1995), the tenth circuit found that absent a showing that the particular money had traveled interstate, giving a video poker manager $200 to "feed the pot" was not a sufficient nexus to interstate commerce. The court noted the government must prove a "minimal" effect on interstate commerce, and wrote:

> "'Minimal' means that the government must prove something, some effect on interstate commerce. Without delving into metaphysics, we can suggest at least that something is more than nothing. Here the government proved nothing, nothing more than that $200 in cash currency was used. The government would have us hypothesize the source and ultimate destination of the $200 in Federal Reserve Notes without one iota of evidence related to its origin or proof of what subsequently took place with the funds, as did the government prosecutors in *Kelly*, *Gallo*, *Peay*, and *Eaves*."
>
> . . .
>
> "In essence, the government asks this court to rewrite the money laundering statute. It asks us to vitiate the language 'a transaction which in any way or degree affects interstate or foreign commerce,' and substitute instead the notion that 'federal jurisdiction under the money laundering statute is vested in any transaction involving Federal Reserve Notes.' This we refuse to do. We lack both the inclination and the power. Moreover, we doubt that even Congress could do this without offending the constitution."

Grey, 56 F.3d at 1225-26 (*Kelly, Gallo, Peay, Eaves* all cited in this brief, *supra*).

Had the government alleged or attempted to prove that Mr. Burgos traveled on an interstate highway, deposited or retrieved his money from a federally-insured bank, had his money delivered through the mail, so done some other activity that touched on a place outside of Massachusetts, an interstate effect might exist. Absent such proof, Mr. Burgos's actions were beyond the scope of the statutory language, and beyond the scope of Congress's interstate commerce authority. Accordingly, taking the evidence "in the light most amiable to the government," *United States v. Saccoccia*, 58 F.3d 754 (1st Cir. 1995), the interstate commerce requirement was not met, and Mr. Burgos's money laundering conviction must be reversed.

2. Non-Existent Cocaine Cannot Move in Interstate Commerce

Purchase of an item can be proof of interstate commerce when it is shown that the item purchased moved in interstate commerce. *United States v. Kelly*, 929 F.2d at 586 (car manufactured in Michigan but sold in Oklahoma had moved in interstate commerce). As noted in section I.A. of this brief, *supra*, in Mr. Burgos's case, however, the informant was arrested on a warrant, and there were no drugs actually involved in this case.

Thus, even assuming that the defendant Mr. Burgos and the informant Mr.

O'Neil arranged a cocaine transaction, because there was no cocaine involved (and non-existent cocaine can hardly move in interstate commerce), the government cannot prove any interstate nexus. Accordingly, taking the evidence "in the light most amiable to the government," *United States v. Saccoccia*, 58 F.3d at 754, the interstate commerce requirement was not met, and Mr. Burgos's money laundering conviction must be reversed.

3. Out-Of-State Supplier Was a Police Figment

The only other evidence the government offered that it might claim suggests interstate commerce is the identity of a fictional "supplier."

Upon Mr. O'Neil being arrested, the government orchestrated a series of taped calls placed by the informant Mr. O'Neil to the defendant Mr. Burgos. DEA agent Clarence Shuler was in the room from which Mr. O'Neil placed the calls. Agent Shuler was "making believe he was the . . . owner of the cocaine which O'Neil was going to sell to Mr. Burgos." 8/16/99 *Trn.* at 43. Upon Mr. Burgos's suggestion that the deal be delayed, 8/16/99 *Trn.* at 42, Agent Shuler began talking, and his voice can be heard on the tapes. When Mr. Burgos queried Mr. O'Neil about who was with him,

> "O'Neil told Mr. Burgos that the guy he heard in the background was his new delivery people or his new supplier out of New York and that he had come down from New York with the two kilograms, and he

had been waiting all day and wasn't too happy about waiting all day." 8/16/99 *Trn.* at 44. This threat was enough to speed along the deal, and Mr. Burgos agreed to have the meeting 15 minutes thereafter. 8/16/99 *Trn.* at 46.

The make-believe supplier pretended to be from New York. If there were a supplier from New York, that might be sufficient evidence for a jury to infer any cocaine he carried had traveled in interstate commerce. But because the supplier, and his point of origin, is only a figment of the government's imagination, having come from "New York" is not proof of an interstate nexus.

