

CASE NO. 14-15205-C

UNITED STATES COURT OF APPEALS  
ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,  
Plaintiff/Appellee,

v.

SAMI OSMAKAC,  
Defendant/Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION

APPELLANT OSMAKAC'S INITIAL BRIEF

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ELEVENTH CIRCUIT

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CASE NO. 14-15205-C

v.

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Defendant/Appellant.

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**CERTIFICATE OF INTERESTED PERSONS  
AND CORPORATE DISCLOSURE STATEMENT**

1. Bentley, Arthur L., III (United States Attorney)
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4. Muench, James A. (AUSA Counsel for Appellee)
5. Osmakac, Sami (Appellant)
6. Porcelli, The Honorable Anthony E. (U.S. Magistrate Judge)
7. Rhodes, David P. (AUSA, Chief, Appellate Division)
8. Scriven, The Honorable Mary S. (U.S. District Judge)
9. Sweeny, Sara C. (AUSA Trial Counsel for Appellee)

**STATEMENT REGARDING ORAL ARGUMENT**

Counsel for the Appellant, SAMI OSMAKAC, does not request oral argument in this case.

**STATEMENT REGARDING TYPE SIZE AND STYLE**

This brief is produced utilizing 14 point type size and Times Roman font.

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**STATEMENT OF JURISDICTION**

This is an appeal from a final judgment of the United States District Court for the Middle District of Florida in a criminal case. The District Court had jurisdiction of this case pursuant to 18 U.S.C. § 3231 because the defendant was charged with offenses against the laws of the United States. Jurisdiction of this Court is thereby invoked pursuant to Title 28, United States Code, Section 1291 and 18 U.S.C. § 3742, which give the Courts of Appeals jurisdiction over final decisions and sentences of United States district courts.

**STATEMENT OF THE ISSUES**

**ISSUE ONE**

**Whether the District Court erred in denying the Appellants series of motions requesting disclosure of FISA interceptions and ancillary CIPA restrictions?**

**ISSUE TWO**

**Whether statements made to the jury during the prosecutor's closing argument constitute prosecutorial misconduct that rendered the trial so fundamentally unfair as to deny the Defendant his right to due process?**

**ISSUE THREE**

**Whether the District Court erred in failing to consider a downward departure based on Sentencing Factor Manipulation?**

**STATEMENT OF THE CASE**

(i) Course of Proceedings and Disposition in Trial Court.

On January 7, 2012, the Defendant, SAMI OSMAKAC, was arrested on a criminal complaint and was detained. (Doc. No. 1). On February 2, 2012, an Indictment was filed against SAMI OSMAKAC. (Doc. No. 10). Count One of the Indictment alleged that the Defendant, attempted to without lawful authority to knowingly use weapons of mass destruction, specifically, destructive devices as defined in Title 18 United States Code, Section 921(a)(4)(A), meaning explosives, grenades, and similar devices, against persons and property within the United States and (1) a facility of interstate and foreign commerce was used in furtherance of the offense; (2) the property against which he intended to use said devices was used in interstate and foreign commerce and in an activity that affected interstate and foreign commerce; and (3) the results of the offense, if it had succeeded, would have affected interstate and foreign commerce, all contrary to the provisions of Title 18 United States Code, Section 2332(a)(2). (Doc. No. 10).

Count Two of the Indictment charged that the same Defendant knowingly received and possessed a firearm, specifically, a machine gun as identified in Title 26, United States Code, Section 5845(b), to wit an AK-47, serial number 1978 IL 93611, not registered to him in the National Firearms Registration and Transfer

Record, in violation of Title 26, United States Code, Section 5841, all contrary to the provisions of Title 18 United States Code, Section 2332(a)(2). (Doc. No. 10).

A substantial amount of evidence in the case was obtained and compiled by the government and was subject to FISA and CIPA protections. Counsel for the Defendant filed several motions aimed at obtaining access to the protected information (Doc. No.'s 8, 100, and 121). All of these were denied by the District Court after a hearing and pursuant to a written order. (Doc. No. 141).

On May 27, 2014 a Jury Trial commenced in the Appellant's case. The trial lasted nine (9) days with the last day of testimony and closing arguments occurring on June 9, 2014. (Doc. No. 382). On June 10, 2014, the Jury was instructed and deliberated. (Doc. No. 383). A verdict was reached that same day, finding the Defendant Guilty of both Counts One and Two of the Indictment. (Doc. 312).

