UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Appeal Nos. 03-1245, 03-1246, 03-1266, 03-1283 & 03-1586

UNITED STATES OF AMERICA

Plaintiff-Appellee,

v.

STEPHEN L. MAYES, RAPHAEL S. CLAYTON,
JAQUAN T. CLAYTON, PAUL T. MOORE &
ELLIS LEE JORDAN,

Defendants-Appellants,

INDIVIDUAL REPLY BRIEF OF DEFENDANT-APPELLANT RAPHAEL S. CLAYTON

**Appeal From the Final Judgment of Conviction
Entered In The United States District Court
For The Eastern District of Wisconsin,
Honorable J. P. Stadtmueller, Presiding**

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ARGUMENT

I.

THE TRIAL COURT ERRED, AND DENIED CLAYTON HIS RIGHT TO CONFRONTATION, BY ADMITTING OUT-OF-COURT STATEMENTS OF CONFIDENTIAL INFORMANTS

As established in Raphael Clayton's opening brief at 5-16, the out-of-court statements of two unnamed "confidential informants" in the early 1990's which identified Clayton as a drug dealer and the source of cocaine obtained during certain "controlled buys" constituted hearsay and their admission violated Clayton's right to

confrontation. While the hearsay statements purportedly were not offered for their truth, the court did not limit their use by the jury, and the *only* possible relevance of the evidence lay in the truth of their assertions regarding Mr. Clayton.

In its response brief, the Government belatedly acknowledges as much, conceding that admission of the statements was error. Government's Brief at 32. *See also Crawford v. Washington*, 124 S.Ct. 1354 (2004) (admission of "testimonial" out-of-court statements, such as statements to police officers, violates right of confrontation absent unavailability and prior opportunity by defendant to cross-examine witness).

The government nonetheless asserts that the error was "harmless." Government's Brief at 32-34. The government is wrong. R. Clayton's Brief at 16-19.

The government understandably avoids any reference to the applicable standard of review on the issue of harmlessness. Given the constitutional nature of the confrontation violation, the government must bear the heavy burden of proving the error harmless beyond a reasonable doubt. *E.g.*, *Chapman v. California*, 386 U.S. 18, 24 (1967). In assessing harmlessness, moreover, the Court must consider the combined prejudicial effect of all evidentiary errors. *United States v. Allen*, 269 F.3d 842, 847 (7th Cir. 2001). *See generally* R. Clayton's Brief at 16-17.

The government cannot meet this standard. As demonstrated in the defendants' joint opening brief at 16-20, their joint reply at 6-10, and Raphael Clayton's opening brief at 17-19, the evidence was far from overwhelming, such that

the impermissible hearsay easily could have tipped the balance on the jury's assessment of reasonable doubt.

The repeated hearsay assertions purporting to identify Raphael Clayton as a source of cocaine and participant in the "controlled buys," although relatively brief, came during the first two days of the trial. There was no legitimate evidence tying Raphael Clayton to his father's possession of the cocaine or the controlled buys other than Clayton's mere residence in the home, so that evidence of the controlled buys and seizures in 1991 and 1993 had little, if any, legitimate relevance to the charge against Clayton. It was only the repeated hearsay assertions that he was the source of the cocaine which tied him to them.

Also, because its case relied almost exclusively on the claims of "cooperating witnesses" trying to avoid the consequences of their own crimes by pointing the finger at others, the government required some form of independent corroboration in order to overcome the inherent unreliability of such claims. Without the hearsay statements attributing the cocaine to Raphael Clayton, evidence of the controlled buys and search warrants from 1991 and 1993 would have provided little if any corroboration for the allegations of the government's witnesses. It is one thing to present evidence that the defendant in fact sold cocaine; it is quite another merely to show that the defendant as a teenager lived with a parent who was caught with cocaine and convicted for it. Evidence of Raphael Clayton's mere residence in the home from which his parents sold cocaine does nothing to corroborate the "cooperating witnesses'" claims that it

was in fact Raphael who was responsible for the drugs.

