

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

THE UNITED STATES OF AMERICA

v.

Criminal No. xxxxxxxxxxxx

XXXXXXXXXXXXXXXXXXXXXXXXXX

* * * * *

**MEMORANDUM IN SUPPORT OF
DEFENDANT'S MOTION IN LIMINE**

XXXXXXXXXXXXXXXXXX, the Defendant herein, respectfully submits this memorandum in support of his Motion under the Double Jeopardy Clause of the Fifth Amendment to exclude certain evidence from the re-trial of this action. As we show, settled principles of collateral estoppel embodied in the Double Jeopardy Clause require that evidence relating to the distribution of crack cocaine on July 23, 1996 be excluded from this case.

BACKGROUND

XXXXXXXXXXXXXXXXXX was charged in a superseding indictment with conspiracy to possess with intent to distribute cocaine and cocaine base (Count One); and distribution of cocaine base (Count Two). Following a four-day trial held late last year, a jury acquitted xxxxxxxx of the distribution charge but deadlocked on the conspiracy count. The government has indicated that it intends to re-try the conspiracy charge contained in Count One. Thus, a clear issue exists concerning the extent to which the government is precluded at the re-trial from using evidence necessarily rejected by the jury when it acquitted xxxxxxxxxxxx on Count Two. The evidence underlying Count Two would be critical to the government on retrial since it, without more, would be sufficient to satisfy the elements of the conspiracy charge under 21 U.S.C. § 841.

The Court listened to the evidence presented by the government during the first trial, and that evidence will not be reviewed at length here. It suffices to note that the government alleged that Mr. Gibson made a sale of crack cocaine to an informant named xxxxx xxxxxxxx in the parking lot of a Roy Rogers located in Capitol Heights, Maryland. The government asked the jury to believe that when xxxxxxxxxxxxxx arrived at the Roy Rogers' parking lot, xxxxxxxxxxxxxx took xxxxxxxxxxxxxx car and drove to a nearby Home Depot parking lot, where he met with his cocaine supplier, whose name variously was said by the government to be "x" or "xxxxx" or "xxx" or "xxxx xxx." Having obtained crack cocaine from his source in exchange for cash given to him by xxxxxxxxxxxxxx, the government asked the jury to conclude that xxxxxxxxxxxxxx returned to the parking lot of the Roy Rogers, where he left a package containing 123 grams of crack on the floorboard of xxxxxxxxxxxxxx car.

In addition to its testimony and evidence concerning what happened on July 23, the government introduced statements made by xxxxxxxxxxxxxx to agents of the Drug Enforcement Administration ("DEA") in which he allegedly admitted engaging in that transaction. According to the government, those admissions were made during two jailhouse interviews of xxxxxxxx by the DEA, and during meetings at DEA Headquarters after the agents secured his release on bond. In its closing argument to the jury at the first trial, the government contended that its testimony regarding the events of July 23; its physical evidence, which included 123 grams of crack cocaine and various photographs; and xxxxxxxxxxxxxx admissions to the DEA agents, all combined to establish that xxxxxxxxxxxxxx distributed crack cocaine on the date in question. By returning a

verdict of not guilty on Count Two, the jury necessarily rejected those arguments and found that xxxxxxxxxxx did not distribute crack cocaine on July 23.

Without its evidence regarding the July 23 transaction, the government's conspiracy case stands or falls on the uncorroborated testimony of its other cooperating witness, a person named xxxxxxxxxxxxxxxx. The fact that the jury deadlocked on Count One during the first trial means that at least some of the jurors found xxxxxxxxxxxxxxxx to lack credibility as a witness. Thus, from the government's perspective, it is essential that it be able to introduce at the re-trial evidence relating to the July 23 sale.

As we show below, however, the introduction of testimony or physical evidence relating to the July 23 sale would violate the principle of collateral estoppel embodied in the Double Jeopardy Clause of the Fifth Amendment. As a result, all such testimony and evidence -- including statements made by xxxxxxxxxxx concerning those events -- must be excluded from the re-trial of this action.

ARGUMENT

THE DOCTRINE OF COLLATERAL ESTOPPEL PROHIBITS THE GOVERNMENT FROM RELITIGATING FACTUAL ISSUES NECESSARILY DECIDED IN FAVOR OF xxxxxxxxxxx IN THE FIRST TRIAL.

