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,

JOINT REPLY BRIEF OF DEFENDANTS-APPELLANTS STEPHEN L. MAYES, RAPHAEL S. CLAYTON, JAQUAN T. CLAYTON, AND PAUL T. MOORE

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

TIM BIASELLO
20 N. Clark Street, Ste 1200
Chicago, IL 60602
(312) 853-0343 tel
(312) 853-0507 fax

Attorney for Defendant-Appellant
Stephen L. Mayes

ROBERT R. HENAK
HENAK LAW OFFICE, S.C.
1223 North Prospect Avenue
Milwaukee, Wisconsin 53202
(414) 283-9300

Counsel for Defendant-Appellant
Raphael S. Clayton

ROBERT K. O'REILLY
Ademi & O'Reilly, LLP
3620 East Layton Avenue
Cudahy, Wisconsin 53110
(414) 482-8000 tel
(414) 482-8001 fax

Attorney for Defendant-Appellant
Jaquan T. Clayton

ERIC M. SCHWING
802 S. Second Street, 2d Fl.
Springfield, IL 62701
(217) 544-8441 tel
(217) 544-8778 fax

Attorney for Defendant-Appellant
Paul T. Moore

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution, Rules and Statutes

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 JORDAN,

Defendants-Appellants,

JOINT REPLY BRIEF OF DEFENDANTS-APPELLANTS STEPHEN L. MAYES, RAPHAEL S. CLAYTON, JAQUAN T. CLAYTON, AND PAUL T. MOORE

ARGUMENT

THE ADMISSION OF EVIDENCE THAT A GOVERNMENT WITNESS RECEIVED ANONYMOUS DEATH THREATS MANDATES REVERSAL AND A NEW TRIAL

A. The Trial Court Abused Its Discretion in Admitting the Anonymous Threats Evidence

In its continuing efforts to identify some legitimate basis for admission of the anonymous threats evidence, the government's response brief adds yet a fourth to its series of rationales for the purported need for such evidence. It originally proffered the evidence as part of a series of questions supposedly to explain why Moore had not

appeared to testify on a particular date (R393:98-99; J.App. 35-36). In response to the defendants' subsequent mistrial motion, the theory of admission evolved into a claim that the evidence was necessary because other witnesses had been threatened and to explain "why [Christopher Moore] was tired and why he was upset during his testimony." (R384:1451-52; J.App. 43-44). The government presented yet a third purported rationale in response to the defendants' post-verdict motions, asserting then that the evidence was necessary to prevent the jury from drawing "improper inferences regarding Mr. Moore's demeanor and any inconsistent statements" (R296:2).

The defendants' joint brief carefully analyzed each of the government's evolving rationalizations for admitting the anonymous threats evidence and demonstrated why they simply did not hold water. Joint Brief at 26-31. In its response brief to this Court, the government merely rolls all of its prior rationalizations into one big conclusory assertion, and, just for good measure, throws in allegations that Moore was "almost inaudible," and appeared "reluctant" and "hesitant," and that evidence of the anonymous threats accordingly was necessary to prevent the jury from assuming he was on drugs. Government's Brief at 18-19.

The only purported support for these new assertions consists of the government's claim that "Moore had been asked to speak up and needed to be reminded to lift his head high enough to reach the microphone." Government's Brief at 19. Yet, the only record support cited for that claim consists of (1) the same advice

given any number of witnesses when they first testify regarding the need to speak up (R393:4), and (2) three instances in which one or another attorney asked Moore to repeat or clarify an answer (*id.*:5, 6, 161). These few instances from a 183-page transcript hardly support a conclusion that Moore was reluctant, hesitant, or "almost inaudible." Nor, contrary to the government's suggestion, Government's Brief at 19, do they suggest any grounds on which a jury reasonably would conclude that Moore was using drugs at the time he testified.

