

**05-5189-cr(L),
05-5456-cr (con), 05-5533-cr (con)**

**UNITED STATES COURT OF APPEALS
SECOND CIRCUIT**

UNITED STATES OF AMERICA,

Appellee,

vs.

BRUCE BLUE, SOLOMON RENFROE, LEONARD SMITH,
JANEIRO H. TARVER, DEXTER CLAYTON, WILLIE BROCKINGTON,
TYRONE HOLTON, EILEEN MARQUEZ, ROSCOE SKINNER and
SHAWN WOODY,

Defendants,

TIMOTHY GIVENS, LEE BLUE, RICKY BLUE,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

**BRIEF OF DEFENDANT-APPELLANT,
RICKY BLUE**

BRUCE R. BRYAN, ESQ.
Attorney for Defendant-Appellant,
Ricky Blue
Office and P.O. Address
333 East Onondaga Street
Syracuse, New York 13202
(315) 476-1800

TABLE OF CONTENTS

| | Page No. |
|--|----------|
| Table of Authorities | ii |
| Preliminary Statement | 1 |
| Subject Matter And Appellate Jurisdiction | 1 |
| Issues Presented | 2 |
| Summary Of Argument | 2 |
| Statement Of Facts | 4 |
| Argument | |
| Point I The Government Conceded That It Abandoned The Argument That The Statutory Minimum Barred Re-Sentencing | 11 |
| Point II In Addition, This Court’s Remand Order Did Not Authorize The District Court To Determine Whether The Statutory Minimum Barred Re- Sentencing | 13 |
| Point III Under 21 U.S.C. § 848, Drug Quantity Is An Element Of An Aggravated Crime And The Judicial Finding On Such Element Violated Ricky Blue’s Sixth Amendment Right To A Jury Trial | 21 |
| Point IV Alternatively, <i>Harris</i> Is In Doubt And Will Be Overruled | 30 |
| Conclusion | 33 |

TABLE OF AUTHORITIES

| Case Law | Page No. |
|--|----------|
| <i>Almandarez-Torres v. United States</i> , 523 U.S. 224 (1998) | 28 |
| <i>Blakely v. Washington</i> , 542 I/S/ 296 (2004) | 8,32 |
| <i>Castillo v. United States</i> , 530 U.S. 120 (2000) | 25 |
| <i>Clark v. Martinez</i> , 543 U.S. 371 (2005) | 29 |
| <i>Harris v. United States</i> , 536 U.S. 545 (2002) | 14,30-32 |
| <i>Hegeman Farms Corp. v. Baldwin</i> , 293 U.S. 163 (1934) | 12 |
| <i>Jefferson v. United States</i> , 110 Fed. Appx. 572 (6 th Cir. 2004) | 12 |
| <i>Jones v. United States</i> , 526 U.S. 227 (1999) | 26 |
| <i>McMillan v. Pennsylvania</i> , 477 U.S. 79 (1986) | 30-31 |
| <i>Moore v. American Scantic Line</i> , 121 F.2d 767 (2d Cir. 1941) | 12 |
| <i>Ring v. Arizona</i> , 536 U.S. 584 (2002) | 32 |
| <i>Scott v. Morrison</i> , 58 Fed. Appx. 603 (6 th Cir. 2002) | 12 |
| <i>Simon v. United States</i> , 361 F. Supp.2d 35 (E.D.N.Y. 2005) | 18 |
| <i>State St. Bank & Trust Co. v. Inversiones Errazuriz Limitada</i> , 374 F.3d 158 (2d Cir. 2004) | 12 |
| <i>United States v. Bariek</i> , 2005 WL 2334682 (E.D. Va. 2005) | 18 |
| <i>United States v. Barresi</i> , 361 F.3d 666 (2d Cir. 2004) | 13 |
| <i>United States v. Carmona-Rodriguez</i> , 2005 WL 840464, *4 (S.D.N.Y. 2005) | 18 |
| <i>United States v. Crosby</i> , 397 F.3d 103 (2d Cir. 2005) | 16 |
| <i>United States v. Estrada</i> , 428 F.3d 387 (2d Cir. 2005) | 28 |
| <i>United States v. Fernandez</i> , 443 F.3d 19 (2d Cir. 2006) | 16 |
| <i>United States v. Forbes</i> , 124 Fed. Appx. 45 (2d Cir.) | 14 |

