IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NOS. 98-8429-J, 99-8169-J

UNITED STATES OF AMERICA

Plaintiff-Appellee,

v.

VIRGINIA HIGH AND GEORGE HIGH,

Defendants-Appellants.

A DIRECT APPEAL OF A CRIMINAL CASE
FROM THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION

INITIAL BRIEF OF APPELLANT

M. ELIZABETH WELLS
State Bar Number: 747852
Federal Defender Program, Inc.
Suite 200, 100 Peachtree Street
Atlanta, Georgia 30303
404/688-7530

Attorney for Appellants
VIRGINIA AND GEORGE HIGH

United States of America v. Virginia and George High, Appeal No. 98-8429-JJ, 99-8169-JJ

CERTIFICATE OF INTERESTED PERSONS

AND CORPORATE DISCLOSURE STATEMENT

Counsel hereby certifies that the following have an interest in the outcome of this case:

(a) Michael Abbott - Trial Counsel for Virginia High;

(b) Richard H. Deane, Jr. - United States Attorney, Northern District of Georgia;

(c) George High - Defendant/Appellant;

(d) Virginia High - Defendant/Appellant;

(e) William A. Morrison - Trial Counsel for George High;

(f) H. Allen Moye - Assistant United States Attorney;

(g) M. Elizabeth Wells - Attorney for Appellants;

(h) The Honorable Robert L. Vining, Jr. - United States District Court Judge, Northern District of Georgia.

STATEMENT REGARDING ORAL ARGUMENT

As this case involves substantial interplay between the facts and the law, oral argument should assist the court in the resolution of the issues. Therefore, Appellants request oral argument.

CERTIFICATE OF TYPE SIZE AND STYLE

Pursuant to 11TH CIR. R. 28-2(d), Counsel for Appellant hereby certifies that the size and style of type used in this brief is TIMES NEW ROMAN 14 POINT.

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STATEMENT OF JURISDICTION

This Court has jurisdiction to consider this case pursuant to Title 18 U.S.C. §3742(a), Title 28 U.S.C. §1291 and Rule 4, Federal Rules of Appellate Procedure. This is a direct appeal from the denial of Appellant's Motion for New Trial by the United States District Court for the Northern District of Georgia.

STATEMENT OF THE ISSUES

Whether the Motions for New Trial filed by Mr. and Ms. High were timely?

Whether the district court erred when it denied Mr. and Ms. High's Motions for Appointment of Counsel?

Whether the trial court erred when it failed to state on the record the reasons for sentencing Mr. High to 97 months?

Whether the trial court erred when it failed to hold a hearing after the case was remanded by this Court and prior to dismissing count thirteen against Mr. and Ms. High, and when it failed to recalculate the special assessment?

STATEMENT OF THE CASE

(i) Course of Proceedings:

On December 10, 1992, George and Virginia High were jointly indicted in a thirty-nine count indictment charging drug distribution in violation of 18 U.S.C. §§ 2 and 8 U.S.C. §§ 841(a)(1) and 846, and conspiracy to lauder money and structure currency transactions in violation of 18 U.S.C. §§ 2 and 371 and 31 U.S.C. § 5324 (R1-89; R4-89). George High was also charged in the indictment with two counts of weapons charges in violation of 18 U.S.C. § 922 (Id.) Both entered pleas of not guilty to all charges (R1-146; R4-110).

Mr. and Ms. High were tried by a jury with co-defendants Alex Gracia and Robert Ward in September of 1993 before the Honorable Robert L. Vining, Jr., United States District Judge. The jury returned guilty verdicts against Mr. High in count one (conspiracy to distribute cocaine); count thirteen (conspiracy to launder drug proceeds, to structure currency transactions and to defraud the United States); counts three and nine (weapons violations); and count fourteen (structuring currency transactions). The jury returned guilty verdicts against Ms. High in count one; count thirteen; counts sixteen, nineteen, twenty-one and twenty-two (structuring currency transactions); and counts seventeen, eighteen, twenty, twenty-three and twenty-four (money laundering) (R2-348; R5-349).

