No. 00-1293

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

KEITH JENNINGS
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of New York

BRIEF FOR APPELLANT

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STATEMENT OF JURISDICTION

Mr. Jennings was charged in seven counts of a twenty-five-count superceding indictment. The indictment charged Jennings in Count One of engaging in a continuing criminal enterprise (CCE) (21 U.S.C. §848), in Count Two of a conspiracy to distribute cocaine, cocaine base, and marijuana (21 U.S.C. §846), in Counts Three and Six of possession with intent to distribute cocaine (21 U.S.C. §841), in Counts Nineteen and Twenty-Two of possession with intent to distribute cocaine base (21 U.S.C. §841), and in Count Twenty-Five of money laundering (18 U.S.C. §1956). A.10.[1]

Mr. Jennings was convicted by a jury of all seven counts. The district court vacated the conspiracy conviction and sentenced Jennings on the remaining counts. Jennings was sentenced to life imprisonment on the CCE and possession with intent to distribute cocaine base counts. Jennings received twenty-year sentences on the money laundering and possession with intent to distribute cocaine counts. All counts were ordered to run concurrently. A.2.

The jurisdiction of this Court is invoked under 28 U.S.C. §1291, as an appeal from a final judgment of conviction and sentence in the United States District Court for the Northern District of New York and under 18 U.S.C. §3742,

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[1] "A" is the 1950-page Appellant's Appendix to Brief.

as an appeal of a sentence imposed under the Sentencing Reform Act of 1984. Notice of appeal was timely filed in accordance with Rule 4(b) of the Federal Rules of Appellate Procedure on March 17, 2000. A.1.

STATEMENT REGARDING ORAL ARGUMENT

Jennings requests oral argument in this case. This appeal involves six issues requiring evaluation of the facts and law. The record is extensive. The Court would be best served by hearing from counsel.

STATEMENT OF THE ISSUES PRESENTED

(1) The district court erred by failing to make findings to support the base offense level under U.S.S.G. § 2D1.1.

(2) The district court erred by sentencing Jennings above the statutory maximum on Counts Nineteen and Twenty-Two.

(3) The district court erred by applying a criminal history point to an offense that was part of the conduct charged for in this case.

(4) The district court erred by including an adjustment for use of a minor that was not relevant conduct to the counts of conviction.

(5) The district court erred by including an adjustment for use of a minor because that section did not apply to drug cases.

(6) The district court erred by failing to instruct the jury that they must unanimously find three prior violations of U.S.C. Title 21 to convict Jennings of a continuing criminal enterprise.

STATEMENT OF THE CASE

On July 18, 1996, Rebecca Ricketts was stopped by sheriffs' deputies after retrieving a package from the post office in Albany, New York. A.411-412. She consented to a search of the package which revealed about 5 pounds of marijuana. A.413. She was arrested and agreed to make a recorded phone call to the defendant, Keith Jennings. A.415-419. As a result of that call, Jennings came to her home and accepted the package. A.430-431. He was then arrested. A.432.

On March 19, 1997, the defendant's brother, Khan Jennings, was stopped by police in Illinois while driving a U-Haul truck and towing a flatbed with an Accura Legend. A.481-482. A search of the vehicle discovered approximately 68 kilograms of marijuana. A.494,1550. Although the defendant was not present, his driver's license and other papers were found in a bag. A.496. The Accura Legend was registered to the defendant. A.503.

On April 21, 1997, a New York State Police Officer, Samuel Serrano, was introduced to the defendant in Utica, New York by a confidential informant. A.540. Serrano then gave the defendant $600 and in return received 15 grams of cocaine. A.540-548.

On May 16, 1997, the defendant was a passenger in a car stopped by police in Utica, New York. A.561-562. A small plastic baggie containing a white

powdery substance was discovered in the vehicle. A.565. The substance was later tested to be benzocaine, which is not a controlled substance. A.576,1182,1372.

On September 17, 1997, a confidential informant received 136.1 grams of cocaine from the defendant. A.914-916. On September 24, 1997, the informant purchased an additional 54.8 grams of cocaine. A.941,960.