| | |
|---|---------|
| <i>United States v. Gonzalez</i> , 420 F.3d 111 (2d Cir. 2005) | 28 |
| <i>United States v. Guevara</i> , 150 Fed. Appx. 84 (2d Cir. 2005) | 14 |
| <i>United States v. Hayes</i> 445 F.3d 536 (2d Cir. 2006) | 11 |
| <i>United States v. Henry</i> , 150 Fed. Appx. 68 (2d Cir. 2005) | 14 |
| <i>United States v. Holman</i> , 131 Fed. Appx. 314 (2d Cir. 2005) | 14 |
| <i>United States v. Lucania</i> , 379 F.Supp.2d 288, 297 (E.D.N.Y. 2005) | 18 |
| <i>United States v. Maggiore</i> , 125 Fed. Appx. 343 (2d Cir. 2005) | 14 |
| <i>United States v. Nellum</i> , 2005 WL 300073 (M.D. 2005) | 18 |
| <i>United States v. Ogando</i> , 968 F.2d 146 (2d Cir. 1992) | 23 |
| <i>United States v. Quintieri</i> , 306 F.3d 1217 (2d Cir. 2002) | 13,20 |
| <i>United States v. Sharpley</i> , 399 F.3d 123 (2d Cir. 2005) | 9-10,14 |
| <i>United States v. Simmons</i> , 923 F.2d 934 (2d Cir. 1991) | 23 |
| <i>United States v. Soler</i> , 124 Fed. Appx. 62 (2d Cir. 2005) | 14 |
| <i>United States v. Spector</i> , 343 U.S. 169 (1952) | 12 |
| <i>United States v. Stanley</i> , 54 F.3d 103, 108 (2d Cir.) | 13 |
| <i>United States v. Thorn</i> , 446 F.3d 378 (2d Cir. 2006) | 13 |
| <i>United States v. Walker</i> , 142 F.3d 103 (2d Cir. 1998) | 23 |
| <i>United States v. Wint</i> , 142 Fed. Appx. 11 (2d Cir. 2005) | 14 |
| <i>Wilson v. United States</i> , 414 F.3d 829 (7 th Cir. 2005) | 29 |

Statutes

| | |
|--------------------|-------------------------|
| 18 U.S.C. § 924(c) | 9-10,121,25-30 |
| 18 U.S.C. § 3231 | 1 |
| 18 U.S.C. § 3553 | 14,15,16,18 |
| 21 U.S.C. § 841 | 1,22 |
| 21 U.S.C. § 846 | 4 |
| 21 U.S.C. § 848 | 1-3,5,21,22,24-25,27-29 |
| 21 U.S.C. § 856 | 4 |
| 28 U.S.C. § 1291 | 2 |

PRELIMINARY STATEMENT

This is an appeal by the Appellant, Ricky Blue, from an Order of the district court holding that the court was without power to consider whether to re-sentence him upon a *Crosby* remand from this Court. Ricky Blue was previously found guilty in the District Court, Western District of New York (Siragusa, J.), of, among other things, Engaging in a Continuing Criminal Enterprise in violation of 21 U.S.C. § 848(a) and Conspiracy with Intent to Distribute a Controlled Substance in violation of 21 U.S.C. § 841. The Judgment of Conviction was entered in the Office of the Clerk, Western District of New York, on March 4, 2003. A first notice of appeal from said Judgment of Conviction and sentence was filed on March 6, 2003.

On June 1, 2005, this Court remanded Ricky Blue's case to the district court under *Crosby* to consider whether the district court should re-sentence him. On September 6, 2005, the district court held that it was without power to re-sentence Ricky Blue because he had been sentenced to the statutory minimum of life imprisonment. The district court issued an Order to that effect dated September 15, 2005. Ricky Blue filed a notice of appeal, dated October 14, 2005. The district court granted a motion to extend the filing for such Notice of Appeal by order dated July 10, 2006. This appeal is from the Judgment of Conviction and sentence that disposed of all federal claims against the Appellant.

SUBJECT MATTER AND APPELLATE JURISDICTION

The district court had subject matter jurisdiction of this case under 18 U.S.C. § 3231. This case involves a criminal prosecution wherein Ricky Blue was found guilty of, among other things, Engaging in a Continuing Criminal Enterprise and a Drug Conspiracy. This

Court has appellate jurisdiction under 28 U.S.C. § 1291. A Judgment of Conviction was entered in the Office of the Clerk, Western District of New York, on March 4, 2003. The district court issued an Order dated September 15, 2005 which denied re-sentencing. A Notice of Appeal with respect to this second appeal was filed on October 16, 2005. The district court granted a motion to extend the filing for such Notice of Appeal by order dated July 10, 2005. This appeal is from a final Judgment of Conviction and sentence that disposed of all federal claims against the Appellant.

ISSUES PRESENTED

1. Whether the Government abandoned the argument that the statutory minimum barred re-sentencing?
2. Whether this Court's remand order authorized the district court to determine whether the statutory minimum barred re-sentencing?
3. Whether, under 21 U.S.C. § 848, drug quantity is an element of an aggravated crime and the judicial finding on such element violated Ricky Blue's Sixth Amendment right to a jury trial?
4. Whether, in the alternative, *Harris* is in doubt and will be overruled?

