IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CRIMINAL NO. 83-314-1

UNITED STATES OF AMERICA,

vs.

GEORGE MARTORANO
_____/

DEFENDANT'S REPLY MEMORANDUM OF LAW
IN SUPPORT OF MOTION TO CORRECT ILLEGAL SENTENCE
AND/OR FOR RECONSIDERATION AND/OR APPROPRIATE RELIEF

The Defendant, GEORGE MARTORANO, by and through undersigned counsel, respectfully files this Reply Memorandum of Law in support of his "Motion To Correct Illegal Sentence And/Or for Reconsideration And/Or Appropriate Relief" (hereinafter "Motion to Correct") and states as follows:

I.
FACTS RELEVANT TO THE ISSUES HEREIN

Mr. Martorano's Motion to Correct presents the Court with matters that have not been expressly determined and are substantial issues that compel a determination that Mr. Martorano presently labors under an illegal sentence. In the "Government's Response To Defendant's Motion Under Rule 35(a) to Correct Illegal Sentence, For Reconsideration And/Or Appropriate Relief" at 1 (hereinafter "Government's Response"), the government attempts to minimize the substantial issues raised in Mr. Martorano's Motion to Correct by claiming that "[a]ll prior motions and appeals [of Mr. Martorano] have been rejected...."

However, this is an inaccurate portrayal of the procedural history of this case. Mr. Martorano prevailed in his initial direct appeal where the Third Circuit vacated his sentence on the basis that the record failed to reflect that the sentencing procedure was properly conducted. *United States v. Martorano,* No. 84-1568 (3d Cir. Jan. 6, 1986) (per curiam). The issues raised thereafter by Mr. Martorano were based upon factual circumstances that are, at the very least, both troubling and bizarre.

Indeed, after the Third Circuit remanded this case for resentencing, Mr. Martorano filed a motion to disqualify United States District Court Judge John Hannum. That motion was based upon the undisputed facts that (1) prior to the date set for Mr. Martorano's trial, his attorney, Robert Simone, was indicted in this Court on tax evasion charges, (2) subsequent to Mr. Martorano's plea hearing but before his sentencing, Judge Hannum testified as a character witness on Simone's behalf at Simone's tax evasion trial, (3) Simone was acquitted , (4) after Judge Hannum testified as a defense witness for Simone and before Mr. Martorano was sentenced, an article in the Philadelphia newspaper, the *Daily News,* criticized Judge Hannum's testimony as "highly unusual," and (5) Judge Hannum then sentenced Mr. Martorano - who had no prior record and accepted responsibility by pleading guilty - to the harshest of all possible federal sentences, life with no parole, although the prosecution did not seek a sentence of life imprisonment. Notably, after the remand, Simone was again indicted in federal court on other charges relating to his alleged connections to organized crime and was ultimately convicted. Thus, Mr. Martorano's litigation directed at

these unusual circumstances seems reasonable and he is not an inmate who has flooded the courts with frivolous motions as the government seems to suggest.

II.
THE COURT IMPOSED AN ILLEGAL GENERAL SENTENCE

A. Martorano's Motion Is The Proper Legal Vehicle For Correcting His Sentence

The district court failed to impose a lawful sentence on each count and instead imposed a single sentence in the case as a whole. That sentence exceeded the statutory maximum on 18 of the 19 counts of conviction. The government claims that a motion to correct an illegal sentence pursuant to former Federal Rule of Criminal Procedure 35(a) is not the appropriate vehicle to correct an illegal "general sentence" such as that imposed in this case but the government does not cite any cases that stand for such a proposition. This claim fails.