Accordingly, taking the evidence "in the light most amiable to the government," *United States v. Saccoccia*, 58 F.3d at 754, the interstate commerce requirement was not met, and Mr. Burgos's money laundering conviction must be reversed.

4. Being in the Drug Business is not Proof of Interstate Commerce

Merely being in the drug business is not a sufficient nexus to interstate commerce to sustain Mr. Burgos's conviction. This is because the interstate commerce effect of a transaction cannot be remote, speculative, or attenuated.

It is instructive to note several analogous federal statutes which depend upon a "transaction" and their affect on interstate commerce.

i. Hobbs Act

Under the Hobbs Act, 18 U.S.C. § 1951 (criminalizing racketeering), courts have determined that although the effect on interstate commerce may be small, "the effect still must be more than a speculative, attenuated 'one step removed' kind of effect." *United States v. Elders*, 569 F.2d 1020, 1025 (7th Cir. 1978) (citations omitted).

For instance, in *United States v. Mattson*, 671 F.2d 1020, 1024 (7th Cir. 1982), a hopeful but apparently unqualified Donald Anderson attempted to buy an electricians license for $3,000, the type of action made a felony by the Hobbs Act. The court said "[t]here was no possibility of a direct effect on interstate commerce, because Anderson's payment of $3,000 for an electrician's license neither actually nor potentially affected the purchase of electrical supplies from outside Illinois for use in electrical repairs" in local building projects. *Mattson*, 671 F.2d at 1024. The court said further:

> "If a sufficient nexus were found here, we are unable to conceive of an extortionate transaction which would not be punishable under the Hobbs Act. To so hold would mean that the extortion of money from any individual in our society could arguably affect interstate commerce eventually. . . . Any effect the extortion had beyond the personal effect on Anderson was too attenuated and was removed one step too far to come within the Hobbs Act."

Mattson, 671 F.2d at 1025.

Thus, there must be a "realistic probability of a nexus, in each case,"

between the prohibited conduct "and interstate commerce before federal jurisdiction will lie." *Mattson*, 671 F.2d at 1024.

The Hobbs Act does contain language helpful to the government had Mr. Burgos been charged with a Hobbs Act violation. Although Congress there set forth specific findings about the movement of drugs in interstate commerce, *see United States v. Gallo*, 927 F.2d 815, 823 (5th Cir. 1991), such findings are not present in the money laundering statute, and do not apply in Mr. Burgos's case.

ii. Clayton Act

There is a similar "in commerce" requirement in the Clayton Act, 15 U.S.C. §§ 12-27 (antitrust). In *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186 (1974), the United States Supreme Court construed the requirement and decided on grounds similar to *Mattson.* Copp processed and sold asphaltic concrete to construction sites in California, and claimed that Gulf, a producer of liquid petroleum asphalt, was engaged in price-fixing. *Gulf v. Copp*, 419 U.S. at 189-90. Copp alleged that it met the "in commerce" requirement because the streets and roads in California were segments of the federal highway system and were made with asphaltic concrete. But the Supreme Court, held that there was not a sufficient nexus to interstate commerce, writing: "The chain of connection has no logical endpoint. The universe of arguably included activities would be broad and

its limits nebulous in the extreme." *Gulf v. Copp* 419 U.S. at 198-99.

iii. Sherman Act

The Sherman Act, 15 U.S.C. §§ 1-7 (antitrust), similarly requires the government to establish that an antitrust conspiracy either be in, or affect interstate commerce. In *McLain v. Real Estate Board of New Orleans, Inc.*, 444 U.S. 232 (1980), the court wrote:

> "Although the cases demonstrate the breadth of Sherman Act prohibitions, jurisdiction may not be invoked under that statute unless the relevant aspect of interstate commerce is identified; it is not sufficient merely to rely on identification of a relevant local activity and to presume an interrelationship with some unspecified aspect of interstate commerce."

McLain v. Real Estate Board, 444 U.S. at 242 (citing *Gulf v. Copp*, 419 U.S. at 202); *Crane v. Intermountain Health Care, Inc.*, 637 F.2d 715, 724 (10th Cir. 1981) ("we do not believe *McLain* signals a shift in analytical focus away from the challenged activity and towards the defendant's general or overall business. The analytical focus continues to be on the nexus . . . between interstate commerce and the challenged activity").