SUMMARY OF ARGUMENT

_____Ricky Blue submits that his sentence should be reversed and remanded to the district court with instructions that the district court has the authority to consider whether to re-sentence him pursuant to *Booker* and *Crosby*. First, the Government conceded that Ricky Blue was entitled to a *Crosby* remand and thereby abandoned the argument that the statutory minimum precluded re-sentencing. On the first appeal, the Government

expressly conceded that Ricky Blue had the right to re-sentencing under *Crosby*. The Government may not reverse its position on remand and contend that the statutory minimum barred re-sentencing when the Government had abandoned such argument on appeal.

Second, this Court's remand order did not authorize the district court to determine whether the statutory minimum barred re-sentencing. This Court's remand order was quite limited and expressly directed the district court to consider whether to re-sentence Ricky Blue under *Crosby*. It did not authorize the district court to determine any other legal questions, including whether the statutory minimum barred such consideration. The district court erred when it exceeded the directive of this Court's remand order and held that the statutory minimum barred re-sentencing under *Crosby*.

Third, under 21 U.S.C. § 848, drug quantity is an element of an aggravated crime and the judicial finding on such element violated Ricky Blue's Sixth Amendment right to a jury trial. Section 848 does not set forth sentencing factors to be determined by a judge. Rather, Section 848 sets forth three separate crimes with elements that must be proven to a jury beyond a reasonable doubt. Subsection (c) sets forth the least-severe crime, violation of which subjects a defendant to a sentence between 20 years and life. Subsection (b) sets forth a more severe crime, violation of which compels a court to impose the statutory minimum sentence of life imprisonment. Subsection (e) sets forth the most severe crime, violation of which may subject a defendant to the death penalty. In the case at bar, the jury was only asked to determine the elements of the least-severe crime under Section 848 (as set forth in subsection (c)). The jury was not asked to determine beyond a reasonable doubt whether Ricky Blue had violated the more severe crime set forth in

subsection (b) dealing with a specified drug quantity. Instead, the district court rendered a judicial finding that Ricky Blue had violated subsection (b) by possessing the requisite quantity of drugs. Such judicial finding of fact violated Ricky Blue's Sixth Amendment right to a jury trial. Therefore, the statutory minimum contained in subsection (b) was not a bar to re-sentencing under this Court's remand to the district court.

Finally, Ricky Blue asserts that *Harris* is in doubt and will be overruled. Ricky Blue recognizes that this Court may not overrule a decision of the Supreme Court of the United States. Nonetheless, to preserve his ability to challenge *Harris* on certiorari or at a later date, Ricky Blue herein challenges the validity of *Harris*. Ricky Blue submits that more than one justice that voted in the majority in *Harris* will likely change his position when the issue is revisited by the Court.

STATEMENT OF FACTS

Indictment

In or about 2000, Ricky Blue ("Mr. Blue"), was charged in a multi-count indictment with, among other things, Engaging in a Continuing Criminal Enterprise (Count I) and Conspiracy With Intent to Distribute a Controlled Substance (Count II). (A.44-45). Count I charging a Continuing Criminal Enterprise did not specify the quantity of drugs allegedly involving Mr. Blue. Id. The Indictment merely charged that Mr. Blue had "engage[d] in a Continuing Criminal Enterprise in that he did violate Title 21, United States Code, Sections 841(a)(1), 846 and 856(a)," which violation was part of a series of violations that he had undertaken as an organizer, supervisor and manager in concert with five or more persons and from which he had obtained substantial income "in violation of Title 21, United States

Code, Section 848(a).”

Count II, charging Conspiracy With Intent to Distribute a Controlled Substance alleged that several individuals, including Ricky Blue, had possessed with intent to distribute “5 kilograms or more of a mixture or substance containing cocaine . . . , [and] “50 grams or more of a mixture or substance containing cocaine base” Id. Other counts charged that Ricky Blue had maintained houses in Rochester, New York to manufacture, distribute and use cocaine and cocaine base. (A.51-52).

The Government’s Case Against Ricky Blue

The Government alleged that Ricky Blue had been involved since approximately 1995 in drug trafficking in Rochester, New York, by supplying different locations with large quantities of crack cocaine and cocaine powder. (A.141). The Government contended that Ricky Blue had relied on family members to market and distribute the drugs, using various houses owned by Ricky Blue in Rochester. Id.