The government's suggestion that the inadmissible hearsay evidence was "cumulative" ignores both the evidence and this Court's teachings in *Washington v. Smith*, 219 F.3d 620, 634 (7th Cir. 2000) (evidence not "cumulative" unless it "supports a fact established by existing evidence," citing Black's Law Dictionary 577 (7th ed. 1999)). The government failed to present any other evidence to the effect that Raphael Clayton was responsible in any way for the controlled buys or the evidence seized during the subsequent search warrants. Rather, all properly-admitted evidence pointed to his parents as the responsible parties, including the fact that they were the only ones charged or convicted as a result of the investigation (R371:68, 75-76; R372:127-30).

Nor did Raphael Clayton's trial strategy render the impermissible hearsay evidence harmless. While Clayton's defense sought to highlight the lack of any *legitimate* tie between him and the evidence of controlled buys and seizures in 1991 and 1993, the hearsay evidence purporting to identify him as the one responsible for the cocaine was admitted without limitation and wholly undermined that effort.

Coming, as they did, at the beginning of the trial, without instructions on their supposedly limited use and bolstered by the superficial "corroboration" provided by the results of the searches, the hearsay statements accordingly had much greater impact than merely asserting Raphael Clayton sold drugs in the early 1990s. Rather, they tainted the entire trial, effectively priming the jury to accept the government's

view of the remaining evidence and Raphael Clayton.

This Court's decision in *United States v. Thompson*, 286 F.3d 950 (7th Cir. 2002), *cert. denied*, 537 U.S. 1134 (2003), is readily distinguishable and does not support a claim that the evidence here was harmless. The improperly admitted evidence in that case consisted of hearsay statements of a murdered confidential informant. Unlike the inadmissible evidence here, this Court recognized that the challenged evidence in *Thompson* was at best "marginally inculpating" and "not very important to the government's case," and that, even to the extent it was arguably important, other evidence provided the same information. 286 F.3d at 962-63. Of course, the hearsay evidence here directly implicated Raphael Clayton in drug dealing and was critical to the government's claim that he was in some way responsible for his father's cocaine and the controlled buys at his father's home.

Also, while the Court found the evidence in *Thompson* to be "overwhelming," it did not rely, as the government suggests here, Government's Brief at 33-34, merely on the fact that a number of cooperating witnesses testified. Rather, the Court also found necessary to note that "evidence of the many numerous expensive cars that conspiracy members purchased in Stephanie Johnson's and other individuals' names was introduces at trial" along with "evidence that large amounts of cash (over $350,000 dollars [sic]) had been seized from [the defendants] during the pendency of the conspiracy–cash that was never reclaimed." *Id.* at 962. It was only when "[t]aken together" that the Court deemed such evidence to be overwhelming. *Id.*

Of course, unlike in *Thompson*, such extensive corroboration simply does not exist here. Indeed, the facts in *Thompson*, if anything, demonstrate the weakness of the government's case here. While the government was able to present evidence in *Thompson* regarding extensive money laundering and hundreds of thousands of dollars in unexplained wealth in a case which, like that alleged here, involved hundreds of kilograms of cocaine, the government admitted having *no* evidence of any unexplained wealth in this case (R383:1348).

The government's case here was far from "overwhelming," resting as it did almost entirely upon the testimony of inherently unreliable "cooperating witnesses" seeking to avoid the consequences of their own wrongdoing. Improper admission of evidence tending to provide a patina of corroboration for their claims and tainting the jury's assessment of the government's entire case accordingly cannot be written off as "harmless."

II.

THE DISTRICT COURT ERRED IN IMPOSING A FOUR-LEVEL ENHANCEMENT FOR RAPHAEL CLAYTON'S ROLE IN THE OFFENSE

Mr. Clayton's opening brief at 20-38 shows why the sentencing court erred in enhancing his sentencing guidelines range under U.S.S.G. §3B1.1 based on his role in the offense. As Clayton explained, although the evidence may suggest that he had a different role than others in the alleged conspiracy, it did not support a conclusion that he played a *greater* or more aggravated role. Nothing in the government's

response legitimately suggests otherwise.