At sentencing on November 5, 2014, the Appellant objected in writing and orally to factual matters and the guideline sentence calculations submitted to the District Court in the PSIR prepared by the United States Probation Office. The District Court made corrections to all factual issues addressed by the Appellant, but overruled the Appellant's objections, including a request for mitigation based on Sentencing Entrapment and Sentencing Guideline Manipulation. (Doc. No. 384, Pg. 35-36). The District Court declined to depart from the advisory guidelines as requested by the Appellant and concluded the recommended sentence was sufficient

but not greater than necessary to comply with the statutory purposes of sentencing, as required by Title 18, United States Code, Sections 3553(a)(1) through (7). Consequently, the District Court sentenced the Defendant to 480 months of incarceration on Count One concurrent with 120 months of incarceration on Count Two. This was a sentence within the guideline range as determined by the Court at sentencing. (Doc. 360; Doc. 384). The Appellant filed a timely Notice of Appeal on November 17, 2014. (Doc. 363). The Appellant remains incarcerated pursuant to the Judgment and Sentence imposed.

(ii) Statement of the Facts

Appellant relies upon the testimony and evidence presented during the Appellant's Jury trial (Doc. No.'s 374-383), the Appellant's sentencing hearing (Doc. No. 384), and the recitation of facts contained in the final Pre Sentence Report as corrected in Court on the day of his sentencing, November 5, 2014 (Doc. No. 360) and the following additional facts. The Appellant was introduced to the CHS (confidential human source) by an individual named Russell Dennison. For an approximately two (2) month period, the CHS communicated with the Appellant without the contacts being recorded. He CHS was paid \$24,000.00 for his work on the case, including payments during the unrecorded two (2) month time period before November 30, 2011. Neither Dennison nor the CHS was called as a witness for the Government in this cause. The UCE (Undercover Agent) who posed as the

bomb maker/weapon supplier enters the picture in December of 2011, after the CHS has been working on the Appellant without being recorded for two (2) months. The Appellant never had the ability to carry out any of the actions he was tried for without substantial government assistance, direction, and guidance. During the course of the trial it was established that the Appellant could not afford to purchase the items needed to carry out the plan; that his employer was the CHS, and that the CHS withheld \$500.00 of his pay at the direction of his government handlers so the Appellant could not use it to buy items from elsewhere, only through the UCE. The Appellant was manipulated into making a “martyrdom video” at the suggestion of the UCE who filmed and “directed” said video. The Appellant, on his own, only ever attempted to buy firearms before the CHS and later the UCE entered the picture. The Appellant was evaluated by a number of psychologists and psychiatrists. Doctor Taylor and Doctor Northrup, who found he suffered from a Schizoaffective Disorder; Doctor Northrup also agreed with Doctor McClain that the Appellant suffered from Post-Traumatic Stress Disorder; and Doctor Goldsmith found he suffered from a depressive and psychotic disorder.

(iii) Standard of Review.

ISSUE ONE – When a United States person was a target of the investigation, as in the present case, the district court’s decision is reviewed for clear error. United States v. Campa, 529 F.3d 980 (11th Cir. Fla. 2008).

ISSUE TWO - A claim of prosecutorial misconduct is reviewed de novo because it is a mixed question of law and fact. United States v. Eckhardt, 466 F.3d 938, 947 (11th Cir. 2006).

ISSUE THREE - A district court's application of the Sentencing Guidelines is reviewed de novo, but the factual determinations of the district court are reviewed for clear error. United States v. Bradford, 277 F.3d 1311, 1316 (11th Cir. 2002).

### **SUMMARY OF THE ARGUMENT**

**ISSUE ONE** - The District Court erred when it failed to permit disclosure of the FISA materials sought by the Appellant. FISA's text, structure, and legislative history all reject a rule of categorical secrecy. Instead of imposing a categorical rule against disclosure, the statute is grounded in Congress's expectation that courts would order disclosure when doing so would substantially promote the accurate determination of a FISA order's legality. Nevertheless, district courts are disinclined to afford Defendant the benefits of disclosure notwithstanding their discretion to do so. Only one district court has seen fit to allow disclosure under the FISA procedures, and it was overruled on appeal. Consequently, Appellants are left to cast about in the dark hoping if there was an error made, it will be ferreted out by the Appellate Court without the benefit of informed argument from the Appellant.

**ISSUE TWO** – The District Court erred when it failed to grant a motion for mistrial based on the Government’s comments during its rebuttal closing. The District Court’s curative measures were insufficient to undo the damage wrought by the Government’s comments. Actionable misconduct occurs when the Government’s remarks are both improper, and prejudicially affect the substantial rights of the defendant. A defendant's substantial rights are prejudicially affected when a reasonable probability arises that, but for the remarks, the outcome of the trial would have been different. The impropriety of the remarks are not in dispute. The four (4) part test suggested for making a determination of whether the cumulative effect of prosecutorial misdeeds had a "reasonable probability" of affecting the trial's outcome, when applied to the present case, demonstrates the comments did have a reasonable probability of doing so. Accordingly, a mistrial should have been granted.