Mr. High was sentenced to 97 months on both counts one and nine, to run concurrent, and to concurrent sentences of 60 months on both counts three and thirteen, which were to run concurrent with the sentences on counts one and nine. Ninety-seven months was the top range of the applicable sentencing guidelines (R24-9).[1] The court imposed a term of five years of supervised release to follow the term of imprisonment and a special assessment of $200.00. (R24-11).

The court sentenced Ms. High to 97 months each on counts 1, 17, 18, 20, 23 and 24, all to run concurrently, and 60 months on count 13, to run concurrent with the other sentences (R23-9). The court also ordered Ms. High to pay a $350.00 special assessment and to serve a five year period on supervised release following her sentence of incarceration (R23-10).[2]

Timely motions for new trial were filed by both defendants following sentencing. These motions were granted only as far as the substantive structuring offenses based on the intervening Supreme Court decision in Ratzlaf v. United States which held that a defendant may be convicted of violating 31 U.S.C. § 5324

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[1]The total offense level for Mr. High was 28 and his criminal history category was I, resulting in a guideline range of 78-97 months (R24-9).

[2]The court did not impose a sentence on Mr. High on count 14 and Ms. High on counts 16, 19, 21 and 22 based upon defense counsel's representations that a motion pursuant to Ratzlaf v. United States, 510 U.S. 135 (1994), would be filed (R24-12; R23-9).

only upon a showing that the defendant "willfully" violated anti-structuring laws (R2-353; 401; R3-465; R5-393, 398; R6-466).

Mr. and Ms. High both filed an appeal in this Court that was consolidated for review with co-defendant Ward. The Highs contended that their convictions on count thirteen must be reversed because the structuring currency transactions instruction was incorrect as a matter of law. This Court agreed and reversed the Highs' convictions on count thirteen and remanded for further proceedings consistent with the ruling. United States v. High, 117 F. 3d 464, 470-71 (11th Cir. 1997). On February 4, 1998, the district court, without conducting a hearing, granted a motion by the government to dismiss counts thirteen against both defendants (R3-543; R6-544).

Shortly before this Court's ruling in United States v. High, Virginia High filed a *Pro Se* Motion for New Trial, Motion to Vacate Sentence Pursuant to 28 U.S.C. § 2255 and a Motion for Appointment of Counsel (R6-509, 510 and 513). On February 6, 1998, after the issuance of this Court's opinion on the direct appeal, the district court denied all three of these motions as to Ms. High (R6-547). Ms. High filed a Notice of Appeal which was ultimately docketed as case

number 98-8429.[3]

Subsequently, Mr. and Ms. High filed a joint Motion for New Trial based upon newly discovered evidence (R3-559; R6-559) and a Motion for Appointment of Counsel with brief in support (R3-560; R6-560). The district court denied the Motions as to both defendants (R3-561; R6-561). Mr. and Ms. High filed a joint Notice of Appeal from this order which was docketed as appeal number 99-8169. The two cases, numbers 98-8429 and 99-8169, were consolidated for review by this Court and are the subject of this brief.

Mr. High is presently in custody of the Federal Bureau of Prisons, Jessup, Georgia, and Ms. High in presently in custody of the Federal Bureau of Prisons, Marianna, Florida.

(ii) Statement of the Facts

George and Virginia High are husband and wife. At the time of their arrest, Mr. and Ms. High were self-employed real estate agents and the owners of Georgia Home Improvement Company, Inc., High's Realty, Inc., and High-Five, Inc. The superseding indictment against Mr. and Ms. High alleged that they used

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[3]There was initially some question about what issues were properly before this Court. After reviewing responses by both parties to the jurisdictional question, this Court determined that the appeal was from the denial of the Motion for New Trial only.

these businesses to structure currency transactions and launder money that was illegally obtained through the trafficking of narcotics. Mr. and Ms. High pled not guilty to the indictment and have maintained their innocence throughout the trial and subsequent proceedings.