Contrary to the implication of the government's arguments, a finding that a defendant exercised decision-making authority and control over others requires more than merely the government's say-so, spin, or speculation. *United States v. Howard*, 80 F.3d 1194, 1202 (7th Cir.1996) ("We must be satisfied, however, that the calculation is based on reliable evidence; speculation and unfounded allegations will not do"). It is not enough for the government to assert that Clayton "exercised decision-making authority and exerted control over others" or that he "decided who would deliver cocaine and at what prices." Government's Brief at 38. Rather, there must be evidence to support such claims. While evidence suggests that Raphael Clayton occasionally would try to mediate disputes between alleged coconspirators, there is no evidence supporting the government's assertions that he either "authorized specific deals" or "controlled the actions of Jaquan and Mayes." Government's Brief at 40.

As explained in Clayton's opening brief at 28-29, evidence that different people delivered drugs at different times suggests, not that Raphael Clayton directed who would make the deliveries, but only that different members took care of different tasks at different times as part of this association of co-equal participants. *E.g.*, *United States v. Schuh*, 289 F.3d 968, 973 (7th Cir. 2001) (mutually beneficial arrangements do not establish control). Not one witness testified that Raphael Clayton in fact directed them or anyone else to make a single delivery. Given the total

lack of evidence regarding how the decisions regarding who would make the deliveries were made, it is accordingly pure speculation to infer that Clayton somehow "directed" or "controlled" them.

Nor does the government's reference to a supposed transaction between Raphael and Jaquan Clayton and Robert McNeal legitimately suggest any control by Raphael. Government's Brief at 39. The fact that Raphael and Jaquan allegedly delivered cocaine together which had been ordered from Jaquan, that both said it was good, and that Raphael promised to make good on it when cocaine turned out not to be good (R387:31-42) does not suggest anything more than joint action by Jaquan and Raphael as co-equals. McNeal did not assert knowledge of any control by Raphael over Jaquan, he merely stated his belief that Raphael was Jaquan's source (*id.*:41). Absent control, however, one's position as a source of drugs does not qualify for a role enhancement. *E.g. United States v. Mustread*, 42 F.3d 1097, 1104 (7th Cir. 1994); *United States v. Brown*, 944 F.2d 1377, 1381 (7th Cir. 1991).

In any event, the McNeal incident demonstrates, not control, but just the opposite. The government's desired inference of control necessarily rests on the assumption that Raphael had the ability and control to make Jaquan compensate McNeal for the bad cocaine. McNeal testified, however, that Jaquan disputed his claims regarding the quality of the cocaine and never did compensate him (*id.*:40-42, 46), suggesting that Raphael simply did not have the power to make him do so.

In its quest to suggest "control" by Raphael Clayton where none exists in fact,

the government seriously misstates the testimony of Otis White. Government's Brief at 40. Contrary to the government's spin, White's actual testimony demonstrated just the opposite of control. White, for instance, explained that, after he had quit selling drugs for a while, he contacted Raphael Clayton in 1995 about getting cocaine to sell. Clayton, however, explained that he had quit the drug business and suggested White contact Jaquan Clayton. (R390:60, 64). White then began dealing directly with Jaquan, but became concerned that he was taking too long to respond to White's calls. White therefore contacted Raphael, not because Raphael had any control over Jaquan or any part in the transactions between Jaquan and White, but because Raphael was able to contact Jaquan directly, while White could not:

> A. And when I beeped Quan, it might take him a hour, two hours to call back so I would call Ralph. What's up, man? *You know. Ralph had all the direct numbers and stuff to him, so he had called him. So then I started telling Ralph that I talk to you, you talk to Quan.*
>
> Q. Okay. What happened?
>
> A. So when I wanted some, I called Ralph and Ralph called Quan because he won't call your numbers and stuff back.

(R390:66 (emphasis added)).

Contrary to the government's spin, therefore, it was White himself who involved Raphael Clayton in the process, and not because Raphael had any control over Jaquan, but because he had Jaquan's direct numbers and could pass along White's request more expeditiously. Indeed, White's testimony demonstrates that Raphael had to check with Jaquan before any transaction could go through (*see*

R390:69), directly undermining any suggestion that Raphael exerted any control over Jaquan's sales.