**ISSUE THREE** - The District Court erred in failing to consider a downward departure based on Sentencing Factor Manipulation. While it is established that Sentencing Entrapment is not recognized as a viable defense in the Eleventh Circuit, this Court has not gone so far as to rule out the possibility that Sentencing Factor Manipulation could be a valid basis for a downward departure. The present case presents facts that are significantly more complex and pervasive representations of the Government manipulating the Appellant through its undercover agents and paid

informants than the case where this Court has seen fit to either decline to validate or elected to overturn a departure. The statements of the District Court at sentencing when presented with this issue seem to suggest the incorrect perception of the status of the law on this matter and warrents remand for clarification and/or resentencing.

## **ARGUMENT**

### **ISSUE ONE**

**Whether the District Court erred in denying the Appellants series of motions requesting disclosure of FISA interceptions and ancillary CIPA restrictions?**

On September 4, 2013 the District Court entered an order denying a series of motions filed by the 4<sup>th</sup> and final Trial Counsel for the Defendant that all related to requests for disclosure of various restricted items protected by the Foreign Intelligence Surveillance Act of 1978, as amended, 50 U.S.C. §§ 1801-1812 and 1821-1829 (FISA); and the Classified Information Procedures Act, 18 U.S.C., Appendix III, Sections 1-16 (CIPA). (See Doc. No. 141). Specifically, the motions filed by the Appellant were:

- 1) Defendant's Motion Requesting Disclosure of FISA Interceptions and Ancillary CIPA Restrictions in Support of Evidence to be Presented by Defendant of Entrapment (Doc. No. 98);
- 2) Second Amended Motion Requesting Disclosure of FISA Interceptions

and Ancillary CIPA Restrictions in Support of Evidence to be Presented by Defendant of Entrapment (Doc. No. 100); and

3) Supplemental Motion to Second Motion for Disclosure of FISA Interceptions and Ancillary CIPA Restrictions in Support of Evidence to be Presented (Doc. No. 121).

These three (3) motions are collectively referred to as the “FISA motions” for the sake of simplification. It should be noted that all three of the FISA motions incorporated by reference the factual summary located in the Motion For Disclosure of Brady, Giglio, Federal Rule of Criminal Procedure 16 and Jencks Material (Doc. No. 96), also in the interest of simplicity.

The District Court also considered the arguments made in the two pleadings filed by the Appellee, The Government’s Unclassified Memorandum in Opposition to the Defendant’s FISA motions (Doc. No. 132) and The Government’s Classified Memorandum in Opposition to the Defendant’s FISA motions (Doc. No. 137).

Appellant sought materials that were presented to the Foreign Intelligence Surveillance Court (FISC), including the resulting FISC orders, that provided the legal basis for the electronic surveillance and physical searches from which some of the evidence that was used against him was acquired. As the Appellant only sought disclosure of the FISA materials under the statutory provisions of FISA and its legislative history, and presented no additional support for his request by way of

case law or other Constitutional provisions, the District Court limited its review of the request to the methods provided in 50 U.S.C. §§ 1806(f), (g) and 1825(g), (h). This meant the District Court had to make a determination as to the legality of the surveillance, and whether or not due process required that discovery or disclosure was warranted. The District Court acknowledged the Attorney General filed a sworn declaration in this case stating that disclosure of the FISA materials or an adversary hearing would harm the national security of the United States. The District Court conducted an in camera, ex parte review of the FISA materials to determine whether the information was lawfully acquired and whether the electronic surveillance and physical searches were lawfully conducted pursuant to FISA Sections 1806(f) and 1825(g). The District Court found that the FISA materials were well organized and readily understood, and that the District Court did not require the assistance of the Appellant to make an accurate determination of the legality of the electronic surveillance and physical searches. The Court declined to make a disclosure citing United States v. Duggan, 743 F.2d 59, 78 (2d Cir. 1984) for the proposition that “disclosure should occur only if the court determines that such disclosure is necessary to make an accurate determination of the legality of the surveillance.”

The District Court then went on to address 50 U.S.C. § 1806(g), which pertains to surveillance, and 50 U.S.C. § 1825(h), which pertains to physical searches. If the District Court determines that the surveillance/physical search was

“not lawfully authorized or conducted, it shall, in accordance with the requirements of law, suppress the evidence which was unlawfully obtained or derived” from electronic surveillance/physical search “of the aggrieved person or otherwise grant the motion of the aggrieved person.” Conversely, if the District Court determines that the surveillance/physical search was “lawfully authorized and conducted, it shall deny the motion of the aggrieved person except to the extent that due process requires discovery or disclosure.”

The District Court concluded that disclosure was not required.

FISA’s text, structure, and legislative history all reject a rule of categorical secrecy. Instead of imposing a categorical rule against disclosure, the statute is grounded in Congress’s expectation that courts would order disclosure when doing so would substantially promote the accurate determination of a FISA order’s legality. *See* S. Rep. No. 701, 95th Cong., 1st Sess. at 64, *reprinted in* 1978 U.S.C.C.A.N. 403.