It is well-established that a Rule 35 motion to correct an illegal sentence is the proper legal vehicle for correcting a "general sentence." *See e.g., United States v. Laing,* 145 F.2d 111**,** 112 (6th Cir. 1944) (holding that a motion to correct an illegal sentence is the proper legal vehicle for correcting a district court's error in imposing a single "general sentence" on multiple counts that exceeds the statutory maximum on some of those counts**);** *Benson v. United States,* 332 F.2d 288 (5th Cir. 1964) (holding that the district court erred in denying the defendant's motion to correct an illegal "general sentence" filed under Rule 35 because such a sentence is illegal; noting that a single "general sentence" on multiple counts is "in the words of F.R.Crim.P. 35, 'illegal'" because "an articulate, identifiable sentence" is "what

the law reasonably requires and prefers"); *United States v. Scott*, 664 F.2d 264, 264 (11th Cir. 1981)(holding that a single undivided sentence on multiple counts which exceeds the statutory maximum on some of the counts "is squarely within the holdings[] of *Benson*," *supra*, which condemned such sentences as "illegal under Fed.R.Crim.P. 35(a)...."). *United States v. Mack,* 466 F.2d 333, 340 n. 10 (D.C. Cir. 1972)("Where general sentences are condemned, they are to held to be 'illegal' within the meaning of Rule 35."); *United States v. Henry,* 709 F.2d 298, 311 (5th Cir. 1983) (recognizing that the "general sentence" in *Benson, supra,* "was illegal within the meaning of rule 35 simply because it was a general sentence").[1]

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[1] The government attempts to distinguish *Benson v. United States*, 332 F.2d 288 (5th Cir. 1964) because the general undivided sentence at issue in *Benson* exceeded the maximum sentence as to all of the individual counts, not just some of the individual counts. However, this is a distinction without any relevance. In *Benson*, the Court held that, because a "general sentence" is not "articulate" and "identifiable," it "is, in the words of Fed.R.Crim.P. 35, 'illegal.'" *Id*. at 291. The *Benson* Court recognized that a general sentence is illegal whenever it exceeds the statutory maximum for any one count. Indeed, courts have repeatedly relied upon *Benson* for the legal principle that a general sentence which exceeds the statutory maximum for any one count, but not all counts, is illegal. *See e.g., Scott*, 664 F.2d at 264 (holding that a single undivided sentence on multiple counts which exceeds the statutory maximum on some but not all of the counts "is squarely within the holding[] of *Benson*" because *Benson* condemns such sentences as "'illegal' under Fed.R.Crim.P. 35(a)"); *Walker v. United States*, 342 F.2d 22, 27 (5th Cir.) (holding that a single undivided sentence on multiple counts which exceeded the statutory maximum for one, but not all, of those counts was illegal under *Benson*), *cert. denied* 383 U.S. 859 (1965). Furthermore, *Clark v. United States*, 367 F.2d 378, 380 (5th Cir. 1966) does not distinguish *Benson* from the instant case as the government claims. The defendant in *Clark* received a general undivided sentence of eight years on two counts each of which carried a maximum sentence of 10 years. The *Clark* Court noted that:

> The appellant's eight year sentence was well within the maximum term authorized for any one count. This case is therefore distinguishable from *Benson*.

(continued...)

This well-established principle of law comports with logic because (1) the text of the rule itself states that a sentence which is "illegal" can be corrected at any time and (2) a single undivided sentence imposed on multiple counts which exceeds the statutory maximum sentence for any one count but not the maximum aggregate sentence for all counts is *"per se* illegal." *United States v. Woodard,* 938 F.2d 1255, 1256 (11th Cir. 1991)(per curiam). *See also e.g., United States v. Ward,* 626 F.3d 179, 184-185 (3d Cir. 2010)(holding that the imposition of a single undivided sentence on multiple counts which exceeds the statutory maximum on some but not all counts is illegal and plain error); *United States v. Scott,* 664 F.2d 264, 264 (11th Cir. 1981) (same; a general sentence is "'*illegal' under Fed. R. Crim. P. 35 (a) and cannot stand*.")(citations omitted; emphasis added).

