THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

JAMES H. GRESHAM
PETITIONER,

VS

UNITED STATES OF AMERICA
JOHN ASHCROFT, ATTORNEY GENERAL
R. WILEY, WARDEN, FCI TALLADEGA
TALLADEGA, ALABAMA
RESPONDENT.

3 01 CV 31/RV/MD

CASE NO. ~~**93-03053/RV**~~

PETITION FOR WRIT OF HABEAS CORPUS

Petitioner, **JAMES H. GRESHAM,** pro se, pursuant to 28 U.S.C. § 2241 seeks a writ of Habeas Corpus. As a premise for writ sought petitioner declares the following:

1) Presently, petitioner is in the custody of the Federal Bureau of Prisons and is confined at the Federal Correctional Institution at Talladega, Alabama.

2) Presently, petitioner is unconstitutionally detained and imprisoned at the Federal Correctional Institution of Talladega, Alabama, by **R. Wiley**, Warden, by virtue of judgement and sentence of thirty years pronounced by the Honorable Judge Roger Vincent, District Court Judge of The Northern District of Florida (Pensacola Division) on October 13, 1993, for the conviction by jury verdict of drug trafficking, 21 U.S.C. §§ 846 and 841(A)(1).

3) Petitioner has exhausted all the currently available Federal remedies in the following manner:

A) Petitioner filed a direct appeal which was denied by the Court of Appeals for the Eleventh Circuit on November 8, 1994. The court's reason for denial was asserted to be for lack of merit in issues presented.

B) Petitioner filed an application for leave to appeal his conviction in The Supreme Court For The United States. This leave to appeal was denied on March 21. 1995.

C) Petitioner filed a Title 28 U.S.C. § 2255 motion to vacate set aside. or correct in October. 1997. This motion was denied as untimely in May 1998. Petitioner submitted an application for Certificate of Appealability to the District Court in June 1998; it was denied March. 1999.

D) Petitioner submitted an application to the United States Court of Appeals For the Eleventh Circuit requesting leave to file a second or successive Title 21 U.S.C. § 2255 motion on January 22. 2001. This request was denied on February 20. 2001.

4) Petitioner's inability to file second or successive motion to vacate entitled him to seek habeas relief Petitioner's inability under Title 28 U.S.C. § 2255, to file a second or successive motion to vacate made that remedy inadequate or ineffective to test the legality of his detention pursuant to the Fourth Fifth and Sixth Amendments to the United States Constitution and The Statu tory Construction decision enunciated by the United State Supreme Court in **Re Jones**, __**F.3d**__**2000 WL 994319 (4th Cir. N.C.)** and **Apprendi v. New Jersey.** Therefore pursuant to 28 U.S.C. § 2241 petitioner is entitled to file a petition for a writ of habeas corpus.

5) Petitioner is imprisoned pursuant to an illegal sentence because the convictions in his original trial and retrial were constitutionally defective for the following reason:

a) Petitioner was convicted on a defective indictment and because an indictment is jurisdictional a detective indictment does not give the trial court jurisdiction The failure to charge every element of an offense is the failure to charge an offense. Fifth Amendment United States Constitution

b) Petitioner's enhanced sentence of three hundred and sixty months in excess of statutory maximum under drug counts imposed in this case inwhich drug quanity and other enhancement were not charged in indictment and proved beyond reasonable doubt but rather, were determined by sentencing judge by preponderance of evidence should be vacated in light of **Apprendi v. New Jersey**.

c) Barring petitioner **Apprendi** claims from Judicial review raise serious constitutional questions and offend U S. Constitution by allowing conviction and sentence to stand even though they are unlawful under the U S. Supreme Court decision announced in **Apprendi**.

d) A new Rule of Law established under **Apprendi** should be applied retroactively during collateral review

e) Petitioner s conviction is due to be vacated on ground that statues under which he were convicted 21 U S C §§ 841(A)(1) and 846 are unconstitutional as a result of the **Apprendi** decision and his conviction under those statues violates his rights to due process under the Fifth Amendment and to Notice and jury Trial safeguards under the Sixth Amendment

6) The original trial court committed reversible error by allowing petitioner's trial to continue without a hearing after Assistant United States Attorney. Benjamin Beard brought to the attention of the court that **Unlawful Contact** with the jury had in fact occurred.

Petitioner contends that the court and prosecutor were under the erroneous assumption that the violator was a member of petitioner's family. However, to their dismay, the culprit of this offense turned out to be the case agent from law enforcement.

A) The retrial and second conviction were the result of consolidating two different indictments, in spite of a new trial order, without "Leave of Court."

B) Two weeks after consolidating the indictments, the Assistant United States Attorney filed a motion to dismiss the first indictment. Petitioner objected to this motion, yet over the petitioner's objection and without a procedural hearing to ascertain the government's reasons for wanting to dismiss, the court granted the motion to dismiss. Petitioner contends this offends the Fifth and Fourteenth Amendments of the United States Constitution's **"due process"** and **"equal protection"** clauses.

C) The convictions were the result of government misconduct, prosecutorial overreaching, piecemeal litigating, and gross negligence caused aggravated circumstance to develop.

D) Petitioner's counsel was ineffective during both trials. Moreover, in particular, counsel was ineffective during the sentencing and appeal phases of the second trail. Petitioner is actually innocent of the crime he was charged and convicted of.

7) Petitioner is imprisoned pursuant to a sentence that is illegal and void for the reasons aforestated and those set forth in the brief in support of the petition for Habeas Corpus in petitioner's motion, and in the exhibits attached hereto, all of which are incorporated by reference herein.

WHEREFORE, petitioner respectfully request:

A) That respondent be required to appear and answer the assertions of this petition.

B) That after full consideration this court relieve petitioner of the unconstitutional restraint on his liberty by issuing a writ of Habeas Corpus.

C) That this court declare petitioner's conviction and sentence void.

D) That this court grant reasonable bond so that petitioner does not have to remain confined under an illegal sentence.

E) That the court, if necesary, grant an evidentiary hearing.

F) That the court grant such other further and different relief as it may deem just and proper.

Respectfully Submitted,

James H. Gresham

Mr. James H. Gresham
Reg. No. 03087-117
Federal Correctional Inst.
PMB 1000
Talladega, AL 35160

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

JAMES H. GRESHAM, Defendant/Movant,	§	
	§	CRIMINAL NO:
	§	**93-03053/RV/MD**
vs	§	
UNITED STATES OF AMERICA, Plaintiff/Respondent.	§	

CERTIFICATE OF SERVICE

I, **JAMES H. GRESHAM,** HEREBY **CERTIFY** that the foregoing instrument, "Petition To File A Title 28 U.S.C. § 2241 Motion in The District Court," has been placed in the Talladega FCI mailing system, and with proper postage affixed, sent by U.S. Postage to the below interested parties:

Benjamin Beard
Assistant United States Attorney
114 East Gregory Street
Pensacola, Florida 32501-4916

So executed on this 3rd Day of April, in the year of our Lord, Two Thousand One.

Sincerely Served,

James H. Gresham

Mr. James H. Gresham
Movant, Pro Se
Reg. No. 03087-017
PMB 1000
Talladega, AL 35160-8799

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

James H. Gresham
Petitioner,

CASE NO: 93-03053/RV

vs

United States of America
John Ashcroft, Attorney General

R. Wiley, Warden FCI Talladega,
Talladega, Alabama
Respondent.
_____/

BRIEF IN SUPPORT OF
PETITION FOR WRIT OF HABEAS CORPUS

James H. Gresham
Reg. No. 03087-017
PMB 1000
Talladega, AL 35160

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B) Prosecutorial gross negligence when the Assistant United States Attorney, Mr. Beard, failed to correct his witness' testimony which he knew or should have known was a direct contradiction of his prior testimony.

C) Prosecutorial misconduct when the Assistant United States Attorney, Mr. Beard, pursuant to Rule 16 of the F.R.Crim.P. failed to disclose or provide a copy of statements made by Benjamin Gresham during an interview which was favorable to Movant.

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

JAMES H. GRESHAM,
Petitioner, §
§ CASE NO: 93-03053/RV
§
vs §
§
§
UNITED STATES OF AMERICA, §
Respondent. §
§

BRIEF IN SUPPORT OF
PETITIONER FOR WRIT OF HABEAS CORPUS

Comes now **James H. Gresham,** pro-se, and **in durance ville,** interposing **HAINES v. KERNER**, 404 U.S. 519, 520 (1972)(per curiam), and respectfully moves this Honorable court pursuant to **Jones v. United States**, 526 U.S.___, 119 S.Ct. 1215, 143 L.Ed. 2d 311 (1999); **Apprendi v. New Jersey, ___U.S.__, No. 99-478** (June 28, 2000), and; **Davis v. United States, 417 U.S.** 333 (1974), to file a writ pursuant to Title 28 U.S.C. § 2241.

