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Filed	Document Description	Page	Docket Text
09/07/2010	appellant brief	2	APPELLANT BRIEF filed by Mr. Gerald L. Gulley, Jr. for Melvin Skinner. Certificate of Service:09/07/2010. Argument Request: requested. (GLG)
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Docket No.: 09-6497

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MELVIN SKINNER,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Tennessee
Northern Division at Knoxville

BRIEF OF APPELLANT, MELVIN SKINNER

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ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

UNITED STATES SUPREME COURT CASES

UNITED STATES COURTS OF APPEALS CASES

UNITED STATES DISTRICT COURTS CASES

FEDERAL STATUTES

FEDERAL SENTENCING GUIDELINES

FEDERAL RULES

SIXTH CIRCUIT RULES

CONSTITUTIONS

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Sixth Circuit Rule 34(a), the Defendant-Appellant, Melvin Skinner, suggests that the nature of the facts and the law are such that oral argument is necessary to facilitate this Court's understanding of the legal issues presented in this case regarding the trial court's interpretation and application of the federal sentencing guidelines to the facts of this case, and the trial court's sentence of the Defendant. Specifically, one of the issues argued herein — the question of suppression of location evidence obtained from a cellular telephone in the Defendant's possession — presents novel questions of law to this Court.

Consequently, oral argument is requested on behalf of the Defendant-Appellant.

STATEMENT OF JURISDICTION

Pursuant to Federal Rule of Appellate Procedure 28(a)(4)(A), the Defendant, Melvin Skinner, states that the District Court below had subject-matter jurisdiction of this cause based 18 U.S.C. § 3231, as the result of an Indictment charging violations of the following statutes: 21 U.S.C. §§ 846, 841(a)(1), and 841(b)(1)(A); 18 U.S.C. §§ 1956(a)(1)(A)(i) and 1956(a)(1)(B)(i); and 18 U.S.C. § 2.

Pursuant to Federal Rule of Appellate Procedure 28(a)(4)(B), the Defendant, Melvin Skinner, states that this Court has appellate jurisdiction of this cause based on 28 U.S.C. § 1291, and on Federal Rules of Appellate Procedure 3 and 4(b). A Judgment in a Criminal Case was entered December 9, 2009; thereafter the Defendant timely filed a Notice of Appeal on December 10, 2009.

STATEMENT OF THE ISSUES FOR REVIEW

I.

Did the trial judge commit legal error in failing to suppress evidence obtained from GPS location information provided by a cellular telephone in the Defendant's possession and within the Defendant's motor home, where the Defendant had sufficient standing to challenge the search and evidence seized, where the Defendant had a legitimate expectation of privacy in the location of his vehicle, and where there was no "good faith" exception to an unconstitutional search and seizure?

II.

Was there legally sufficient evidence to convict the Defendant of conspiracy to commit money laundering in the Eastern District of Tennessee, where there was no showing that any currency or money, or any other item constituting "profits," was involved in this cause?

III.

Did the trial court commit prejudicial error in sentencing the Defendant to a term of imprisonment of 235 months based on a Criminal History Category of I and an adjusted offense level of 38, by failing to reduce the adjusted offense level based on the mitigated role of the Defendant as a courier or "mule" whose involvement consisted primarily of transporting loads of marijuana?

STATEMENT OF THE CASE

A. NATURE OF THE CASE AND PROCEEDINGS BELOW

In a Superseding Indictment filed December 19, 2006, the Defendant, Melvin Skinner (hereinafter "Skinner" or "Defendant"), was charged with conspiracy to distribute and possess with intent to distribute in excess of 1,000 kilograms of marijuana, and corresponding forfeiture allegations, in violation of 21 U.S.C. §§ 846, 841(a)(1), and 841(b)(1)(A); as well as related forfeiture allegations. (R-1.54, Superseding Indictment).[1]

Subsequently, a new Indictment dated July 18, 2007 consolidated the aforementioned Superseding Indictment with charges against other individuals in another case. The United States asked the trial court to dismiss Skinner from the earlier Superseding Indictment, and re-assign the cases; the Motion to dismiss was granted by Order dated August 22, 2007. (R-1.89, Motion to Re-Assign Cases; R-1.90, Motion to Dismiss Defendants from Case; R-1.91, Order).

[1] References to court documents in the technical record, including transcripts, will be cited with the letter "R-1" or "R-2" followed by the document number in the trial court's docket sheet, a description or style of the document, and page number in the document, if applicable. References to the Presentence Investigation Report will be cited with the letters "PSIR" followed by the paragraph and/or page number of that document. Exhibits to a hearing will be cited with "Ex." followed by the exhibit number. Transcripts will also be referenced by "R-__" and the letters "Tr." followed by date of hearing and page number. 6th Cir. R. 28(a), 28(c), 30(a), 30(b), 30(f).

In the new Indictment,[2] Skinner was charged with conspiracy to distribute and possess with intent to distribute in excess of 1,000 kilograms of marijuana, and corresponding forfeiture allegations, in violation of 21 U.S.C. §§ 846, 841(a)(1), and 841(b)(1)(A) [Count One]; with conspiracy to engage in money laundering relating to the marijuana conspiracy, and corresponding forfeiture allegations, in violation of 18 U.S.C. §§ 1956(a)(1)(A)(i) and 1956(a)(1)(B)(i) [Count Two]; and with aiding and abetting an attempt to distibute in excess of 100 kilograms of marijuana [Count Three]. (R-2.3, Indictment).

Defendant was convicted of the charged offense after a trial by jury. (R-2.183, Jury Verdict). By Order filed December 8, 2009, the trial court sentenced Skinner to, *inter alia*, 235 months of imprisonment. (R-2.253, Judgment in a Criminal Case, at 2-3). The Defendant then timely filed a Notice of Appeal on December 10, 2009. (R-2.254, Notice of Appeal).

Defendant presently is incarcerated at FCI Oakdale in Oakdale, Louisiana.

[2] The docket number of the case in which Skinner was originally indicted in the Eastern District of Tennessee is 3:06-CR-100; Skinner was subsequently dismissed from this case after he had been charged in a later Indictment in the Eastern District of Tennessee bearing the docket number 3:07-CR-89. Thus, the record entry numbers listed herein relate to two different case docket numbers: record entry numbers relating to the earlier case, No. 3:06-CR-100, are designated in this Brief as "R-1.__"; record entry numbers relating to the subsequent charged case, No. 3:07-CR-89, are designated in this Brief as "R-2.__".

B. RELEVANT FACTS

1. Motions to Suppress

During pre-trial proceedings, Skinner filed a Motion to suppress certain evidence seized or obtained as a result of the warrantless search of Skinner's vehicle, in violation of Skinner's rights under the Fourth and Fifth Amendments to the United States Constitution. (R-1.34, Motion to Suppress).

a.

At an evidentiary hearing on the Motion to suppress, Phillip Apodaca, a high-level member of the marijuana conspiracy, testified that he supplied marijuana to Mike West and others from Tucson, Arizona, where Apodaca lived. (R-1.71, Tr.[02/13/07], at 139-42). Apodaca would send marijuana that he obtained from Mexico to West by way of trucks or other vehicles that were driven by drug couriers. (R-1.71, Tr.[02/13/07], at 141-44, 146). Apodaca would communicate with West through cellular telephones that Apodaca would buy, program with contact information, and then give to drug couriers who would keep a cellular telephone and also give one to West. (R-1.71, Tr.[02/13/07], at 143-44). Apodaca would provide false names and addresses for the subscriber information that he gave to the operators of the cellular telephones. (R-1.71, Tr.[02/13/07], at 151-53, 159-63).

One of the drivers went by the nickname or "handle" of "Big Foot," although Apodaca never met "Big Foot." (R-1.71, Tr.[02/13/07], at 144-45). According to Apodaca, "Big Foot" drove a Ford F250 pickup truck with Georgia license plates; however, Apodaca learned from West that "Big Foot" also obtained a larger, recreational vehicle (RV) in addition to the Ford F250. (R-1.71, Tr.[02/13/07], at 148-49). Apodaca explained that whenever he had marijuana to pick up, he would contact West, who would in turn inform Apodaca by cellular telephone that a courier — such as "Big Foot" — was on his way. Information relayed to West about the location of the marijuana would then be relayed to "Big Foot" by West. (R-1.71, Tr.[02/13/07], at 146-47).