The investigation began with the arrest of Carlos Givens and Gordon Paige, after investigators conducted several controlled purchases from them of cocaine and crack cocaine. (PSR, para. 20). Thereafter, investigators searched two houses owned by Ricky Blue on Taylor Street where the alleged drug dealing had taken place. Id. Ricky Blue did not live in the houses, but rather rented them to tenants. He lived with his family on Arnett Boulevard. Id. Ultimately, Paige cooperated with the Government which led to the arrest of other individuals, including Ricky Blue. Paige testified at trial that he had moved to Rochester in 1996 whereupon he observed several co-defendants, including Ricky Blue, engage in drug distribution. (PSR, para. 22). Eventually, Paige supplied two houses on Taylor Street with cocaine that he obtained from Ricky Blue. Id. Paige testified that Ricky

Blue let him live at one of the houses rent free and paid him weekly. (PSR, para. 23). Paige further testified that Ricky Blue brought cocaine to one of the houses and buried it in the yard. Id. He also testified that he saw Ricky Blue cook cocaine into crack cocaine. Id.

Solomon Renfro, another cooperating defendant, testified that he had acted as a middleman between Ricky Blue as supplier and others as buyers. (PSR, para. 26). Renfro lived at 159 Clifton Street and sold drugs from that house. (PSR, para. 30). He testified that he saw Ricky Blue bury cocaine in the backyard and cook crack cocaine. Id.

Ricky Blue's Defense

Ricky Blue was forty-six years old, and the father of three children, one of whom was a Rochester police officer. (PSI, para. 73). Ricky Blue had no prior criminal record. (PSI para. 57). He contended that he was merely a landlord of the properties where the drug dealing took place and that he was not involved. A number of witnesses testified on his behalf, including his son (the police officer), his spouse (who handled bookkeeping on the properties), an insurance agent and others who had witnessed his management of the properties. They testified that they did not see any conduct that indicated that he was involved in drug dealing. (A.100-23). Moreover, Ricky Blue argued that there was a distinct lack of corroborating evidence, such as controlled purchases from him, wiretap evidence or video surveillance (as was done with other defendants). (A.65-99).

Jury Instructions On The Continuing Criminal Enterprise Charge

The jury was instructed that they could find Ricky Blue guilty of engaging in a Continuing Criminal Enterprise if it found that (1) he committed the crime of conspiring to possess with the intent to distribute narcotics, (2) that the offense was part of three or more

narcotics offenses, (3) that he had acted as an organizer, supervisor or manager of five or more persons in committing the offenses, and (4) that he obtained substantial income therefrom. (A.124-26). The court did not instruct the jury that they need find the quantity of drugs applicable to the Continuing Criminal Enterprise or that the quantity of crack cocaine for which Ricky Blue was responsible equaled or exceeded 1.5 kilograms. (See (A.124-30). Nor were they instructed that they were required to find that he was a “principal” organizer. Id.

The Jury’s Verdict

The jury found Ricky Blue guilty of Count I charging a Continuing Criminal Enterprise. The jury also found him guilty of Count II charging a Drug Conspiracy. (A.274). In relation to Count II, the jury was asked and did find that Ricky Blue had conspired to possess with intent to distribute, and had in fact distributed, 5 or more kilograms of cocaine. (A.132-33). The jury also was asked, and did find, that Ricky Blue had conspired to possess with intent to distribute, and did distribute 50 grams or more of crack cocaine.

Id. In regard to Counts 11 through 17, the jury found Ricky Blue guilty of Counts 11 through 13, but not guilty of Counts 14 through 17. (A.134). (Each count related to a particular property on which it was alleged that the manufacture and distribution of a controlled substance had occurred.) Id.

The Pre-Sentence Investigation Report

The Pre-Sentence Investigation Report (“PSR”) summarized the trial evidence on drug quantity. Marino Guerrero (“Guerrero”) testified that he supplied 75 kilograms of cocaine to Ricky Blue from December, 1995 to June, 2000. (PSR, para. 19). Others testified that they had observed or participated with Ricky Blue in converting power cocaine

to crack. (PSR, para. 37). Among them, Gordon Paige testified that he had sold 10 kilograms of powder and 10 kilograms of cocaine base to Ricky Blue. Id. The PSR concluded: “Given the testimony during trial, it would appear that the amount of cocaine base involved in defendant’s relevant conduct exceeds the highest amount of the drug quantity of 1.5 kilograms of cocaine base.” Id.

Sentencing

At sentencing, the court made the following factual finding: “Based on the trial testimony the court determines that your relevant conduct involves more than 1.5 kilograms of cocaine base, as reflected in the Pre-Sentence Report. . . .” (A.142). Based on such finding, the court applied Sentencing Guideline § 2D1.1(C)(1) which provided for a base offense level of 38. (A.142-43). The court then applied Guideline § 2D1.5, which required an adjustment of 4 levels, making a total offense level of 42. Id. Mr. Blue had no prior criminal record and therefore had a Criminal History Category of 1. (A.143). Having found that the drug quantity exceeded 1.5 kilograms, the court sentenced Ricky Blue to a statutory minimum sentence of life imprisonment. (A.143-44).

