

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Northern Division

NIGHT BOX
FILED

MAR 17 1997

CARLOS JUENKE
CLERK, USDC / SDFL / WPB

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CASE NO. 94-0506-CR-HURLEY

JESSE DEAN,

Defendant.

**DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF
MOTION FOR JUDGMENT OF ACQUITTAL, OR,
IN THE ALTERNATIVE, A NEW TRIAL**

TABLE OF CONTENTS

	<u>PAGE</u>
I. PRELIMINARY STATEMENT	1
II. SUMMARY OF THE ARGUMENT	2
III. FACTUAL BACKGROUND	5
A. Nature and Origin of Criminal Conspiracy Charge in Count One	5
1. Conspiracy to Import	5
2. Testimony of Special Agent, Kevin Stevens	6
B. Nature and Origin of Dean's Involvement of Conspiracy Charge in Count One	6
C. Nature and Origin of Conspiracy Tried in Count One	7

1.	March 1994: "Conspiracy" Commenced With Miguel Perez	7
2.	July 1994: Plans Made	8
3.	May 1994: Plans That Did Not Leave The Ground	8
D.	Government's "Evidence" Which Was Submitted As Evidence of Intent to Participate in a Drug Smuggling Activity for the Benefit of The Criminal Conspiracy	9
1.	Testimony of Hugh Duncan	9
2.	Testimony of David Shelton	12
3.	Testimony of Kevin Stevens	15
4.	Testimony of Miguel Perez	21
IV.	ARGUMENT	23
A.	Testimony Should have been excluded in Accordance with Defendant's Pre-trial Motion in Limine	23
B.	404(b) Evidence of Prior "Bad Acts" Should Have Been Excluded Even if Derived From An Independent Source	26
C.	It Was Plain Error For The Government to Use The Putative Immunized Statements on Cross-Examination	26
D.	Government's Reading of Testimony of Pre- Confidential Informant "Bad "Acts" Was Incurably Prejudicial	27
E.	Defendant Dean Was Prejudiced by a Material Variance	28
F.	Dean Was Entrapped as a Matter of Law	30
<i>f.c.</i>	THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN THE CONVICTION	31
VI.	CONCLUSION	33
VII.	CERTIFICATE OF SERVICE	34

I. PRELIMINARY STATEMENT

On 6 February 1997, Defendant JESSE DEAN was convicted of several offenses relating to conspiracy to import, possess, and the substantive offenses of importation and possession with intent to distribute cocaine. He was also convicted of a single count of using the telephone to facilitate the commission of the substantive offenses. Following his adjudication of guilt, he remained in custody where he has been since his arrest.

After summarizing his arguments, the Defendant will state the factual background which will support his position that the evidence was insufficient to support a conviction, and, therefore, the granting of this Motion, made pursuant to Fed.R.Crim.P. 29(c), for judgment of acquittal, would be appropriate.

Defendant will separately discuss his position with regard to his Motion in Limine in which he attempted to exclude the use of evidence offered under Fed.R.Evd. 404(b) as not only in contravention of that rule, but also in violation of his putative immunized statements given to the Drug Enforcement Administration (hereinafter referred to as the "DEA") on 2 and 3 October 1991.

Defendant will further demonstrate that the rule against variance was violated, in that he was charged with being involved in single conspiracy in the indictment, yet the evidence against him related to two separate and distinct conspiracies not charged in the indictment. Related to this, is Defendant's argument that even if he were not prejudiced by the variance, the two "conspiracies" in which he was involved were separate and distinct from the

conspiracy to import as charged, and that a conviction for the latter could, thus, not lie.

Finally, Mr. Dean will urge upon the Court that even if all of the evidence received in this case was perfectly proper, the quality of the substance of that evidence was simply insufficient, taken in the light most favorable to the Government, to sustain a conviction.

Defendant will also argue and show support for his position that judgment of acquittal is warranted based on the doctrine of entrapment by estoppel, since the Government appointed him as a confidential informant and did not inform him of his deactivation of 28 April 1994, with full knowledge that he would continue to become involved in the arrangement of drug smuggling activities.

Additionally, Defendant will urge the Court to grant him, in the alternative, a new trial, based on the prosecutor's argument that Defendant alternated "doing deals" for the Government and criminal conspirators, having full and complete knowledge that no testimony or reasonable inferences from testimony could support such an argument.

II. SUMMARY OF THE ARGUMENT

The record in this case compels the granting of a Motion for Judgment of Acquittal on several distinct bases. Likewise, a new trial would be warranted should a determination be made that a judgment of acquittal is inappropriate.

Without regard to resolution of subsidiary issues, the record as a whole, with credit being given to the Government's evidence, is insufficient, as a matter of law, to support the convictions. Defendant was a confidential informant who was authorized by the DEA to

arrange drug trafficking operations for the purpose of Governmental interception. His five-count conviction was based upon his arranging for the importation of cocaine through the Bahamas. Since he made arrangements as authorized, and was previously successful, he could not properly be convicted of conspiracy for agreeing with criminal conspirators to do that for which he was authorized in the absence of sufficient evidence for a reasonable jury to conclude, beyond a reasonable doubt, that when he made the arrangements, he did them not for the purpose of interception, but for the purpose of avoiding interception; that is to benefit a criminal conspiracy.

While the issue of intent is theoretically a factual one, there must still be direct or circumstantial evidence of sufficient quantum to support the Government's theory that Defendant alternated his purposes between "for the good of drug traffickers" and "for the good of the Government." Such a conclusion could be established only through conjecture and speculation as there was nothing of substance.

In becoming a confidential informant, Defendant Dean was required to provide the DEA his entire life story, which included "bad acts." While no testimony was taken on this issue, Mr. Dean is prepared to testify that he was given use and prosecutorial immunity for any information disclosed during the debriefings which took place on 2 and 3 October 1991.

The Government solicited Dean's immunized statements from Miguel Perez, who testified that the Defendant participated with him in ten to fifteen drug loads. This information was disclosed during the DEA debriefing, and Perez also testified that he had personal contact with the Defendant on only one or two occasions. A hearing should be

LIE