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Office of the Solicitor General
Attention: Michael R. Dreeben
Department of Justice
950 Pennsylvania Ave., NW
Room 5614
Washington, D.C. 20530-0001

Re: Government appeal to Seventh Circuit in
USA v. Freeman, Wilbourn, et al.; 07 CR 843 (N.D. Ill.)

Dear Solicitor General:

I am the appointed attorney for Brian Wilbourn, a defendant in the above-referenced case. I am writing to urge the Solicitor General *not* to authorize a government appeal to the U.S. Seventh Circuit Court of Appeals of Judge Joan Humphrey Lefkow's August 26, 2009, order granting new trials for Mr. Wilbourn and his co-defendants on some of the counts.

In her 27-page memorandum opinion and order, Judge Lefkow found that a key cooperating witness for the government named Senecca Williams testified falsely about certain significant events which supported the government's case on the disputed counts. Williams's false testimony related to events which allegedly took place at an apartment on Granville Avenue on the north side of Chicago.

The portion of Williams's testimony leading up to the events at the Granville apartment is not in dispute. Williams testified that he was released from prison in February 2002 after serving approximately two years for a drug offense. Tr. 1339. (The date of his release was also confirmed by official documents from the Illinois Department of Corrections.) Williams testified that he stayed away from the Cabrini Green Housing Projects for about four months, returning in the "summer ... 2002." Tr. 1339. Upon his return, he started working for co-defendant Rondell Freeman as a "bagger" of drugs, using an apartment on Halsted Street that belonged to Freeman's girlfriend. Tr. 1345. Then "[a]bout three to four months down the line" Freeman (and Williams) moved their drug packaging spot to an apartment on 35th and King Drive. Tr. 1345. Then after "about three months," in about early 2003, Freeman (and Williams) moved operations to the Granville apartment. Tr. 1345-47.

Brian Wilbourn went to jail on April 23, 2002 following a drug arrest by the Chicago Police Department. Wilbourn was not released from State custody until September 8, 2005, *after* Freeman had moved his operations from the Granville apartment to another apartment on Sheridan Road. The government has stipulated to the dates of Wilbourn's incarceration.

Thus, according to the undisputed evidence, Freeman and Williams occupied the Granville

apartment from early 2003 until early 2005. During that entire period of time, Brian Wilbourn was incarcerated. Nevertheless, Williams testified that he regularly saw Wilbourn packaging drugs at the Granville Apartment and also overheard two separate conversations between Wilbourn and Freeman which directly supported the government's case for the conspiracy.

Judge Lefkow found that, prior to the close of the government's case, the prosecutors had confirmation that Williams's testimony linking Wilbourn to the Granville apartment was false. Indeed, the government entered into a stipulation about the dates of Wilbourn's incarceration just prior to resting its case. Tr. 2509. Nevertheless, during final summation, the lead prosecutor argued to the jury that Williams testified truthfully but merely mixed up the dates of these events after the defense lawyers played a game of "gotcha" with the witness. Tr. 2893-94.

Judge Lefkow found that this argument improperly bolstered "those portions of Williams's testimony that are verifiably false [and] likewise served to reinforce his overall credibility as a witness." Lefkow Order Granting New Trial, at p. 22 (Aug. 26, 2009). Judge Lefkow's ruling was correct. Citing *Napue v. Illinois*, 360 U.S. 264, 269 (1959), the court followed a very basic principle of due process – that a prosecutor should not ask a jury to credit testimony she knows to be false. (Indeed, *Napue* obligates the prosecution to correct false testimony by its witness.)

Now, the United States Attorney's office seeks to take the position on appeal to the Seventh Circuit that its prosecutor properly argued to the jury that Senecca Williams was truthful about the events described, but mistaken as to the dates. According to the prosecutors, this argument was justified because it is physically possible that the events described by the witness could have happened at some other point in time.

In the case at bar, Williams and Wilbourn were both free from incarceration at the same time only for only about three months, between February and April, 2002. (They were both free again after September, 2005, but the dispute about Williams's testimony does not include any events in 2005 or later. Indeed, at trial, Wilbourn conceded that he engaged in drug transactions with Freeman after he got out of prison in September, 2005.)

Therefore, according to the prosecutors, it was physically possible that the events which Williams described as having taken place in early 2003 at the Granville apartment *could have* taken place a year earlier, in early 2002. It is important to take note that the prosecutors are not alleging that the disputed events *did* take place in early 2002. Nor has Senecca Williams ever stated, either under oath or otherwise, that he was mistaken as to the dates or that the disputed events involving Wilbourn and the Granville apartment did actually take place in early 2002 or at any other time. Indeed, the undisputed evidence is that Freeman and Williams did not occupy the Granville apartment until December 2002 or January 2003.

For these reasons, the position which the United States Attorney's Office seeks to take in its proposed appeal of Judge Lefkow's order is not a good faith position. In effect, it seeks to argue that its prosecutor was permitted to make a factually false argument to the jury because that argument was not contrary to any physical law of nature, *i.e.*, the law that a person cannot be in two places at one time. The Solicitor General should not authorize such an appeal. To take such a position on appeal would violate the implied promise of the Obama Justice Department that it will act forthrightly and acknowledge mistakes when they occur.

Lastly, it should be noted that Wilbourn and his co-defendants all stand convicted of serious drug offenses which have not been vacated by Judge Lefkow's order. Each faces lengthy periods of incarceration. No defendant will escape punishment for his crimes.

Thank you for considering my letter which I submit on behalf of my client, Brian Wilbourn. Feel free to contact me if I can provide any additional information.

Sincerely,

Leonard C. Goodman

cc. Brian Wilbourn
Assistant United States Attorneys Rachel Cannon and Sharon Fairley