STATEMENT OF GROUNDS PRESENTED

GROUND ONE

"A watershed change transpired in constitutional law." See, e.g., **Apprendi v. New Jersey**, __U.S.__,__2000, Criminal Law Reporter, Vol. 67, NO. 13 @ 489 (June 28, 2000), Justice Sandra Day O'Conner and Chief Justice Rehnquist dissenting.

A. Movant asserts that he was denied equal protection and due process of law when the government failed to provide true notice of sentencing exposure by indictment and when the court did not enjoin the prosecution to present to the jury the type and amount of drugs requisite to be proven beyond a reasonable doubt, which subsequently increased Movant's statutory maximum by three-fold.

[T]he judgment, though pronounced or awarded by the judges, is not their determination or sentence, but the determination and the sentence of the law." 3 **Blackstone** 396 (emphasis deleted). Apprendi v. New Jersey, __U.S.__, 2000 Criminal Law Reporter, Vol. 67, No. 13 @ 487 (June 28, 2000).

GROUND TWO

Whether a general verdict for controlled substance conspiracy covering multiple drugs requires sentencing for the drug carrying the lowest penalty.

GROUND THREE

Whether Movant was denied due process and equal protection of the law when the Assistant United States Attorney disregarded the mandate of Rule 13 of the FRCrP by consolidating two different indictments without requesting leave of court.

GROUND FOUR

Whether Movant was denied a fair trial in the first and second proceedings when the court allowed:

A) The first trial to proceed to verdict after unlawful contact was made with the jury by a member of the prosecuting team, in violation of the Fifth and Sixth Amendments to the Constitution.

Flagrantly, the principles of due process and equal protection of law were flouted by members of the Court. The Rules of the Court were not adhered to by an official of law enforcement.

B) Prosecutorial gross negligence when the Assistant United States Attorney Mr. Beard failed to correct his witness testimony which he knew or should have known was a direct contradiction of his prior testimony.

C) Prosecutorial misconduct when the Assistant United States Attorney Mr. Beard, pursuant to Rule 16 of the F.R.Crim.P., failed to disclose or provide a copy of statement made by Benjamin Gresham during an interview which was favorable to movant.

GROUND FIVE

Whether movant conviction was obtained by use of evidence gained pursuant to an unconstitutional search and seizure when the Okaloosa County Sheriff Department failed to knock and announce.

GROUND SIX

Whether movant had ineffective assistance of counsel in the first and second trial proceedings via his attorney's failure to make appropriate motions and objections. In particular, Counselor failed to call critical witnesses, to ask critical question during cross-examination of prosecution's witnesses, failed to properly prepare for trial, failed to object to the court's sentencing him with respect to crack cocaine instead of cocaine hydrocloride after the jury returned a general verdict inwhich both drugs were named in the same counts.

STATEMENT OF THE CASE

Statement of the Proceedings

In the instant case, Movant was named alone in his original indictment on January 27, 1993, Case No. 93-03012/RV. After a jury trial, on April 28, 1993, Movant was convicted. ON May 5, 1993, movant filed a motion for a judgment of acquittal or in the alternative a new trial. In the motion for a judgment of acquittal, Movant asserted that the government had failed to prove the essential elements of count one (1) as charged in the indictment. Movant requested in the alternative a new trial because the government solicited (over Movant's objections) inadmissible evidence during the rebuttal phase of the trial.

The last day of Movant's original trial, a federal grand jury returned an indictment in the case, United States v. Marbot et. al., 93- 03053/RV. This indictment was superseded on May 27, 1993, adding two defendants to the Marbot indictment.

On June 9, 1993, the court granted Movant's motion for a new trial but failed to address the issue of judgment of acquittal. On June 23, 1993, the government added Movant's name to the Marbot case in a second superseding indictment. Movant was arraigned on the Marbot indictment July 2, 1993. The government then filed a motion to dismiss Movant's original indictment on July 6, 1993. Movant filed a motion opposing the dismissal of his original indictment and filed a motion to dismiss him from the Marbot indictment. Without a hearing, the court granted the prosecutor's motion to dismiss.

Movant went to trial on the Marbot indictment August 2,

1993, and was convicted by a jury August 4, 1993. Movant was sentenced October 13, 1993, to a term of 360 months imprisonment. Movant appealed his conviction to the 11th Circuit Court of Appeals, it was affirmed on November 8, 1994. Movant made application to the Untied States Supreme Court for a Writ of Certiorari. The Writ of Certiorari was denied on March 20, 1995. Movant filed a Title 18 U.S.C. § 3582(c)(2) motion for modification of sentence on December, 1995. The district court denied the motion June, 1996. Movant filed a Title 28 U.S.C. § 2255 motion on October, 1997. This motion was denied as untimely. Movant submitted application for a certificate of appealability on June, 1998. It was denied on August, 1998. Movant submitted application for certificate of appealability to the Court of Appeals for the 11th Cir. on September, 1998. It was denied March, 1999. Movant submitted two motion for reconsideration. The first motion was submitted on March 16, 1999. After not receiving a response to this motion, Movant contacted the Clerk of Court regarding the disposition of said motion. The Clerk didn't know the disposition status and instructed Movant to file another motion. In compliance with the Clerk's instruction, Movant filed a second reconsideration motion on October 15, 1999. To date, Movant is yet to receive a response to this last reconsideration motion filed. Thus, Movant remains incarcerated at the Federal Correctional Institution of Talladega, Alabama.

STATEMENT OF FACT

Petitioner submitted an application to the United States Court of Appeals for the Eleventh Circuit requesting Leave To File A Second or Successive Title 28 U.S.C. § 2255 Motion on January 22, 2001. This request was denied on February 20, 2001. Petitioner's inability, under 28 U.S.C. § 2255, to file a second or successive motion to vacate made that remedy inadequate or ineffective to test the legality of his detention pursuant to the Fourth, Fifth, and Sixth Amendments to the United States Constitution, and the statutory construction decision enunciated by the United States Supreme Court in RE **Jones, __F.3d__2000WL 994319 (4th Cir.N.C)** and **Apprendi v. New Jersey, __U.S.__,__2000** Criminal Law Reporter Vol. 67, No.13 @ 487 (June 28, 2000).

The Supreme Court has not specifically ruled that the direct appeal decisions in **Apprendi, Jones, Castillo, or Richardon** are retroactive on collateral review. This is technically correct, but should be irrelevant since **Bousley** pronounced that statutory construction decisions are always retroactive since they state what the law always was. See **Rivers v. Roadway Express, 511 U.S. __, 113 S.Ct. 1250 (1993).**

The Supreme Court's recognition of a statutory right should suffice under § 2255(3). In **united States v. Valdez**, 195 F.3d 544, 546-547 (9th Cir. 1999), the court allowed a defendant to file his first § 2255 motion long past the one-year limitation based on the new United States Supreme Court decision in **Bailey** regarding "use" of a firearm under Title 18 U.S.C. 924(c).

The court was forced to permit this filing because of the later decision in **Bousley v. United States**, 523 U.S. 614, 118 S.Ct. 1604, 1610 (1998) making **Bailey** specifically retroactive on collateral review. See also **United States v Lloyd**, 188 F.3d 184, 187 (3rd Cir. 1999).

A Supreme Court decision on statutory construction is always retroactive. **Rivers v. Roadway Express Inc**. 511 U.S. __, 113 S.Ct. 1250 (1993). When the Supreme Court "construes a statute, it is explaining its understanding of what the statute has meant continuously since the date when it became law." Id. 113 S.Ct.at 1264. The decision of the court as to what a certain statute has always meant serves to "explain why the Courts of Appeals had misinterpreted the will of the enacting congress." Id.

In **Bousley v. United States**, 523 U.S. 614, 118 S.Ct 1604, 1610 (1998), the United States Supreme Court held that a defendant is authorized under Title 28 U.S.C. § 2255's exception to file such a motion where there is a new decision from the United STates Supreme Court that correctly interprets the language of a statute; in that instance, the case was **Bailey v. United States**, 516 U.S. 135 (1995) which defined the meaning of "use" of a firearm in 18 U.S.C. § 924(c).