Before FISA, there was no statute authorizing disclosure of foreign surveillance materials to criminal defendants. Consequently, in the four decades preceding FISA’s enactment, aggrieved defendants could point to no law or procedural rule requiring disclosure of foreign surveillance materials in the absence of a judicial determination that the Constitution had been violated. FISA’s enactment permits disclosure even when the executive branch asserts that disclosure

would harm national security, because it is rooted in a statutory scheme designed to assure meaningful judicial review of FISA orders. This is accomplished in three (3) ways.

First, the provisions' plain text authorizes disclosure whenever a reviewing court is uncertain about the legality of a contested FISA order. If the court has no doubts about the order's legality— or, indeed, its illegality— then disclosure is not “necessary to make an accurate determination.” 50 U.S.C. §§ 1806(f), 1825(g). But disclosure is deemed necessary if the court's *ex parte* review cannot rule out the possibility that the court's determination will be mistaken, or if the relevant materials are sufficiently “complex,” United States v. Belfield, 692 F.2d 141 at 148 (D.C. Cir. 1982).

Second, these provisions reject a disclosure scheme that would force courts to automatically defer to the executive branch's judgment about the wisdom of disclosure. Instead, the text of these provisions reflects a congressional expectation that courts would occasionally part ways with the executive branch. Courts are called upon to resolve disclosure issues only after the “Attorney General files an affidavit under oath that disclosure . . . would harm the national security of the United States.” 50 U.S.C. §§ 1806(f), 1825(g).

Third, §§ 1806 and 1825 permit courts to tailor disclosure to the facts of each case. Courts may order disclosure of “portions” of the sought-after materials, and of

“summar[ies]” of materials relating to physical searches, “under appropriate security procedures and protective orders.” 50 U.S.C. §§ 1806(f), 1825(g). Congress’s judgment was therefore that disclosure of FISA materials can be “appropriate,” and that carefully controlled disclosure can be preferable to both complete disclosure and complete nondisclosure. Thus, Congress has enacted a disclosure scheme that requires individualized determinations of, rather than a blanket ban on, disclosure.

FISA’s structure confirms that the statutory preference for in camera and ex parte review is not a bar to court-ordered disclosure. FISA tempers the government’s surveillance authority with mechanisms designed to protect individual rights by ensuring that courts can accurately determine the legality of government surveillance.

FISA does this in various ways, which collectively give courts a robust role in ensuring that FISA surveillance is undertaken only when it is based on sufficient legal grounds. For example, FISA generally requires the government to obtain a court order before conducting surveillance or a physical search, and the government cannot obtain such an order without first showing facts justifying a belief that the targeted person “is a foreign power or an agent of a foreign power,” and that the targeted facility or place is itself associated with “a foreign power or an agent of a foreign power.” 50 U.S.C. §§ 1804, 1823.

Likewise, the government must apply for a court order approving the installation of a pen register or trap and trace device, and it must certify that “the information likely to be obtained is foreign intelligence information not concerning a United States person or is relevant to an ongoing investigation to protect against international terrorism or clandestine intelligence activities,” and that an investigation of a United States person is not conducted “solely” based on expression protected by the First Amendment. *Id.* § 1842. And FISA also imposes reporting requirements that enable congressional oversight. *See id.* §§ 1807, 1808, 1826, 1846, 1862, 1871.

Congress also located §§ 1806(f) and 1825(g) within a statutory framework designed to ensure that the legality of FISA orders would be adequately tested in court. FISA requires federal and state agencies to notify an “aggrieved person” whenever a court or other proceeding is likely to involve information “obtained or derived from” FISA surveillance or physical searches. 50 U.S.C. §§ 1806(c), 1806(d), 1825(d), 1825(e). The Supreme Court has stated that these notice provisions ensure meaningful judicial review of foreign surveillance used against “affected persons.” Clapper v. Amnesty International, 133 S. Ct. 1138 at 1157 (2013) (discussing the FISA Amendments Act).

Disclosure is integral to that system of judicial review. FISA’s disclosure provisions assure that courts will have the benefit of informed argument from

defense counsel when they need it most: that is, when they cannot be sure that in camera, ex parte review will yield “an accurate determination of the legality of” a FISA order. 50 U.S.C. §§ 1806(f), 1825(g).

Although the “necessity” standard makes in camera, ex parte review a default first step, the disclosure standard is met in cases where, for any reason, a district court might reasonably lack certainty about a FISA order’s legality.

