

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI  
JACKSON DIVISION**

**UNITED STATES OF AMERICA**

v.

**CRIMINAL NO. 3:08-cr-00107**

**FRANK E. MELTON  
MICHAEL RECIO  
MARCUS WRIGHT**

**GOVERNMENT’S MOTION *IN LIMINE* TO EXCLUDE  
REFERENCE TO THE DEFENDANTS’ STATE COURT ACQUITTAL**

The United States, by its undersigned counsel, respectfully requests that this Court exclude from trial all reference to the fact that the defendants in this case were previously acquitted on state charges arising out of the conduct underlying the current federal charges. Any evidence relating to, and any mention of, the state court acquittal should be excluded because it is not relevant; because such evidence presents a danger of unfair prejudice or of misleading or confusing the jury; and because the state jury’s verdict constitutes inadmissible hearsay. In further support of its Motion, the government states the following:

**I. Background**

On July 9, 2008, a Grand Jury for the Southern District of Mississippi returned a three-count Indictment against the defendants charging each of them with violating 18 U.S.C. §§ 241, 242, and 924(c) for conduct on August 26, 2006, which led to the unlawful demolition of a private home at 1305 Ridgeway Street in Jackson, Mississippi [hereafter, “the home”]. The defendants are charged with conspiring to violate, and with actually violating, the rights of the

home's owner and tenant to be free from unreasonable searches and seizures by those acting under color of law, and with violating a federal firearm statute. Trial in the matter is scheduled for November 12, 2008.

In September 2006, almost two years before the federal indictment was handed down, a Grand Jury sitting in Hinds County, Mississippi, charged the same three defendants with five felonies arising out of the August 26, 2006, destruction of the home. The defendants were charged with Breaking and Entering, Malicious Mischief, two counts of Conspiracy, and Directing a Minor to Commit a Felony.<sup>1</sup> In April 2007, a Hinds County jury acquitted the defendants of all charges.

## **II. Legal Argument**

Any evidence relating to, and any mention of, the state court acquittal should be excluded for several reasons. First, it should be excluded under Federal Rules of Evidence 401 and 402 because it is not relevant. Moreover, under Federal Rule of Evidence 403, any evidence relating to the state court acquittal should be excluded because, even if it were relevant, its probative value is substantially outweighed by the danger of unfair prejudice or of misleading or confusing the jury. Finally, the state jury's verdict should be excluded as inadmissible hearsay under Federal Rule of Evidence 802.

### **A. Evidence of the State Court Acquittal Should be Excluded Under Federal Rules of Evidence 401 and 402 Because It Is Irrelevant.**

Rule 401 of the Federal Rules of Evidence defines relevant evidence as any evidence that has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. Rule 402 states, "Evidence which is not relevant is not admissible." Fed.R.Evid. 402.

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<sup>1</sup> Before trial, the Hinds County District Attorney dismissed the count of Directing a Minor to Commit a Felony.

Evidence of a state court acquittal should be excluded under Rules 401 and 402 because it is irrelevant. In United States v. Kerley, 643 F.2d 299, 300-01 (5th Cir. 1981), a case in which a sheriff's deputy was charged with a federal criminal civil rights violation for beating a person in custody, the Fifth Circuit upheld the exclusion of any reference to the state court acquittal of the defendant on battery charges on the grounds that such evidence was not relevant under Rule 401. The court held that evidence of a prior acquittal is "not relevant because it does not prove innocence but rather merely indicates that the prior prosecution failed to meet its burden of proving beyond a reasonable doubt at least one element of the crime." Id., citing McCormick's Handbook of the Law of Evidence § 318 (2d ed. 1972) and 4 Weinstein's Evidence P 803(22) (02), at 803-280 (1979). See also, United States v. De La Rosa, 171 F.3d 215, 219 (5th Cir. 1999), citing Kerley (trial court did not abuse its discretion in excluding evidence of prior acquittal by federal jury on related charge); United States v. Posada-Rios, 158 F.3d 832, 862 n. 13 (5th Cir. 1998); United States v. Simmons, 470 F.3d 1115, 1127 (5th Cir. 2006). Thus, any evidence of, or reference to, the state court acquittal in this case should be excluded as irrelevant.