On Appeal, The Government Conceded That Ricky Blue Had The Right To A Crosby Remand To Permit The District Court To Reconsider His Sentence

On his first appeal to this Court, Ricky Blue contended that his Sixth Amendment right to a jury trial had been violated under *Blakely v. Washington*, 542 U.S. 296 (2004). (A.163-67). Among other things, he contended that the district court had made unconstitutional factual determinations of drug quantity. Id.

Prior to the filing of the Government’s brief, the Supreme Court decided *United States v. Booker*, 543 U.S. 220 (2005). The Government thereafter conceded in the brief that Ricky Blue had a right to remand. (A.168-70). Specifically, the Government stated:

The government concedes that in light of the Supreme Court's decision in *United States v. Booker*, 125 S. Ct. 738 (2005), and this Court's decision in *United States v. Crosby*, ___ F.3d ___, 2005 WL 240916 (No. 03-1675) (2d Cir. February. 2, 2005), such sentences should be remanded to the district court for further proceedings in conformity with *Crosby*.

(A.169).

Significantly, the Government expressly argued that co-appellant Timothy Givens was not entitled on remand to have the district court consider whether it would impose a different sentence for his conviction for violation of 18 U.S.C. § 924(c). (A.169-70). The Government stated:

Even under the post-*Booker* sentencing scheme, the defendant would not be entitled to a lower sentence, as the mandatory Guidelines had no effect on the statutorily required sentence he received. Stated differently, as defendant “cannot obtain any improvement in his sentence in re-sentencing [under Count 3] . . . [there is] no reason to remand to the district court.” *United States v. Sharpley*, ___ F.3d ___, 2005 WL 357449, *3 (Nos. 04-2934, 04-2935) (2d Cir. February. 16, 2005).

Id.

This Court Issued A Crosby Remand For Ricky Blue

_____ Consistent with the Government's concession that Ricky Blue was entitled to a remand under *Crosby*, this Court ordered the district court to conduct “further proceedings in conformity with *Crosby*.” (A.172). This Court stated that “UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that . . . the cases of defendants Timothy Givens, Ricky Blue and Lee Blue are REMANDED so that the District Court may consider whether to re-sentence those three defendant-appellants in light of this order.” (A.171). This Court also ordered that the proceedings in the district

court must be conducted “consistent with this order.” (A.172).

In regard to Timothy Givens, this Court held that the remand only applied to his conviction for conspiracy, and not his firearms conviction under 18 U.S.C. § 924(c). *Id.* This Court stated that “no remand is necessary for the 60 month sentence [under § 924(c)], as it matches the statutory minimum for the offense,” citing *United States v. Sharpley*, 399 F.3d 123 (2d Cir. 2005). *Id.*

The Government Changed Its Position In The District Court And Argued That The Court Did Not Have The Power To Re-Sentence Ricky Blue Because Of The Statutory Minimum

_____ The Government changed its position after remand and argued to the district court and argued that the statutory minimum sentence of life imprisonment barred the district court from further action. Specifically, the Government stated:

Although the government conceded remand in its appellate brief, the government’s primary argument on remand is that no re-sentencing should be considered on Count One of the Indictment, as the defendant was sentenced to the mandatorily prescribed minimum sentence: life imprisonment. 21 U.S.C. 848(b). Since the defendant was not sentenced to a Guidelines range, but rather to a statutory range, there is no *Crosby* issue. (Blue, Sentencing Transcript, page 9). Accordingly, because the sentence cannot get any better, that is, because it matches the statutory minimum for the offense, re-sentencing is not appropriate. *United States v. Sharpley*, 399 F.3d 123, 127 (2d Cir. 2005).

(A.177).

Ricky Blue responded that the Government had conceded the issue on appeal, and the concession, “having been made and accepted (by the Second Circuit Court of Appeals), cannot be undone.” (A.181-82).

The District Court Held That It Was Without Power To Re-Sentence Ricky Blue Because He Was Sentenced To The Statutory Minimum Of Life Imprisonment

While acknowledging that this Court had given the district court specific instructions to consider whether to re-sentence Ricky Blue under *Crosby*, the court stated: “frankly . . . I don’t know what we’re doing here.” (A.193-94). This court also remarked: “Why the Government conceded the remand . . . is beyond me because really this is not a Guidelines case.” (A.191).

The court then addressed the legal question of whether the statutory minimum is a bar to re-sentencing and held that “the statute trumps” the guidelines. (A.194). The court confirmed that it had imposed the life sentence based on the judicially-found fact that Ricky Blue was accountable for 1.5 kilograms of cocaine base. (A.197-98). The court reasoned that the jury’s verdict authorized a life sentence for the Continuing Criminal Enterprise charge and therefore the court could make such judicial finding without violating the Sixth Amendment. (A.205-08).