Nevertheless, where the District Court makes a determination disclosure is not warranted, a Defendant is left to proceed blindly on Appeal. The Appellant is hamstrung in that he is not privy to the information under review by the District Court and is left to rely on that Court’s findings. Despite all the aforementioned avenues for a district court to exercise its discretion and permit disclosure of FISA evidence to a Defendant as opposed to marching lock step with the Government’s position, this is a common issue facing every Defendant convicted under evidence obtained pursuant to FISA. In point of fact, in all FISA cases as amended in 2008 to date, only one (1) District Court judge has reviewed FISA evidence in camera and arrived at a conclusion that disclosure to the Defendant was warranted. That decision was later reversed by the Seventh Circuit Court of Appeals. *See United States v. Daoud*, 755 F.3d 479 (7th Cir. 2014)(holding district court erred in disclosing classified FISA materials to defense counsel because there were compelling reasons of national security for their being classified and their disclosure

to defendant's lawyers was not "necessary" for an accurate determination of the legality of the surveillance and that it was possible to determine the legality of the government's investigation of defendant without disclosure of classified materials to his lawyers, and the investigation did not violate FISA). Ironically, the Daoud case is the most factually similar case the undersigned has found to those of the case presently before this Court.

Consequently, the only effective way the Appellant can address any potential error that was made by the District Court is to blindly assert error and hope that a review by the Appellate Court of the confidential pleadings yields a different conclusion.

Appellant concedes that the Order entered by the District Court clearly outlines the steps undertaken by the District Court in making its determination of whether or not to grant the Appellant's FISA motions. Appellant further concedes that the District Court's enumerated steps appear to be in compliance with existing case law as to the procedure followed in arriving at the decision made by the District Court.

Nevertheless, Appellant contends the certifications submitted in support of a FISA application are insufficient to support the District Court's findings, even by the standard established by the low threshold of the "minimal scrutiny" standard cited in United States v. Badia, 827 F.2d 1458, 1463 (11th Cir. 1987).

Appellant additionally contends that said insufficiency overcomes the “presumption of validity accorded to the certifications” *See United States v. Duggan*, 743 F.2d 59, 77 & n.6 (2d Cir. 1984) (citing Franks v. Delaware, 438 U.S. 154, 171 (1978); United States v. Campa, 529 F.3d 980, 993 (11th Cir. 2008).

Appellant further submits that the District Court erred in concluding that each certification is not “clearly erroneous.” Campa, 529 F.3d at 994; Duggan, 743 F.2d at 77.

Lastly, Appellant contends his Sixth Amendment’s right to confrontation was abrogated by denying him access to the FISA materials at issue.

Consequently, the Appellant requests his conviction be set aside and the case remanded for further proceedings in light of the reversal of the District Court’s Order (Doc. No. 141) sought by the Appellant.

## ISSUE TWO

**Whether statements made to the jury during the prosecutor’s closing argument constitute prosecutorial misconduct that rendered the trial so fundamentally unfair as to deny the Defendant his right to due process?**

During the closing argument, the Defense Counsel argued that the Defendant was the victim of government entrapment, and that his mental condition rendered him more susceptible to manipulation by government agents and informants.

Defense Counsel pointed out the absence of any recordings, logs, or testimony about the approximately two (2) month period of surveillance and interaction that took place between the Defendant and the government's paid informant (CHS) before the conversations began to be recorded. Defense Counsel raised concerns about the absence of witnesses that could have testified to direct involvement in the case with the Defendant who were not called by the Government, some of whom were available and some who were not. These included government agents, including the lead case agent who was present in court, and the CHS. Defense Counsel directed the jury to consider these factors during their deliberations.

Defense Counsel's specific comments that appear to have been the trigger for the objectionable Government comments, were as follows:

“ And when the UCE was testifying, he told you about Agent Collins who's been sitting here through the whole trial. He told you about other FBI agents. He told you Agent Collins was the case agent. Who wrote the reports that he hasn't seen? Why are they keeping those reports from us? Why wouldn't they show those reports to the UCE before he testified so that he could answer questions about it? Why don't we have the reports that were written by the FBI in this case? Why don't we have the surveillance logs that were done by the FBI in this case? Why don't we have those things? Why didn't Agent Collins testify? What are they scared of putting Agent Collins on? Why is that?

How about the other agents they talked about; the surveillance guys who saw this and saw that supposedly? If they saw it, why aren't they here? Does a lack of evidence give you a reasonable doubt about what really happened in this case?” (Vol. 9, Doc. 382, P. 160).

The Government then initiated its rebuttal closing argument as follows:

“So ladies and gentlemen, essentially what Mr. Tragos has just stood up and asked you to do is to ignore every piece of evidence that has been entered in this case, to ignore everything that you can see and hear and judge on its own merits and to throw it out the window in favor of baseless speculation. That's what he's just asked you to do.

You've seen enough during this trial to know that there are rules of evidence, that there are rules about what kinds of evidence can be entered in a case and what can't.

Mr. Tragos asked you to speculate about why reports weren't entered, about why surveillance logs weren't entered, about why certain agents did or did not testify. All of those are things that are, unfortunately, not part of your consideration. The Judge makes those sorts of determinations if evidence is offered.” (Vol. 9, Doc. 382, P. 166-7).