On June 18, 1998, law enforcement officers sent an informant, Omar Sanchez, to meet Jennings. Sanchez paid $3,000 for 77.3 grams of cocaine base. A.1180-1181,1302. On July 30, 1998, Sanchez received another 151.1 grams of cocaine base from Jennings for $5,000. A.1180-1181,1307-1311.

On September 22, 1998, DEA officers executed an arrest warrant for the defendant at JFK airport. A.1195. He was taken in custody for the charges in this case. A.1198. He was charged by indictment and later by superceding indictment. Neither indictment charged Jennings with any drug quantity, and each named only 21 U.S.C. § 841 (a) (1) as authority for the drug counts. A.10.

At trial, the government called four persons who were alleged to have conspired with Jennings, but who pleaded guilty to receive reduced sentences. (Hope Thomas A.453-674, Kimberly Furgol A.680-774, Carl Cowley, Jr. A.775-881, Maritza Rodriguez A.1052-1161). Jennings challenged the truthfulness of each witness. Based upon their testimony, the following was attributed to

Jennings: 66.75 grams of cocaine (seized from 1132 Seymour on August 20, 1997) A.1024-1026,1384; 188.22 grams of cocaine (seized from Apt. C-2, Maplewood Apartments on October 8, 1997) A.1227,1399; and up to 185 kilograms of marijuana (estimated in the Presentence Report) was transported from New York City to Utica between March 1997 and August 1998. PSR, p.14, ¶25.

The total quantities of drugs attributed to Jennings at trial were approximately 185 kilograms of marijuana, 461 grams of cocaine powder, and 228 grams of cocaine base. Based upon the "Drug Equivalency Tables" in U.S.S.G. § 2D1.1, *Application Note 10*, those quantities are the equivalent total of 4867 kilograms of marijuana.

At trial, Jennings was convicted of Counts One, Two, Three, Six, Nineteen, Twenty-Two and Twenty-Five. A.2. The district court ordered a presentence report to be prepared and set a date for a sentencing hearing. A.1766.

The presentence report calculated Jennings' sentence by grouping all of the counts. The report found a total offense level of 43 and a criminal history category of II, creating a guideline sentence of life. PSR, p. 24, ¶90. The report also listed statutory ranges for Counts One, Two, Nineteen and Twenty-Two that had maximum sentences of life imprisonment. PSR, p. 24, ¶89.

Jennings filed written objections to the presentence report. A.1856-1859. He

objected to the report's proposed findings regarding drug types and quantities, possession of a weapon, a leadership role, and the use of a minor. At a hearing on December 15, 1999, Jennings challenged the jurisdiction of the court over him and sought to discharge his counsel. A.1863-1865. The court adjourned the hearing. A.1884.

At a hearing on January 4, 2000, Jennings again told the court that he wished to discharge his attorney and challenge the jurisdiction of the court. A.1887-1888. Judge Munson ordered Jennings to be removed from the courtroom to a holding cell where Jennings could watch the proceeding by video transmission. A.1890. The government presented no evidence. Jennings' counsel then repeated the objections to the presentence report, previously made in writing, and cited relevant case law. A.1895-1905.

Before the end of the hearing, the court and the parties agreed that the Double Jeopardy Clause of the Fifth Amendment prevented Jennings from receiving convictions for both a continuing criminal enterprise (Count One) and conspiracy to possession with intent to distribute cocaine, cocaine base and marijuana (Count Two). A.1915-1916. No action was taken at the time, but the court stated its intention to write an opinion regarding sentence. A.1916.

On January 24, 2000, the court issued its *Memorandum-Decision and Order*

addressing motions pursuant to FRCP Rules 29 and 33, as well as objections to the presentence report. A.1927-1935. The court found that the findings of the presentence report were "appropriate" and adopted them.

Jennings appeared for a sentencing hearing on March 10, 2000. A.1919. He again challenged the court's jurisdiction to hear his case. A.1921. No additional evidence was presented and no other findings were made. The Court vacated Count Two and sentenced Jennings on Counts One (Life), Three (20 years), Six (20 years), Nineteen (Life), Twenty-Two (Life) and Twenty-Five (20 years), to run concurrently. A.1924.