Apodaca stated that in 2006 he had programmed a cellular telephone with the false name of "Tim A. Johnson" and put it in the glove compartment of the truck used by "Big Foot." (R-1.71, Tr.[02/13/07], at 154-57, 159-63). Apodaca was unaware that the cellular telephone that he put into the Ford F250 owned by "Big Foot" had global positioning system (GPS) capability. (R-1.71, Tr.[02/13/07], at 164-67). Apodaca also testified that the last load in 2006 was put into an RV along with the Ford F250 that was driven by "Big Foot." (R-1.71, Tr.[02/13/07], at 157-58).

DEA Agent David Lewis of Knoxville, Tennessee testified that a confidential informant who was arrested in Arizona in early 2006 revealed that he was a drug money courier for Mike West in the marijuana conspiracy. (R-1.71, Tr.[02/13/07], at 16-18). The confidential information identified Phillip Apodaca as the supplier of marijuana to Mike West; and subsequently Agent Lewis obtained authorization to intercept wire communications of Mike West's regular cellular telephone, along with a 'super secret" cellular telephone belonging to West. (R-1.71, Tr.[02/13/07], at 22-24). Agent Lewis learned from the confidential informant and through telephone wire taps that West and his affiliates would periodically discard their cellular telephones and get new cellular telephones with different telephone numbers in fictitious names. (R-1.71, Tr.[02/13/07], at 29-30).

Agent Lewis also learned during the course of the telephone wire taps that West used a courier with the nickname of "Big Foot" who drove a Ford F250 pickup truck. (R-1.71, Tr.[02/13/07], at 25-27). Around July 8, 2006, Lewis further discovered through telephone wire taps that "Big Foot" would be in Tucson, Arizona on or about July 10, 2006, to pick up a load of marijuana on or about July 11, 2006. (R-1.71, Tr.[02/13/07], at 28-29, 37). At this time, Agent Lewis believed that "Big Foot" carried a cellular telephone that he obtained from Phillip Apodaca through Mike West that was under the fictitious name of "James Westwood." (R-1.71,

Tr.[02/13/07], at 31-33). Through several intercepted telephone conversations, Agent Lewis further learned that "Big Foot" would pick up a load of approximately 975 pounds of marijuana from Apodaca, although "Big Foot" would not leave Tucson until July 14, 2006. (R-1.71, Tr.[02/13/07], at 37-39, 48).

On July 12, 2006, a DEA agent presented an affidavit to a federal magistrate judge to obtain an Order allowing a cell site trap and trace records, and GPS records, for the cellular telephone that was subscribed in the fictitious name of "James Westwood," under the erroneous belief that this was the cellular telephone being carried by "Big Foot." (R-1.71, Tr.[02/13/07], at 40-41, 126). This cellular telephone was "pinged" by Agent Lewis to obtain GPS (or triangulation) information, and revealed a location for the cellular telephone in North Carolina, at a location owned by Mike West. After seizing a cellular telephone there from Mike West that turned out to be the one subscribed to the name of "James Westwood," Agent Lewis obtained records for telephone numbers dialed by the "James Westwood" telephone, and found records of calls to a cellular telephone registered in the name of "Tim A. Johnson" — which Agent Lewis realized must be the telephone being carried by "Big Foot." (R-1.71, Tr.[02/13/07], at 41-42, 74-76). On July 13, 2006, Agent Lewis used another affidavit, which was signed by another DEA agent, to obtain a second Order from a federal magistrate judge to get cell site trap and trace for the cellular telephone

that was subscribed in the fictitious name of "Tim Johnson." (R-1.71, Tr.[02/13/07], at 42-43, 74-75).

Because the DEA agents did not know the residence or identity of "Big Foot," they decided to locate the vehicles belonging to "Big Foot" and apprehend them as they travelled east from Arizona to Tennessee. No agents were following the vehicles or conducting any type of visual surveillance. Instead, the DEA agents "pinged" the cellular telephone in truck being driven by "Big Foot" in order to use the GPS and cell site location information to track the cellular telephone as it travelled from Tucson, Arizona eastwards. (R-1.71, Tr.[02/13/07], at 41-42, 49-50, 74-75). Continued "pinging" of the cellular telephone with "Big Foot" provided GPS coordinates of the vehicle being driven by "Big Foot"; ultimately the GPS coordinates indicated that this vehicle was at a truck stop near Abilene, Texas. (R-1.71, Tr.[02/13/07], at 51-52). Agent Lewis continued to "ping" the telephone in order to verify the latitude and longitude provided by the cellular telephone's GPS data. (R-1.71, Tr.[02/13/07], at 52-53). Later that morning, federal agents went to the truck stop in Tye, Texas and arrested two individuals later identified as Melvin Skinner and his son. R-1.71, (Tr.[02/13/07], at 53-58, 193-98). The cellular telephone with the subscriber name of "Tim Johnson" was seized from Skinner. (R-1.71, Tr.[02/13/07], at 156).

DEA Agent Alan Westerman participated in the arrest of Skinner on July 16, 2006; he had initially been told that Knoxville, Tennessee DEA agents had used a Title III wire intercept to identify drug couriers; subsequently he was told that the Knoxville DEA agents had used a GPS system in a cellular telephone to track the location of suspected drug couriers driving a Ford F250 pickup truck and an RV. (R-1.71, Tr.[02/13/07], at 183-86, 189). Agent Westerman and several other DEA agents and law enforcement personnel confronted Skinner in the RV, and his son Samuel Skinner in the Ford F250 truck. Skinner denied Agent Westerman consent to search the RV, whereupon a police K-9 officer and his dog did a "free air sniff" around the RV; Agent Westerman was told that there "was a positive hit for drugs in the RV." (R-1.71, Tr.[02/13/07], at 193-98). Agent Westerman entered the RV, where he saw green and white bales of what was later identified as marijuana. (R-1.71, Tr.[02/13/07], at 198-99). Two firearms were also found in the RV, along with two cellular telephones on the passenger side of the RV. Skinner was then placed under arrest for possession of marijuana with intent to distribute. (R-1.71, Tr.[02/13/07], at 200, 202-04).

b.

After the conclusion of the evidentiary hearing, the Magistrate Judge ruled that Skinner lacked the requisite standing "to contest any violation of privacy interests as they relate to the cell phone" that was located in his vehicle. (R-1.75, Report and Recommendation, at 29, 37). In dicta, the Magistrate Judge further opined that even if Skinner had standing to challenge the search and seizure, Skinner did not have a legitimate or reasonable expectation of privacy in location(s) searched; and that the law enforcement agents acted in good faith. (R-1.75, Report and Recommendation, at 29-37).

Skinner filed objections to the Report and Recommendation. (R-1.81, Objections to Report and Recommendation). The trial court entered an Order adopting the Report and Recommendations *in toto* and overruling Skinner's Motion to suppress. (R-1.82, Order Adopting Report and Recommendation).

2. Trial Testimony

Most of the testimony at trial involving Skinner related to his role in delivering drugs to Mike West from Phillip Apodaca, and taking money to Apodaca from West.

James Michael ("Mike") West, one of the main participants in the marijuana conspiracy, testified that he knew Melvin Skinner as "Big Foot," which he believed to be a trucker nickname or "handle." (R-2.200, Tr.[01/27/09], Testimony of James Michael West, at 21-22). Beginning in 2001 or 2002, and continuing until perhaps 2003, West used Skinner to transport money and deliver marijuana as part of the drug conspiracy. (R-2.200,Tr.[01/27/09], Testimony of James Michael West, at 23, 32, 42-45, 47). In late 2005, West arranged to bring back "Big Foot" as a drug courier; Skinner would deliver marijuana to West's house in Mooresburg, Tennessee, and also to another house in Cosby, Tennessee. (R-2.200, Tr.[01/27/09], Testimony of James Michael West, at 66-70). While Skinner was making his runs between Arizona and Tennessee in 2005-06, West would communicate with him via cellular telephones provided by Phillip Apodaca. (R-2.200, Tr.[01/27/09], Testimony of James Michael West, at 73-75, 186-87). West also described how Skinner was carrying a delivery of marijuana from Apodaca in July 2006 when he was arrested. (R-2.200, Tr.[01/27/09], Testimony of James Michael West, at 124-46, 150-63, 165-73).