The court held that claims based on pre-**Bailey** convictions were properly raised on habeas petitions. **Bailey** stated only what the statute had meant since the date the statute was enacted.

In **Apprendi v. New Jersey**, the United States Supreme Court decision interpreting the prerequisite of a valid indictment, unequivocally stated that any fact other than a prior conviction that increase a sentence beyond the statutory maximum should be charged in the indictment, submitted to a jury, and proved beyond a reasonable doubt. Since petitioner's indictment failed to meet the prerequisite enunciated by the Supreme Court to make it a valid indictment, pursuant to Title 28 U.S.C. § 2241, petitioner is entitled to file a petition for a writ of habeas corpus.

GROUND ONE

A) An indictment's failure to charge an offense constitutes a jurisdictional defect. Because an indictment is jurisdictional, defendants at any time may raise an objection to the indictment based on failure to charge an offense. To be sufficient, an indictment must allege each material element of the offense; if it does not, it fails to charge that offense. See **United States v. Gayton**, 74 F.3d 545, 552 (5th Cir. 1996); see also **Russell v. United States**, 369 U.S. 749, 763-64, 825 S.Ct. 1038, 8 L.Ed.

This requirement stems directly from one of the central purposes of an indictment, i.e., to ensure that the grand jury finds probable cause that the defendant has committed each element of the offense, hence, justifying a trial, as required by the Fifth Amendment.

Movant asserts his indictment's citation of statute setting forth offense of control substance violation was insufficient in itself to substitute for indictment's failure to include offense drug amount element. Statutory citation, standing alone can not substitute for failure to include all the elements of a crime in an indictment. The failure to allege the drug amount element of the offense is not a technical error, but rather is violative of the due process and equal protection clauses of the Fifth Amendment and specifically of the principles enunciated in the **Apprendi** ruling, and thus requires dismissal of the **DEFECTIVE INDICTMENT**.

B) Movant asserts, and established by the record, that the government failed to provide true notice of the maximum sentencing exposure by indictment; and denied Movant a fundamentally fair trial when it failed to present the type and amount of drugs for the jury's consideration, to be proven beyond a reasonable doubt, where the penalty provisions of 21 U.S.C. § 841 provide escalating sentencing exposure depending upon the type and amount of drugs. See Appendix (A)-(B) and (C).

The Due Process and Equal Protection of Law's Clauses of the Fifth Amendment and the jury trial guarantees under the Sixth ....

Amendment, requires any fact, other than the prior convictions, which increases the maximum penalty for a crime must be charged in the indictment, submitted to a jury, and proved beyond a reasonable doubt. Movant respectfully submits Jones v. United States, 526 U.S. ___, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999), and Apprendi v. United States, ___U.S.___, ___ (2000), Criminal Law Reporter, Vol. 67 No. 13 @ 487 (June 28, 2000), applies to sentences for violation of 21 U.S.C. §§ 841 and 846 under U.S.S.G. 2D1.1. "A fundamental principle stemming from the Fifth Amendment is that a defendant can only be convicted for a crime charged in the indictment." United States v. Canellere, 69 F.3d 1116 @ 1121 (11th Cir. 1995). In the Eleventh Circuit Court of Appeals, U.S. v. Rogers, ___ F.3d___, 2000 WL 1451907 (11th Cir. Sept. 29, 2000), the court stated that Apprendi applies to Section 841(a). In an opinion by Judge Gerald B. Tjoflat, the Eleventh Circuit began by tracing the development of the Apprendi rule from the court's decision in McMillian v. Pennsylvania, 477 U.S. 79 (1986), through Jones v. United States, 526 U.S. 227, 64 CrL 512 (1999).

In United States v. Hester, 199 F.3d 1287 (2000), the Eleventh Circuit interpreted Jones without the guidance of the later decision in Apprendi. As a matter of statutory construction, the Hester court ruled that Section 841(b), which sets out the penalties for violations of Section 841(a), requires sentencing judges rather than juries to make findings as to sentence enhancing drug quantities. In light of Apprendi, the Supreme Court reversed and remanded Hester, ___U.S.___, 2000 WL

2797322 (U.S. Oct. 16, 2000). In overruling its prior decision of Hester in the Roger's case, the Eleventh Circuit said, "[I]t is clear that Apprendi applies to drug cases and that the prescribed statutory maximum for a drug offense must be determined without regard to quantity. The court explained:

> "This means that Sections 841(b)(1)(A) and 841(b)(1)(B) may not be utilized for sentencing without a finding of drug quantity by the jury. If a provision of Section 841(b) that does not contain a quantity amount applies, for example, Section 841(b)(1)(C), then a convicted defendant may still be sentenced under that provision."

The court went on to state: "In light of Hester's determination that section 841 is not ambiguous and given to alternate interpretation, we must conclude that principles of statutory construction alone cannot resolve this case, and that the constitutional issue decided by Apprendi is starkly presented." See also United States v. Nordby, ___F.3d.___, No. 99-10191 (9th Cir. Sept. 11, 2000)("We conclude that we are unable to give a construction to [section 841] that would avoid the constitutional issue raised by Apprendi."). Applying Apprendi's constitutional principle to section 841 cases, it is clear that the principle is violated if a defendant is sentenced to a greater sentence than the statutory maximum based upon the quantity of drugs, if such quantity is determined by the sentencing judge rather than the trial jury. The statutory maximum must be determined by assessing the statute without regard to quantity. This means that sections 841(b)(1)(A) and 841(b)(1)(B) may not be utilized for sentencing without a finding of drug quantity by the jury.

The court added that other circuits have reached the same conclusion. See United States v. Nordby, 67 CrL 755 (9th Cir.

2000), United States v. Aguayo-Delgado, 220 F.3d 926, 67 CrL 627 (8th Cir. 2000); United States v. Rebmann, 67 CRL 731 (6th Cir. 2000).

The defendant here must be resentenced without regard to drug quantity, the court directed, "In effect, the jury verdict convicted him only of manufacturing, possessing, or distributing an undermined quantity of crack cocaine and cocaine." Moreover, it is Movant's position that since Apprendi instructs that it is the province of the jury to determine quantity and type of drugs, the trial court's failure to so instruct the jury was plain error. The indictment in this case should be dismissed for failure to charge all the essential elements of the offense in the indictment. For these reasons, the Movant's conviction and sentence should be reversed.

GROUND TWO

When the jury return a general verdict to a charge that a conspiratorial agreement covered multiple drugs, the defendant must be sentenced as if the defendant was convicted only of the drug carrying the lowest penalty. United States v. Dale, 178 F.3d 429 (6th Cir. 1999).

The indictment in this case named Movant and six co-defendants. Movant was charged with conspiracy "To possess with intent to distribute cocaine and cocaine-base (crack), Count I; and possession with intent to distribute cocaine and cocaine base (crack), Count III. See Appendix **(A), (C).**

In dictum, this Eleventh Circuit has interpreted Edwards v. United States, ___U.S.___, 118 S.Ct. 1475, 1477 (1998), to hold

that in a conspiracy to distribute case with two controlled substances but only a general verdict, "if the amount of one substance involved leads to a lower statutory maximum sentence than would apply to the amount of the other substance ... then the district court must stay below the lower statutory maximum." See United States v. Riley, 142 F.3d 1254 (11th Cir. 1998).

The Court acknowledged pursuant to Edwards, that if the amount of one substance leads to a lower statutory maximum sentence than would apply to the amount of the other substance, the sentencing court must stay below the lower statutory maximum. 142 F.3d at 1256; see also United States v. Dale, supra; United States v. Bass, U.S.D.C.N.D. Fla., Pensacola; United States v. Orozco-Prada, 732 F.2d 1076, 1083-84 (2nd Cir. 1984); United States v. Barnes, 158 F.3d 662, 668 (2nd Cir. 1998); Newman v. United States, 817 F.2d 635 (10th Cir. 1987); United States v. Owens, 904 F.2d 411, 414-15 (8th Cir. 1990); United States v. Bounds, 985 F.2d 188, 194-95 (5th Cir. 1993); United States v. Garcia, 37 F.3d 1357, 1369-71 (9th Cir. 1994).

In the case herein, the indictment and the jury instruction each stated that count one (1) and count three (3) in which Movant was charged, alleged both cocaine and cocaine base (crack). See Appendix **(A)** and **(B)**.

Under the facts of this case, counsel should have objected to the court's sentencing Movant based on cocaine base (crack) in the absence of a special verdict. His failure to do so resulted in prejudice to Movant. This motion to vacate should be granted as to this issue, and Movant's case should be scheduled for

resentencing.