5. No Nexus to Interstate Commerce Alleged in Mr Burgos's Case

As in the Hobbs, Clayton, and Sherman Acts, the money laundering statute requires a nexus to interstate commerce. The cases decided under these acts demonstrate that proof of interstate commerce cannot be made by merely pointing to the business or industry of which the transaction was a part. There must instead be a direct connection, however small, from the transaction being scrutinized to interstate commerce. Without such a direct connection, the interstate commerce requirement is not met.

In Mr. Burgos's case, therefore, the government cannot merely allege that because Mr. Burgos's attempted payment of money for drugs is part of the drug industry, and the drug industry is interstate, therefore the transaction affected interstate commerce. A much more direct connection, however minimal, must be drawn. The government, however, did not attempt to prove any connection at all. Accordingly, taking the evidence "in the light most amiable to the government," *United States v. Saccoccia*, 58 F.3d at 754, the interstate commerce requirement was not met, and Mr. Burgos's money laundering conviction must be reversed.

C. Proof Neither Obvious Nor Overwhelming

"A reasonable doubt . . . means a doubt founded upon reason and not speculation." *United States v. Flannery*, 451 F.2d 880, 883 (1st Cir. 1971). The evidence is insufficient to sustain a conviction on appeal, if, based on the totality of the evidence at trial, a rational juror could not find all of the elements of the charged offense beyond a reasonable doubt. *United States v. Machor*, 879 F.2d 945 (1st Cir. 1989), *cert. denied*, 493 U.S. 1094; *United States v. Henson*, 945 F.2d 430 (1st Cir. 1991).

The government may concede its failure to allege interstate commerce in the indictment or to offer specific proof of it at trial, but claim that there is nonetheless sufficient evidence to sustain the conviction. When the interstate connection is obvious, and the proof is overwhelming, this may be so. *United States v. Wilkinson*, 137 F.3d 214, 224 (4th Cir. 1998) (plethora of loans involving a variety of financial and other federally regulated institutions made error harmless), *cert. denied*, 119 S.Ct. 172. In Mr. Burgos's case, however, there is neither. In light of the government's failure to offer any evidence to prove interstate commerce, no rational juror could find a nexus to interstate commerce. Accordingly, Mr. Burgos's conviction must be reversed.

D. Interstate Commerce is Necessary to Confer Federal Jurisdiction

Not only is an affect on interstate commerce an element of the offense, it is also necessary to confer federal jurisdiction. *See e.g., United States v. Kelley*, 929 F.2d 582, 586 (10th Cir. 1991), *cert. denied*, 502 U.S. 926 (1992).

If the mere intra-state use of cash were enough to create federal jurisdiction, the tenth amendment and the founders system of dual sovereignty would be destroyed. The United States Supreme Court held that the interstate commerce power:

> "must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon intestate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government."

NLRB v. Jones & Laughlin Steel, 301 U.S. 1, 37 (1937). In Mr. Burgos's case, the government failed to allege or prove an affect on interstate commerce. Accordingly, the court was without power to convict Mr. Burgos, and the conviction must be reversed.

While the jurisdictional issue was not considered below, courts always have the ability to rule on their on jurisdiction. *Texas & Pac. Ry. v. Gulf, C. &. S.F. Ry.*, 270 U.S. 266, 274 (1926) (Brandies J.) ("Every court of general jurisdiction has

power to determine whether the conditions essential to its exercise exist."). Here the government made no effort to prove the facts necessary for the jurisdiction of the district court, and it was therefore without power to hear the government's money laundering case against Mr. Burgos, or to convict him. Accordingly, the conviction must be reversed.

E. The Indictment Does Not Allege an Affect on Interstate Commerce

Indictments must contain "the essential facts constituting the offense charged." FED.R.CRIM.P. 7(c)(1); *Russell v. United States*, 369 U.S. 749 (1961). An conviction brought by an insufficient indictment cannot be sustained. *Id.*

As noted above, an affect on interstate commerce is an essential element of the offense. Thus, a money laundering indictment must contain an allegation that the accused's actions affected interstate commerce. *See e.g., United States v. Goodwin*, 141 F.3d 394 (2nd Cir. 1997).