Mark Cort, a member of the conspiracy, testified that in 2003 or 2004 he heard the nickname of "Big Foot" from Mike West, who said that "Big Foot" was a truck driver who transported marijuana from Arizona to Tennessee. Cort did not know the real name of "Big Foot," nor had he ever met him. (R-2.199, Tr.[01/26-27/09], Testimony of Mark Cort, at 40-41, 87-89).

Daniel Ramsey, a member of the conspiracy, testified that he had heard the name of "Big Foot" from Phillip Apodaca; and that he knew "Big Foot" to be Melvin Skinner because he recognized a truck that was used to haul marijuana as belonging to "Big Foot," and this truck was registered in the name of Melvin Skinner. (R-2.201, Tr.[01/29/09], Testimony of Daniel Ramsey, at 25-26, 29). Ramsey also testified that he put cellular telephones that had been purchased by Apodaca into the truck owned by "Big Foot." (R-2.201, Tr.[01/29/09], Testimony of Daniel Ramsey, at 48-49).

Christopher Shearer, another co-conspirator in the drug and money laundering conspiracies, detailed how the drug proceeds were used to purchase, *inter alia*, gold coins, gemstones, exotic wines, and real estate; but he also testified that Skinner was not involved in these money laundering operations. (R-2.210, Tr.[01/22/09], at 140-44).

3. Post-Trial Motions

After the jury verdict of guilty on all three counts of the Indictment, Skinner moved the trial court pursuant to Federal Rules of Criminal Procedure 29(c) and 33 for a judgment of acquittal or, in the alternative, a new trial. (R-2.190, Motion for New Trial). In this Motion, Skinner raised issues relating to insufficiency of the evidence for conviction on Count 2 (conspiracy to engage in money laundering);

failure to suppress jailhouse recordings of Skinner with family members; and failure to suppress evidence obtained from a cellular telephone in Skinner's possession and within a vehicle owned by Skinner. (R-2.190, Motion for New Trial).

The trial court subsequently denied Skinner's Motion for New Trial as to all issues raised. (R-2.245, Memorandum and Order). The trial court specifically ruled that Skinner's transportation of drug monies constituted money laundering, and that the trial testimony properly established venue in the Eastern District of Tennessee; that Skinner had no expectation of privacy in any jailhouse conversations; and that evidence obtained through a cellular telephone placed in Skinner's vehicle was properly admitted on the grounds that Skinner had no standing to contest any privacy interests in the said cellular telephone. (R-2.245; Memorandum and Order, at 8-9, 13, 16-17).

4. Sentencing

a.

At sentencing, the United States called three witnesses to testify: Rachel Skinner, Phillip Apodaca, and Michael West. (R-2.259, Tr.[12/4/09], at 2). Rachel Skinner, a daughter of Melvin Skinner, was the first witness. She testified about activities that transpired in the home of Melvin Skinner involving the growth and

transportation of marijuana between 2001 and January 2003, when Ms. Skinner moved out of the residence. (R-2.259, Tr.[12/04/09], at 10-12). Ms. Skinner had no personal knowledge of Melvin Skinner's transportation of marijuana from Arizona; having only heard of it from others. (R-2.259, Tr.[12/04/09], at 14). Ms. Skinner described an indoor marijuana growth facility that Skinner had set up in his garage, detailing the height of the plants, the method of growth of the plants, and the eventual termination of the plants. (R-2.259, Tr. [12/04/09], at 23-24). She also testified that a man named Capers came to the house to check on marijuana plants being grown by Skinner. (R-2.259, Tr.[12/04/09], at 22). Ms. Skinner was unable to provide testimony about any of Skinner's activities after May of 2005, because she moved to Atlanta at that time. (R-2.259, Tr.[12/04/09], at 25).

The second witness was Phillip Apodaca, who currently is serving time in prison for his role in the drug conspiracy at issue in this case. (R-2.259, Tr.[12/04/09], at 57). Apodaca was higher up in the conspiracy than Skinner, and operated from Arizona. Apodaca confirmed Skinner's role in the conspiracy as a driver who would deliver quantities of marijuana from Tuscon, Arizona to Tennessee. (R-2.259, Tr.[12/04/09], at 60). He also identified Skinner as having the nickname "Big Foot," and stated that Skinner began working for the operation in early 2001. (R-2.259, Tr.[12/04/09], at 61). Apodaca testified that Skinner would hide the

marijuana in a hidden compartment of his semi-truck that had the ability to hold up to 2,000 pounds of marijuana, and that Skinner made four or five trips to Arizona to pick up the marijuana, usually taking 1,000 pounds on each trip. (R-2.259, Tr.[12/04/09], at 62-63). Finally, Apodaca testified that Skinner was beginning to drive marijuana loads again in 2005 and 2006; he estimated that Skinner made four or five trips during this time period as well. (R-2.259, Tr.[12/04/09], at 68).

The final witness against Skinner was James Michael West, who played a major role in the drug conspiracy. West confirmed that Skinner served as a subcontractor for West during some time of the operation, and that Skinner transported marijuana between 2001 and 2002 as well as between 2005 and 2006. (R-2.259, Tr.[12/04/09], at 80-81). West further stated that in late 2002, Skinner stopped transporting the marijuana after a man known as Capers (another co-conspirator) told Skinner not to continue the transportation. (R-2.259, Tr.[12/04/09], at 82). In late 2005, however, West contacted Skinner again, and asked him if he would be willing to start transporting marijuana again; according to West, Skinner agreed, and West advanced Skinner some money to purchase a truck to use for the transportation. (R-2.259, Tr.[12/04/09], at 87-88). West added that the trips Skinner made between 2005 and 2006 were fairly small, with loads ranging from 80-140 pounds; Skinner was paid $100/pound transported. (R-2.259, Tr.[12/04/09] at 96).

b.

The trial court found that by a preponderance of the evidence that Skinner was more than just a minor or a minimum player in this conspiracy. The trial court also determined that Skinner was accountable for 9,600 pounds of marijuana between 2000-2002; and 2,025 pounds from 2005-2006, plus the final load of 986 pounds which Skinner defendant possessed during his time of arrest; all for a total of 12,611 pounds of marijuana. (R-2.259, Tr.[12/04/09], at 126-27). This amount equates to 5,720.35 kilograms of marijuana, and a base offense level of 34. (R-2.259, Tr.[12/04/09], at 127).

The Court concluded that the appropriate offense level in the case was 38 after adjustments for Skinner's role in the money laundering offense and for the possession of firearms; with a criminal history category of I. (R-2.259, Tr.[12/04/09], at 128). Skinner was sentenced to, *inter alia*, 235 months as to each of Counts One, Two, and Three, with the terms to run concurrently; this term of imprisonment was at the low end of the advisory guideline range of 235-293 months. (R-2.259, Tr.[12/04/09], at 134).

SUMMARY OF ARGUMENT

I.

The trial court committed legal error when it denied, on the grounds that the Defendant lacked standing, a Motion to suppress evidence obtained from a cellular telephone in the Defendant's possession and under this control. The Defendant not only had a legitimate expectation of privacy in the cellular telephone that was in his automobile, but he had a legitimate expectation of privacy regarding the location of his vehicle and his person. Further, the government lacked a reasonably objective legal basis for obtaining a court Order to engage in electronic surveillance through the cellular telephone in the Defendant's possession and control, thereby precluding a "good faith" basis for an exception to the exclusionary rule. All of the evidence obtained through location information obtained by way of the cellular telephone, plus the fruits of the illegal search and seizure, must be suppressed.

II.