However, the court strongly indicated that it would have sentenced Ricky Blue to less than life imprisonment if it had the power to do so. (A.208-09). The court observed that Ricky Blue was not “the biggest drug dealer in the case.” (A.209). Guerrero was the main supplier yet he received a sentence of 180 months imprisonment. (A.209;214).

POINT I

THE GOVERNMENT CONCEDED THAT RICKY BLUE WAS ENTITLED TO A *CROSBY* REMAND AND THEREBY ABANDONED THE ARGUMENT THAT THE STATUTORY MINIMUM PRECLUDED RE-SENTENCING

_____ A party that abandons an argument on appeal is thereby bound. *See, United States v. Hayes*, 445 F.3d 536 (2d Cir. 2006) (although the defendant expressly waived his right

to appeal any term of supervised release that fell within or under the applicable Sentencing Guideline range, “because the government does not argue that Hayes has waived his right to appeal this aspect of his sentence, we deem any objection abandoned.”); *See, e.g., State Stazzone. Bank & Trust Co. v. Inversiones Errazuriz Limitada*, 374 F.3d 158, 172 (2d Cir. 2004); *Moore v. American Scantic Line*, 121 F.2d 767 (2d Cir. 1941) (court presumes that a position not urged on appeal is abandoned); *Jefferson v. United States*, 110 Fed. Appx. 572 (6th Cir. 2004) (party abandons issue when it failed to argue it in the court of appeals); *Scott v. Morrison*, 58 Fed. Appx. 603 (6th Cir. 2002) (issue argued in district court but not on appeal is abandoned and not reviewable on appeal). *See also, United States v. Spector*, 343 U.S. 169 (1952) (issue that was neither raised, briefed or argued will not be considered by the Supreme Court on an appeal from the district court); *Hegeman Farms Corp. v. Baldwin*, 293 U.S. 163 (1934) (contention not pressed in Supreme Court must be treated as abandoned).

The Government not only abandoned any contention that the statutory minimum precluded a *Crosby* remand, it expressly conceded that Ricky Blue was entitled to a *Crosby* remand. Significantly, the Government made the concession with full knowledge that a statutory minimum can preclude re-sentencing. In regard to Timothy Givens, the Government affirmatively argued to this Court that Givens was ineligible for a *Crosby* remand for the firearms conviction under 18 U.S.C. § 924(c). Significantly, the Government did not assert that the statutory minimum barred a *Crosby* remand for Ricky Blue. Based on the Government’s concession, this Court remanded Ricky Blue’s case to the district court to consider whether it would have given Ricky Blue a lesser sentence under *Crosby*.

POINT II

THIS COURT’S REMAND ORDER DID NOT AUTHORIZE THE DISTRICT COURT TO DETERMINE WHETHER THE STATUTORY MINIMUM BARRED RE-SENTENCING

In *United States v. Quintieri*, 306 F.3d 1217 (2d Cir. 2002), this Court dealt with the “knotty questions that emerge when an appeal results in a remand for re-sentencing.” *Id.* at 1221. This Court held that “absent explicit language in the mandate to the contrary, re-sentencing should be limited when the Court of Appeals upholds the underlying convictions but determines that a sentence has been erroneously imposed and remands to correct that error.” *Quintieri*, 306 F.3d at 1228; see e.g. *United States v. Stanley*, 54 F.3d 103, 108 (2d Cir.), *cert denied*, 516 U.S. 891 (1995).

In *United States v. Barresi*, 361 F.3d 666 (2d Cir. 2004), this Court further stated that “[t]he nature of the issues for resolution in the district court on a remand from the Court of Appeals depends principally on the issues that had been presented in the appeal and the directions given by the Court of Appeals in ordering further proceedings.” This Court stated that “if the remand specifies the nature of the correction to be made, the scope of the issues on remand is thereby limited.” *Id.* at 672. See, *United States v. Thorn*, 446 F.3d 378 (2d Cir. 2006) (*Thorn* identified particular sentencing issues necessitating remand, narrowly directing imposition of the nine-level enhancement under § 2Q1.2(b)(2) without inviting the district court to consider downward departures“ - hence re-sentencing was “limited, not *de novo*.”).

In the case at bar, this Court’s remand order was quite limited and expressly directed the district court to consider whether to re-sentence Ricky Blue under *Crosby*. It did not authorize the district court to determine any other legal questions, including whether

the statutory minimum barred such consideration. Specifically, this Court ordered the district court to conduct “further proceedings in conformity with *Crosby*.” This Court did not order the district court to also determine whether Ricky Blue was barred from being re-sentenced under this Court’s Opinion in *United States v. Sharpley*, 399 F.3d 123 (2d Cir. 2005) or the Supreme Court’s Opinion in *Harris v. United States*, 536 U.S. 545 (2002). The power to re-sentence was not at issue, in that it had been already conceded by the Government on the first appeal.