Defense Counsel objected to the comments of the Government whereupon the Court conducted a conference at sidebar. Defense Counsel based his objection on the notion that it was improper for the prosecution to tell the jury to question or ignore the absence of evidence or why evidence was not presented, as a lack of evidence can be a sufficient basis for reasonable doubt. The Government countered that it was making a proper argument. The Trial Court pointed out to the Government that “you didn't make an argument, you just stated as a fact that the Court is going to tell you or the Court is going to tell you and the Court has some rule about what it did or didn't let in.” (Vol. 9, Doc. 382, P. 165).

Defense Counsel requested that the Trial Court “instruct the jury that the prosecutor was in error and that they can consider the lack of evidence in their

deliberations.” (Vol. 9, Doc. 382, P. 167). The Trial Court directed the Government to move away from the issue and that it would consider additional jury instructions to address the matter during the charge conference.

During the charge conference after the conclusion of closing arguments, the issue was taken up again. The Government contended the items specifically mentioned, FBI reports and surveillance logs would not ever be admissible. Defense Counsel countered that the items would have been disclosed to the Defense as *Jencks* material and their content and perhaps the documents themselves might have been referenced or even admitted during cross-examination of the agents or informants who did not testify.

The Trial Court observed that “I don't think there's a question but that the absence of testimony by witnesses who were or were not called is something the jury can consider in determining the weight of the Government's evidence.” (Vol. 9, Doc. 382, P. 182). The Court also pointed out to the Government that its argument exceeded the scope of just FBI reports and surveillance logs.

“So when you say all of those things are not part of the record -- I'm sorry -- not part -- I'm sorry -- all of those things are unfortunately not part of your consideration, the Judge makes those sorts of determinations,..., aren't you including in all of those things agents who did or did not testify?” (Vol. 9, Doc. 382, P. 184).

The Government conceded that it had unintentionally done just that, but that the Court could correct it by instructing “the jury that you, as the Judge, you don't

decide which agents are called or not called.” (Vol. 9, Doc. 382, P. 184). The Government also maintained it believed this was the only incorrect statement it made.

The Trial Court countered that Government also incorrectly said those things were not part of the jury’s consideration. “[A]nd it is indeed part of the jury’s consideration that Agent Collins wasn’t called, for example, or the surveillance agents weren’t called. The jury may consider that and wonder collectively or individually why. And the Court obviously doesn’t decide whether they are or aren’t called. That’s the Government’s call or the defense, as the case may be.” (Vol. 9, Doc. 382, P. 185).

The Court also pressed Defense Counsel as to under what circumstances an FBI Agent’s report would be admissible as substantive evidence. Defense Counsel countered it could not answer that question because the Defense had not seen the reports, and, more to the point, the Trial Court had not made any rulings regarding those reports, underlining the impropriety of the Government’s comment to the Jury that the District Court had ruled them inadmissible.

When the District Court inquired specifically what the Defense proposed be done about the error, Defense Counsel moved for a mistrial, which the District Court denied. (Vol. 9, Doc. 382, P. 186). Defense counsel then proposed, as an alternative, that the District Court instruct the jury that “A reasonable doubt is a

doubt based upon reason and common sense and may arise from the careful and impartial consideration of all the evidence or from lack of evidence. Simple. In this case, I think the jury needs to be admonished what the lawyers say is not the law.” (Vol. 9, Doc. 382, P. 187).

The District Court indicated it would give some sort of curative instruction, but would ruminate on exactly what was appropriate overnight and advise the parties the next morning.

The District Court made the following comments on or changes to the joint proposed jury instructions.

First, it pointed out that Instruction 3, which was the parties' joint proposed instruction, already stated that “evidence includes the testimony of witnesses and the exhibits admitted, but anything the lawyers say is not evidence and isn't binding on you.” (Vol. 10, Doc. 383, P.3). The District Court believed this addressed part of the curative instruction requested.

Second, it added additional language to the same Instruction, specifically that “[a] reasonable doubt may arise from the evidence, from a lack of evidence or from a conflict in evidence.” (Vol. 10, Doc. 383, P.3).

After first reasserting the Defendant’s Motion for Mistrial on the issue, Defense Counsel did not object to the wording. (Vol. 10, Doc. 383, P.4). The District Court expounded on it’s earlier denial of this motion to add that:

“my review of the transcript against both counsel's suggestions, including providing for the curative instruction, gives me confidence that the statement of counsel was, in large part, stopped by a timely objection, but to the extent that any suggestion could come from the Government's argument, it is cured by the requested curative instruction to which the Government, upon review of the transcript, did not object.” (Vol. 10, Doc. 383, P.4).

As the Appellant objected to the comment and preserved the issue for appeal, the prosecutorial misconduct claim is reviewed de novo because it is a mixed question of law and fact. United States v. Eckhardt, 466 F.3d 938, 947 (11th Cir. 2006).