B. A Single Undivided Sentence On Multiple Counts Exceeding The Statutory Maximum On Some Of Those Counts Is Illegal

In support of Mr. Martorano's contention that the district court imposed an illegal general sentence, he cited on-point case law of the Eleventh, Fifth and Third Circuits. *See e.g., United States v. Moriarty*, 429 F.3d 1012, 1025 (11th Cir. 2005); *United States v. Woodard*, 938 F.2d 1255, 1256-58 (11th Cir. 1991)(*per curium*); *United States v. Scott*, 664 F.2d 264 (11th Cir. 1981); *Benson v. United States*, 332 F.2d 288 (5th Cir. 1964); *United States v. Ward*, 626 F.3d 179, 184-85 (3d Cir. 2010). It is telling that the government's response ignores *Moriarty*, *Woodard* and *Scott*.

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[1](...continued)
Id. at 380. In contrast, Mr. Martorano's sentence, as in *Benson*, exceeded the statutory maximum for some of the counts and, thus, was illegal.

Furthermore, although the government addresses *Ward*, *supra*, it attempts to distinguish it by omitting a key word ["and] when quoting from it in an attempt to transform what the *Ward* Court stated. More specifically, the government asserts that, "[i]n footnote 8 ... the [*Ward*] Court specifically distinguished its holding from cases whose circumstances 'did not concern the Sentencing Guidelines,' declaring such cases cited by the government as 'inapposite here.'" Government's Response at 9. In making this assertion, the government (1) omits the key word " and" from the footnote; and (2) fails to note that the Defendant Ward claimed twofold that his sentence was (a) an illegal general sentence and (b) also violative of the Sentencing Guidelines.

In reality, footnote 8 provides as follows:

> FN8. The cases upon which the government relies, *United States v. Xavier*, 2 F.3d 1281, 1292 (3d Cir. 1993), *United States v. Corson*, 449 F.2d 544, 551 (3d Cir. 1971)(en banc), and *Jones v. Hill*, 71 F.2d 932 (3d Cir. 1934) did not concern the Sentencing Guidelines ***and*** are inapposite here. To the extent those cases can be read as permitting a general sentence on multiple convictions to cure a Double Jeopardy problem, the Supreme Court has since rejected such an approach. *See Rutledge v. United States*, 571 U.S. 292, 307, 116 S. Ct. 1241, 134 L.Ed.2d 419 (1996)(requiring vacatur of conviction on one of two counts held to constitute "same" offense). Furthermore, in *Corson* we recognized that we had previously "expressed a dissatisfaction with general sentences and ... declared it 'highly desirable that the trial judge in imposing sentence on an indictment containing more than one count deal separately with each count.'" 449 F.2d at 551 (quoting *United States v. Rose*, 215 F.2d 617, 630 (3d Cir. 1954)).

Ward, 626 F.3d at 185 n. 8. (emphasis added). It is not surprising that the *Ward* Court, by way of a passing reference in a footnote, would point out that the cases cited by the

government (*United States v. Xavier*, 2 F.3d 1281, 1292 (3d Cir. 1993), *United States v. Corson*, 449 F.2d 544, 551 (3d Cir. 1971)(en banc) and *Jones v. Hill*, 71 F.2d 932 (3d Cir. 1934) "did not concern the Sentencing Guidelines and are inapposite" because those cases are pre-Guidelines cases where defendant Ward was claiming a Guidelines violation and those cases were also inapposite for other reasons beyond Guidelines issues.[2]

Contrary to the government's claim, the *Ward* Court never states in footnote 8 that its decision was based solely upon the Sentencing Guidelines and never states that general sentences are not illegal. Rather, footnote 8 of *Ward* is helpful to Mr. Martorano 's argument that his sentence is an illegal general sentence because one of the reasons that the *Ward* Court rejected the cases relied upon by the government was that ***pre-Guidelines*** Third Circuit precedent - *United States v. Corson*, 449 F.2d 544, 551 (3d Cir. 1971) (en banc) and *United*