SUMMARY OF THE ARGUMENT

The presentence report included allegations about drug quantity that were challenged by the defendant, but were never offered or proven by the government at any proceeding in this case. Those statements erroneously inflated Jennings' base offense level for the continuing criminal enterprise and drug counts.

The court sentenced Jennings to more than the 20-year statutory maximum on both Counts Nineteen and Twenty-Two for possession with intent to distribute cocaine base. Those counts alleged no drug quantity and the jury was asked to consider no drug quantity. No element was alleged or submitted that increased the statutory maximum above 20 years.

The court adopted the criminal history category in the presentence report. The report gave Jennings a criminal history point for using drug paraphernalia (benzocaine) that was charged in the indictment and introduced against Jennings at trial. It was not a prior sentence and not eligible to receive a criminal history point. The addition of this criminal history point raised Jennings' criminal history category and affected his sentence. This was plain error.

The court gave Jennings a two-level upward adjustment for use of a minor. This adjustment was not relevant conduct to any of the counts of conviction. Jennings timely objected to this error. Further, the adjustment does not apply to

use of a minor during a drug crime.

The court failed to instruct the jury that it must unanimously find three violations of U.S.C. Title 21 in order to convict Jennings for a continuing criminal enterprise. This error was preserved and was not harmless.

ARGUMENT

A. Standards of Review

Applications of the federal sentencing guidelines are reviewed de novo. *United States v. Stanley*, 12 F.3d 17 (2d Cir. 1993). Findings of fact are reviewed for clear error. *United States v. Rosa*, 17 F.3d 1531 (2d Cir. 1994). Rulings made without objection are reviewed for plain error. *United States v. Boyd*, 222 F.3d 47 (2d Cir. 2000). Failure to charge an essential element is reversible error per se. *United States v. Tran*, 234 F.3d 798 (2d Cir. 2000). Omission of a charge regarding an essential element is reviewed for harmless error. *United States v. Jackson,* 196 F.3d 383 (2d Cir. 1999).

B. Drug Quantity

The district court erred by failing to make findings to support the base offense level under U.S.S.G. § 2D1.1. The presentence report attributed 13.6 kilograms of cocaine base to Jennings with the following statement: "Furthermore, government debriefings of high ranking members of the Jennings Organization have established that the defendant distributed an average of 12 ounces (340 grams) of cocaine base per week during the 10 month period from October of 1997 until August of 1998." PSR, p.14, ¶25.

No evidence of weekly cocaine base distribution was presented at trial.

Jennings objected to the calculation of drug quantity in writing prior to sentencing. A.1856-1859. No additional evidence of drug quantity was presented by the government to answer Jennings' objection.

This single allegation, supported nowhere in the record, gave Jennings a maximum base offense level of 38. See PSR, p. 15, ¶ 30. Further, the report also held Jennings responsible for 19 kilos of cocaine, although that figure too was neither proven at trial nor prior to sentencing. PSR, p.15, ¶30.

The only cocaine base ever introduced was 228 grams resulting from two sales on June 18 and July 30, 1998. A.1080-1081,1302,1307-1311. Although drugs seized on August 20, 1997 and October 8, 1997, were initially identified as cocaine base, testimony at trial by government chemists indicated they were not. A.1384-1385, 1388, 1397-1398. The amount of cocaine base introduced at trial (228 grams) is the equivalent to 4560 kilograms of marijuana. U.S.S.G. § 2D1.1, *Application Note 10*.

The only other drugs introduced were 461 grams of cocaine and estimates about weekly or biweekly marijuana deliveries. That amount of cocaine (461 grams) is the equivalent to 92 kilograms of marijuana. U.S.S.G. § 2D1.1, *Application Note 10*. Accepting the presentence report's calculation of 185 kilograms of marijuana as accurate, and converting both the cocaine and cocaine

base to marijuana, the total attributable to Jennings should have been 4867 kilograms of marijuana (not 275,985 as stated in the presentence report). That quantity of marijuana has a base offense level of 34. U.S.S.G. § 2D1.1(c) (3) (Drug Quantity Table). That is less than the level 38 found in the presentence report. PSR, p. 15, ¶30. The higher quantity was adopted by the court without receiving any evidence beyond what was introduced at trial.