The government also asserts again that, "[d]uring his testimony, Moore also pulled back from statements made before trial regarding the extent of the defendant's activities." Government's Brief at 19, citing R393:68-98. Once again, the government dramatically overstates the record. As explained in the Defendants' Joint Brief at 29 ("Joint Brief"), but ignored by the government, there was no evidence of any prior inconsistent statements presented beyond the implications of the prosecutor's own questions. Moore had never reviewed the Special Agent's report which the prosecutor's questions suggested contained the prior statements (*id.*:75), and the prosecutor never presented evidence of the supposed statements beyond his own questions. Because the jury was properly instructed that the prosecutor's questions were not evidence (R272:6), there simply were no inconsistent statements which evidence of the supposed threats was necessary to explain away.

The government chooses not to expand on its remaining allegations other than to quote the trial court's conclusions and to assert in summary fashion that those

conclusory findings did not reflect an abuse of discretion. Government's Brief at 17-18. The defendants demonstrated the fallacy of the trial court's reasoning in their Joint Brief at 22-31. The government had the opportunity to rebut that showing, but chose not to make the attempt other than with conclusory assertions, in effect conceding the point.

Finally, the government's attempt to distinguish away *Dudley v. Duckworth*, 854 F.2d 967, 970 (7th Cir. 1988), and, by implication, *Clark v. Duckworth*, 906 F.2d 1174 (7th Cir. 1990), and *United States v. Thomas*, 86 F.3d 647, 654 (7th Cir. 1996), *see* Government's Brief at 20-21, is fatally flawed. Nothing in the record, and nothing in the trial court's findings, suggests any need for the anonymous threats evidence beyond that deemed insufficient in *Dudley*, *Clark*, and *Thomas*. At best, the record supports the trial court's finding that Moore was "groggy" and "upset." Yet, the grogginess was fully addressed by Moore's explanation that he had just gotten off working his third shift job (R393:4-5), and the possibility he appeared "upset" reflects nothing beyond the level of nervousness often experienced by witnesses and deemed patently insufficient justification for admission of anonymous threats evidence in *Dudley*, *supra*.

> Nervousness is not an uncommon condition affecting witnesses. Those natural anxieties, without more, cannot be a means of admitting otherwise prejudicial evidence.

854 F.2d at 971. Nothing in the trial court's findings, or in the record, suggests the type of "demeanor indicating intimidation" necessary to permit admission of such

inherently prejudicial evidence. *See Thomas*, 86 F.3d at 654. *See also Dudley*, 854 F.2d at 972 (even extreme nervousness insufficient to authorize admission of anonymous threats evidence).

Admission of the evidence under pretext is not required for a *Dudley* violation. Rather, the question is whether there existed some legitimate reason why the anonymous threats evidence was necessary to account for any specific behavior on the part of the witness which the government needed to explain away, and whether the probative value of such evidence is substantially outweighed by the resulting unfair prejudice inherent from such evidence. Fed. R. Evid. 403; *see Dudley*, *supra*. In the absence of such a showing, "[t]he probative value of such evidence . . . is extremely limited at best," so that admission of the evidence would violate Rule 403 and the defendants' rights to due process. *Thomas*, 86 F.3d at 654; *Dudley*, *supra*.

Given the total absence of such a legitimate basis for admission of the evidence in this case, it is irrelevant whether the government's proffer of the evidence was based on pretext or a good faith failure to understand the legal requirements for admission of such evidence. *But cf. Gomez v. Ahitow*, 29 F.3d 1128, 1139 (7th Cir. 1994) (construing *Dudley* as inferring pretext from fact "there was no need to introduce the threats other than to prejudice the defendant"). The government's primary reliance upon its lengthy but wholly irrelevant recitation of other alleged threats when responding to the defendants' mistrial motion ((R384:1447-51; J.App. 40-44; *see* R384:1529-30), strongly suggests pretext. *See* Joint Brief at 30. It may be,

however, that the proffer and argument merely resulted from ignorance or misunderstanding of the applicable legal standards rather than a knowing attempt to prejudice the jury.

In either event, the lack of any legitimate basis or need for the evidence renders its admission an abuse of discretion. Here, as in *Dudley* and *Thomas*, the record is devoid of evidence or findings regarding the witness' demeanor as would justify admission of the inherently prejudicial evidence of anonymous threats.