The trial court committed legal error when it failed to grant the Defendant's Motion for acquittal and/or for new trial with regard to Defendant's conviction of conspiracy to engage in money laundering as set forth in Count 2 of the Indictment.

The term "proceeds" in the money laundering statute refers to net income ("profits") and not gross income earned by the drug conspiracy, notwithstanding any precedent of this Circuit which suggests anything to the contrary. There was no proof at trial that the Defendant received any profits from the drug conspiracy, or engaged in a conspiracy to launder profits of the drug conspiracy. Consequently, the Defendant's conviction on Count 2 of the Indictment cannot stand.

III.

The trial court committed legal error in sentencing the Defendant to, *inter alia*, a term of imprisonment of 235 months, based on an offense level of 38, because the trial court incorrectly determined that the Defendant had more than a minor or minimum role in the marijuana conspiracy and the money laundering conspiracy, where his role was essentially limited to serving as a drug "mule" or courier in transporting load of marijuana and/or money. Defendant's offense level should have been lowered between 2-4 levels for his mitigated role in the drug conspiracy, with a concomitant reduction in applicable sentencing range.

ARGUMENT

I. THE TRIAL COURT COMMITTED LEGAL ERROR BY DENYING THE DEFENDANT'S MOTION TO SUPPRESS EVIDENCE OBTAINED FROM A CELLULAR TELEPHONE THAT FORMED THE BASIS FOR A WARRANTLESS SEARCH OF DEFENDANT'S VEHICLE, WHERE THE DEFENDANT HAD STANDING TO CONTEST THE EVIDENCE, HAD A LEGITIMATE EXPECTATION OF PRIVACY REGARDING THE LOCATION OF HIS VEHICLE, AND THERE WAS NO "GOOD FAITH" EXCEPTION APPLICABLE TO THE SEARCH AND SEIZURE.

A. Standard of Review

> The grant or denial of a motion to suppress is a mixed question of fact and law. *United States v. Hurst*, 228 F.3d 751, 756 n. 1 (6th Cir. 2000). On appeal, we review the district court's findings of fact for clear error and its conclusions of law de novo. *United States v. Dillard*, 438 F.3d 675, 680 (6th Cir. 2006). A factual finding is clearly erroneous when, although there may be evidence to support it, the reviewing court, utilizing the entire evidence, "is left with the definite and firm conviction that a mistake has been committed." *United States v. Navarro-Camacho*, 186 F.3d 701, 705 (6th Cir. 1999). The evidence must be viewed "in the light most likely to support the district court's decision." *Dillard*, 438 F.3d at 680 (internal quotation marks and citations omitted). Finally, "'[w]here there are two permissible views of the evidence' the district court's conclusions 'cannot be clearly erroneous.'" *United States v. Worley*, 193 F.3d 380, 384 (6th Cir. 1999) (quoting *Anderson v. City of Bessemer City*, 470 U.S. 564, 574, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985)).

United States v. Ellis, 497 F.3d 606, 611-612 (6th Cir. 2007).

In the case at bar, the trial court erred as a matter of law by ruling that Skinner had no standing to challenge the search and seizure of his vehicle and subsequent statements made by him to law enforcement agents, on the grounds that Skinner lacked any Fourth Amendment interest in the cellular telephone given to him by a member of the drug conspiracy. Additionally, the trial court erred as a matter of law by ruling that Skinner did not have a legitimate expectation of privacy in his location while travelling in his vehicle or while in a parking lot. Finally, the trial court erred as a matter of law by ruling that the "good faith" exception to the exclusionary ruled applied in the circumstances at issue. For the reasons set forth herein, the trial court's ruling must be **reversed**, and this case **remanded** for **dismissal.**

1. The Defendant Had Legal Standing To Assert A Fourth Amendment Interest In The Cellular Telephone Given To Him And Stored In His Automobile, Because He Had Both An Actual Expectation Of Privacy In The Cellular Telephone, And His Expectation Of Privacy In The Cellular Telephone Is One That Society Recognizes As Reasonable.

a.

"[C]apacity to claim the protection of the Fourth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded

place." *Rakas v. Illinois*, 439 U.S. 128, 143 (1978) (citing *Katz v. United States*, 389 U.S. 347, 353 (1967)). In *Rakas*, the United States Supreme Court abandoned the traditional concept of standing in Fourth Amendment cases based on whether a defendant had a property or possessory interest in the thing searched, relying instead upon the concept of "a legitimate expectation of privacy" in the thing searched. *Rakas*, 439 U.S. at 148. The court in *Rakas* noted that "arcane distinctions developed in property and tort law . . . ought not to control" whether a person had standing to raise a Fourth Amendment challenge. *Id.* at 143.

Following up on the rationale it expressed in *Rakas*, the Supreme Court noted that "[w]hile property ownership is clearly a factor to be considered in determining whether an individual's Fourth Amendment rights have been violated, . . . property rights are neither the beginning nor the end of this Court's inquiry." *United States v. Salvucci*, 448 U.S. 83, 91 (1980). Thus, a court "must instead engage in a 'conscientious effort to apply the Fourth Amendment' by asking not merely whether the defendant had a possessory interest in the items seized, but whether he had an expectation of privacy" in the subject of the search. *Salvucci*, 448 U.S. at 93.

As this Court has observed in the context of determining the existence of standing under the Fourth Amendment,

> [a] determination of whether a legitimate expectation of privacy exists involves a two-part inquiry. "First, we ask whether the individual, by conduct, has exhibited an actual expectation of privacy; that is, whether he has shown that he sought to preserve something as private. . . . Second, we inquire whether the individual's expectation of privacy is one that society is prepared to recognize as reasonable." . . . . Whether a legitimate expectation of privacy exists in a particular place or item is a determination to be made on a case-by-case basis.

United States v. King, 227 F.3d 732, 743-44 (6th Cir. 2000) (internal citations omitted) (citing *United States v. Brown*, 635 F.2d 1207, 1211(6th Cir. 1980)). This case-by-case determination of what expectations qualify for Fourth Amendment protection is based on several different factors in addition to a person's "proprietary or possessory interest in the place to be searched or item to be seized," *King*, 227 F.3d at 744:

> Other factors include whether the defendant has the right to exclude others from the place in question; whether he had taken normal precautions to maintain his privacy; whether he has exhibited a subjective expectation that the area would remain free from governmental intrusion; and whether he was legitimately on the premises.

Id.

Standing to challenge a search of a cellular telephone has been upheld by one federal Court of Appeals. In *United States v. Finley*, 477 F.3d 250 (5th Cir. 2007), the defendant had standing to challenge a search of his cellular telephone even though

he did not own the telephone, and the telephone was issued to the defendant by his employer for purposes relating to his employment. *Finley*, 477 F.3d at 254. After police arrested the defendant and seized the cellular telephone given to him by his employer, the police then searched the call records and text messages of the cellular telephone to find evidence incriminating the defendant in drug trafficking. *Id.* at 254-55. The appellate court ruled that because the defendant had a right to exclude others from using the telephone, was permitted to use the telephone for personal purposes, and took precautions to maintain privacy in the telephone, the defendant had standing to challenge the warrantless search of the telephone. *Id.* at 259.

b.

In this case, Skinner certainly had an actual expectation of privacy in the cellular telephone given to him by Philip Apodaca; indeed, it was for the specific use by Skinner in furtherance of drug trafficking activities. (R-1.71, Tr.[02/13/07], at 143, 151-55, 163-66). Skinner had possession of the cellular telephone in his vehicle; he had control of the cellular telephone in his vehicle; and he had the right to exclude others from its use. Consequently, Skinner had standing to raise a Fourth Amendment challenge to a search of the cellular telephone, and to any information seized therefrom.

The fact that the cellular telephone in the case at bar was purchased and used for an illicit purpose does not preclude Skinner from having a Fourth Amendment interest in the telephone. Indeed, courts have rejected the idea that expectations of privacy depend upon the nature of a person's activities. *See, e.g., United States v. Pitts*, 322 F.3d 449, 458-59 (7th Cir. 2003) ("the legitimate expectation of privacy does not depend on the nature of the defendant's activities, whether innocent or criminal) (citing *United States v. Fields*, 113 F.3d 313, 321 (2d Cir.), *cert. denied*, 522 U.S. 976 (1997)).