The indictment in Mr. Burgos's case charges that he:

> "did knowingly and willfully conduct and attempt to conduct a financial transaction, to wit, the delivery of $44,000 in cash, which said cash involved the proceeds of a specified unlawful activity . . . with intent to promote the carrying on of a specified unlawful activity . . . and that while conducting and attempting to conduct such financial transaction knew that the cash represented the proceeds of unlawful activity."

SUPERSEDING INDICTMENT, *Addendum* at 7. The indictment is insufficient because it contains no language from which one can infer an interstate commerce component.

In several money laundering cases, courts have found that allegedly deficient indictments were sufficient because they contained some language that made clear the connection to interstate commerce.

In *United States v. Goodwin*, 141 F.3d 394, 401 (2nd Cir. 1997), for instance, the second circuit found that the indictment there specified that money was "converted to cashier's checks" which necessarily involve interstate commerce. In *United States v. Green*, 964 F.2d 365, 372 (5th Cir. 1992), *cert denied*, 113 S.Ct. 984, the fifth circuit found that the indictment there alleged that the defendant had used specified bank accounts in perpetrating his crime, and that the use of banks necessarily effects interstate commerce. In *United States v. Lucas*, 932 F.2d 1210, 1219 (8th Cir. 1991), the eighth circuit found that the indictment there charged the defendant with using dirty money to erect a shopping mall, which necessarily has interstate commerce effects.

In *Goodwin*, *Green*, and *Lucas*, the courts found that the facts alleged in the indictments had inherent interstate effects. In Mr. Burgos's case, however, no reasonable construction of the indictment alleges an affect on interstate commerce.

See 1 Charles A. Wright, *Federal Practice and Procedure: Criminal* § 123 at 539-41 (3rd ed. 1999). Because it fails to allege a necessary element of the crime for which Mr. Burgos was convicted, the indictment is facially deficient, and the conviction must be reversed.

III. The Court Should Have Severed the Money Laundering and Drug Possession Counts

Daniel Burgos was charged with two counts – attempt to possess cocaine with intent to distribute, and money laundering – which were tried together. The defendant requested severance of the counts, which was denied.

The criminal procedure rules provide that offenses ought to be tried separately if "it appears that a defendant or the government is prejudiced by a joinder of offenses." FED. R. CRIM. P. 14.

In *Zafiro v. United States*, 506 U.S. 534 (1993), the Supreme Court determined that having mutually antagonistic defenses is not sufficiently prejudicial to mandate separate trials. The Supreme Court instead focused on the evidence admissible for the various charges. Severance should be granted:

> "if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence. Such a risk might occur when evidence that the jury should not consider against a defendant and that would not be admissible if a defendant were tried alone is admitted against a codefendant. For example, evidence of a codefendant's wrongdoing in some circumstances erroneously could lead a jury to conclude that a defendant was guilty. . . . Evidence that is probative of a defendant's guilt but technically admissible only against a codefendant also might present a risk of prejudice."

Zafiro v. United States, 506 U.S. at 539 (while *Zafiro* was concerned with two defendants tried together, it applies the same to one defendant with two counts).

Thus, the focus is on the evidence admissible on each count.

A. Evidence Necessary to Prove Money Laundering Was Not Admissible For The Drug Possession Charge

In order to prove a money laundering case, the government must show the defendant had proceeds of unlawful activity. In Mr. Burgos's case, the evidence admissible for this purpose was testimony and documents showing that Mr. Burgos had lots of money, but no visible means of having earned it, and that his expenses far exceeded his legitimate income. Testimony included two bankers and a car dealer regarding loan histories for various vehicles purchased by Mr. Burgos and his wife. 8/16/99 *Trn.* at 119, *et seq.*; 8/16/99 *Trn.* at 147, *et seq.*; 8/16/99 *Trn.* at 150, *et seq.* A third banker testified about the mortgage on Mr. Burgos's home. 8/16/99 *Trn.* at 126, *et seq.* Three of Mr. Burgos's and his wife's former employers testified about the couple's relatively paltry earnings. 8/16/99 *Trn.* at 123, *et seq.*; 8/16/99 *Trn.* at 131, *et seq.*; 8/16/99 *Trn.* at 138, *et seq.* One of the employers, a jeweler, noted that the Burgos's had bought expensive jewelry from her store in cash. 8/16/99 *Trn.* at 135. A travel agent testified about the Burgos's purchase of a trip. 8/16/99 *Trn.* at 143, *et seq.* An IRS agent testified, based on his analysis of the Burgos's bank records, tax forms, and other documents, that the Burgos's total bank deposits and cash expenditures exceeded their total earnings by