B. Admission of the Threats Evidence was not Harmless

Contrary to the government's best efforts at suggesting otherwise, Government's Brief at 21-31, it fails to meet its burden of proving that the erroneous admission of the anonymous threats evidence was harmless. Attempts to minimize the prejudicial effect of the evidence by reference to the number of witnesses and the length of the trial, Government's Brief at 22, is to no avail. This Court in *Dudley* found admission of such evidence to be so prejudicial as to constitute a violation of fundamental fairness and to require reversal even though the impermissible evidence in that case was just as brief as that here and the case involved 33 witnesses over a two-week trial. 854 F.2d at 972.

Suggesting that its evidence was "overwhelming," the government nonetheless makes a valiant effort at turning its sow's ear of a case into a silk purse, emphasizing its own desired inferences from ambiguous evidence, and minimizing or ignoring evidence damaging to its case. The attempt ultimately must prove unsuccessful,

however, for the reasons stated in the Defendants' Joint Brief at 31-38.

The government's evidence overwhelmingly established various degrees of association between the defendants and others, either through friendship, neighborhood, or family ties. Far from overwhelming, however, was the government's evidence that those associations were, in whole or in part, for purposes of distributing cocaine. For, while the government's traffic stops, garbage searches, and the like independently corroborated the fact of the associations, it was only the inherently unreliable "cooperating witnesses" who provided evidence purportedly connecting Stephen Mayes, Raphael Clayton, Paul Moore, and Jaquan Clayton to any kind of joint agreement to distribute drugs.[1] Jaquan Clayton's possession conviction likewise depends almost entirely upon the credibility of "cooperating witness" Dwayne Wilson.

While such witnesses are not inherently incredible as a matter of law, they had every reason to lie to improve their own lots, and a rational jury thus easily could have discredited their claims. *See* Joint Brief at 31-33. Not only are the allegations of witnesses such as these who are trying to avoid the consequences of their own lawlessness "inherently dubious," *Dudley*, 854 F.2d at 972, but they are all the more so in a totally historical case such as that on which the conspiracy charge here is

[1] The government's controlled buys from, and subsequent searches of, Ellis Jordan's homes in 1993 and 1999 establish only that Jordan himself was involved in dealing drugs. Nothing but bald hearsay, *see* Separate Brief of Raphael Clayton at 5-16, and the allegations of "cooperating witnesses" connects any of the trial defendants to Jordan's drug trafficking. Indeed, trial court granted the government's midtrial motion to dismiss the count alleging Raphael Clayton's responsibility for possessing the cocaine seized at Ellis Jordan's home in 1999 (R266).

based. With very few exceptions, the "cooperating witnesses'" allegations concerned events and conversations which supposedly took place years before trial and were thus incapable of credible independent corroboration.

The government's evidence of "association" between the defendants and others does not "corroborate" the "cooperating witnesses'" allegations of drug dealing. It is very easy for one seeking to avoid responsibility for his own crimes to allege that the associations of others involved not just friendship and family relationships, but joint pursuit of drug trafficking as well. The allegation is easy enough to make, but virtually impossible to corroborate or disprove. It is just this difficulty of corroboration or disproof which makes such allegations attractive to the unprincipled "cooperating witness," and which make such allegations inherently unreliable.

The government also attempts to downplay its inability to present evidence of the type of unexplained wealth one would expect on the part of these defendants if, as the government contends, the defendants were the prime movers in a multi-million dollar drug conspiracy. Government's Brief at 29-31. Even if the government is correct that the amounts involved were closer to $7 million than to $13 million, and even if we account for net profit rather than gross sales, accepting the government's conspiracy claims leaves millions of dollars unaccounted for.