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[2] *Corson, supra*, was inapposite in *Ward* because the *Corson* Court held that, under the unique circumstance of the federal bank robbery statute and as intended by Congress, under a "pyramided" offense scheme, multiple counts of a conviction may support a single, "merged" sentence which is the exception to the rule that general sentences are unlawful. *See e.g., United States v. Scott*, 664 F.2d 264, 265 (11th Cir. 1981) (holding that the imposition of a single sentence for "pyramided" offenses in the bank robbery statutes is the exception to the rule that general sentences are illegal). *Xavier, supra*, was similarly inapposite in *Ward* because the Court in *Xavier* held that, where Congress intended to allow multiple convictions under different statutes constituting the "same offense," a court should "impose a general sentence ... for a term not exceeding the maximum permissible sentence on that count which carries the greatest maximum sentence." (citations omitted). Furthermore, the *Ward* Court noted that, after *Rutledge v. United States*, 517 U.S. 292, 307 (1996), the holdings of *Corson* and *Xavier* have been called into doubt. *Jones v. Hill*, 71 F.2d 932 (3d Cir. 1934), was also inapposite in *Ward* because (1) Defendant Jones' general sentence was upheld but that sentence, unlike Defendant Ward's general sentence, did not exceed the statutory maximum on any counts and (2) the *Ward* Court noted that *Jones* was decided before *Corson, supra* and *United States v. Rose*, 215 F.2d 617 (3d Cir. 1954) where the Third Circuit disapproved of general sentences. *See Ward*, 626 F.3d at 185 n. 8.

States v. Rose, 215 F.2d 617, 630 (3d Cir. 1954) - has long disapproved of general sentences in multi-count cases.

As previously explained, the *Ward* Court noted that the issue before it was Ward's argument that his general sentence was ***both*** "illegal ***and*** contrary to the Sentencing Guidelines." 626 F.3d at 184 (emphasis added). The *Ward* Court held that Ward's contention that his sentence was both "illegal ***and*** contrary to the Sentencing Guidelines" was valid. In explaining why Ward's sentence was illegal, the *Ward* Court pointed out that, just as in the ***pre-Guidelines*** case of *United States v. Pungitore*, 910 F.2d 1084, 1135 (3d Cir. 1990), where the Third Circuit held that a general verdict of guilty is prejudicial to a defendant because it does not disclose whether the jury found the defendant guilty of one crime or of both, "as a result of the general nature of [Ward's] sentence, neither we nor *Ward* can determine whether it was legal as to particular counts." *Id*. The *Ward* Court further explained, "We do not know whether the Court intended to impose a 25 year sentence on each count to run concurrently which would clearly be illegal considering the statutory maximums on certain counts - or whether the Court had some other sentence in mind, and accordingly ... we will remand for resentencing." *Id*. Thus, the *Ward* Court plainly held that Ward's "general sentence" was prohibited under both pre-Guidelines and post-Guidelines law. Notably, the defendant in *Ward* failed to object at sentencing but yet the *Ward* Court further recognized the enormity of the error and held that "general sentences" rise to the level of plain error. *Id*.

C. The Remedy For Mr. Martorano's Illegal General Sentence Is To Vacate That Sentence In Its Entirety And Order A *De Novo* Sentencing

The government claims that the required remedy for the *Ward* violation in this case would be to merely restructure Mr. Martorano's sentence so that he is again sentenced to life imprisonment without parole. This claim is meritless because the required remedy for an illegal general sentence is a *de novo* sentencing at which the defendant may be sentenced to a lesser sentence than that originally imposed. *Jones v. United States*, 224 F.3d 1251, 1259-60 (11th Cir. 2000)(recognizing that the required remedy for an illegal general sentence is a *de novo* sentencing at which the district court can sentence the defendant to a lesser sentence than that originally imposed). *See also e.g., Ward*, 626 F.3d 179 (3d Cir. 2010) (vacating illegal "general sentence" in its entirety and remanding for "resentencing" at which the district court will be required to "specify sentences on individual counts"); *Walker v. United States*, 342 F.2d 22 (5th Cir. 1965) (vacating illegal general sentence in its entirety and remanding "for correct resentencing in which the defendant will know precisely the penalty assessed as to each and every count and the order in which the sentences thereby imposed are to be served").