A remand under *Crosby* is a direction to the district court to consider whether it would have imposed a non-Guideline sentence had it known that the Guidelines are advisory. Such a remand assumes that the statutory minimum is not a bar to such consideration. If a statutory minimum applies, no remand is ordered. See, *United States v. Guevara*, 150 Fed. Appx. 84 (2d Cir. 2005); *United States v. Henry*, 150 Fed. Appx. 68 (2d Cir. 2005); *United States v. Wint*, 142 Fed. Appx. 11 (2d Cir. 2005); *United States v. Holman*, 131 Fed. Appx. 314 (2d Cir. 2005); *United States v. Maggiore*, 125 Fed. Appx. 343 (2d Cir. 2005); *United States v. Soler*, 124 Fed. Appx. 62 (2d Cir. 2005); *United States v. Forbes*, 124 Fed. Appx. 45 (2d Cir. 2005). *Crosby* was written by this Court to explain and implement the directives of the Supreme Court in *Booker*. When a *Crosby* remand is ordered, it is done in recognition that a defendant’s Sixth Amendment rights have been violated and that the district court is free, if it should so choose, to impose a lesser sentence. The district court is directed to consider the factors under 18 U.S.C. § 3553 in evaluating an appropriate sentence.

Scope Of A *Crosby* Remand Under *Booker*

Booker held that the mandatory nature of the Guidelines violates the Sixth

Amendment. As a consequence, the Supreme Court excised provisions of the Federal Sentencing Reform Act of 1984 that make the Guidelines mandatory. Such provision includes 18 U.S.C. § 3553(b)(1), which mandated use of the Guidelines. A sentencing court must now “consider” the applicable Guideline range along with the requirements and statutory factors set forth in 18 U.S.C. § 3553(a).

_____ Under 18 U.S.C. § 3553(a), a Court must determine whether there are facts that favor a “non-Guideline” sentence. 18 U.S.C. § 3553(a) is comprised of two distinct parts. The so-called “sentencing mandate” contained in the prefatory clause of § 3553(a) and the “factors” for fulfilling that mandate. The basic mandate of § 3553(a) requires district courts to impose a sentence “*sufficient but not greater than necessary*” to comply with the four purposes of sentencing set forth in § 3553(a)(2).

- (a) retribution (to reflect the seriousness of the offense, to promote respect for the law, and to provide “just punishment”);
- (b) deterrence;
- (c) incapacitation (“to protect the public from further crimes”); and
- (d) rehabilitation (“to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner”).

The *sufficient-but-not-greater-than-necessary* requirement is often referred to as the “parsimony provision.” Said requirement is not just another “factor” under § 3553(a) - it sets an independent limit on the sentence that a court may impose. After *Booker*, the controlling sentencing law states that the sentencing court “shall impose” a sentence that is “sufficient but not greater than necessary “to satisfy the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2) after “consider[ing]” a specific list of factors, only one of which is the advisory guideline range.

Neither the statute nor *Booker* suggest that any one factor set forth in 18 U.S.C. § 3553(a) should be given greater weight than any other. This Court has held that the Guidelines are not presumptively reasonable. *United States v. Fernandez*, 443 F.3d 19 (2d Cir. 2006). All factors are subservient to § 3553(a)'s mandate to impose a sentence *sufficient but not greater than necessary* to comply with the four purposes of sentencing.

In *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005), this Court provided important guidance concerning the selection of a sentence under *Booker*:

- (1) the Guidelines are no longer mandatory;
- (2) the sentencing judge must consider the Guidelines and all of the other factors listed in 18 U.S.C. § 3553(a).
- (3) consideration of the Guidelines will normally require determination of the applicable Guideline range;
- (4) the sentencing judge is entitled to find all of the facts appropriate for determining either a Guideline sentence or a non-Guideline sentence.

United States v. Crosby, 397 F.3d 103, 113 (2d Cir. 2005).

18 U.S.C. § 3553(a) sets forth the factors that a court must now consider, in addition to the Guidelines, when imposing a sentence. Section 3553(a) provides:

- (a) Factors to be considered in imposing a sentence. The purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider - - -
 - (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
 - (2) the need for the sentence imposed - -
 - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense.

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

(3) the kinds of sentence available and the sentencing range established for - -

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines - -

(i) issued by the Sentencing Commission pursuant to Section 994(a)(1) of Title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under Section 994(p) of Title 28; and

(ii) that, except as provided in Section 3742(g), are in effect on the date the defendant is sentenced; or

(B) In the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to Section 994(a)(3) of Title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under Section 994(p) of Title 28);

(5) any pertinent policy statement - -

(A) issued by the Sentencing Commission pursuant to Section 994(a)(2) of Title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under Section 994(p) of Title 28; and

(B) that, except as provided in Section 3742(g), is in effect on the date the defendant is sentenced.