(iii) Standard of Review

The district court's denial of a motion for new trial based on newly discovered evidence is reviewed for an abuse of discretion. United States v. Fernandez, 136 F.3d 1434, 1438 (11th Cir. 1998); United States v. Obregon, 893 F. 2d 1307, 1312 (11th Cir. 1990).

The district court's denial of a Motion for Appointment of Counsel is reviewed for abuse of discretion. Bass v. Perrin, 170 F. 3d 1312, 1320 (11th Cir. 1998).

A challenge to the legality of the imposition of a sentence is reviewed *de novo*. United States v. Aimufa, 122 F.3d 1376 (11th Cir. 1997)

SUMMARY OF ARGUMENT

The Motions for New Trial filed by both Ms. and Mr. High were timely made and properly before the district court for review.

The district court erred when it failed to appoint counsel to represent Mr. and Ms. High on their Motions for New Trial.

The district court failed to comply with the mandates of 18 U.S.C. §3553(c), when it failed to state, on the record, its reasons for imposing a sentence of 97 months for Mr. High.

The district court erred when it failed to hold a hearing prior to the dismissal of count thirteen against Ms. and Mr. High. The failure to hold a hearing deprived them of a proper review of the monetary penalties assessed against them pursuant to 18 U.S.C. § 3013.

ARGUMENT AND CITATION OF AUTHORITY

ISSUE I

APPELLANTS' MOTIONS FOR NEW TRIAL WERE TIMELY FILED.

Virginia High filed a Motion for New Trial on August 5, 1997 (R6-509). This motion was denied by the district court on February 27, 1998 (R6-547). On December 21, 1998, Virginia and George High filed a joint Motion for New Trial based on newly discovered evidence (R6-559; R3-559). This motion was denied as to both defendants on January 20, 1999 (R3-561; R6-561). The government contends that this latter joint motion for new trial was untimely because it was filed beyond the period mandated by statute for filing a motion for new trial.[4] This position is in error because the Motion for New Trials were filed less than two years after the final judgment by this Court.

Federal Rules of Criminal Procedure, Rule 33 governs the filing of Motions for New Trial following a criminal trial. At the time of the Highs' trial and until

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[4]Although the Appellee does not specifically assert that the first Motion for New Trial filed by Ms. High on August 5, 1997, was untimely, the position taken by the Appellee with respect to the timeliness of the December 21, 1998, Motion for New Trial is equally applicable to the first Motion for New Trial. Therefore, the argument presented in Issue I of this brief is germane to each of the Motions for New Trial.

November 31, 1998, the rule read:

> The court on motion of a defendant may grant a new trial to that defendant if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. *A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case.* A motion for a new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty or within such further times as the court may fix during the 7-day period.

Fed. R. Crim. P. 33 (1998)(emphasis added). The rule was modified, effective December 1, 1998, to read:

> On a defendant's motion, the court may grant a new trial to that defendant if the interests of justice so require. If trial was by the court without a jury, the court may – on defendant's motion for new trial – vacate the judgment, take additional testimony, and direct the entry of a new judgment. *A motion for new trial based on newly discovered evidence may be made only within three years after the verdict or finding of guilty. But if an appeal is pending, the court may grant the motion only on remand of the case.* A motion for a new trial based on any other grounds may be made only within 7 days after the verdict or finding of guilty or within such further time as the court may fix during the 7-day period.

Fed. R. Crim. P. 33 (emphasis added). The government contends that the only relevant change in the two rules was to change the period for filing a motion for new trial from two years from the rendering of the verdict in the old version of the rule to three years from the rendering of the verdict in the new version of the rule

(Second Corrected Brief for Appellee, page 7, n. 1). Because the Highs' motions for new trial were filed in excess of three years from the verdict[5], the government asserts that the Motions for New Trial are untimely.