Additionally, any evidence seized after the warrantless search of Skinner's vehicle and the cellular telephone found therein is "fruit of the poisonous tree," and should be suppressed as well. *E.g., Wong Sun v. United States*, 371 U.S. 471, 484, (1963). *See United States v. Kelly*, 913 F.2d 261, 265 (6th Cir. 1990). Because the trial court erred as a matter of law in ruling that Skinner lacked standing for any Fourth Amendment challenge to the search and seizure involving the cellular telephone, this Court must **reverse** the ruling of the trial court, **sustain** the Motion to suppress, and **dismiss** the convictions of Skinner.

2. The Defendant Had A Legitimate Expectation Of Privacy In The Cell Site Information Contained In The Cellular Telephone That Revealed His Location On A Highway And In A Public Parking Area, And His Expectation Of Privacy In The Location Information Is One That Society Recognizes As Reasonable.

a.

In the case at bar, the trial court adopted the reasoning of the Magistrate Judge that a person travelling in an automobile on a public highway or parked in a parking lot has no reasonable expectation of privacy in his movements. (R-1.75, Report and Recommendation, at 33-36; R-1.82, Order Adopting Report and Recommendation). The Magistrate Judge relied upon the reasoning of *United States v. Knotts*, 460 U.S. 276 (1983) and *United States v. Forest*, 355 F.3d 942 (6th Cir. 2004) to conclude that Skinner had no expectation of privacy in his location on a public highway. (R-1.75, Report and Recommendation, at 25-26). Neither of these cases are apposite to the case at bar, however.

In *Knotts*, the United States Supreme Court concluded that surveillance of an automobile by means of an electronic "beeper" was permissible, because the police used visual surveillance to track the movements of the defendant in his automobile; and the electronic surveillance device merely "augment[ed] the sensory faculties bestowed upon [the police] at birth with such enhancement as science and technology afforded them . . . ." *Knotts* 460 U.S. at 282. In *Forest*, a law enforcement agent

dialed the defendant's cellular telephone, and used the cell site information to determine his general location in order that the DEA could re-establish and resume visual surveillance that had previously been lost. *Forest*, 355 F.3d at 951.

Unlike *Knotts* and *Forest*, however, the law enforcement agents in the case at bar had never established visual surveillance of Skinner in the first place; so use of the cell site information, or the electronic surveillance, was clearly not used to re-locate the position of Skinner but rather to establish that position in the first place. The law enforcement agents in the case at bar did not know the identity of Skinner before using the cell site information in the cellular telephone; nor did the agents know the make or model of the vehicle that Skinner was driving. Thus, in contrast to the use of electronics in *Knotts* and *Forest*, the law enforcement agents in the case at bar used the cell site information in the cellular telephone in Skinner's vehicle to supplant, not augment, "the sensory faculties bestowed upon them at birth . . . ." *Knotts*, 460 U.S. at 282. Such use goes far beyond what courts determined is permissible in use of electronic information.

b.

As far as societal expectations of privacy in cellular telephone information, the Magistrate Judge noted that newer cellular telephones come with GPS receivers, (R-

1.75, Report and Recommendation, at 26), and that "society is increasingly willing to utilize cell phones as a tool to track people, citing their use by search and rescue teams to locate persons lost in remote areas as well as by 9-1-1 operators, not to mention private companies and individuals, (R-1.75, Report and Recommendation, at 35-36). Such private persons are not governmental actors, however, and thus are not bound by the Fourth Amendment. There is not such an overwhelming indication that society has a lack of expectations of privacy in location information stored or available in cellular telephones.

There was clearly a reasonable expectation of privacy in the location information contained in the cellular telephone given to Skinner. Consequently, the trial court erred as a matter of law in finding that Skinner had no reasonable expectation of privacy in his location; the trial court's denial of the Motion to suppress must be **reversed**, and this case **remanded** for **dismissal**.

3. The "Good Faith" Exception To The Exclusionary Rule Was Not Applicable In This Case, Because The Government's Reliance On Existing Law For The Disclosure Of Cell Site and GPS Location Information In The Defendant's Cellular Telephone Was Not Objectively Reasonable.

The "good faith" exception to the exclusionary rule, as set forth in *United States v. Leon*, 468 U.S. 897 (1984), requires, *inter alia*, that the reliance on a warrant

be "objectively reasonable" or that the magistrate who issues the warrant is mislead by those providing information to obtain the warrant. *E.g., United States v. Hython*, 443 F.3d 480, 484 (6th Cir. 2006). In the case at bar, the "good faith" exception is not available to the government, contrary to the opinion of the trial court.

Here, the government's request for cell site location information, along with real time GPS data and "ping" data — which is used to locate individuals within a relatively small geographic area by way of a tracking device — in regard to the cellular telephone in Skinner's possession was based on the Stored Communications Act found at 18 U.S.C. § 2701 *et seq.* This type of information is considered prospective, as opposed to historical; and is not subject to disclosure pursuant to 18 U.S.C. § 2703. Certainly, those courts which have considered whether cell site location information is subject to disclosure pursuant to 18 U.S.C. § 2703 have concluded that it is not. *See, e.g., In re Application of the United States for Orders Authorizing the Installation and Use of Pen Registers*, 416 F. Supp. 2d 390 (D. Md. 2006); *In re Application of the United States for an Order Authorizing the Disclosure of Prospective Cell Site Information*, 412 F. Supp. 2d 947 (E.D. Wisc. 2006); *In re the Application of the United States of America for an Order Authorizing the Release of Prospective Cell Site Information*, 407 F. Supp. 2d 132 (D.D.C. 2005).

Rather, the monitoring of cell site location information, GPS data, and "ping" data is a type of electronic surveillance that requires a warrant issued pursuant to Federal Rule of Criminal Procedure 41. *See, e.g., In re the Application of the United States for Orders Authorizing the Installation and Use of Pen Registers*, 416 F. Supp. 2d 390 (D. Md. 2006); *In re Application for Pen Register and Trap/Trace Device with Cell Site Location Authority*, 396 F. Supp. 2d 747 (S.D. Tex. 2005); *In re Application of the United States for an Order (1) Authorizing the Use of a Pen Register and a Trap and Trace Device and (2) Authorizing Release of Subscriber Information and/or Cell Site Information*, 396 F. Supp.2d 294 (E.D.N.Y. 2005).

Given the statutory and case authority that prospective cell site location information and GPS/"ping" data could be released only upon the authority of a warrant based upon probable cause, there can be no objectively reasonable belief by the United States that such information could legally be obtained through a court Order based upon specific articulable facts. Hence, the "good faith" exception to the exclusionary rule cannot apply in this case as a matter of law; and this Court must **reverse** the trial court's ruling that denied the Motion to suppress, and **remand** for **dismissal**.

II. THE TRIAL COURT COMMITTED LEGAL ERROR BY DENYING THE DEFENDANT'S MOTION FOR ACQUITTAL OR FOR NEW TRIAL BASED ON INSUFFICIENCY OF THE EVIDENCE TO CONVICT THE DEFENDANT OF PARTICIPATION IN A MONEY LAUNDERING CONSPIRACY, WHERE THE DEFENDANT MERELY ENGAGED IN THE TRANSPORTATION OF CURRENCY, AND WAS NOT INVOLVED WITH "PROFITS" FROM A DRUG TRAFFICKING CONSPIRACY.

A. Standard of Review

> [An appellate] court reviews de novo a denial of a motion for judgment of acquittal, but affirms the decision "if the evidence, viewed in the light most favorable to the government, would allow a rational trier of fact to find the defendant guilty beyond a reasonable doubt."

United States v. Harrod, 168 F.3d 887, 889-90 (6th Cir.) (quoting *United States v. Canan*, 48 F.3d 954, 962 (6th Cir. 1995), *cert. denied*, 516 U.S. 1050 (1996)), *cert denied*, 526 U.S. 1127 (1999)).