GROUND THREE: Petitioner was denied due process and equal protection of the law when the Assistant United States Attorney disregarded the mandate of Rule 13 of the F.R.Crim.P by consolidating two different indictments without requesting leave of court.

Movant asserts that in the original and second trial his conviction and sentence was obtained in violation of the United States Constitution and Federal law which causes him to be confined illegally.

After a jury verdict of guilty, counsel filed a motion concerning inadmissible evidence for judgment of acquittal or in the alternative a new trial. In response to this motion, the court issued an order granting Movant a new trial. After the new trial order, the Government's consolidation of the two different indictments without leave of court conclusively oust the new trial court of jurisdiction.

Hence, a subsequent trial on the consolidated indictment or the judgment entered thereon, which did not derive its effect from law is of no force, ab initio. The erroneous judgment in this case was rendered according to course and practice of the Honorable Court but contrary to the rules and upon erroneous application of legal principles. This error apparent of record is plain fundamental error that goes to the foundation of the action irrespective of the evidence. Park's v. Park's, 68 App.D.C. 363, 98 F.2d 235, 236.

The many prejudicial errors of procedures in this case are so grave that if not rectified would result in denial of

fundamental due process. Roberts v. State, Ind. 492 N.E. 2d 310, 313. Procedural due process is the guarantee of procedural fairness which flows from the Fifth and Fourteenth Amendment's due process clauses of the United States Constitution.

Rule 13 of the F.R.Crim.P. states in Note 5 that: where defendants could have been joined in single indictment, it was within power of court to consolidate separate indictments for trial. U.S. v. Fancher, D.C.D.C. 1960, 195 F.S. 634.

Movant humbly would like to focus the attention of this Honorable Court to the fact that when Movant was originally indicted and in jeopardy for three days during trial, there was not any separate indictment which could have been consolidated.

Note 6, Clause 2 of Rule 13 states that: in determining whether indictments should be tried together, trial court must take into account promotion of economical and efficient administration of criminal justice by avoidance of needless multiple trials and protection of criminal defendants from unfair prejudice that may be caused by joining of indictments. U.S. v. Halper, C.A.N.Y. 1978, 590 F.2d 422.

Note 6, Clause 3 of Rule 13 goes on to state that: the trial court has obligation of safeguarding the rights not only of the government but also of individuals accused, and must see that such rights are not jeopardized by consolidation for trial of numerous cases. U.S., C.C.A. Ohio 1944, 143 F.2d 544.

The foregoing statement contained in the notes of Rule 13 and Note 7 instructs us that the question whether consolidation of charges should be ordered is addressed to sound discretion of

the trial court. U.S. v. Haygood, C.A. Ill. 1974, 502 F.2 166, cert. denied. 95 S.Ct. 791, 419 U.S. 1114, 42 L.Ed.2d 815.

In the case **at bar,** the Assistant United States Attorney, without asking permission from the court, consolidated the two cases. The phrase by Leave of Court in the Rules of Criminal Procedure requiring such leave before the consolidation of two different indictments, was intended to condition absolute power of executive, consistently with the concept of separation of powers by erecting check on abuse of executive prerogative.

Under Rules of Criminal Procedure requiring leave of court before the prosecution may consolidate two different indictments the judicial remains absolute judge of whether indictments may be consolidated, and presumptively, best judge of whether indictments should be tried together. Only the judicial has the power to grant leave to consolidate criminal indictments which carries with it the correlative power to exercise a discretion to deny leave to consolidate. The Federal Rules of Criminal Procedure have the force and effect of law just as a statute ... Dupont v. United States, 388 F.2d 39, 44 (5th Cir. 1967), procedural fundamental fairness must be examined in the entire context of the original proceedings. The government arbitrarily consolidated Movant's original indictment with a different existing indictment without a motion to the court for permission to consolidate the two indictments. Approximately two weeks later, the government filed a motion to dismiss Movant's original indictment. Obviously, if the Honorable Court was not petitioned so that it could exercise its sound discretion whether to grant

leave of court to consolidate, or whether the motion should be denied based on the facts presented. Without these facts, it must be an abuse of discretion for the Honorable Court to grant a motion to dismiss, without receiving the factual basis therefor.

Indeed, it is unfortunate that the government wishes to make Movant's case an exception to the rules. The rules should be followed without exception. Movant concedes that there are exceptions to a rule. However, the decisions of our Honorable Courts, though strict, must be just. When mistakes are made in prior proceedings, to revisit the proceedings and correct such errors, are the feelings that should arise in a court full of equity and justice.

Movant affirms his faith in the integrity of our Honorable Courts and do not wish any assertion in his motion to be perceived as an attack on the personal character of any officer of the court. However, truly, it is an egregious unfairness for legal proceedings to be full of errors and when brought to the acute attention of our Honorable Courts and the government ... she be reluctant to recognize and rectify them. For the above stated reasons, Movant's conviction and sentence should be vacated.

GROUND FOUR: Movant was denied a fair trial in the first and second proceedings.

The first day of Movant's trial on the original indictment, upon returning from the lunch recess, the Assistant United States Attorney, Mr. Beard, alerted the court to the fact that a United States Marshal had informed him that extrinsic contact with the jury had occurred. The government thought that it was a member of Movant's family who was responsible, thus extremely prejudicial. However, when the Marshal was asked to identify the culprit, to the surprise of the court, it was discovered that Case Agent, Mark Schineep, was the one responsible for this illegal act. Unfortunately for Movant after this shocking discovery, the issue was dismissed without any further inquiry. See Appendix (D).

Exposure to material not presented in open court mandates a new trial, United States v. Heller, 785 F.2d 1524 (11th Cir. 1986); United States v. Lufferd, 911 F.2d 1011 (5th Cir. 1990). It is well established that a defendant is entitled to a new trial when extrinsic evidence (influence) is introduced into the jury room. Llewellyn v. Stynchcombe, 609 F.2d 194, 195 (5th Cir. 1980); Farese v. United Sates, 428 F.2d 178 (5th Cir. 1970); Paz v. United States, F.2d 740 (5th Cir. 1972).

Prejudice to the defendant therefore is a rebuttable presumption, the government bears the burden of proving the harmlessness of the breach. United States v. Howard, 506 F.2d 865 (5th Cir. 1975). The burden of proving prejudice from juror's exposure to the extraneous influence does not lie with a

defendant because the prejudice is presumed the moment the defendant established that extrinsic contact with the jury did, in fact, occur. United States v. Martinez, 14 F.3d 543 (11th Cir. 1994).

In a criminal case, any private communication, contact of tampering directly or indirectly with a jury during the trial about the matter pending before the jury is for obvious reasons deemed presumptively prejudicial, if not made pursuant to known rules of the court, with full knowledge of the parties. Remmer v. United States, 347 U.S. 227, 74 S.Ct. 450, 98 L.Ed. 654 (1954).

Movant asserts that neither he nor the government in a criminal trial has a right to have his case decided by a jury which may be tainted by bias. The government agent's contact with the jury not only tainted the jury, but thus severely prejudiced the Movant. The Constitutional standard of fairness requires that a defendant have "a panel of impartial, 'indifferent' jurors." Irvin v. Dowd, 366 U.S. 717, 722 (1961).

Counsel for Movant requested a judgment of acquittal at the close of the government's case in chief, and again at the end of trial. The Honorable Court had the motion for judgment of acquittal six-weeks then granted an automatic request for a new trial, that's also a part of the motion, not citing the more egregious harmful errors, e.g., "unlawful contact with the jury." The Honorable Court granted the new trial because of inadmissible evidence, precluding Movant from contesting the new different indictments and two weeks later, the dismissal procedure of the

original trial indictment.

(B) The origin of this case began with a Okaloosa County Florida States search warrant executed by a County Sheriff Drug Task Force. Movant was not at his residence when the search was conducted. It was alleged that a United States Custom Agent, Joe Wright, found drugs during the search. It seems only practical and lawful that Mr. Wright, primarily responsible for the discovery of the drugs allegedly found in the investigation would inevitably testify at a subsequent trial procedure as to his specific findings in an executed search. Furthermore, if some unexpected reason should arise preventing his personal attendance, it seems only reasonable that his report, memorandum, notes, statements, depositions and/or an affidavit should have been presented to the Honorable Court on his behalf.

Unfortunately, for Movant, the only evidence purportedly regarding United States Custom Agent, Joe Wright's participation in the search and alleged drug finds, was the bias, unreliable testimony of Okaloosa County Florida Deputy Sheriff, Mr. McGraw. Mr. McGraw made several contradicting and inconsistent statements during his testimony in the two trials.