This argument ignores a more substantive change in the rule. Former Fed. R. Crim. P. 33 (1998) allowed that the motion be filed within two years after "final judgment" as opposed to "after the verdict of finding of guilty." Appellate courts considering the computation of former Rule 33's two-year period with respect to appealed convictions consistently held that the term "final judgment" referred to a date reflecting action by the court of appeals. See United States v. Dayton, 981 F.2d 1200, 1202-03 (11th Cir.1993)(motion timely filed if filed within two years of return of mandate); Romero v. United States, 28 F.3d 267, 268 (2d Cir.1994) (same); United States v. Gross, 614 F.2d 365, 366 n. 2 (3d Cir.) (same), *cert. denied*, 447 U.S. 925 (1980); United States v. Granza, 427 F.2d 184, 185 n. 3 (5th Cir.1970) (same); Casias v. United States, 337 F.2d 354, 356 (10th Cir.1964) (same); Harrison v. United States, 191 F.2d 874, 876 (5th Cir.1951) (same). Thus, if the Appellants were proceeding under former Fed. R. Crim. P. 33 (1998),

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[5]The verdicts against both Mr. and Ms. High were entered on October 13, 1993 (R5-347, 348)

their motions were timely filed.[6]

The Advisory Committee notes to the 1998 Amendments provide further support for Appellants' position that the triggering event for filing a Motion for New Trial is the issuance of the mandate of the appellate court. An essential part of the 1998 amendments to Fed. R. Crim. P. 33 was the change of the term "after final judgment" to the term "after the verdict or finding of guilty." The advisory committee notes to the rule change explain that this Amendment was adopted to change the current practice of relying upon the appellate court's decision as the triggering event. Specifically, the committee noted:

> As currently written, the time for filing a motion for new trial on the ground of newly discovered evidence runs from the "final judgment." The courts, in interpreting that language, have uniformly concluded that that language refers to the action of the Court of Appeals [citations omitted]. It is less clear whether that action is the appellate court's judgment or the issuance of its mandate. In Reyes, the court concluded that it was the latter event. In either case, it is clear that the present approach of using the appellate court's final judgment as the triggering event can cause great disparity in the amount of time available to a defendant to file timely a motion for new trial....
> It is the intent of the Committee to remove that element of inconsistency by using the trial court's verdict or finding of guilty as the triggering event. The change also furthers internal consistency within the rule itself; the time for filing a motion for new trial on any

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[6]Appellants assert that the Motions for New Trial were filed pursuant to the "newly discovered evidence" provision of Rule 33, and not "on any other grounds," thus it was not necessary that the motions be filed within 7 days after the verdict or finding of guilt. *See* Fed. R. Crim. P. 33.

other ground currently runs from that same event.

....

Fed. R. Crim. P. 33, Advisory Committee Notes.

Although the effective date for the new Fed. R. Crim. P. 33 was December 1, 1998, twenty days before the filing of Mr. High's Motion for New Trial and Ms. High's second Motion for New Trial[7], application of this rule to the Highs' Motions would violate the *Ex Post Facto* clause of the United States Constitution. The law is clear that the *Ex Post Facto* clause applies to procedural as well as substantive changes that deprive a defendant of "substantial personal rights." *See, e.g.*, Collins v. Youngblood, 497 U.S. 37, 53 (1990)(Stevens, J., joined by Marshall, J., Brennan, J., concurring); Thompson v. Utah, 170 U.S. 343 (1898). Simply calling a law procedural does not insulate it from an *ex post facto* challenge. The Court must look to the effect of the statute in the particular case, not the form of the statute. If the application of a particular rule that is essentially procedural in nature deprives a defendant of a substantive right, then the application of that rule to the defendant's case violates the *Ex Post Facto* clause.

A defendant's right to file a Motion for New Trial is a substantive right that cannot be denied simply because of a new filing deadline. Because the 1998

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[7]Both were filed on December 21, 1998.

amendments to Rule 33 were not passed until April 24, 1998, the Appellants in the case at bar could not have foreseen the rule change in time to file a timely Motion for New Trial. Application of this rule to their case would deny them of a substantial personal right and prohibit them from filing a Motion for New Trial. Thus, this Court should find that the Motions for New Trial were timely filed.