The leading case in the Circuit on the estimation of drug quantity is *United States v. Shonubi*, 103 F.3d 1085 (2d Cir. 1997). Jennings' counsel specifically cited *Shonubi* at the sentencing hearing. A.1895. In that case, the Circuit held that the government must present "specific evidence" of drug quantity. This is evidence that points to a specific drug quantity by such proof as drug records, admissions, or live testimony, at 1089-1090.

Although those examples are not exhaustive, they clearly indicate that more is required than a conclusion in a presentence report that a quantity of drug was distributed each week for a certain number of weeks. The court needs to know who provided the information, their credibility, the basis they used to estimate a weekly quantity, any variables about the operation that could have affected such estimates, and what – if anything – corroborated that information. In other words, this is more than a question of math. The court must have some basis for accepting

the validity of the multipliers. Here there was nothing supporting the quantities of cocaine base or cocaine in the presentence report.

Alternatively, there was a basis for the marijuana estimate. Witnesses testified at trial that 8 to 10-pound quantities of marijuana were transported between Brooklyn and Utica between August 1997 and September 1998 on a weekly or biweekly basis. The presentence report multiplied 8-pound quantities over that period at 10-day intervals, and concluded a total quantity of marijuana of 185 kilograms. This was consistent with trial testimony and the court had a basis to measure its credibility and accuracy.

That contrasts with the findings about cocaine base and cocaine. The court's *Memorandum-Decision and Order* merely repeated the language from the presentence report and stated, "His base offense level of thirty-eight is appropriate." Although, Jennings attacked the underlying basis for the drug quantity findings[2], the court mistakenly rejected this as an objection to the use of hearsay.

The court based its findings on allegations in the presentence report that

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[2] "The amount and quantity of drugs...is not supported by clear, competent, and concise evidence, to support a preponderance of evidence, but rather based in most part upon the hearsay statements of cooperating individuals, uncorroborated by any other competent and sufficient evidence, marshaled for the sole purpose to enhance the sentence to be imposed upon Keith Jennings." A.1858.

were never proven by testimony, exhibit or proffer. There was no basis for the court's drug quantity findings. Jennings timely objected and preserved this issue for review.

C. Sentences Beyond Statutory Maximum

The district court erred by sentencing Jennings above the statutory maximum on Counts Nineteen and Twenty-Two. Jennings was sentenced to life on Counts Nineteen and Twenty-Two. A.2. In those counts, Jennings was charged with possession with intent to distribute cocaine base. The indictment alleged no drug quantity and no issue of drug quantity was submitted to the jury. The indictment merely listed 18 U.S.C. § 841 (a) (1) as authority.

This Circuit is currently considering the effect of failing to plead and prove drug quantities when the government seeks to sentence the defendant to an increased statutory maximum under 18 U.S.C. § 841 (b) (1) (A) or (B). *United States v. Thomas*, No. 98-1051 (L) (*in banc*). The Circuit's ruling in *Thomas* will control this issue.

In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the United States Supreme Court held that sentencing aggravators, which increase the statutory maximum, are elements of separate offenses that must be charged in the indictment. Since that decision, circuits have applied that same rule to the drug quantity sentencing

aggravators under 18 U.S.C. § 841 (b). *See United States v. Rogers*, 228 F.3d 1318 (11th Cir. 2000); *United States v. Norby*, 225 F.3d 1053 (9th Cir. 2000); *United States v. Nance*, 236 F.3d 820 (7th Cir. 2000); *United States v. Doggett*, 230 F.3d 160 (5th Cir. 2000); *United States v. Aquayo-Delgado*, 220 F.3d 926 (8th Cir. 2000); *United States v. Flowal*, 234 F.3d 932 (6th Cir. 2000).

If the Second Circuit follows this trend, then Jennings' sentence under 18 U.S.C. § 841 (b) (1) (A) was error, because Jennings was not charged with possession of more than 50 grams of cocaine base, nor was the issue submitted to the jury. Jennings' sentences for Counts Nineteen and Twenty-Two should have been limited to the lowest statutory maximum under §841 (b), which is 20 years. 18 U.S.C. § 841 (b) (1) (C).