**B. Evidence of the State Court Acquittal Should be Excluded Under Rule 403 Because Any Probative Value is Substantially Outweighed by the Danger of Unfairly Prejudicing, Confusing, or Misleading the Jury.**

Rule 403 of the Federal Rules of Evidence states that even evidence that is otherwise relevant may be excluded if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Fed. R. Evid. 403. In Kerley, the Fifth Circuit held that evidence of the prior acquittal was also properly excluded pursuant to Rule 403, because any probative value was substantially outweighed by the danger of causing unfair prejudice or of confusing or misleading the jury. 643 F.2d at 300-01. The Fifth Circuit found that the trial court did not abuse its discretion when it excluded evidence about the prior acquittal under Rule 403, because the elements of the state charge in that case (battery) were

“entirely different from” the elements of the federal charge (civil rights violation). Id. See also, United States v. Jones, 808 F.2d 561, 566-67 (7th Cir. 1986), citing Kerley (in excluding evidence of prior state court acquittal, the Seventh Circuit held that “the potential for prejudice was obviously substantial” in a case where the defendants were acquitted in state court on charges of rape and kidnapping and were subsequently tried in federal court on charges of conspiracy and kidnapping).

Evidence of these defendants’ prior acquittals should also be precluded under Rule 403 because, the probative value, if there were any, would be substantially outweighed by the risk that the jury will be unfairly prejudiced, confused, or misled. Admission of evidence of another factfinder’s determination of guilt or innocence improperly encroaches on the federal jury’s role as factfinder in the federal case. Reference to, or evidence of, the state court acquittal would be unfairly prejudicial because it would serve no purpose other than to invite the jury to make its decision based on what the state jury concluded. It would be clearly improper for the federal jury to consider whether the defendants already had been acquitted on state charges in determining whether the defendants were guilty of the federal crimes charged in this case. Moreover, there is a strong possibility that the jury would be confused or misled by the introduction of, or reference to, evidence of the state court acquittal, particularly since the charges in the federal case are significantly different than the charges in the state case. The focus of the federal prosecution will be on the defendants’ willful violation of the Fourth Amendment, an issue not raised at all in the state trial.

**C. Evidence of the State Court Acquittal Should Also be Excluded Because it is Inadmissible Hearsay Pursuant to Federal Rule of Evidence 802.**

Rule 802 generally prohibits the introduction of hearsay, which is defined in Rule 801 as an out-of-court statement offered for the truth of the matter asserted. Fed. R. Evid. 801, 802. A

state court acquittal is tantamount to an out-of-court statement by the jury that the jury is of the opinion that the defendant is not guilty. In United States v. De La Rosa, 171 F.3d at 219, the Fifth Circuit excluded reference to a prior acquittal and noted that a judgment of acquittal constituted hearsay that was not otherwise exempt from the operation of the hearsay rule. See also, United States v. Irvin, 787 F.2d 1506, 1516-17 (11th Cir. 1986) (upholding district court's order precluding defense counsel from mentioning, referring to, or soliciting any information from any witness concerning acquittals in previous trial on grounds that such evidence constituted inadmissible hearsay); United States v. Sanchez, 992 F.2d 1143, 1160 (11th Cir. 1993) ("Evidence of a judgment of acquittal is generally inadmissible because it is hearsay and not covered by any exception to the rule against hearsay."); United States v. Wells, 347 F.3d 280, 286 (8th Cir. 2003) ("[J]udgments of acquittal are hearsay."); United States v. Gricco, 277 F.3d 339, 352 (3d Cir. 2002) (same). The Fifth Circuit in De La Rosa also observed that "[o]ther circuits overwhelmingly agree that . . . evidence of prior acquittals are [sic] generally inadmissible," and noted that seven other circuits had endorsed this view and that no circuit had disagreed. Id. at 220. In the instant case, the state court acquittal should be excluded as inadmissible hearsay pursuant to Rule 802.

**III. Conclusion**

For the reasons stated herein, the government respectfully requests a pretrial ruling excluding any evidence of, or reference to, the defendants' prior acquittals in state court.<sup>2</sup>

Respectfully submitted,

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<sup>2</sup> The government recognizes that the Court and the parties will need to determine, during voir dire, whether jurors are familiar with the facts of this case, and that the questioning will therefore necessarily touch on the issue of the prior state proceedings. The government would request that these questions be asked without specific reference to the state trial or acquittal. Thus, instead of asking the venire whether anyone is familiar with the outcome of the state trial, the Court could ask jurors to raise their hands if they have heard about the case or about any "prior proceedings" relating to the case. Affirmative answers could then be pursued further during individual voir dire conducted at the bench in order to avoid potentially prejudicial information coming out in open court.

**CERTIFICATE OF SERVICE**

I, the undersigned counsel for the United States, hereby certify that on the 29th day of September, 2008, I electronically filed the foregoing with the Clerk of the Court using the ECF system which sent notification of such filing to the following:

John Reeves, Attorney for Frank E. Melton

John M. Colette and Matt Baldrige, Attorneys for Defendant Marcus Wright; and

Cynthia Stewart, Attorney for Michael Recio.

/s/ Mark Blumberg