ISSUE II

THE DISTRICT COURT ERRED WHEN IT FAILED TO APPOINT COUNSEL TO REPRESENT MS. AND MR. HIGH ON THEIR MOTIONS FOR NEW TRIAL AND COLLATERAL PROCEEDINGS.

It is well-established that under the Sixth and Fourteenth Amendments, a criminal defendant is entitled to counsel during trial, Gideon v. Wainwright, 372 U.S. 335, 342- 45 (1963) and at various critical stages of a criminal prosecution where "substantial rights of a criminal accused may be affected," Mempa v. Rhay, 389 U.S. 128, 134 (1967) (right to counsel attaches to deferred sentencing proceeding); *see also, e.g.,* Williams v. Turpin, 87 F. 3d 1204, 1210 (11th Cir. 1996) (motion for new trial); Estelle v. Smith, 451 U.S. 454, 469 (1981) (psychiatric interview); United States v. Wade, 388 U.S. 218, 236 (1967) (pretrial line-up); White v. Maryland, 373 U.S. 59, 60 (1963) (preliminary hearings). Furthermore, a criminal defendant has a constitutional right to counsel during the first appeal as of right. Evitts v. Lucey, 469 U.S. 387, 398 (1985); Douglas v.

California, 372 U.S. 353, 356-57 (1963).

In holding that defendants have a right to counsel on appeal, the United States Supreme Court, in Douglas v. California, anticipated the problem of not having a lawyer at the first opportunity to present a claim:

> We are not here concerned with problems that might arise from the denial of counsel for the preparation of a petition for discretionary or mandatory review beyond the stage in the appellate process at which the claims have once been presented by a lawyer and passed upon by an appellate court.

Id. at 356.

Cases analyzing the right to counsel in various proceedings are tied to two, often interrelated, constitutional moorings: due process and equal protection.

Cases tied to the Due Process clause examine whether "fundamental fairness" requires the appointment of counsel. *E.g.*, Pennsylvania v. Finley, 481 U.S. 551, 555 (1987). "'Due process' emphasizes fairness between the State and the individual dealing with the State, regardless of how other individuals are treated." Ross v. Moffitt, 417 U.S. 600, 609 (1974). "[I]t is the source of that right to a lawyer's assistance, combined with the nature of the proceedings, that controls the constitutional question." Finley, 481 U.S. at 556; *see also* Lassiter v. Department of Social Services, 452 U.S. 18, 24 (1981) ("[D]ue process is not a technical conception with a fixed content unrelated to time, place and

circumstances.")(quotation omitted).

Other lines of cases establish similar standards under the Equal Protection clause. While the focus of due process is the fairness between the State and the individual, equal protection "emphasizes the disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable." Ross, 417 U.S. at 609. The equal protection analysis focuses more directly on whether the indigent defendant has had an appropriate opportunity to raise claims: "[W]here the merits of the one and only appeal an indigent has of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between the rich and poor." Douglas, 372 U.S. at 357.

The due process and equal protection cases with respect to the right to counsel eventually merge in substance. Once clear principle emerges from both lines of cases: indigents must have an adequate opportunity to present their claims fairly within the adversary system. *E.g.*, Ake v. Oklahoma, 470 U.S. 68, 77 (1985); Ross v. Moffitt, 417 U.S. 600, 609 (1974). The inquiry in these cases is whether the indigent defendant has been provided the basic tools for an adequate presentation of the evidence. *See* Ake, 470 U.S. at 77.

Mr. and Ms. High have both presented claims to the district court that their convictions were wrongfully obtained. In support of their claims, the Highs

presented a lengthy affidavit from Mr. High detailing errors that occurred prior to and during the trial of the case. The district court rejects the Motions with a finding that the Highs have not been able to show that any of the alleged newly discovered evidence was not known to them at the time of the trial. Further, the Court denies Ms. High's Motion to Vacate Convictions and Sentences because she "offers no factual evidence whatsoever to show how these alleged deficiencies affected the outcome of her trial" (R6-547-4). Yet at the same time the district court denies Mr. and Ms. High the appointment of counsel to assist them in the investigation of the issues and the presentation of the necessary facts to the court to enable them to prevail on their claims.