To establish prosecutorial misconduct, (1) the remarks must be improper, and (2) the remarks must prejudicially affect the substantial rights of the defendant. A defendant's substantial rights are prejudicially affected when a reasonable probability arises that, but for the remarks, the outcome of the trial would have been different. When the record contains sufficient independent evidence of guilt, any error is harmless. Eckhardt, 466 F.3d at 947; United States v. Kallen-Zury, 2015 U.S. App. LEXIS 18502 (11th Cir. Fla. Oct. 23, 2015).

Courts look to several factors to determine whether the cumulative effect of prosecutorial misdeeds had a "reasonable probability" of affecting the trial's outcome. These include: (1) the degree to which the challenged remarks have a tendency to mislead the jury and to prejudice the accused; (2) whether they are isolated or extensive; (3) whether they were deliberately or accidentally placed before the jury; and (4) the strength of the competent proof to establish the guilt of

the accused. United States v. Feliciano, 761 F.3d 1202, 1211 (11th Cir. 2014); Davis v. Zant, 36 F.3d 1538, 1546, 1549 (11th Cir. 1994).

As to the degree to which the challenged remarks have a tendency to mislead the jury and to prejudice the accused, Appellant contends that the Government's comments at closing were highly misleading to jury and prejudicial to the Appellant. The jury could have little doubt, based on the evidence presented at trial, as to what was said by the Appellant during the investigation as a substantial portion of the Government's case rested on Audio and video recordings of the Appellant communicating with the Confidential Human Source (CHS) and the Undercover Agent (UCE). However, the crux of the Defense was that the Appellant was entrapped by the Government agent and paid informant; that his mental health was not sound and rendered him more susceptible to manipulation by the Government, and, most critically, that there was a period of two (2) months of contact between the CHS and the Appellant that was undocumented during the trial where in undue influence on the Appellant was exerted by the CHS and Mr. Russell Denison, neither of whom were called as witnesses by the Government. The Defense maintained these individuals worked on him, controlled him, and convinced him to take the actions he undertook before they began to "officially" monitor the Appellant.

Consequently, the Government's comments were isolated to the rebuttal closing argument, they nevertheless stabbed at the very heart of the Appellant's

defense and left the jury with the incorrect presumption that the District Court had ruled in some capacity those witnesses that did not testify, including the lead case agent and other agents with direct contact in the case, were exclude from testifying and considering their absence was not permissible.

As to whether or not they were isolated or extensive, the Appellant has previously conceded the comments were of an isolated nature. However, as previously stated, it struck at the core of the Appellant's Defense. "[P]rosecutorial misconduct is least acceptable under the Constitution when aimed at the core of the defense's case." Davis, 36 F.3d at 1550 n.17.

As to whether they were deliberately or accidentally placed before the jury, this area presents some difficulty. Appellant concedes that to some extent, based on the Prosecutors discussion with the District Court, Supra, the Government made an unintentionally broad comment in its rebuttal closing. That said, the Government maintains it was otherwise correct in it argument, and that only mention of any agents lack of testimony was improper. "[I]t is improper for a prosecutor to use misstatements and falsehoods." Davis, 36 F.3d at 1548; *see also* Berger v. United States, 295 U.S. 78, 55 S. Ct. 629, 79 L. Ed. 1314, (U.S. 1935) *at* 84-85. Appellant concedes that the comments are most accurately described as a misstatement of law and not an intentional falsehood. Nevertheless, their impact is not lessened by the distinction.

Lastly, the strength of the competent proof to establish the guilt of the accused must be considered. As previously stated, there is abundant evidence that the Appellant engaged in ongoing conversations with Government Agents for months about committing the attempted crime he was accused of. Likewise, there can be little doubt that the Appellant lacked any viable means to carry this crime out absent the substantial assistance that the Government provided him in the form of money, transportation, expertise, planning and execution. Given the entrapment issue raised by the Defense and the Appellant's mental complications, Appellant contends the proof establishing the Appellant's guilt was not great.

Given the totality of these considerations when taken in concert with each other, The Appellant submits the cumulative effect of the comments by the Government had a reasonable probability of affecting the outcome. Consequently, the Appellant's conviction should be reversed.

### ISSUE THREE

#### **Whether the District Court erred in failing to consider a downward departure based on Sentencing Factor Manipulation?**

In its response to the Pre-Sentence Report and during sentencing, the Defense argued that the Defendant should be considered for a downward departure based on Sentencing Entrapment. At sentencing, Defense Counsel acknowledged that this Circuit has addressed the issue of Sentencing Entrapment and has declared as a

matter of law that this Circuit has rejected sentence entrapment as a viable defense. United States v. Sanchez, 138 F.3d 1410, 1414(11th Cir. Fla. 1998). However, Defense counsel also raised the issue of Sentencing Factor Manipulation. (Doc. No. 384, P. 35-36). The District Court inquired if the Defendant wished to preserve the issue for appeal, which Defense Counsel affirmed. The District Court stated that “[i]t is so noted, but the Eleventh Circuit doesn't recognize it and if you would like to argue for a change in the law in that regard, you're free to assert that on appeal.” (Doc. No. 384, P. 36).