> [An appellate court will] review a district court's decision to grant or deny a Rule 33 motion for abuse of discretion. *United States v. Carson*, 560 F.3d 566, 585 (6th Cir. 2009). . . . . Abuse of discretion occurs when a district court "relies on clearly erroneous findings of fact, improperly applies the law, or uses an erroneous legal standard." *United States v. Washington*, 584 F.3d 693, 695 (6th Cir. 2009).

United States v. Munoz, 605 F.3d 359, 366 (6th Cir. 2010).

B. Law and Argument

1.

In the case of *United States v. Scialabba*, 282 F.3d 475 (7th Cir.), *cert. denied*, 537 U.S. 1071 (2002), a conviction for money laundering was overturned on the grounds that the term "proceeds" as used in 18 U.S.C. § 1956(a)(1) meant "profits" (i.e., net income) as opposed to "receipts" (i.e., gross income). *Scialabba*, 282 F.3d at 478. This view was adopted by the United States Supreme Court in *United States v. Santos*, 553 U.S. 507 (2008), when it used the "rule of lenity" to determine that "proceeds" in the money laundering statute means "profits":

> This venerable rule not only vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed. It also places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead. Because the "profits" definition of "proceeds" is always more defendant-friendly than the "receipts" definition, the rule of lenity dictates that it should be adopted.

Santos, 553 U.S. at ___.

2.

In the case at bar, there is no proof that Skinner received any "profits," as opposed to "proceeds," in this case. According to Mike West, one of the principals

of the drug conspiracy, Skinner was paid for his services for delivering marijuana at a rate of $100 per pound of marijuana delivered. (R-2.200, Tr.[01/27/09], at 68), and his pay was not dependent upon any profits derived from the sale of the marijuana delivered. Further, Mike West testified at trial that Skinner transported cash in his vehicle along with marijuana, but otherwise had no involvement in laundering drug proceeds. (R-2.200, Tr.[01/28/09], at 243). In fact, West testified that Skinner "didn't always know how much" money he was transporting. (R-2.200, Tr.[01/28/09], at 152). Christopher Shearer, another co-conspirator in the drug and money laundering conspiracies, detailed how the drug proceeds were used to purchase, *inter alia*, gold coins, gemstones, exotic wines, and real estate; but he also testified that Skinner was not involved in these money laundering operations. (R-2.210, Tr.[01/22/09], at 140-44). Nor was there any other testimony that Skinner profited from the drug conspiracy to make investments or purchases with the payments that he received for transporting marijuana.

In short, there was no testimony at trial that Skinner received any "profits" from the drug conspiracy; and thus there was insufficient proof to support a conviction of Skinner on Count 2 of the Indictment. Consequently, this Court must **reverse** Skinner's conviction on Count 2, and/or **remand** for **dismissal** of Count 2 against Skinner.

Your Defendant is mindful of this Court's opinion in *United States v. Smith*, 601 F.3d 530 (6th Cir. 2010), in which this Court, citing *United States v. Kratt*, 579 F.3d 558 (6th Cir. 2009), ruled that it was not plain error to fail to instruct a jury on the difference between "profits" and "proceeds" under the money laundering statute. *Smith*, 601 F.3d at 544. In reaching that conclusion, this Court adopted the reasoning of Justice Stevens in the *Santos* opinion to find that "proceeds" does include "gross revenues from the sale of contraband and the operation of organized criminal syndicates involving such sales . . . ." *Id.* Your Defendant respectfully suggests, however, that reading the *Santos* opinion to conclude that *Santos* "does not apply" in drug conspiracy cases is not merited based on the holding of the *Santos* plurality; and, consequently, *Smith* is not apposite as binding authority on this point.

III. THE TRIAL COURT COMMITTED LEGAL ERROR BY SENTENCING THE DEFENDANT TO 235 MONTHS BASED ON A DETERMINATION THAT THE DEFENDANT DID NOT HAVE A MINOR OR MINIMUM ROLE IN THE MARIJUANA CONSPIRACY OR IN THE MONEY LAUNDERING CONSPIRACY.

A. Standard of Review

An appellate court will

> review a district court's sentencing determination for reasonableness, which has both a procedural and a substantive component. *See Gall*, 128 S. Ct. at 597; *Thomas*, 498 F.3d at 339. Thus, when reviewing a district court's sentencing determination, we "first ensure that the district court committed no significant procedural error, such as . . . failing to consider the § 3553(a) factors . . . or failing to adequately explain the chosen sentence." *Gall*, 128 S. Ct. at 597. "Assuming that the district court's sentencing decision is procedurally sound, [an appellate court] should then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard." *Id.* District courts are charged with imposing "a sentence sufficient, but not greater than necessary" to fulfill the purposes of sentencing in § 3553(a)(2). *Foreman*, 436 F.3d at 644 (internal quotation marks omitted). "The fact that the appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court." *Gall*, 128 S. Ct. at 597. Moreover, a sentence that falls within a properly calculated Guidelines range is accorded a rebuttable presumption of reasonableness. *Heriot*, 496 F.3d at 608.

United States v. Madden, 515 F.3d 601, 609 (6th Cir. 2008).

> "Assuming that the district court's sentencing decision is procedurally sound, the appellate court should then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard." For a sentence to be substantively reasonable, "it must be proportionate to the seriousness of the circumstances of the offense and offender, and sufficient but not greater than necessary, to comply with the purposes" of § 3553(a).

United States v. Curry, 536 F.3d 571, 573 (6th Cir. 2008) (internal citations omitted).

"A sentence is procedurally unreasonable if the district court fails to calculate (or improperly calculates) the Guidelines range . . . ." *United States v. Baker*, 559 F.3d 443, 448 (6th Cir. 2009) (citing *Gall*, 128 S.Ct. at 597). An appellate court will "review the district court's application of the Sentencing Guidelines *de novo*". *Baker*, 559 F.3d at 448 (citing *United States v. Hunt*, 487 F.3d 347, 350 (6th Cir. 2007)). In reviewing whether a defendant should be accorded a downward adjustment for his role in the criminal offense, "the degree of participation and culpability is a factual determination entitled to review for only clear error." *United States v. Allen*, 516 F.3d 364, 375 (6th Cir. 2008).

B. Law and Argument

In the case at bar, the trial court determined that Skinner was responsible for 5,720.35 kilograms of marijuana during the time that he was in the conspiracy, which corresponds to an offense level of 34 (other increases resulted in an adjusted offense level of 38). The trial court also made a clearly erroneous determination that Skinner had more than a minor or minimum role in both the marijuana conspiracy and the money laundering conspiracy, and, consequently, was not eligible for a downward departure from the adjusted offense level of 38 based on his role in the offense. Consequently, **remand** for resentencing is appropriate.

1.

a.

United States Sentencing Guidelines provide in pertinent part as follows:

> Based on the defendant's role in the offense, decrease the offense level as follows:
>
> (a) If the defendant was a minimal participant in any criminal activity, decrease by 4 levels.
>
> (b) If the defendant was a minor participant in any criminal activity, decrease by 2 levels.
>
> In cases falling between (a) and (b), decrease by 3 levels.

U.S.S.G. § 3B1.2. The Commentary to Section 3B1.2 also states the following:

> 3. Applicability of Adjustment. —
>
> (A) Substantially Less Culpable than Average Participant. — This section provides a range of adjustments for a defendant who plays a part in committing the offense that makes him substantially less culpable than the average participant.
>
> A defendant who is accountable under § 1B1.3 (Relevant Conduct) only for the conduct in which the defendant personally was involved and who performs a limited function in concerted criminal activity is not precluded from consideration for an adjustment under this guideline. For example, a defendant who is convicted of a drug trafficking offense, whose role in that offense was limited to transporting or storing drugs and who is accountable under § 1B1.3 only for the quantity of drugs the defendant personally transported or stored is not precluded from consideration for an adjustment under this guideline.

b.