The only other consideration is the standard of review, which will also be decided in *Thomas*. Pursuant to *United States v. Tran*, 234 F.3d 798 (2d Cir. 2000), failure to allege an essential element of the offense is illegal and resentencing is automatic.

If the "plain error" factors of *United States v. Olano*, 507 U.S. 725 (1993), are applied, a sentence for an offense never charged by the grand jury necessarily meets the plain error standard. Other circuits have found failure to charge drug quantity is plain error. *United States v. Nance*, *supra*; *United States v. Mojica-*

Baez, 229 F.3d 292 (1st Cir. 2000).

This Court has held that an error that increases the defendant's authorized sentence "affects substantial rights." *United States v. Martinez-Rios*, 143 F.3d 662 (2d Cir. 1998). In *United States v. Gore*, 154 F.3d 34 (2d Cir. 1998), this Court found it was plain error when a federal court exceeded its own authority by imposing punishments not authorized by Congress. Therefore, whether the error is per se reversible, or plain error, Jennings has met the standard of review.

D. Prior Sentence

The district court erred by applying a criminal history point to an offense that was part of the conduct charged for in this case. In the presentence report, Jennings received one criminal history point for "Crim. Use Drug Par., 2nd" for which the sentence was described as "Forfeiture of $1,559." PSR, p. 19, ¶58. The circumstances were explained to be a May 16, 1997 traffic stop during which a plastic bag of benzocaine was found in a car where Jennings was a passenger.

The indictment in this case charged :

> It was part of the conspiracy that some of the co-conspirators would personally transport benzocaine and "comeback", cutting agents used in the manufacture and processing of cocaine and cocaine base (crack), including on or about May 16, 1997. A.15 (Indictment),1808

(Jury Instruction).

The government called a police officer to describe the circumstances of the search and arrest of Jennings on May 16, 1997. A.560-569. A DEA chemist identified the substance seized on that day as benzocaine and described its use as a cutting agent for cocaine distribution. A.1372-1373. The other persons present with Jennings were individuals that the government claimed Jennings led and supervised in this case. A.564, PSR, p.16, ¶33. The government argued that this incident helped prove Jennings was the leader of a continuing criminal enterprise and a conspiracy to traffic in cocaine and cocaine base. A.1655-1656.

U.S.S.G. §4A1.2 states: "The term prior sentence means any sentence previously imposed ... for conduct not part of the instant offense." Section 4A1.1 only allows criminal history points for offenses defined as a "prior sentence." Therefore, any sentence for conduct that was part of the instant offense is not a prior sentence and is not counted. *United States v. Walker*, 142 F.3d 103 (2d Cir. 1998).

"Conduct that is part of the instant offense means conduct that is relevant conduct to the instant offense under the provisions of § 1B1.3 (*Relevant Conduct*). § 4A1.2, *Application Note 1*. Section 1B1.3 provides that relevant conduct includes "all acts ... that were part of the same scheme or plan as the offense of

conviction." § 1B1.3 (a) (2). Therefore, even if the May 16, 1997 case were not specifically alleged in the indictment, it still should not have been counted because it was part of the offense of conviction.

In *United States v. Thomas*, 54 F.3d 73 (2d Cir. 1995), the sentence was reversed when the defendant received criminal history points for conduct that was part of the same scheme. The defendant was charged with conspiring to utter forged money orders. The district court gave the defendant criminal history points for larceny convictions related to the use of the forged money orders. This Court found that was error.

In *United States v. Walker*, *supra*, the defendant was charged with a continuing criminal enterprise. At sentencing, the district court gave the defendant criminal history points for convictions regarding conduct that was part of the charged offense. Although, there was no objection to the presentence report, this Court found that because the error affected the defendant's sentence, it was plain error.

In this case, Jennings had two criminal history points. That placed him in criminal history category II. Had the May 16, 1997 conviction not been counted, Jennings would have been in criminal history category I. Jennings was harmed by the inclusion of the criminal history point. This was plain error.