Officer McGraw, while giving testimony regarding finger print evidence rendered conflicting statements. During the first trial, with the jury present, Detective McGraw was asked were the igloo thermos, plastic sandwich bags, and Brown paper bags tested for finger prints and he responded: "Yes, sir." He went on to explain that his department had a unit that tested those items. Then he was asked if there were any finger prints found on those

items. He responded, "none that we could use."

This testimony of Officer McGraw can be found in the first trial transcripts (Case No. 93-03012; Movant's counsel, Mr. Quinnell, did not request any transcript of this case to review the prior testimony of witnesses for impeachment preparation.) The testimony of Officer McGraw in the second trial contradicted the testimony that he gave in the first trial. In the second trial, Officer McGraw was asked by Movant's counsel Mr. Quinnell, Case No. 93-03053 (Tr. 179): See Appendix (**E**)

10. Q: "Do you know if these were tested for fingerprints?"

11. A: "I don't know myself personally."

The answer Officer McGraw gave to this question in the second trial was inconsistent with his testimony submitted in the first trial. In the first trial, he unequivocally stated that the items confiscated were tested for finger prints. In particular, he stated that his department had a special unit that tested the items for finger prints. Moreover, another striking inconsistency in Officer McGraw's testimony arose when he stated during his cross-examination testimony that he was not the one that found the igloo thermos that he was searching in the dresser (Tr. 179):

12. Q: All right. Looking now at H nine A, these are the pictures of the closet with the jug apparently placed in the corner of the closet, is that correct?

15. A: That's correct.

16. Q: Now was that the way you saw it? Did you see the thermos in that position?

18. A: I was searching to the right in a dresser which you can see right here. Investigator Joe Wright was searching the closet. He was searching and pulled out this thermos and unscrewed the cap and immediately saw there

was some sort of contents, and we called Rickey Williams in and put it back exactly the way he found it and took the pictures. And we took it out and proceeded to open it up and take a picture of the contents. (Tr. 180).

1. Q: I see. So you actually personally did not see it in that condition, Mr. Wright did?

3. A: Yes

4. Q: From Customs. And he's not here today, is that correct?

5. A: No Sir, he's not.

14. Q: Mr. Wright found the cooler, said something. Did he say something like, "what have we got here," something to that effect?

17. A: No Sir. I was so close. You can see in the picture. I was standing beside of him, and he pulled it out, and I seen him pull it out of the closet as he found it.

25. Q: These other photographs were taken after it was then (Tr. 181): taken back out of the closet a second time?

2. A: Yes

3. Q: And opened up on the bed. Now do you know if the thermos was actually in plain view or obvious view like in this photograph when Mr. Wright found it, or did he have to dig around to get it, do you know?

7. A: No, Sir. We were standing there side by side, and he just was starting in, and he reached in, and he just pulled it out. From what I could determine, he didn't go through anything. It was just sitting there, and he pulled it out.

22. Q: All right. Who was present in the Gresham residence at 115 Wayne Street when you conducted the search? Mr. Gresham wasn't there, was he?

25: A: No, Sir, he wasn't.

(C) Prosecutor's Violation of Discovery Rule 16 Involving Concealment of Statements of the Potential Witnesses.

When a prosecutor has suppressed pre-trial statements that contradicts statements made at trial and which would have been material to trial preparation, nondisclosure must be considered

prejudicial.

The Supreme Court held that the state defendant had a federal constitutional due process right not to be deprived of his liberty except in accordance with the laws of the State, and that federal right to discovery pursuant to Rule 16 of the F.R.Crim.P. was violated. See Hicks, 447 U.S. at 346.

Movant asserts that it was prosecutorial misconduct when the Assistant United States Attorney, Mr. Beard, pursuant to Rule 16 of FRCrP, failed to disclose or provide a copy of statements made by Benjamin Gresham during an interview, which was favorable to Movant. The government's failure to provide this vital information helped to prevent Movant from having an adequate defense. For these reasons Movant's motion to vacate his conviction and sentence should be granted. See Appendix **[F]**

GROUND FIVE: Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure when the Okaloosa County Florida Sheriff Department failed to Knock and Announce.

On Wednesday July 22, 1992, at approximately 11:30 p.m., fifteen agents from the Sheriff Department's Drug Task Force arrived at Movant's residence located at 115 Wayne Ave., Ft. Walton Beach, Florida. Then leaping from a rental van immediately rushed to the locked front door of Movant's home and knocked it open and ran inside.

After their illegal entry, they dispersed themselves throughout the residence. The first person they found in the

residence was Willie Gresham in the downstairs bedroom watching television. At this point, they identified themselves and curtly explained their reason for being at the residence.

The agents dispersed to the upper section of the residence and awaken Movant's two teenage sons who were in separate bedrooms and brought them downstairs.

Simultaneously, Movant's daughter Tripoli Hall, a resident of 115 Wayne Ave., witnessed the invasion of her home transpiring from a neighbor's house located at 109 Wayne Ave. Instinctively, then she immediately returned to her residence. Upon arriving at her home, Ms. Hall asked to speak to the officer in charge. One of the officers directed her to a member of the task force who was supposedly in charge of the operation. Then she asked him what was their purpose. Rudely, the officer failed to respond to Ms. Hall's query. Then she asked did they have a search warrant, to no avail. The agent with whom she was speaking never produced a search warrant for her review nor did he speak with her any further regarding her inquires as to their purpose for being at her residence.

When the agents left, they did not leave any paper receipt for the items they carried away from the residence. Movant wasn't provided with a copy of the search warrant which had "No-Knock" stamped on it until around 4:30 a.m., in a holding cell at the Sheriff's department, the morning following their illegal invasion of his home.

The Sheriff Department's "Drug Task Force" unit failed to

knock and announce before forcibly entering Movant's residence. The Florida Supreme Court in its ruling on the State Criminal case, Earl Bamber, issued a unanimous decision on January 20, 1994, stating: "Florida Law does not allow no knock searches and that forcible entry is lawful only under exceptional circumstances where no reasonable alternative is available." Federal law, Title 18 U.S.C. § 3109)(also require officers to knock and announce. Officer Chris Lahr's testimony in both trials explicitly states that he executed a no knock search. Movant's counselor, Mr. Quinnell, asserted a violation of the constitution's 4th Amendment claim and filed a pretrial motion to suppress fruits of the search. The district court denied the motion.

Movant asked his counsel Mr. Quinnell to proceed further with the Fourth Amendment violation claim, his response was, that since the Court had denied the motion to suppress, that we would have to wait until later. He never tried to bring the issue forward again. Fruits of the search should have been suppressed. The search was unlawful and for these reasons Movant's conviction and sentence should be vacated.

GROUND SIX: Movant had ineffective assistance of counsel when counsel failed to make appropriate motions requesting transcript of prior testimony of testifying prosecution witnesses to enable him to conduct a sufficient cross-examination, to ask critical questions.

Officer McGraw, while testifying in Movant's second trial, contradicted his prior testimony of the first trial. Officer McGraw was asked in the first proceeding whether the igloo thermos, plastic bags, brown paper bags had been tested for fingerprints, he responded, "yes sir." He then explained their procedure in the testing and where the testing was conducted. When he was asked, were any fingerprints found on the items, he responded, "none that we could use." The testimony of Officer McGraw in the second trial contradicted the testimony that he gave in the first trial. In the second trial, Officer McGraw as asked by Movant's counsel Mr. Quinnell, in Case No. 93-03053 (Tr. 179)(see Appendix **[E]**

10. Q: "Do you know if these were tested for fingerprints?"

11. A: "I don't know myself personally."

When Officer McGraw contradicted his prior testimony of the first trial, Movant brought the inconsistency in Officer McGraw's testimony to the attention of his counsel, Movant's counsel Mr. Quinnell only smiled and put his right index finger to his lips, a sign for Movant to be silent. The government knew or should have known that Officer McGraw's testimony was in conflict with his prior testimony of the first trial. The jury was denied the opportunity to consider the contradictions. See Appendix **[E]**

Failed to Call Critical Witnesses

Movant directs this Court's attention to the trial record to irrefutably prove that he did indeed request that critical witnesses be summoned to testify on his behalf. The trial record

will inconfutably show that the government itself even questioned counsel's motive for not having been more efficacious in securing the critical witnesses needed for Movant's defense. During the proceedings, after a brief inquiry regarding the absence of several of Movant's witnesses not available to testify on his behalf, the government made this explicit retort to Mr. Quinnell's reason given for not having made prior arrangements to have the witnesses at trial; I quote from the trial transcript: "I suspect the defense has cooked its own goose as relates to these witnesses." See Appendix **[G]**

Counsel Failed To Properly Prepare For Trial

There is a specific segment in the trial transcript where a controversial debate commenced regarding some discovery material which the government asserted it had been persistently trying to get to Movant's counsel prior to the trial. Unfortunately, for Movant, to no avail. As the trial transcript will indicate, counsel did not possess nor had he reviewed this vital discovery material prior to Movant's trial. Thus, it's unreasonably impractical to believe that he was properly prepared or did adequately represent Movant's legal interest, when there was critical evidence that had never been scrutinized preceding the trial.