This Court has recently explained the application of U.S.S.G. § 3B1.2 in the case of *United States v. Allen*, 516 F.3d 364 (6th Cir. 2008):

> The sentencing guidelines instruct the district court to decrease a defendant's offense level based on the defendant's role in the offense: "If the defendant was a minimal participant in any criminal activity, decrease by 4 levels[;][i]f the defendant was a minor participant in any criminal activity, decrease by 2 levels[; and,] [i]n cases falling between ["minimal"] and ["minor"], decrease by 3 levels." U.S.S.G. § 3B1.2. . . . .
>
> A "minimal participant" is one "who plays a minimal role in concerted activity." *Id.* at Application Note 4. Those dubbed "minimal participants" are "plainly among the least culpable of those involved in the conduct of a group . . . [based on a] lack of knowledge or understanding of the scope and structure of the enterprise and of the activities of others [within the group]." *Id.* . . . .
>
> A "minor participant" is a defendant "who is less culpable than most other participants, but whose role could not be described as minimal." *Id.* at Application Note 5.

Allen, 516 F.3d at 374. Thus, a court must look at not only the role of a defendant, but that defendant's "actions must be compared with those of the average participant in a similar scheme." *United States v. Jackson*, 55 F.3d 1219, 1225 (6th Cir. 1995). *See United States v. Groenendal*, 557 F.3d 419, 428 (6th Cir. 2009) ("whether to apply § 3B1.2 'is heavily dependent upon the facts of the particular case'").

2.

In the case at bar, the trial court committed clear error by concluding that Skinner was neither a "minor" nor a "minimal" participant in either the drug conspiracy or the money laundering conspiracy. (R-2.259, Tr.[12/04/09], at 126-28). In this respect, the case of *United States v. Santos*, 357 F.3d 136 (1st Cir. 2004) provides instruction in the determination of a mitigating role for Skinner. In *Santos*, the defendant was found to have a "minor" role in a drug conspiracy even though the quantity of drugs "was very large," and was also found to be more than a mere courier of drugs as someone who "inspected the cocaine for quality and assisted in repackaging it for transportation." *Santos*, 357 F.3d at 143. Nevertheless, the defendant was the "least culpable" of the four -co-conspirators, which supported the trial court's finding of a minor role in the drug conspiracy. *Id.*

Here, the proof at trial and at sentencing showed that Skinner was nothing more than an independent contractor who was paid per trip. Thus, Mike West, one of the leaders of the drug conspiracy, testified that Skinner served as a subcontractor for West during the operation of the drug conspiracy, and that Skinner transported marijuana from 2001-02 as well as between 2005-06. (R-2.259, Tr.[12/04/09], at 80-81). During the 2005-06 time frame, West paid Skinner $100 per pound for delivery of marijuana. (R-2.200, Tr.[01/27/09], at 68). Philip Apodaca, another high-level participant in the drug conspiracy, confirmed Skinner's role as a driver who would

deliver quantities of marijuana from Tuscon, Arizona to Tennessee. (R-2.259, Tr.[12/04/09], at 60). Skinner's role in the drug conspiracy was really that of a courier or "mule": there was no proof at trial or sentencing that he had the high degree of culpability in the conspiracy of the top-level conspirators such as Mike West or Philip Apodaca, who were the ultimate suppliers, buyers, and distributors; there was no proof at trial or sentencing that Skinner had the degree of culpability of mid-level individuals who organized the operations of the drug conspiracy, set up drug deals, or otherwise had any decision-making authority in the conspiracy.

With respect to the conspiracy to launder the drug proceeds, Mike West testified at trial that Skinner transported cash in his vehicle along with marijuana, but otherwise had no involvement in laundering drug proceeds. (R-2.200, Tr.[01/28/09], at 243). In fact, West testified that Skinner "didn't always know how much" money he was transporting. (R-2.200, Tr.[01/28/09], at 152). Further, Christopher Shearer, a co-conspirator in the drug conspiracy who admitted to participating in the money laundering operation, detailed how the drug proceeds were used to purchase, *inter alia*, gold coins, gemstones, exotic wines, and real estate; but Shearer testified that Skinner was not involved in these money laundering operations. (R-2.210, Tr.[01/22/09], at 140-44). Nor was there any other testimony that Skinner profited from the drug conspiracy to make investments or purchases with the payments that

he received for transporting marijuana.

Based on the testimony at trial and at sentencing, the trial court's determination that Skinner did not qualify for a decrease of at least two, and not more than four, offense levels for having a mitigated role in the drug and money laundering conspiracies was clear error. This Court must **remand** for **resentencing** based on a lower adjusted offense level resulting from Skinner's mitigated offense role.

CONCLUSION

For the reasons set forth hereinabove, the Defendant, Melvin Skinner, respectfully requests that this Court **reverse** the trial court's denial of his Motions to suppress and **remand** for **dismissal**; that this Court **reverse** the conviction on Count 2 for conspiracy to engage in money laundering; that this Court **remand** for **resentencing**; and/or that this Court provide for such further disposition that is not inconsistent with this Court's ruling.

Respectfully submitted this 7th day of September, 2010.

GULLEY OLDHAM, PLLC

/s/ Gerald L. Gulley, Jr.
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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of this the foregoing document was sent to all counsel of record or parties in this cause by sending a copy of same via electronic case filing, electronic mail, or by United States Mail with prepaid first-class postage thereon sufficient to cause delivery, to the following:

DAVID P. LEWEN, Esq.
OFFICE OF THE U.S. ATTORNEY
800 Market Street, Suite 211
Knoxville, Tennessee 37902

This the 7th day of September, 2010.

By: /s/ Gerald L. Gulley, Jr.
Attorney

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

The Defendant, Melvin Skinner, pursuant to Sixth Circuit Rule 30, hereby designates the relevant district court documents identified hereinbelow:

DESCRIPTION OF ENTRY	DATE	RECORD ENTRY NO.
Docket Sheet	--	--
Motion to Suppress	09/29/06	R-1.34
Superseding Indictment	12/19/06	R-1.54
Report and Recommendation	04/26/07	R-1.75
Objections to Report and Recommendation	05/10/07	R-1.81
Order Adopting Report and Recommendation	05/24/07	R-1.82
Motion to Re-Assign Cases	07/18/07	R-1.89
Motion to Dismiss Defendants from Case	08/13/07	R-1.90
Order	08/22/07	R-1.91
Indictment	07/18/07	R-2.3
Jury Verdict	02/03/09	R-2.183
Motion for New Trial	02/12/09	R-2.190

Memorandum and Order	09/04/09	R-2.245
Judgment in a Criminal Case	12/08/09	R-2.253
Notice of Appeal	12/10/09	R-2.254

Transcript of Suppression Hearing	03/09/07	R-1.71
Transcript of Trial Testimony	03/18/09	R-2.199
Transcript of Trial Testimony	03/18/09	R-2.200
Transcript of Trial Testimony	03/18/09	R-2.201
Transcript of Trial Testimony	03/18/09	R-2.210
Transcript of Trial Testimony	02/04/10	R-2.259

CERTIFICATION

Pursuant to Sixth Circuit Rule 30(f)(1)(G), I hereby certify that all documents included in the Appendix, as indicated hereinabove, are copies of documents properly made a part of the record. I also certify, pursuant to Federal Rule of Appellate Procedure 28.1(e)(2) and 32(a)(7)(C), this Brief contains no more than 14,000 words.

/s/ Gerald L. Gulley, Jr.
GERALD L. GULLEY, JR., Esq.
Attorney for Melvin Skinner

Docket No.: 09-6497

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MELVIN SKINNER,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Tennessee
Northern Division at Knoxville

REPLY BRIEF OF APPELLANT, MELVIN SKINNER

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ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

UNITED STATES SUPREME COURT CASES

UNITED STATES COURTS OF APPEALS CASES

STATE COURT CASES

FEDERAL RULES

SIXTH CIRCUIT RULES

CONSTITUTIONS

SCHOLARLY ARTICLES AND TREATISES

SUMMARY OF ARGUMENT

The trial court committed legal error when it denied, on the grounds that the Defendant lacked standing, a Motion to suppress evidence obtained from a cellular telephone in the Defendant's possession and under this control. The Defendant had a legitimate expectation of privacy regarding the location of his vehicle and his person. All of the evidence obtained through location information obtained by way of the cellular telephone, plus the fruits of the illegal search and seizure, must be suppressed.