many thousands of dollars. 8/17/99 *Trn.* at 105-106, 109-110. Several police officers testified about the search of the defendant's house, in which they found thousands of dollars in cash stashed everywhere, including the laundry room, 8/17/99 *Trn.* at 39-40, a bedroom safe, 8/16/99 *Trn.* at 158, an Ajax container with a false bottom, 8/16/99 *Trn.* at 160, and a shoebox. 8/17/99 *Trn.* at 66-67. Police also testified that they found a mock *Money Magazine* cover photograph, probably taken at an amusement park photo booth, showing Mr. Burgos holding a large wad of cash. 8/16/99 *Trn.* at 167-68; 8/17/99 *Trn.* at 72.

In order to prove money laundering, the government must show that the defendant had dirty money, and that he used the dirty money in furtherance of a crime. Thus, the government explained through testimony that the reason Mr. Burgos's had all that money was because he was active in the drug business. 8/16/99 *Trn.* at 113.

All of this evidence is clearly relevant to and admissible for the money laundering charge. It is not relevant nor admissible, however, for the drug charge, because it runs flatly against rule 404(b) of the Federal Rules of Evidence. The rule requires that evidence of a defendant's prior bad acts is not admissible against him because of the risk of a jury convicting a person based on their history or character rather than the specific facts of the case at hand. FED. R. EVID. 404(b);

see e.g., United States v. Arias-Montoya, 967 F.2d 708 (1st Cir. 1992) (in trial for possessing cocaine with intent to distribute, evidence of prior conviction for cocaine possession not admissible); *United States v. Tutiven*, 40 F.3d 1, 5 (1st Cir. 1994) (allowing evidence defendant owned tools useful for altering vehicle VINs because in stolen vehicle case, such tools are "intrinsic" to the crime); *Lataille v. Ponte*, 754 F.2d 33 (1st Cir. 1985) (past conduct inadmissible to prove current conduct).

B. Trying the Money Laundering and Drug Possession Counts Together Caused the Defendant Prejudice

If Mr. Burgos had been tried on the drug charge alone, none of the financial evidence would have been heard by the jury. Once heard, however, the defendant was forced into admitting that he was a drug dealer, 8/17/99 *Trn.* at 122, 126, 129, even though he contested the facts offered by the government with regard to the particular drug transaction alleged. This admission is highly probative of guilt on the drug charge, and no reasonable juror could ignore it. Having his money laundering and drug counts tried jointly created precisely the type of prejudice which the Supreme Court in *Zafiro* said requires severance.

This case is not like *United States v. Rose*, 104 F.3d 1408, 1416 (1st Cir. 1997). There, the defendant was charged with robbery and being a felon in

possession of a firearm after he used a gun to rob a bank. This court found that the defendant was not prejudiced because he had stipulated to being a felon and thus the government had not been permitted to put on evidence concerning the number and nature of his prior convictions. In Mr. Burgos's case, whether or not he was a drug dealer would not have been an issue had the money laundering trial been conducted separately. Mr. Burgos was forced to concede his bad acts because the jury could not possibly ignore the overwhelming evidence of his ill-got money.

C. Had the Money Laundering and Drug Possession Counts Been Tried Separately, it Would Not Have Prejudiced the Government Nor the Court's Calendar

The District Court denied the defendant's motion to sever because it found that "severance of the first and second counts of the superseding indictment would result in two multi-day trials, likely involving many of the same witnesses and evidence." MEMORANDUM AND ORDER (July 9, 1999), *Addendum* at 17. The court was in error. The government presented the testimony of a number of police officers during the first half of the trial. This was the evidence necessary for its drug case and related forfeiture. The government presented the testimony of employers, bank officers, the IRS, and others during the second half of the trial. This was the evidence necessary for its money laundering case. There was no overlap. Thus, had the cases been tried separately, there would have been no

prejudice to the government, and little impact on the court's calendar.

The District Court thus abused its discretion, *United States v. Yefsky*, 994 F.2d 885, 896 (1st Cir. 1993), in forcing Mr. Burgos's to try the money laundering and drug possession counts together in the same trial. Accordingly, this court should reverse the lower court's decision.