Both Mr. and Ms. High have been incarcerated since 1994. As they noted in their Motions for Appointment of Counsel, the facts of their incarceration preclude them from adequately investigating and litigating their case. They have limited access to the prison legal library. Because they cannot leave the institution, they are virtually unable to conduct any meaningful investigation. Because they are indigent, they are unable to hire counsel to assist them. By denying them counsel at this critical stage of their proceedings -- motion for new trial, the district court denied Mr. and Ms. High any opportunity to effectively present their claims fairly within the adversary process. Additionally, by denying

Ms. High counsel to assist her in presenting the issue of ineffective assistance of counsel to the court, Ms. High was precluded from showing the necessary deficient performance and prejudice. The Highs, without any legal training and confined to prison, were unable to formulate their claims adequately and therefore were denied the opportunity ever to raise them. The district court's denial of counsel was an abuse of discretion that ultimately resulted in a denial of their Motions for New Trial and Ms. High's Motion to Vacate Convictions and Sentences. Without counsel, the Highs were denied the due process and equal protection that are guaranteed to them by the United States Constitution. This Court should remand to the district court with an Order that the Highs be appointed counsel and be allowed to file successive Motions for New Trial and a Motion pursuant to 28 U.S.C. § 2255 out of time.

ISSUE III

THE DISTRICT COURT ERRED IN FAILING TO STATE REASONS FOR IMPOSING A SENTENCE OF 97 MONTHS ON MR. HIGH.

This Court has noted that "as a general rule, a sentencing court need not explain why a particular sentence was imposed so long as the sentence was within the range as specified by the guidelines." United States v. Veteto, 920 F.2d 823, 826 (11th Cir. 1991). The Court further noted, that Congress has imposed a

specific mandate on sentencing courts to "state the reason for imposing a sentence at a particular point within the range when the range exceeds 24 months.[8]" Id. Should a district court fail to comply with 3553(c)(1)'s mandate, "the sentence is imposed in violation of the law and is reviewable on appeal." Id.

At the close of Mr. High's sentencing proceeding, the district court found that his custody guideline range was from 78-97 months and imposed a sentence of 97 months. The district court failed, however, to state on the record the reason or reasons for imposing a sentence at that point in the particular guideline range. Although it appears the court was aware of the requirement in certain circumstances that the reasons for a particular sentence must be stated on the record, the court apparently believed, incorrectly, that requirement was only when sentences exceeded *the recommended guidelines* by twenty-four months rather

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[8]This mandate is clearly announced in 18 U.S.C. 3553(c)(1) which states in pertinent part:

> The Court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and if the sentence --
>
> > (1) is of the kind, and within the range, described in subsection (a)(4) and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range

18 U.C. §3553(c)(1).

than simply exceeded twenty-four months.[9] Specifically, the court noted:

> The sentence imposed is within a guideline range that does not exceed twenty-four months and the court has found no cause to depart from the guidelines.

(R24-12).

It is clear that Mr. High was entitled to have the district court state a reason or reasons for imposing a sentence of 97 months. The only prerequisite needed to engage §3553(c)(1)'s mandate is that the sentencing range exceed 24 months. Mr. High's guideline range and ultimate sentence both exceeded 24 months. Thus he was entitled to a reason for the sentence. Because the district court utterly failed to satisfy the requirements of §3553(c)(1), this Court must remand the case for resentencing.[10]

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[9]Although the district court did state reasons on the record for imposing the sentence of 97 months for Ms. High, the court's comments during her sentencing hearing also indicate that the court believed the reasons were only necessary if the sentence exceeded the guideline range by 24 months. *See* R23-10 (The Court: "...The sentence imposed is within the guideline range that does not exceed 24 months....."