Indeed, as a consequence of the aforementioned facts, Movant suffered ineffective assistance of counsel. See Appendix **[H]**

CONCLUSION

Wherefore, for all the above stated reasons, it is respectfully submitted that Movant's motion be granted, conviction and sentence be vacated and that he be granted any other relief he may be entitled. It is so prayed!

Dated: April 3, 2001 Respectfully submitted

James H. Gresham

James H. Gresham
Movant, Pro se
Reg. No. 03087-017
PMB 1000
Talladega, Alabama 35160-8799

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

JAMES H. GRESHAM, Defendant/Movant,	§	
	§	CRIMINAL NO:
	§	**93-03053/RV/MD**
vs	§	
	§	
UNITED STATES OF AMERICA, Plaintiff/Respondent.	§	

CERTIFICATE OF SERVICE

I, **JAMES H. GRESHAM,** HEREBY **CERTIFY** that the foregoing instrument, "Petition To File A Title 28 U.S.C. § 2241 Motion in The District Court," has been placed in the Talladega FCI mailing system, and with proper postage affixed, sent by U.S. Postage to the below interested parties:

Benjamin Beard
Assistant United States Attorney
114 East Gregory Street
Pensacola, Florida 32501-4916

So executed on this 3rd Day of April, in the year of our Lord, Two Thousand One.

Sincerely Served,

James H. Gresham

Mr. James H. Gresham
Movant, Pro Se
Reg. No. 03087-017
PMB 1000
Talladega, AL 35160-8799

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

UNITED STATES OF AMERICA,

v.

PCR 93-03053/RV

LUIS ROBERTO MARBOT,
ANGELA MARTINEZ,
RICARDO ENRIGUEZ,
JESUS MARBOT,
TIMOTHY KEITH STOCKER,
TERRY GILCHRIST, and
JAMES H. GRESHAM
_____/

SECOND
SUPERSEDING
INDICTMENT

THE GRAND JURY CHARGES:

COUNT I

That from on or about December 1, 1984, and continuing through the date of the return of this indictment, in the Northern District of Florida and elsewhere, the defendants,

LUIS ROBERTO MARBOT,
ANGELA MARTINEZ,
RICARDO ENRIGUEZ,
JESUS MARBOT,
TIMOTHY KEITH STOCKER,
TERRY GILCHRIST, and
JAMES H. GRESHAM

did unlawfully combine, conspire, confederate, agree and have a tacit understanding with each other and with other persons to possess with intent to distribute the controlled substances cocaine base, commonly known as "crack cocaine," and cocaine in violation of Title 21, United States Code, Sections 841(a)(1) and (b)(1)(A)(iii).

FILED IN OPEN COURT THIS
6/23/93
CLERK, U. S. DISTRICT
COURT, NORTH. DIST. FLA.

Appendix A
Second Indictment

All in violation of Title 21, United States Code, Section 846.

COUNT II

That in or about May and June 1991, in the Northern District of Florida, the defendant,

LUIS ROBERTO MARBOT,

during and in relation to a drug trafficking crime for which he may be prosecuted in a court of the United States, that is, possession with intent to distribute cocaine base, commonly known as "crack cocaine," did knowingly carry a firearm, that is, a handgun, in violation of Title 18, United States Code, Section 924(c).

COUNT III

That on or about July 22, 1992, in the Northern District of Florida, the defendant,

JAMES HENRY GRESHAM,

did knowingly and intentionally possess with intent to distribute the controlled substances cocaine base, commonly known as "crack cocaine," and cocaine in violation of Title 21, United States Code, Sections 841(a)(1) and (b)(1)(A)(iii) and Title 18, United States Code, Section 2.

COUNT IV

That on or about July 22, 1992, in the Northern District of Florida, the defendant,

JAMES H. GRESHAM,

during and in relation to a drug trafficking crime for which he may be prosecuted in a court of the United States, that is, possession with intent to distribute cocaine base, commonly known as "crack

cocaine", did knowingly use and carry a firearm, that is, a shotgun, in violation of Title 18, United States Code, Section 924(c).

COUNT V

That on or about May 10, 1993, in the Northern District of Florida, the defendants,

LUIS ROBERTO MARBOT,
ANGELA MARTINEZ,
RICARDO ENRIGUEZ,
JESUS MARBOT,
TIMOTHY KEITH STOCKER, and
TERRY GILCHRIST,

did knowingly and intentionally possess with intent to distribute the controlled substances cocaine base, commonly known as "crack cocaine," and cocaine in violation of Title 21, United States Code, Sections 841(a)(1) and (b)(1)(A)(iii) and Title 18, United States Code, Section 2.

COUNT VI

That on or about May 10, 1993, in the Northern District of Florida, the defendants,

LUIS ROBERTO MARBOT,

during and in relation to a drug trafficking crime for which he may be prosecuted in a court of the United States, that is, possession with intent to distribute cocaine base, commonly known as "crack cocaine", did knowingly use and carry a firearm, that is, a handgun, in violation of Title 18, United States Code, Section 924(c) and Title 18, United States Code, Section 2.

COUNT VII

That on or about May 10, 1993, in the Northern District of Florida, the defendants,

LUIS ROBERTO MARBOT, and
TERRY GILCHRIST,

during and in relation to a drug trafficking crime for which they may be prosecuted in a court of the United States, that is, possession with intent to distribute cocaine base, commonly known as "crack cocaine," did knowingly use and carry a firearm, that is, a handgun, in violation of Title 18, United States Code, Section 924(c) and Title 18, United States Code, Section 2.

COUNT VIII

(FORFEITURE)

1. The allegations contained in Count I of this Indictment are hereby realleged and incorporated by reference for the purpose of alleging forfeitures, pursuant to the provisions of Title 21, United States Code, Section 853.

2. From their engagement in the violations alleged in Count I of this Indictment, punishable by imprisonment for more than one year, the defendants,

LUIS ROBERTO MARBOT,
ANGELA MARTINEZ,
RICARDO ENRIGUEZ,
JESUS MARBOT,
TIMOTHY KEITH STOCKER, and
TERRY GILCHRIST,

shall forfeit to the United States, pursuant to Title 21, United States Code, Section 853(a)(1) and (2) all of their interest in:

A. Property constituting and derived from any proceeds the defendants obtained, directly or indirectly, as the result of such violations;

B. Property used in any manner or part to commit and to facilitate the commission of such violations.

The property referenced to in sub-paragraphs A and B above includes, but is not limited to, the following: All that tract or parcel of land, together with its buildings, improvements, fixtures, attachments and easements, commonly known as 2432 NW 34 Street, Miami, Dade County, Florida, and more particularly described as follows:

> Lot 8, Block 7, MELROSE HEIGHTS, according to the Plat thereof recorded in Plat Book 11, at Page 17, of the Public Records of Dade County, Florida.

Said property belonging to and in the name of LUIS MARBOT and ANGELA MARTINEZ, as described in a warranty deed dated September 14, 1987, recorded on September 22, 1987, in Official Records Book 13420 at Page 1671, in the Official Records of Dade County, Miami, Florida.

3. If any of the property described above as being subject to forfeiture as a result of any act or omission of the defendants:

A. cannot be located upon the exercise of due diligence;

B. has been transferred or sold to, or deposited with, a third person;

C. has been placed beyond the jurisdiction of this court;

D. has been substantially diminished in value; or

E. has been commingled with other property which cannot be subdivided without difficulty;

it is the intent of the United States, pursuant to Title 21, United States Code, Section 853(p) to seek forfeiture of any other property of said defendant(s) up to the value of the above forfeitable property.

All in violation of Title 21, United States Code, Section 853.