ARGUMENT

THE DEFENDANT HAD A REASONABLE EXPECTATION OF PRIVACY THAT WAS VIOLATED BY THE GOVERNMENT'S COLLECTION AND USE OF CELLULAR TELEPHONE SITE LOCATION INFORMATION, IN CONTRAVENTION OF THE FOURTH AMENDMENT, AND THE TRIAL COURT THEREFORE COMMITTED LEGAL ERROR BY DENYING THE DEFENDANT'S MOTION TO SUPPRESS.

A. Standard of Review

> The grant or denial of a motion to suppress is a mixed question of fact and law. *United States v. Hurst*, 228 F.3d 751, 756 n. 1 (6th Cir. 2000). On appeal, we review the district court's findings of fact for clear error and its conclusions of law de novo. *United States v. Dillard*, 438 F.3d 675, 680 (6th Cir. 2006). A factual finding is clearly erroneous when, although there may be evidence to support it, the reviewing court, utilizing the entire evidence, "is left with the definite and firm conviction that a mistake has been committed." *United States v. Navarro-Camacho*, 186 F.3d 701, 705 (6th Cir. 1999). The evidence must be viewed "in the light most likely to support the district court's decision." *Dillard*, 438 F.3d at 680 (internal quotation marks and citations omitted). Finally, "'[w]here there are two permissible views of the evidence' the district court's conclusions 'cannot be clearly erroneous.'" *United States v. Worley*, 193 F.3d 380, 384 (6th Cir. 1999) (quoting *Anderson v. City of Bessemer City*, 470 U.S. 564, 574, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985)).

United States v. Ellis, 497 F.3d 606, 611-612 (6th Cir. 2007).

B. Law and Argument

The United States, in its responsive Brief, suggests that the trial court's decision to overrule and deny the Motion to suppress was correct because it did not violate the Fourth Amendment interests of the Defendant. Recent jurisprudence, however, further demonstrates that the government's acquisition and use of cellular telephone site location information in the case at bar is prohibited under the Fourth Amendment, absent a probable cause warrant, which was not obtained by the government in the case at bar. Consequently, this Court must **reverse** the trial court's denial of the Motion to suppress, and **remand** for **dismissal**.

The case of *United States v. Maynard*, 615 F.3d 544 (D.C. Cir. 2010), dealt with the question whether surveillance of a defendant by use of a GPS device, installed without a warrant, over the course of days or weeks constituted a violation of the Fourth Amendment. *Maynard*, 615 F.3d at 555. The United States Court of Appeals for the D.C. Circuit initially concluded that *United States v. Knotts*, 460 U.S. 276 (1983) was distinguishable because the Supreme Court in *Knotts* "explicitly distinguished between the limited information discovered by use of the beeper — movements during a discrete journey — and more comprehensive or sustained monitoring," *Maynard*, 615 F.3d at 556 (citing *Knotts*, 460 U.S. at 283-85). The court in *Maynard* distinguished the use of a beeper under the scenario in *Knotts*,

where the beeper was tracked over a 100-mile distance, for a short amount of time, with the "24/7" surveillance used by government agents to track the whereabouts of the defendant in *Maynard*:

> In short, *Knotts* held only that "[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another," *id.* at 281, 103 S.Ct. 1081, not that such a person has no reasonable expectation of privacy in his movements whatsoever, world without end, as the Government would have it. The Fifth Circuit likewise has recognized the limited scope of the holding in *Knotts*, *see United States v. Butts*, 729 F.2d 1514, 1518 n. 4 (1984) ("As did the Supreme Court in *Knotts*, we pretermit any ruling on worst-case situations that may involve persistent, extended, or unlimited violations of a warrant's terms"), as has the New York Court of Appeals, *see People v. Weaver*, 12 N.Y.3d 433, 440-44, 882 N.Y.S.2d 357, 909 N.E.2d 1195 (2009) (*Knotts* involved a "single trip" and Court "pointedly acknowledged and reserved for another day the question of whether a Fourth Amendment issue would be posed if 'twenty-four hour surveillance of any citizen of this country [were] possible'"). *See also* Renee McDonald Hutchins, *Tied Up in Knotts? GPS Technology and the Fourth Amendment*, 419 UCLA L. Rev. 409, 457 (2007) ("According to the [Supreme] Court, its decision [in *Knotts*] should not be read to sanction 'twenty-four hour surveillance of any citizen of this country.'" (quoting *Knotts*, 460 U.S. at 284, 103 S.Ct. 1081)).

Maynard, 615 at 557.

The court in *Maynard* then determined that, in a case where surveillance was continuous over a period of several days, the person surveilled does likely have a reasonable expectation of privacy:

> First, unlike one's movements during a single journey, the whole of one's movements over the course of a month is not actually exposed to the public because the likelihood anyone will observe all those movements is effectively nil. Second, the whole of one's movements is not exposed constructively even though each individual movement is exposed, because that whole reveals more — sometimes a great deal more — than does the sum of its parts.

Maynard, 615 F.3d at 558. The court went on to explain that there was a reasonable expectation of privacy because the likelihood that a stranger would observe the collective movements of an individual over a protracted period of time, and not just a short trip, "is essentially nil" — and, consequently, "not actually exposed to the public." *Id.* at 560. Further, "[a] reasonable person does not expect anyone to monitor and retain a record of every time he drives his car, including his origin, route, destination, and each place he stops and how long he stays there; rather, he expects each of those movements to remain 'disconnected and anonymous,'" *id.* at 563 (quoting *Nader v. Gen. Motors Corp.*, 25 N.Y.2d 560, 572, 307 N.Y.S.2d 647, 255 N.E.2d 765 (1970) (Breitel, J., concurring)).

In the case at bar, government agents testified that the cellular telephone given to the Defendant was "pinged" continually while the Defendant drove eastward from Arizona towards Tennessee, in order to obtain cell site location information and GPS coordinates to track the Defendant, over multiple days and hundreds of miles. (R-1.71, Tr.[02/13/07], at 41-42, 49-58, 74-75, 193-98).

By analogy, where the movements of the Defendant took place over the course over an extended time frame and involved extensive travel, such activity was not "exposed to the public" — notwithstanding that it may have taken place on public highways. Consequently, *Knotts* does not support the government's capture and use of the cell site and GPS location information used to track the Defendant; and the Defendant in this case had a Fourth Amendment right to the reasonable expectation of privacy in his whereabouts and location. Further, since any evidence seized after the warrantless search of Skinner's vehicle and the cellular telephone found therein would be "fruit of the poisonous tree," all such evidence should be suppressed as well. *E.g., Wong Sun v. United States*, 371 U.S. 471, 484, (1963). *See United States v. Kelly*, 913 F.2d 261, 265 (6th Cir. 1990).

For these reasons, the trial court's ruling that overruled and denied the Motion to suppress must be **reversed**, and this case **remanded** for **dismissal.**

CONCLUSION

For the reasons set forth in his original Brief and in this Reply Brief hereinabove, the Defendant, Melvin Skinner, respectfully requests that this Court **reverse** the trial court's denial of his Motions to suppress and **remand** for **dismissal**; that this Court **reverse** the conviction on Count 2 for conspiracy to engage in money laundering; that this Court **remand** for **resentencing**; and/or that this Court provide for such further disposition that is not inconsistent with this Court's ruling.

Respectfully submitted this 14th day of December, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of this the foregoing document was sent to all counsel of record or parties in this cause by sending a copy of same via electronic case filing, electronic mail, or by United States Mail with prepaid first-class postage thereon sufficient to cause delivery, to the following:

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This the 14th day of December, 2010.

By: /s/ Gerald L. Gulley, Jr.
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CERTIFICATION

Pursuant to Sixth Circuit Rule 30(f)(1)(G), I hereby certify that all documents included in the Designation of Relevant District Court Documents, as indicated hereinabove, are copies of documents properly made a part of the record. I also certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(A-C), this Reply Brief contains no more than 15 pages or 7,000 words.

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