White's own testimony thus fails to disclose the type of control by Raphael which the government seeks to attribute to it. To the contrary, White would order cocaine from Jaquan, Jaquan would deliver it, and White would pay him (R390:68). White merely used Raphael as a means to relay his cocaine order to Jaquan. Despite the government's misleading attempt to summarize White's testimony at trial (*id.*:70), White did not *have* to go through Raphael for the cocaine he wanted; he chose to do so.

The testimony of Torian Griffin relied upon by the government, Government's Brief at 41, similarly reflects that, although Anthony Scott and Rodney Davis were dealing directly with Steven Mayes, they would try to contact him through others, including Raphael Clayton and Paul Moore, when they were unable to get ahold of Mayes on their own. (R392:81-85). Such calls, of course, in no way suggest authority or control on the part of Raphael Clayton. It is not at all uncommon to call one's friends or family members in an attempt to locate a mutual friend or acquaintance, and such calls do not suggest any kind of control or authority on the part of the person called. Mayes, like Jaquan Clayton, negotiated his own transactions with Scott and Davis, made his own deliveries, and received his own payments. As with Jaquan, no one testified to a single instance in which Raphael Clayton in fact directed or controlled any of Mayes' alleged drug sales.

The acts of Raphael Clayton and Paul Moore to attempt to mediate the dispute between Mayes and Rodney Davis, which the government asserts shows their "decision-making authority and control," *see* Government's Brief at 41-42, shows no such thing. *See* R. Clayton's Brief at 31-32. Also, while the government suggests that Raphael and Moore arranged for Jaquan to deal with Davis after the dispute and dictated changes to the means of delivery, Government's Brief at 42, nothing but bald speculation supports either suggestion. To the contrary, Torian Griffin testified that, after the dispute between Davis and Mayes, Davis obtained drugs from his other sources (R392:96). While Griffin stated that Davis ultimately called "Ralph or Smalls or whoever he can get in touch with," and would sometimes go get drugs, Griffin never went with him (*id.* at 96-97). Nor did Griffin testify concerning any conversations regarding who Davis spoke with in order to begin buying from Jaquan Clayton or how that association began.

Mr. Griffin neither witnessed the circumstances under which Jaquan allegedly began selling to Davis nor overheard any conversations by those who did witness them. He neither witnessed any exercise of control by Raphael over Jaquan nor testified regarding any conversations reflecting such control. Once again, the government merely substitutes its own speculation for the proof necessary for enhancement under U.S.S.G. §3B1.1. *See Howard*, *supra*.

The government's claims that Raphael Clayton "insulated" himself from drug trafficking fares no better. Government's Brief at 42-43.

Of course, there was ample evidence that Raphael Clayton intended to withdraw from the drug business in about 1995 to focus instead on more legitimate activities such as buying and rehabilitating distressed real estate. (R388:28-29; R390:60, 64-65; R392:86-87). The government nonetheless seeks to transmogrify the facts into a claim that Clayton merely sought to insulate himself from the "dirty work" while actually controlling the drug trafficking activity. Government's Brief at 42-43.

The government relies upon two pieces of evidence as support for its claims. Neither in fact does so.

First, the government asserts that the efforts of Clayton and Paul Moore to withdraw from the drug trafficking business "were designed to insulate Clayton and Moore from day-to-day risks of drug dealing, including trasporting cocaine and switching trap cars." Government's Brief at 42. It goes on to assert that "Torian Griffin specifically identified this as the reason why Mayes became more involved with deliveries to Davis." *Id.*, citing (R392:86-87).

Torian Griffin, however, said no such thing. The testimony cited by the government as support for its inflammatory allegation merely confirmed that Clayton and Moore had, in fact, pulled away from drug trafficking to focus on refurbishing distressed real estate; he said nothing about insulating themselves from the day-to-day risks of drug dealing or their controlling the trafficking from a distance:

> A. Well, eventually I hear [Davis] telling Tone that Steve was Smalls' cousin and, you know, he was – came in the picture because Smalls and Ralph and them wanted to, you know, lay back and get into the housing thing. They didn't want to be all in the picture, you know,

the actual drug selling no more.

Q. Okay. Now, in your contacts with Ralph and Smalls at this time, did you see anything or know anything directly to make you say, hey, they were – Tone and 5000 were right? They are stepping back?