E. Use of a Minor

(1) Not Relevant Conduct

The district court erred by including an adjustment for use of a minor that was not relevant conduct to the counts of conviction. Jennings objected in writing to a two-level upward adjustment for use of a minor under U.S.S.G. § 3B1.4. A. 1858. In its *Memorandum-Decision and Order* the district court made the following finding:

> Testimony at trial from Utica Police Department Investigator Michael Nolan indicated that Ericka Palmer was only sixteen when she was arrested for selling marijuana at one of defendant's primary drug locations, and Maritza Rodriguez testified that she was no more than fifteen when defendant first recruited her to sell drugs out of the same location. She also testified that another minor, Joshua Arroyo, was sixteen when he began selling drugs for defendant. Under these circumstances, a two point sentencing enhancement under § 3B1.4 is justified. A.1934-1935.

The problem with that finding is the enhancement does not apply to any of the counts under which it was grouped (Counts One, Three, Six, Nineteen and Twenty-Two). Count Two was vacated because convictions for CCE and

conspiracy violated double jeopardy.[3] A.1915-1916. Jennings cannot be punished for a count that was vacated for double jeopardy reasons, otherwise it would have the same effect of letting the conviction stand – multiple punishments for the same offense. *Rutledge, supra.*

To the remaining counts, § 3B1.4 simply does not apply. Count One is the continuing criminal enterprise. That conduct is covered by § 2D1.5. *Application Note 1* to that section states: *"Do not apply any adjustment from Chapter Three, Part B (Role in the Offense)."* The Background note explains: *"An adjustment from Chapter Three, Part B is not authorized because the offense level of this guideline already reflects an adjustment for role in the offense."*

Counts Three, Six, Nineteen and Twenty-Two are substantive drug counts involving cocaine and cocaine base. They are sales between the defendant and government informants. They did not involve marijuana, nor minors. Absent a finding that the use of a minor was relevant conduct to these counts, there was no basis for the two-level enhancement. Those counts involved different persons, different substances, and different dates, than what was referred to in the court's finding regarding this adjustment. To make legally sufficient findings, the court

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[3] At the sentencing hearing on January 4, 2000, the court and the parties agreed that the conspiracy count had to be vacated for double jeopardy concerns. *See Rutledge v. United States*, 517 U.S. 1241 (1996).

should have found that the activity was jointly undertaken and foreseeable to the defendant, in connection to the counts he was convicted. *United States v. Studley*, 47 F.3d 569 (2d Cir. 1995).

This case is different than *United States v. Eng*, 14 F.3d 165 (2d Cir. 1994). In that case, the defendant complained that because the CCE guidelines prevented Chapter Three, Part B adjustments, he could not receive a leadership role under the other grouped drug counts. There was no question that the leadership role was applicable to those other drug counts. In this case, Jennings is saying (1) that the adjustment cannot be applied to the CCE, (2) that the conspiracy was vacated (and therefore cannot be used without violating double jeopardy), and (3) that the adjustment is simply not relevant conduct to the other counts of conviction.

(2) Wrong Guideline

The district court erred by including an adjustment for use of a minor because that section did not apply to drug cases. *Application Note 2* to § 3B1.4 states: *"Do not apply this adjustment if the Chapter Two offense guideline incorporates this factor."* There is a Chapter Two guideline that applies to the use of minors in drug cases. *See* § 2D1.2 "Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals; Attempt or Conspiracy".

That guideline only applies if the defendant is charged by statute with the crime of "Employment or use of persons under 18 years of age." 21 U.S.C. § 861, *See Application Note 1*, § 2D1.2 (*"This guideline applies only in a case in which the defendant is convicted of a statutory violation of drug trafficking in a protected location or involving an underage or pregnant individual..."*). Therefore, since Jennings was not charged under §861, he cannot receive the adjustment. *Compare United States v. Chandler*, 125 F.3d 892 (5th Cir. 1997) (No enhancement for selling drugs near school unless charged by indictment).

The district court cannot utilize §3B1.4 to avoid the statutory requirement of §2D1.4. The latter section is specific to drug cases. To apply §3B1.4 would render the requirements of §2D1.4 meaningless.

F. <u>CCE Instruction</u>

The district court erred by failing to instruct the jury that they must unanimously find three prior violations of U.S.C. Title 21 to convict Jennings of a continuing criminal enterprise. Jennings requested such an instruction and it was not given. A.1949-1950.