Attempting to circumvent its concession below that it had no evidence of unexplained wealth or assets that could not be justified by the defendants' legitimate income (R383:1348, 1365), the government cites to one instance in which Raphael

Clayton had $5,000 and the fact that Raphael Clayton, Jaquan Clayton and Paul Moore each purchased automobiles. Government's Brief at 30. However, the government ignores the fact that Raphael Clayton traded in another vehicle which covered more than half of the down payment and that he financed the bulk of the purchase price (R383:1313-14). It also ignores the fact that each of the defendants had independent, legitimate sources of income, whether it be rehabilitating and renting out distressed houses or various part time jobs and businesses. *See* Joint Brief at 36. As the government notes, Government's Brief at 30, the evidence demonstrates that Raphael Clayton and Paul Moore likewise participated in gambling, which a reasonable jury could view as providing another source of income which, although less legitimate, was unrelated to any drug trafficking. Also, while the government now claims that it had other reasons for its failure to seek forfeiture of the defendants' property, Government's Brief at 31, a reasonable jury could conclude that its failure to seek forfeiture instead suggests an inability to establish any connection between the property and drug dealing.

The bottom line is that, although a reasonable jury untainted by the anonymous threats evidence could have accepted the government's desired inferences and entered guilty verdicts, the evidence is not so one-sided or imperative as to require that result. The evidence is "overwhelming," in other words, only if the government's "cooperating witnesses" are to be believed. Such a jury, however, easily could have discredited the "cooperating witnesses'" allegations, or at least could have found them

sufficiently questionable to give rise to a reasonable doubt whether the associations between the defendants and others were merely affiliations of family and friendship, rather than extending to an agreement to distribute cocaine. The jury which heard this case rejected the "cooperating witnesses'" allegations against Matthew Smith, the one defendant on trial who was *not* identified in Christopher Moore's litany of supposed drug dealing, *see* Joint Brief at 35 & n.5, and easily could have done the same for the others but for the prejudicial effect of Moore's testimony of anonymous threats.

Because the evidence was not "overwhelming," and because the erroneous admission of the anonymous threats evidence was inherently prejudicial and had the effect of suggesting a "consciousness of guilt" on the part of the defendants, and thereby impermissibly bolstering the perceived credibility of the government's "cooperating witnesses," the error was not harmless.

CONCLUSION

For these reasons, as well as for those in their opening Joint Brief, Stephen Mayes, Raphael Clayton, Paul Moore, and Jaquan Clayton respectfully ask that the Court reverse the judgments of conviction and remand these matters for a new trial.

Dated at Milwaukee, Wisconsin, March 19, 2004.

Respectfully submitted,

STEPHEN L. MAYES, RAPHAEL S. CLAYTON,
JAQUAN T. CLAYTON, and PAUL T. MOORE,
Defendants-Appellants

ROBERT R. HENAK
HENAK LAW OFFICE, S.C.
1223 North Prospect Avenue
Milwaukee, Wisconsin 53202
(414) 283-9300

Attorney for Raphael S. Clayton

TIM BIASELLO
20 N. Clark Street, Ste 1200
Chicago, IL 60602
(312) 853-0343 tel
(312) 853-0507 fax

Attorney for Stephen L. Mayes

ROBERT K. O'REILLY
Ademi & O'Reilly, LLP
3620 East Layton Avenue
Cudahy, Wisconsin 53110
(414) 482-8000 tel
(414) 482-8001 fax

Attorney for Jaquan T. Clayton

ERIC M. SCHWING
802 S. Second Street, 2d Fl.
Springfield, IL 62701
(217) 544-8441 tel
(217) 544-8778 fax

Attorney for Paul T. Moore

Joint Reply1.wpd

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 2,337 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 19th day of March, 2004, I caused 15 hard copies of the Joint Reply Brief of Defendant-appellants Stephen L. Mayes, Raphael S. Clayton, Jaquan T. Clayton, and Paul T. Moore 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 counsel for the Government, AUSA Richard G. Frohling, Eastern District of Wisconsin, 517 East Wisconsin Ave., Milwaukee, WI 53202, Richard.Frohling@usdoj.gov, and to counsel for Defendant-Appellant Ellis Lee Jordan, Kent V. Anderson, Office of the Federal Public Defender, 401 Main Street, Suite 1500, Peoria, IL 61602, kent.anderson@fd.org .

_____

Robert R. Henak
State Bar No. 1016803

Joint Reply1.wpd