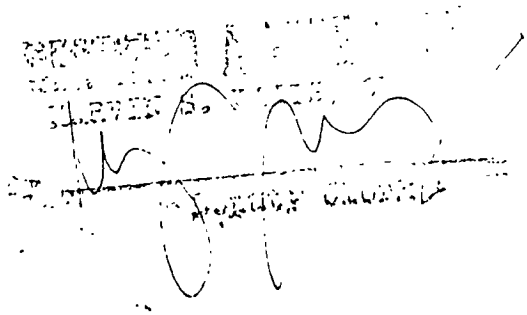
A TRUE BILL:

Douglas Carlton Neel Jr.
FOREPERSON

6-23-93
DATE

Samuel A. Allen Jr. for
GREGORY R. MILLER
United States Attorney

Benjamin W. Beard
BENJAMIN W. BEARD
Assistant U.S. Attorney



INDICTMENT

At this time, I would like to take up the specific charges set out in the indictment in this case. Please remember, as I have already told you, that the indictment is NOT part of the evidence in this case. It is merely an accusation, and you may not draw any inference of guilt from it.

The indictment in this case contains five counts. Count I charges that the Defendants James Henry Gresham and Terry Gilchrist conspired with each other, and with other persons, to knowingly and intentionally possess with intent to distribute cocaine and cocaine base, commonly known as crack cocaine, both of which are controlled substances.

Count III charges that the Defendant James Henry Gresham, on or about July 22, 1992, knowingly and intentionally possessed with intent to distribute cocaine and cocaine base (crack cocaine), both of which are controlled substances.

Count IV charges that the Defendant James Henry Gresham, on or about July 22, 1992, during and in relation to the commission of a drug trafficking crime, namely, possession with intent to distribute crack cocaine,

knowingly used and carried a firearm, specifically, a shotgun.

Count V charges that the Defendant Terry Gilchrist, on or about May 10, 1993, knowingly and intentionally possessed with intent to distribute cocaine and cocaine base (crack cocaine), both of which are controlled substances.

Count VII charges that the Defendant Terry Gilchrist, on or about May 10, 1993, during and in relation to the commission of a drug trafficking crime, namely, possession with intent to distribute crack cocaine, knowingly used and carried a firearm, specifically, a handgun.

10.4
CAUTION - PUNISHMENT
(MULTIPLE DEFENDANTS - MULTIPLE COUNTS)

A separate crime or offense is charged against one or both of the Defendants in each count of the indictment. Each offense, and the evidence pertaining to it, should be considered separately. Also, the case of each Defendant should be considered separately and individually. The fact that you may find one of the Defendants guilty or not guilty of any of the offenses charged should not affect your verdict as to any other offense or the other Defendant.

I caution you, members of the Jury, that you are here to determine from the evidence in this case whether the Defendants are guilty or not guilty. The Defendants are on trial only for the specific offenses alleged in the indictment.

Also, the question of punishment should never be considered by the jury in any way in deciding the case. If a Defendant is convicted, the matter of punishment is for the Judge to determine.

AO 156
Rev. 7/82

VERDICT

United States District Court

DISTRICT
Northern District of Florida

CASE TITLE

UNITED STATES OF AMERICA

V.

JAMES H. GRESHAM

DOCKET NO.
93-03053/RV

MAGISTRATE'S CASE NO.

WE, THE JURY, IN THE ABOVE ENTITLED AND NUMBERED CASE FIND:

the defendant, **JAMES H. GRESHAM:**

Guilty of the offense as charged in Count I of the Indictment;

Guilty of the offense as charged in Count III of the Indictment;

Not Guilty of the offense as charged in Count IV of the Indictment;

SO SAY WE ALL.

8-4-93

John Wendell Wooten Jr.
FOREMAN'S SIGNATURE

DATE
August 4, 1993

186

C

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

James H. Gresham Defendant/Petitioner, -V- United States of America Plaintiff/Respondent,	Case No. 93-03053/RV/MD Civil No. 3:97 CV 466/RV/MD Affidavit of **Arthur Watters**

I, ARTHUR WATTERS, The undersigned do hereby declare that:

1) On Monday April 26, 1993, I was in Pensacola Florida, present in Federal Court during the trial of James H. Gresham.

2) After a break for lunch and Court was starting again, the prosecutor alleged to the judge that I had been polling the Jurors.

3) The Judge asked who was polling the Jury. Then, the prosecutor pointed me out and said, "I think he's a member of the defendant's family.

4) The Judge asked me to stand up, I did as I was instructed and stated to the Court,"Your Honor, I haven't done nothing." The Judge asked the Prosecutor,"who says he's been polling the Jurors." The prosecutor replied, "one of the Marshals your Honor." The Judge ordered, "well get him in here."

5) After the Marshal came to the Courtroom, the Judge had me to stand up again and asked the marshal, "did you say that this man was polling the Jurors?" and the Marshal replied, "not him," then pointing to the man with a beard seated behind the prosecutor, exclaimed, "him, he's the one that was polling the jurors."

D

6) The man that the Marshal identified who was polling the Jurors was a white man with a beard. I am a brown skin Afican-American man with a beard.

7) After this incident the trial started again, I remained in the Courtroom for the rest of the day, very uneasy and filled with fright from the accusation. I did not return. I have not seen James H. Gresham since the trial.

I HEREBY swear under the penalty of perjury that the facts and representations made in the foregoing are True and Correct to the best of my knowledge.

Arthur Walters

Arthur Walters

is that correct?
A That's correct.
Q The cookies and some powder also apparently were contained in those plastic baggies inside the cooler, do you recall?
A Yes, sir.
Q Okay, so they were inside the baggies. Do you know if plastic baggies are a good medium for fingerprints?
A They can be.
Q Do you know if these were tested for fingerprints?
A I don't know myself personally.
Q All right. Looking now at H nine A, these are the pictures of the closet with the jug apparently placed in the corner of the closet, is that correct?
A That's correct.
Q Now, was that the way you saw it? Did you see the Thermos in that position?
A I was searching to the right in a dresser which you can see right here. Investigator Joe Wright was searching the closet. He was searching and pulled out this Thermos and unscrewed the cap and immediately saw there was some sort of contents, and we called Ricky Williams in and put it back exactly the way he found it and took the picture. And we took it out and proceeded to open it up and take a picture of the contents.

Q I see. So you actually personally did not see it in that condition, Mr. Wright did?
A Yes.
Q From Customs. And he's not here today, is that correct?
A No, sir, he's not.
Q All right. So let me just make sure I understand. Mr. Wright apparently found the cooler?
MR. BEARD: Asked and answered, Your Honor, objection.
THE COURT: Overruled. Go ahead and finish your question.
MR. QUINNELL: Thank you, Your Honor.
BY MR. QUINNELL:
Q Mr. Wright found the cooler, said something. Did he say something like, "What have we got here," something to that effect?
A No, sir. I was so close. You can see in the picture. I was standing beside of him, and he pulled it out, and I seen him pull it out of the closet as he found it.
Q Okay, so he put it back and opened it and looked inside and put it back and called the photographer to take the picture?
A Yes, sir, we called the photographer, Ricky Williams, to take pictures.
Q These other photographs were taken after it was then

taken back out of the closet a second time?
A Yes.
Q And opened up on the bed. Now, do you know if the Thermos was actually in plain view or obvious view like in this photograph when Mr. Wright found it, or did he have to dig around to get it, do you know?
A No, sir. We were standing there side by side, and he just was starting in, and he reached in, and he just pulled it out. From what I could determine, he didn't go through anything. It was just sitting there, and he pulled it out.
Q So you assume it was easy for him to spot?
A Yes, sir.
MR. QUINNELL: Okay. May I return these to the clerk, Your Honor?
THE COURT: Yes.
BY MR. QUINNELL:
Q In Mr. Gresham's bedroom you said there was a lot of junk laying around. Was there a lot of -- what kind of junk, miscellaneous items?
A Clothes, plastic bags containing more clothes, the footlocker, papers, newspapers, magazines.
Q All right. Who was present in the Gresham residence at 115 Wayne Street when you conducted the search? Mr. Gresham wasn't there, was he?
A No, sir, he wasn't.

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

James H. Gresham
Defendant / Petitioner

V
United States of America
Plantiff / Respondent

Case No. 93-03053/RV

Affidavit Of

Benjamin Gresham

I Benjamin Gresham the undersigned do here-by declare that ;

(1) The Okaloosa County Sheriff department officer transported me (Benjamin Gresham) to The United States Attorney Office in Pensacola Florida to be interviewed on (4/16/93)

(2) During the interview The Assistant United States Attorney, (Mr. Benjamin Beard) asked me did the cocaine residue found in a pipe come from my brother (James H. Gresham).