In *Richardson v. United States*, 526 U.S. 813 (1999), the United States Supreme Court held that a jury must unanimously agree upon which specific acts make up the continuing series. Although the Supreme Court did not identify the

appropriate standard of review, subsequent cases have held that such error requires a harmless error analysis as used in *Neder v. United States*, 527 U.S. 1 (1999). *See Benevento v. United States*, 81 F.Supp 2d 490 (S.D.N.Y. 2000).

The error here was not harmless. Jennings challenged the CCE charge and conceded none of its elements. The government's evidence in support of the continuing criminal enterprise was the testimony of alleged co-conspirators. Jennings cross-examined each witness and attacked their motivation and credibility. A.647-673,756-770,846-877,1026-1160.

When conducting a harmless error analysis for *Richardson* error, the question is: "Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?" *United States v. Brown*, 202 F.3d 691, 699 (4th Cir. 2000). In this case, the answer is unclear.

Jennings was convicted of Counts Three, Six, Nineteen and Twenty-Two. Each was an individual drug transaction where a government informant purchased gram amounts of cocaine or cocaine base from the defendant. The CCE and conspiracy, as described by the cooperating witnesses, was an operation primarily transporting marijuana from Brooklyn to Utica, and then distributing marijuana in Utica. It is not clear that the jury believed that the four transactions orchestrated by the government had anything to do with a continuing criminal enterprise or

conspiracy. Absent the appropriate instruction, the jury was given no opportunity to express this connection.

Even more confusing to the jury, was evidence introduced of transactions which could not legally be predicate crimes under CCE, but still may have influenced their verdict. For example, evidence showed on several occasions Jennings was arrested with large amounts of unexplained sums of money. A.514-518,981-992,1001-1006. The predicate acts of a CCE must be U.S.C. Title 21 drug crimes. Possessing drug proceeds, or even money laundering of drug proceeds, are not CCE predicates. *See* 21 U.S.C. § 848 (c). In this case, the jury was merely told: "The phrase 'a continuing series of violations' means three or more violations of the federal narcotics laws which are in some way related to one another." A.1803.

In *United States v. Brown*, *supra*, the Fourth Circuit found that *Richardson* error was not harmless (1) when it was not clear which transactions the jury may have relied to find the violations, (2) when evidence of transactions which were not under U.S.C. Title 21 were introduced, (3) when the defendant contested the omitted element by challenging the motivation and credibility of the witnesses supporting those allegations. All those same things are true in this case. Under those circumstances, it is questionable whether the jury would have found Jennings guilty of Count One with a proper instruction. The error was not harmless.

CONCLUSION

Jennings must be resentenced because the facts and law do not support the district court's findings of drug quantity, use of a minor, and criminal history. Jennings must be resentenced because the district court exceeded the statutory maximum on Counts Nineteen and Twenty-Two. Count One must be reversed because the jury was not instructed that they must be unanimous about which U.S.C. Title 21 violations establish a continuing criminal enterprise.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Lillian Spagnola, certify that today, July 30, 2001, a copy of the brief for appellant, a copy of the record excerpts, and the official record in this case, consisting of one appellate brief and appendix, were served upon Ms. Elizabeth Riker, Assistant United States Attorney, Northern District of New York, by first class mail, postage prepaid to her at Office of the U.S. Attorney, 100 South Clinton Street, Syracuse, NY 13261.

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Lillian Spagnola

CERTIFICATE OF COMPLIANCE

Pursuant to 2ND CIR. R. 32 (a)(7), undersigned counsel certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 32 (a)(7).

1. Exclusive of the portions exempted by 2ND CIR. R. 32, this brief contains 5279 words.

2. This brief has been prepared in proportionally spaced typeface using Corel WordPerfect 8.0 software in Times New Roman 14 point font in text and Times New Roman 12 point font in footnotes.

3. Undersigned counsel understands that a material misrepresentation in completing this certificate, or circumvention of the type-volume limits in Fed. R. App. P. 32 (a)(7), may result in the Court's striking this brief and imposing sanctions against the person using the brief.

____

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