[10]Appellants assert that the district court should have granted them a hearing following this Court's remand on direct appeal (*see* Issue IV, *infra*). If the court had held a hearing, and had stated his reasons for the resulting sentences on the record, Appellants would have had the opportunity to present to the court reasons why a particular sentence contemplated by the court was not supported by adequate grounds. Without a hearing, the Appellants were unable to present their arguments to the district court and to convince the court that the sentences were not warranted under the facts of this case.

ISSUE IV

THE COURT ERRED BY NOT CONDUCTING A SENTENCING HEARING ON THE REMAND FROM THIS COURT AND BY NOT REFUNDING THE SPECIAL ASSESSMENT ON THE DISMISSED COUNTS.

Both Mr. and Ms. High were ordered to pay special assessments in their original sentencing. Ms. High, who was sentenced on seven counts, was ordered to pay a special assessment for each count for a total of $350.00 (R23-9). Mr. High, who was sentenced on four counts, was ordered to pay a special assessment of $200.00 -- $50.00 each for counts one, three, nine and thirteen (R24-9).

On direct appeal to this Court, the Court found that the conviction for conspiracy to launder drug proceeds, structure currency transactions and defraud the United States should be reversed and remanded for proceedings consistent with the opinion. U.S. v. High, 117 F. 2d 464, 470-71 (11th Cir. 1997). The Government moved the district court to dismiss the counts, which the court did without a hearing. No analysis of the special assessments was made by the distirct court.

The concurrent sentence doctrine does not control here. As a general rule, the doctrine establishes that the existence of one valid conviction may make unnecessary the review of other convictions when concurrent sentences have been imposed. United States v. Caldwell, 776 F. 2d 989, 1006, n.21 (11th Cir. 1985).

A critical caveat to the rule is that failure to review the remaining convictions cause no collateral consequences. The United States Supreme Court refused to apply the doctrine in a case similar to the case at bar where the defendant received, in addition to concurrent terms of incarceration, special assessments pursuant to 18 U.S.C. § 3013. Ray v. United States, 481 U.S. 736, 737 (1987). The Supreme Court found that the cumulative special assessments were adverse collateral consequences and thus declined to apply the concurrent sentence doctrine.

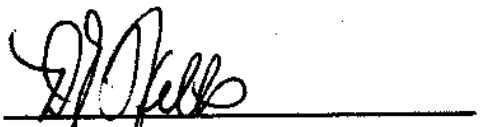
The court below, presumably acting under the auspices of the concurrent sentence doctrine, simply entered an order granting the Government's Motion to Dismiss count thirteen and held no further hearings. Appellants assert that this failure to hold a hearing was in error. Had the court conducted a resentencing hearing, Appellants could have and would have argued that the court reconsider its earlier orders with respect to special assessment. The dismissal of count thirteen requires the court to reassess and reduce the special assessment by fifty dollars ($50.00) with respect to each defendant.

CONCLUSION

For the foregoing reasons, the Appellants' cases should be remanded to the district court with instructions that counsel be appointed and successive Motions for New Trial and Motions to Vacate pursuant to 28 U.S.C. § 2255 be allowed.

Additionally, the Court should instruct the district court to hold a new sentencing hearing to state the reasons for any sentences on the record, and to reconsider the special assessment with respect to each Appellant.

Respectfully submitted this 16th day of September, 2000.



M. ELIZABETH WELLS
GEORGIA STATE BAR NUMBER: 747852
ATTORNEY FOR GEORGE AND
VIRGINIA HIGH

Federal Defender Program, Inc.
100 Peachtree Street, Suite 200
Atlanta, Georgia 30303
404/688-7530

CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the foregoing Brief of Appellant upon:

H. Allen Moye
Assistant United States Attorney
400 Richard B. Russell Building
75 Spring Street, S.W.
Atlanta, Georgia 30335

by depositing the same in the United States Mail with adequate postage affixed thereto to ensure delivery of the same.

Dated: This 16th day of September, 2000.

M. ELIZABETH WELLS