A. Yeah.

Q. Describe that. What do you mean?

A. Well, they start – they really started getting a lot of property, you know, started seeing 'em with their work trucks and stuff and they was, you know, really dedicated to just focusing on the real estate. So maybe we will go by one of they houses or hang out. You know, they had a house like on 27th and I believe Condordia or something, and sometimes they will be working on it and we ride through the city and we will stop and talk to 'em, you know.

Or they had houses on 45th Street, you know, and they would be working on them and we would see 'em talking or Ralph was working on the house on Holton Street one day and I was walking through the neighborhood and I stopped and talked to him. So they really were into trying to get into the real estate business.

(R392:86-87). Far from seeking to control the drug operation, therefore, Griffin makes clear that Clayton and Moore in fact were "really dedicated to just focusing on the real estate." (*Id.*).

The testimony of "cooperating witness" Duane Wilson, reflecting a statement allegedly made by Marcus Adams likewise does not rationally support the government's claim or the District Court's conclusion:

Q. [D]id you ever have a discussion with Amp about Ralph and whether he was getting out of the business of selling dope?

A: Yeah. He's talking about going out. He said Ralph going to stop hustling the plastic bag, "plastic bag" means cocaine, let somebody else do it.

(R380:946). Of course, there is nothing about the actual statement attributed to "Amp," i.e., Marcus Adams, which suggests that Raphael Clayton intended to insulate himself or to assert any kind of control over drug trafficking. The specific statement was that he was going to stop selling and let someone else do it. This statement thus is fully consistent with Torian Griffin's testimony (and that of Earl Morrow (R388:28-29) and Otis White (R390:60, 64-65)), that Raphael Clayton intended to leave the drug dealing business and focus on rehabilitating distressed real estate (R392:86-87).

It was only Wilson's reinterpretation of Adams' actual words which adds the spin that the government seeks to rely upon here:

> Q: Okay. When you mean "stop hustling," you mean stop dealing drugs?
>
> A: I mean he going to probably stop distributing but – He's probably going to stop. He going to stop hustling hisself and let somebody else do it, but he will still be, I guess, you know, the head man or getting the work in.

(R380:946-47). Contrary to Wilson's "guess" about what Raphael Clayton "probably" meant, nothing in the statement actually attributed to Adams (and, through him, to Clayton) reasonably suggests that Clayton *ever* was the "head man," let alone that, by getting out of the drug business, he intended to "still be . . . the head man."

Wilson's speculation or "guess" about what Adams might have meant Raphael might have meant in making the statement that Clayton was getting out of the drug business is wholly irrelevant to application of the role enhancer. Speculation or unfounded allegations of a witness can no more support enhancement under the

guidelines than would speculation by the prosecutor. *See Howard*, 80 F.3d at 1202 (guidelines calculations must be based on reliable evidence, not speculation or unfounded allegations). To the contrary, the evidence must be reliable; Wilson's speculation about what Raphael actually intended is not.

Contrary to the government's suggestion, Government's Brief at 43-44, evidence that Raphael Clayton may have had contact with one source of cocaine, while perhaps tangentially relevant to the existence of a conspiracy, is irrelevant to assessment of his role in the offense. Even if there were evidence that Clayton himself was a major source of the alleged conspiracy's cocaine, that would not affect his role in the offense under U.S.S.G. §3B1.1. *E.g. United States v. Mustread*, 42 F.3d 1097, 1104 (7th Cir. 1994) (even position as large scale distributor insufficient for enhancement absent influence or authority over purchaser); *United States v. Brown*, 944 F.2d 1377, 1381 (7th Cir. 1991) (status as distributor, standing alone, does not warrant enhancement under U.S.S.G. §3B1.1).