(3) I stated my brother (James) did not condone the use of cocaine and that he would regularly lecture other's to discontinue the use.

(4) Luis Marbot told me (Benjamin Gresham), while we were in church at the Okaloosa County Jail (July 1993) that he told the investigator's in The First interview that there was not any drug involvement between He (Luis Marbot) and my Brother (James H. Gresham).

I Hereby Swear Under The Penalty of Perjury that the facts and Representations made in the foregoing are true and correct to the best of my knowledge.

Date: Jan. 22 1996 Benjamin Gresham

Benjamin Gresham
117 King Ave. N.W.
Ft. Walton Bch, Fl
32548

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MR. QUINNELL: Your Honor, I'll just take a couple more moments. What has happened this afternoon is that I talked to Mr. Rodriguez who was brought here by the Marshals, Mr. Riffe, and I thank them for the help. And it turned out we decided not to use Mr. Rodriguez for a number of different reasons, number one of which was he didn't want to be here. But we had a request, Your Honor. There is a brother of Mr. Gresham, Ben Gresham, who is now incarcerated in the Okaloosa County Jail. Mr. Gresham, Ben Gresham, is there I think on a violation of probation by state authorities. We would like to have him as a witness.

THE COURT: I think you probably waited too late. It's twenty to six. Getting somebody from state custody in another county, I mean that's going to take probably at least twenty-four hours notice. I don't see how we can get him here.

MR. QUINNELL: Well, Your Honor, I understand the problem, logistics problem. The Marshals are keeping a lot of these gentlemen in Okaloosa County anyway, and they have to go back and forth tomorrow.

THE COURT: You've got to have a writ. The clerk's office is closed, and you can't get a writ, can't get the paperwork done until tomorrow.

MR. QUINNELL: Let me work on that a little bit, Your Honor.

THE COURT: Well, you can work on it, but there's nothing we can do right now about it. Let me ask the Marshals what they need.

DEPUTY MARSHAL: Your Honor, I need a writ to get a state prisoner out of an institution.

THE COURT: He's not in federal custody, and he's not even in this county. He's in a different county under state authority.

MR. QUINNELL: Just by way of convenience purposes, Your Honor, could I inquire if they're going to go to Okaloosa County with a shuttle bus tomorrow anyway and I can maybe try to work on it.

DEPUTY MARSHAL: Yes, sir, we're going to Okaloosa County at six o'clock in the morning.

MR. QUINNELL: It's looking dim, Your Honor.

THE COURT: It is. That's what I'm telling you. You're a little bit late for that.

MR. QUINNELL: Your Honor, excuse me, there's one other individual Mr. Gresham has asked or inquired about. That's a fellow inmate he had in Tallahassee. I tried to locate him last evening, and he's no longer in Tallahassee. We're not sure where he is. If I could locate him tomorrow, I might come up with some kind of emergency writ. He apparently observed --

THE COURT: All I can say is the same thing I just

told you. You can't do it on such short notice, I don't think. I don't know why you didn't think about this sooner. He probably should have told you earlier.

MR. QUINNELL: It's a combination of circumstances, Your Honor, and I apologize for the delay, but we thought he was in Tallahassee which would have made life easier because I could have presented a writ to you today. We don't know exactly where he is is the basic problem. Anyway, I wanted to alert the court we had those questions.

THE COURT: It makes it extremely difficult, if not impossible, to get him here tomorrow.

MR. BEARD: Could we have the inmate's name, Your Honor?

THE COURT: What's his name?

MR. QUINNELL: Robert E. Smith.

MR. BEARD: I don't know if he was ever disclosed to counsel prior to today as well.

MR. QUINNELL: I think he was listed on the witness list, Your Honor.

MR. BEARD: Well, I wonder why he didn't try to make arrangements Monday. I suspect the defense has cooked its own goose as relates to these witnesses, Your Honor.

THE COURT: If there's nothing else, we'll see you in the morning at 8:45. We're in recess.

(At 5:44 PM the trial was adjourned until August 4, 1993.)

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF FLORIDA

JAMES GRESHAM, Defendant/Petitioner v. UNITED STATES OF AMERICA Plaintiff/Respondent	CASE NO. 93-03053/RV ROBERT EARL SMITH

I, Robert Earl Smith, the undersigned, do hereby declare that:

(1) I am a Federal prisoner, currently serving a sentence at the Federal Correctional Institution at Butner, North Carolina;

(2) That on Friday, June 25, 1993, I was transported by the United States Marshal's Service from the Federal Detention Center at Tallahassee, Florida, to the United States District Court at Pensacola, Florida;

(3) That while being transported from the Detention Center to the District Court, I was handcuffed to another prisoner with whom I had become acquainted at the Detention Center;

(4) That in the hallway of the Tallahassee Detention Center, while awaiting transport to the District Court, I had occasion to witness a conversation that took place between James H. Gresham, who was still handcuffed to me, and another prisoner, Louis Margot. During this conversation, James Gresham and myself were standing in a hallway and Louis Margot was in a Holding Cell that was located immediately adjacent to the hallway;

(5) That during the conversation between James Gresham and Louis Margot, I witnessed Louis Margot explain to James Gresham that he (Margot) was sorry for saying things to the agents (during the investigation) about Jimmy that were not true (Margot and Gresham). Margot further explained to Gresham that he had found it necessary to say these untruths about Gresham, in order to get a deal with the government: "It was the only way that I could get my deal with the the government;"

(6) That, after Louis Margot had explained to James Gresham the reason that he (Margot) had said things that were untrue/false in their case and his reason for doing so, Louis Margot then apologized to James Gresham for having had to do this. Mr. Margot then wished James Gresham the best of luck with his case;

(7) That after witnessing this conversation between Louis Margot and James Gresham, Gresham and myself were taken to the Escambia County Jail, Pensacola, Florida, where I was held awaiting sentencing -- and that I have never again, before or since, had the occasion to discuss this matter with anyone.

I hereby swear under the penalty of perjury that the facts and representations made in the foregoing are true and correct to the best of my knowledge.

DATE: 12/03/95

Robert Smith

Robert Earl Smith

29745-004

arraignment was Wednesday of last week. I had told Mr. Gilchrist at the arraignment and had written him several times to come in my office and talk about his case. He came in yesterday, I mean, excuse me, Wednesday, at 4:15. We started reviewing the evidence against him and his witnesses and that type thing. I don't feel that we're adequately prepared to go forward. However, I have talked with Mr. Gilchrist at length, and he feels that he wants to go forward. Basically those are the facts. With one additional fact, that we have not received some discovery from Mr. Beard's office, but he has assured me that that discovery would be provided to us first thing after lunch. Is that right, Mr. Beard?

MR. BEARD: That's correct, Your Honor. I would like the record to reflect several things. First, on July 5, 1993, this past July 5th, I wrote a letter to all parties indicating that discovery that they had all requested would be on July 13, 1993, at 10:00 AM. Neither Mr. Pitts nor Mr. Quinnell were there at 10:00 AM. I made efforts to call both of them. Mr. Pitts wasn't available. Mr. Quinnell indicated to me by secretary he would not be available till the afternoon. I made arrangements for a second showing of evidence at 1:30 that afternoon. Mr. Quinnell called my secretary and advised he couldn't make that one but advised he could do it by 4:30. I had the agents wait till 4:30, and

Mr. Quinnell did not show up.

In addition, I have provided by letter dated July 19, 1993, a bunch of information with respect to the evidence in this case. This Friday, even though neither Mr. Quinnell nor Mr. Pitts contacted me, I prepared Jencks material and I provided the plea agreements that were just executed on Thursday and Friday of this week. I provided them a statement of Mr. Schniepp, and I provided them new Brady material. And I want to report to the court that Brady material right now so there won't be my misunderstanding.

We proffered and interviewed Mr. Bustemonte, excuse me, Mr. Marbot Friday afternoon, Friday morning and Thursday afternoon. Mr. Marbot is in conflict with Mr. Aguilar. He disagrees with the testimony of Mr. Aguilar, and they are in conflict. At that point -- at this point I have not yet decided if I will use Mr. Aguilar.

In any event, because no one asked for it, I sent it out by regular mail Friday afternoon to both offices. Those are local offices, and I thought they would get it Saturday morning. I don't know if they have it. I have it available for them and will give it to them at lunch.

This morning I provided them grand jury materials of Mr. Schniepp, and Mr. Schniepp will be my first witness. And I also provided them further information with respect to this, what we learned yesterday, which is that Mr. Enriquez and Mr.