The doctrine of collateral estoppel precludes the Government from relitigating issues relating to the July 23 sale because the jury resolved these issues in xxxxxxxxxxx favor in the first trial. In Ashe v. Swenson, 397 U.S. 436, 445 (1970), the Supreme Court recognized that the Double Jeopardy Clause of the Fifth Amendment incorporates the doctrine of collateral

estoppel. Collateral estoppel may bar a subsequent prosecution or may foreclose the relitigation of particular factual issues that were disputed in the first trial. United States v. Ragins, 840 F.2d 1184, 1194 (4th Cir. 1988). It is the latter type of collateral estoppel that is at issue in the instant case.

Collateral estoppel “means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.” Ashe, 397 U.S. at 443. See also United States v. Kramer, 289 F.2d 909, 916 (2d Cir. 1961)(stating that “[t]he very nub of collateral estoppel is to extend res judicata beyond those cases where the prior judgment is a complete bar. The Government is free within the limits set by the Fifth Amendment to charge an acquitted defendant with other crimes claimed to arise from the same or related conduct; but it may not prove the new charge by asserting facts necessarily determined against it on the first trial . . .). In Ashe, a group of armed men had robbed six men while they were playing poker. Ashe was charged with the robbery of one of the men. At trial, Ashe argued that he had been misidentified as one of the robbers. The jury acquitted Ashe of the armed robbery. Subsequently, he was prosecuted for the robbery of one of the other poker players. The Supreme Court held that the doctrine of collateral estoppel precluded the prosecution from relitigating the issue of whether Ashe was one of the robbers because the jury had resolved that issue in favor of Ashe at the first trial. 397 U.S. at 446.

In addition, the Ashe Court explained the approach courts must take in determining the applicability of collateral estoppel:

[T]he rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality. Where a previous judgment of acquittal was based on a general verdict, as is usually the case, this approach requires a court to examine that record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.

Id. at 444 (footnote omitted)(internal quotation marks omitted).

Stated differently, in determining whether the Government is estopped from introducing acquitted conduct evidence in a subsequent prosecution, courts must determine, whether the factual allegations at issue were “necessarily decided” at the first trial. Hess v. Medlock, 820 F.2d 1368, 1373-74 (4th Cir. 1987); United States v. Head, 697 F.2d 1200, 1208-09 (4th Cir. 1982), cert. denied, 462 U.S. 1132 (1983); See also, Phillips v. United States, 502 F.2d 227, 232 (4th Cir. 1974)(holding that jury’s acquittal of defendant in prosecution for bank robbery estopped government from relitigating issue of defendant’s presence in bank in subsequent prosecution for possession of stolen money);¹ United States v. Leach, 632 F.2d 1337, 1340-41 (5th Cir. 1980)(holding that factual issues involved in indictment for receiving illegal campaign contributions were necessarily determined in defendant’s favor at previous trial for

¹ Phillips was reheard en banc, 518 F.2d 108 (4th Cir. 1975). On rehearing, the members of the Court could not agree on whether the prosecution was collaterally estopped from introducing acquitted conduct evidence. However, the majority agreed that at least in practice precluded from presenting the acquitted conduct evidence. Id. at 111. The original opinion in has been cited in subsequent cases as being vacated on other grounds, implying that the decision by the first panel still has precedential value. See, e.g., Head, 697 F.2d at 1209 n. 15. In any event, even if this Court should determine that the Government is not constitutionally prohibited under collateral estoppel principles from introducing the proffered evidence, it should, as a practical matter, balance the equities and exclude this evidence.

election violations); United States v. Romeo, 114 F.3d 141, 143 (9th Cir. 1997)(holding that prosecution of defendant for importation of marijuana was estopped by acquittal of possession of marijuana with intent to distribute); United States v. Seley, 957 F.2d 717, 722 (9th Cir. 1992)(holding that acquittal of drug possession charge estopped introduction of evidence in subsequent conspiracy prosecution because acquittal based on finding that defendant did not know imported propane tanks contained drugs). As demonstrated below, the evidence which the Government seeks to introduce -- evidence that xxxxxxxxxx possessed and distributed drugs on July 23 -- was necessarily decided at xxxxxxxxxxxx first trial. Accordingly, this Court should exclude the evidence.