The government's claims that Raphael Clayton "reaped more substantial profits than other members of the conspiracy," Government's Brief at 44, is just pure, unadulterated speculation. Despite its many "cooperating witnesses," the government failed to present a single witness regarding how the supposedly millions of dollars in proceeds of the alleged conspiracy were distributed. Likewise, despite having evidence of each of the cars and properties cited by the government as somehow demonstrating that Raphael Clayton "reaped more substantial profits than other

members of the group," Government's Brief at 44, the government was unable to present evidence of a single dollar in unexplained wealth on the part of Raphael Clayton (R383:1348 (government agent conceded that it had no evidence of unexplained wealth)), or any other alleged conspirator for that matter (R383:1365), and none of Clayton's properties were deemed appropriate for forfeiture as "drug proceeds" (R383:1330).[1]

Finally, the government here seeks to discern the control over others required for enhancement under U.S.S.G. §3B1.1 from claims that Raphael Clayton owned a car which allegedly was used by others to deliver cocaine and that he had repair invoices for two cars which were apparently similar to other cars allegedly used in the conspiracy. Government's Brief at 45-46. Once again, the government's claims simply do not hold water.

In *United States v. Schuh*, 289 F.3d 968, 973 (7th Cir. 2001), this Court reaffirmed that the type of control over property relied upon by the government here cannot form the basis for a aggravated role enhancement under U.S.S.G. §3B1.1.

The decision relied upon by the government, *United States v. Falcon*, 347 F.3d 1000 (7th Cir. 2003), does not hold to the contrary. The enhancement in *Falcon* was upheld, not based on Falcon's control over property, but because of his control over

[1] Indeed, the government's newfound rationale for not seeking forfeiture, *see* Government's Brief at 31, undermines its argument here. It is hard to comprehend how ownership of a few distressed properties having so little value as to render their forfeiture "unattractive" to the government can, at the same time, evidence that the owner was the primary financial beneficiary of a multi-million dollar drug conspiracy.

a coconspirator, Valdovinas, who served as a messenger for Falcon and who Falcon directed to accompany him on trips to sell drugs. *Id.* at 1004. The government presented no equivalent evidence of control over people here.

But, even if this Court had not already established that the type of control over property asserted by the government here does not support enhancement under U.S.S.G. §3B1.1, the government's argument would still fail. Once again, that claim rests upon bald assertions and speculation, not evidence. The fact that someone uses another person's car in no way suggests that the owner of the car had either control or even knowledge of the intended use. The presence of Raphael Clayton's car at his father's home at the time a search warrant was executed in 1999 also is meaningless for purposes of Clayton's role in the offense, as neither drugs, money nor any other evidence of drug dealing was discovered in that car. (R378:659-60). Nor does the fact that Clayton possessed repair orders for two cars similar to those allegedly used to transport cocaine rationally suggest that he "exercised control over the group's trap cars." Government's Brief at 45. The government does not establish by anything other than speculation that the two cars in question were, in fact, "trap cars" and, even if it had proved as much, the government presented evidence of a multitude of automobiles allegedly used in this supposed conspiracy. Evidence that Raphael Clayton owned one and had repair orders for two others in no way suggests that he had any greater role in the offense than did any other member of the alleged conspiracy.

CONCLUSION

For these reasons, as well as for those in his opening Brief, the Joint Brief, and the Joint Reply Brief, Raphael Clayton respectfully asks that the Court reverse his conviction and grant him a new trial. Should the Court not grant such relief, Clayton asks that the Court vacate the sentence imposed and remand for resentencing.

Dated at Milwaukee, Wisconsin, March 24, 2004.

Respectfully submitted,

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RULE 32(a)(7) CERTIFICATION

I hereby certify that this brief complies with the type volume limitations contained in Fed. R. App. P. 32(a)(7) for a reply brief produced with a proportionally-spaced font. The length of the includable portions of this brief, *see* Fed. R. App. P. 32(a)(7)(B)(iii), is 4,298 words as determined using the word count of the WordPerfect word-processing program used to prepare the brief.

_____

Robert R. Henak

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of March, 2004, I caused 15 hard copies of the Individual Reply Brief of Defendant-Appellant Raphael S. Clayton to be mailed, properly addressed and postage prepaid, to the United States Court of Appeals for the Seventh Circuit, 219 South Dearborn Street, Chicago, Illinois 60604. I further certify that on the same date, I caused two hard copies of that document to be mailed, properly addressed and postage prepaid, and an electronic copy of the brief to be e-mailed, to the following:

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