IV. The Government Filed the Money Laundering Count Too Late

Daniel Burgos was arrested on February 10, 1999. On February 25, 1999, the grand jury returned an indictment, charging Mr. Burgos with possession of cocaine with intent to distribute. INDICTMENT, *Addendum* at 1. The government continued its investigation, and on June 17, 1999, the grand jury indicted Mr. Burgos with money laundering as well. SUPERSEDING INDICTMENT, *Addendum* at 7. The money laundering indictment was returned 91 days, or about 4½ months, after Mr. Burgos was arrested.

Federal law provides that:

> "Any information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges.

18 U.S.C. § 3161(b). The remedy for non-compliance is dismissal. 18 U.S.C. § 3162(a)(1). Congress's purpose was not to give defendant's a technicality, but to ensure that criminal cases move through the court on a timely basis. *United States v. Noone*, 913 F.2d 20, 28 (1st Cir. 1990).

There is no dispute that more than 30 days elapsed between the time of Mr. Burgos's arrest and his money laundering indictment. The District Court, however, relied on a number of cases from other circuits to hold that dismissal is

not required. MEMORANDUM AND ORDER (July 9, 1999), *Addendum* at 13. In *United States v. Bailey*, 111 F.3d 1229, 1235-36 (5th Cir. 1997), the defendant was arrested on a misdemeanor, and later indicted on a felony. The court found the statute did not pertain to the misdemeanor arrest, an issue not present in Mr. Burgos's case. In *United States v. Orbino*, 981 F.2d 1035 (9th Cir. 1992), the defendant was detained on an INS warrant, and later indicted on a drug charge. The court found the INS warrant was not an "arrest" for the purposes of the statute, an issue not relevant to Mr. Burgos's case. In *United States v. Beal*, 940 F.2d 1159 (8th Cir. 1991), the defendant was arrested on a warrant for drug conspiracy, and later indicted for firearms offenses. The court found that the two charges were not "in connection" with each other, a distinction not present in Mr. Burgos's case. In *United States v. Palma-Ruedas*, 121 F.3d 841, 855 (3rd Cir. 1999), *rev'd on other grounds sub nom*, *United States v. Rodriguez-Moreno*, 119 S.Ct. 1239, the court apparently also found the charges were not in connection with each other.

In Mr. Burgos's case, he was arrested on a drug charge. The money laundering conduct clearly arose from the same set of circumstances, and is therefore "in connection with" the drug charge. Thomas M. DiBiagio, *Money Laundering and Drug Trafficking: A Question of Understanding the Elements of the Crime and the use of Circumstantial Evidence*, 28 U.RICH.L.REV. 255, 284

(1994) ("Because of the cash-intensive nature of drug trafficking, the huge profits, and the appendage needed to remove the taint and association with the narcotics enterprise, the federal money laundering statute has come to be primarily about drugs and drug money."). Both counts are felonies. There was no warrant or other detainer – Mr. Burgos was clearly "arrested."

Thus, the statute applies to Mr. Burgos's case. "This court reviews factual findings concerning the Speedy Trial Act for clear error and questions of law regarding its interpretation *de novo*." *United States v. Orbino*, 981 F.2d 1035, 1036 (9th Cir. 1992). Accordingly, this court must reverse Mr. Burgos's money laundering conviction.

CONCLUSION

In light of the foregoing, Daniel Burgos requests that this honorable court reverse his drug conviction, or in the alternative to remand it for re-sentencing with no possibility of incarceration; and to reverse his money laundering conviction.

Mr. Burgos requests that his attorney be allowed to present oral argument.

Respectfully submitted,
Daniel Burgos,
By his Attorney,
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Dated: October 6, 2000

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I hereby certify that on October 6, 2000, two copies of the foregoing, as well as a computer disk containing the foregoing, formatted by WordPerfect 8, will be forwarded to William M. Welsh, II, Esq., Assistant United States Attorney.

Dated: October 6, 2000

Joshua L. Gordon, Esq.

I hereby certify that this brief complies with the type-volume limitations contained in F.R.A.P. 32(a)(7)(B) and that it contains no more than 7,942 words.

Dated: October 6, 2000

Joshua L. Gordon, Esq.

ADDENDUM

1. Indictment (Feb. 25, 1999) *1*

2. Superseding Indictment (June 17, 1999) *5*

3. Memorandum and Order (July 9, 1999) *11*