In *Jones*, the defendant filed a Section 2255 Motion arguing that his trial counsel rendered ineffective assistance of counsel because his counsel failed to object to the district court's imposition of an illegal general sentence of 360 months imprisonment for all four counts on which Jones was convicted. The district court denied the Section 2255 Motion on the ground that Jones suffered no prejudice because, if Jones had challenged his sentence on

direct appeal, the federal appellate court would have remanded for resentencing and the district court would have resentenced Jones to the same 360-month term of imprisonment. Jones appealed to the Eleventh Circuit from the district court's denial of his Section 2255 Motion. The Eleventh Circuit vacated Jones' sentence, remanded for resentencing and explained that the test for determining prejudice "is not what the court ***might*** have done; the test is whether the original sentence comported with the law." 224 F.3d at 1259 (citation omitted, emphasis added). The Eleventh Circuit further explained that "a particular judge's sentencing practices should not be considered in the prejudice determination." *Id*. at 1259-1260. (citations omitted). Thus, the Eleventh Circuit held that, when a defendant's sentence is vacated on the basis that it is an illegal general sentence, the district court is required to hold a *de novo* sentencing at which the district court may sentence the defendant to a lesser term of imprisonment than that originally imposed.

Notably, the Third Circuit has held that, where a resentencing is required to correct a sentence that is illegal under former Rule 35(a), "[i]n resentencing a defendant the district court is required to exercise its discretion anew in fixing the penalties and need not simply choose from among the sentences it originally imposed." *United States v. Corson*, 449 F.2d 544, 551 n. 16 (3d Cir. 1971). Mr. Martorano presently has a single undivided sentence for 19 counts which exceeds the statutory maximum as to 18 of those counts. Because that single sentence is illegal, it "cannot stand" and must be vacated for a *de novo* sentencing. *See e.g., Scott*, 664 F.2d at 264.

III.
THE VIOLATION OF THE DOUBLE JEOPARDY CLAUSE

The Third Circuit in *Ward*, 626 F.3d at 184, stated that a general sentence on multiple counts can be interpreted as imposing concurrent sentences on those counts. The *Ward* Court, relying upon *Rutledge v. United States*, 1517 U.S. 292 (1996), further stated that a general sentence on multiple convictions does not cure a Double Jeopardy problem. *Ward*, 626 F.3d at 185 n. 8. Accordingly, Mr. Martorano's general sentence for conspiring to distribute drugs and supervising a continuing criminal enterprise can be interpreted as imposing concurrent sentences for those violations and violates the Double Jeopardy Clause. *See Rutledge, supra*. The government argues that *Ward* is inapposite to Mr. Martorano's double jeopardy claim because it is a "guidelines holding." Government's Response at 16. However, the *Ward* Court was not discussing the Sentencing Guidelines when it made these statements about a general sentence and the Double Jeopardy Clause.

Furthermore, it is important to note that the government ignores *United States v. Garmany*, 498 F.Supp.2d 1251 (D. Ariz. 2007), a case that is strikingly similar to Mr. Martorano's cause, where the Court explained that it had granted the defendant's motion to correct his illegal sentence pursuant to former Federal Rule of Criminal Procedure 35(a) because the defendant's concurrent sentences for a drug conspiracy under Section 846 and a continuing criminal enterprise under Section 848 violated the Double Jeopardy Clause of the Constitution and the holding of *Rutledge, supra*.

CONCLUSION

For all of the foregoing reasons and those set forth in Mr. Martorano's "Motion To Correct Illegal Sentence And/Or For Reconsideration And/Or Appropriate Relief," Mr. Martorano respectfully requests that this Court grant his motion to correct illegal sentence and/or for reconsideration and/or for appropriate relief, vacate his sentence, and order a resentencing and any such other relief as this Court deems appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th day of January 2011 I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served electronically this day on Andrea G. Foulkes, Assistant U.S. Attorney, 615 Chestnut Street, Philadelphia, PA.

s/ Marcia J. Silvers
MARCIA J. SILVERS, ESQUIRE