It is unclear looking at the record whether or not the District Court was observing that the Eleventh Circuit doesn't recognize Sentencing Entrapment, Sentencing Guideline Manipulation, or both. Nevertheless, the District Court inquired if Defense Counsel wished to address the record further on this point. Defense Counsel argued that:

“in this case, our position is that all the Defendant wished to procure on his own were guns, according to the statements that -- on the transcripts, that he went down to St. Petersburg to buy some guns, and that the Government introduced weapons of mass destruction, and therefore, this matter should only be with regards to the count with regards to the unlawful possession of the guns and that the weapons of mass destruction was a sentencing entrapment by the Government in order to increase the Defendant's sentence.” (Doc. No. 384, P. 36).

It should be noted that the Sanchez decision, while clearly torpedoing the notion Sentencing Entrapment as a Defense, it has not struck the same decisive blow

against Sentencing Factor Manipulation. “It does not appear from the record that this basis [Sentencing Factor Manipulation] for a downward departure from sentencing was raised below, but even assuming it were properly before us on this appeal, defendants would not prevail. The fact that the government's fictitious reverse sting operation involved a large quantity of drugs does not amount to the type of manipulative governmental conduct warranting a downward departure in sentencing.” Sanchez, 138 F.3d at 1414.

This Court has enumerated facts that do not support Sentencing Factor Manipulation. “We have held that neither a fictitious government-organized "reverse sting" operation in which defendants agreed to break into a house to steal a large quantity of drugs, nor an aggregation of separate quantities of crack cocaine purchased by the defendant in small quantities on four separate occasions instead of stopping after the first purchase, constitutes sentencing factor manipulation.” United States v. Nelson, 155 Fed. Appx. 509, 510 (11th Cir. Fla. 2005). *See also* United States v. Govan, 293 F.3d 1248, 1251 (11th Cir. Fla. 2002). The latter two (2) cases being cited dealt with the two (2) factual scenarios outlined in Nelson. It should be noted the District Court in the Govan case was reversed for having actually sentenced the Defendant pursuant to a Sentencing Factor Manipulation departure in the four small purchases scenario outlined *Supra*.

The logical conclusion from this is that the District Court does have the ability to consider Sentencing Factor Manipulation as a basis for downward departure. If the District Court believed otherwise, or in the absence of clarity on this point, then the Defendant's Sentence should be reversed and remanded for further clarification and consideration.

In the present case, we are not addressing cocaine purchases. Rather, we have a Defendant whose only activity that was free of government influence that arguably represents a crime was his attempt to purchase firearms. The fact supporting the Attempted Use of Weapons of Mass Destruction Charge in Count One were all engineered by the Government. The Appellant did not possess the means to purchase or construct or transport or deploy or implement the conduct he was charged with without the government holding his hand and in some cases dragging him along the entire way. The \$500.00 down payment for the disabled AK-47 and inert "explosive device" was "paid" by him by having him work for the CHS, and in turn having that agent pay the \$500.00 for him to the UCE by CHS so he would not be able to anything else with it. The facts of this case, coupled with the mental health issues established by the Defense, certainly merit consideration for such a departure. The Appellant requests this Court reverse and remand the case for clarification and reconsideration of his sentence by the District Court.

## **CONCLUSION**

Based on the foregoing analysis, Appellant SAMI OSMAKAC'S conviction should be set aside and the case remanded for further proceedings consistent with the reversal of the District Court's Order (Doc. No. 141) sought by the Appellant. Additionally, the Appellant's conviction should be set aside and the motion for mistrial granted based on the inadequacy of the curative instruction offered in light of the prosecutorial misconduct that occurred during the Government's Rebuttal Closing. Finally, if the conviction is not set aside for the reasons argued supra, then the Sentence in this cause should be vacated and set aside, and the case remanded back to the District Court for clarification and resentencing due to the apparent misperception of law regarding downward departures based on Sentencing Factor Manipulation evidenced during the Appellant's sentencing.

## **CERTIFICATE OF COMPLIANCE**

The undersigned hereby certifies that this brief complies with Rule 32(a)(7) of the Federal Rules of Appellant Procedure and contains approximately 7,772 words.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to CHERIE KRIGSMAN, ASSISTANT UNITED STATES ATTORNEY, 400 N. Tampa Street, Suite 3200, Tampa, Florida 33602, by Electronic and U.S. Mail delivery, and SAMI OSMAKAC, Appellant, by U.S. Mail Delivery this 25th day of November, 2015.

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