As this Court instructed the jury, the elements of the acquitted count are: (1) that the defendant possessed narcotic drugs; (2) that the defendant did so knowingly; and (3) that the defendant distributed the drugs. The jury was further instructed on principles of possession and distribution. While ascertaining which issues were necessarily decided by the jury may be difficult in some cases (i.e. cases involving alternative theories of defense), the issues necessarily decided by the jury in this case are straightforward. In an attempt to prove that xxxxxxxxxx was involved in the July 23 crack cocaine transaction, the Government introduced through the testimony of law enforcement agents: (1) 123 grams of crack cocaine; (2) personal observations with respect to xxxxxxxxxxxx alleged involvement in the July 23 transaction, including photographs taken on the date in question; and (3) statements that xxxxxxxxxx had made to DEA Agent xxxxxxxxxxxx and other DEA agents while incarcerated for traffic offenses and

during subsequent meetings at DEA headquarters. xxxxxxxxxxxx defense was simple: He argued that he was not the person involved in the July 23 transaction.

With respect to the personal observations of law enforcement agents, the evidence demonstrated that there was a fifteen second window during which xxxxxxxxxxxxxxxx, the Government's informant, and an unidentified black male were alone inside the Roy Rogers and outside the view of Agent xxxxxxxx. During his closing, xxxxxxxxxxxx argued that the crack cocaine introduced into evidence by the Government had been obtained by xxxxxxxxxxxxxxxx from the unidentified black male during that fifteen second interval and not from xxxxxxxx as the Government had argued.

In addition, the defense argued that xxxxx statements did not evince his involvement in the July 23 sale. Rather, the defense argued that these statements were a ploy to gain the agents' help in obtaining his release from jail on the state traffic charges, not a confession of his knowledge and involvement in the July 23 transaction. In support of this theory, the defense noted in closing argument that details of his statement were either uncorroborated or flatly inconsistent with evidence introduced by the Government relating to the July 23 transaction.

In order to reach the verdict that it did, the jury necessarily had to reject both the testimony from law enforcement connecting xxxxxx to the July 23 transaction and the Government's argument that xxxxxxxxxxx statements demonstrated his involvement in this transaction. This is "necessarily" true since either standing alone would have been sufficient for a guilty verdict. Accordingly, the Court should not permit the Government to relitigate the issue

of whether xxxxxx was involved in the July 23 transaction using the very evidence it presented to the first jury.

Moreover, the evidence presented at trial simply does not support a finding that the jury verdict could have been grounded on any other basis. For example, based on the evidence presented at trial and argument by counsel, the verdict could not reasonably have been grounded on a finding that xxxxxxxxx possessed the drugs, but did so unknowingly. Likewise, given the amount of drugs involved, the verdict could not reasonably have been based on a finding that xxxxxxxx knowingly possessed drugs, but did not distribute them. Clearly, by returning a verdict of not guilty as to this charge, the jury rejected the Government's theory that xxxxxxxx was involved in the July 23 transaction. The Government seeks to introduce this evidence in the hopes that the second jury will reach a directly contrary conclusion. This is precisely what the Constitution forbids. Accordingly, this Court should estop the Government from introducing as proof on the conspiracy charge evidence relating to the July 23 drug transaction .

Respectfully submitted,

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January ___, 1998

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XXXXXXXXXXXXXXXXXXXXXXXXXXXX

* * * * *

ORDER

Upon consideration of the Defendant's Motion in Limine, the Government's opposition thereto, and the entire record herein, it is this _____ day of _____, 1998

ORDERED, that for the reasons stated on the record this date in open court, the motion be, and hereby is, GRANTED; and it is further

ORDERED, that the government be, and hereby is, precluded from introducing at the re-trial of this action any evidence or testimony relating to the alleged sale of drugs by the defendant on July 23, 1996, in the parking lot of the Roy Rogers restaurant in Capitol Heights, Maryland.

Alexander Williams, Jr.
United States District Judge

Copy to:
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AFPD Steven F. Reich