- (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
- (7) the need to provide restitution to any victims of the offense.

Significantly, *Crosby* did not concern the issue of whether a statutory minimum barred re-sentencing. It assumed that the district court held the power to consider re-sentencing and gave directions for that consideration. For example, under § 3553(a)(6), a court may correct “unwarranted disparities” in sentencing to promote “somewhat more individualized justice.” See, *Crosby*. In the case at bar, the district court acknowledged that there was likely an unjust disparity between Ricky Blue’s life sentence and Guerrero’s lesser sentence, who was clearly more culpable.

In addition, Ricky Blue presents a low risk of recidivism due to his age. See 18 U.S.C. § 3553(a)(2)(c). Numerous courts have recognized that a defendant who is middle-aged and older statistically presents a much lower risk of recidivism, and therefore a lesser sentence is warranted. See, *United States v. Bariiek*, 2005 WL 2334682 (E.D. Va. 2005) (Guideline sentence was greater than necessary where defendant was older and thereby there was no indication that he posed a significant risk of recidivism); *United States v. Lucania*, 379 F.Supp.2d 288, 297 (E.D.N.Y. 2005) (“post-*Booker* courts have noted that recidivism is markedly lower for older defendants.”); *United States v. Carmona-Rodriguez*, 2005 WL 840464, *4 (S.D.N.Y. 2005) (55 year-old defendant received sentence below guideline range in part “in view of the low probability that [she] will recidivate.”); *Simon v. United States*, 361 F.Supp.2d 35 (E.D.N.Y. 2005) (same); *United States v. Nellum*, 2005

WL 300073 (M.D. 2005) (57-year old defendant sentenced below guideline range, court noting that recidivism rate for older defendants is much less and that “the guidelines failure to account for this phenomena renders it an imperfect measure of how well a sentence protects the public from further crimes” of the defendant with “the likelihood of recidivism by a 65-years old [being] very low.”). U.S. Sentencing Commission,, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines*, 112 (May 2004), available at <http://www.ussc.gov/research.htm> (*Measuring Recidivism*). (Rates of recidivism consistently decline as age increases, from 35.5% under age 21 to 9.5% over age 50). The Parole Commission’s Salient Factor Score likewise confirms that a defendant’s increasing in age, coupled with a fewer number of prior commitments, decreases the likelihood of recidivism, and that defendants over 41 years of age are automatically entitled to a reduction in their score. See, U.S. Sentencing Commission, *A Comparison of the Federal Sentencing Guidelines Criminal History Category and the U.S. Parole Commission Salient Factor Score* 8, 13-15, <http://www.ussc.gov/publicat/RecidivismSalientFactor.Com.pdf>.

Likewise, employment, education and marital status are linked to the rate of recidivism. U.S. Sentencing Commission, *Measuring Recidivism*, 12 and Exhibit 10 (May 2004).

Mr. Blue was born on May 13, 1954. He is now 51 years of age. *Id.* He has been in a relationship with Debra Johnson for the past 26 years and is the father of three children, one of which is a police officer. (PSR, para. 73). After graduating from high school, he served in the United States Army and was honorably discharged (PSR, para.

78). Before becoming self-employed as a landlord of several low-income properties, Ricky blue had steady employment for nearly a decade with Kodak (PSR, para. 79). He had no prior criminal record. Based on the foregoing, he is a low risk of recidivism. Therefore, there exists little need to protect the public from further crimes from Mr. Blue. When considering a sentence that is no greater than is necessary, a lesser sentence than that called for by the Guidelines was warranted.

The Exceptions In *Quintieri*

In *Quintieri*, this Court identified the following exceptions to the rule that a district court's authority on remand is limited: (1) if an issue had no practical effect at the initial sentencing but becomes relevant due to the outcome of the appeal, a party may raise the issue on remand; (2) "even when a remand is limited, an issue may be raised if it arises as a result of events that occur after the original sentence"; (3) courts may "depart from the law of the case and reconsider their own decisions for cogent and compelling reasons if those decisions have not been ruled on by the appellate court; or (4) the "spirit of the mandate" requires re-sentencing *de novo* "when the reversal effectively undoes the entire "knot of calculation" of the initial sentencing. *Id.* at 1228-30.

The four exceptions that this Court identified in *Quintieri* do not apply. Obviously, the statutory minimum had a practical effect on the initial sentencing. The issue regarding the statutory minimum did not arise as a result of events that occurred after the original sentence. There are no cogent or compelling reasons to reconsider the issue. Rather, the issue was expressly conceded by the Government on the first appeal. Finally, re-sentencing would not undo the "knot of calculation" of the initial sentencing. Rather, the district court strongly indicated that it would impose a lesser sentence if it had the power to do so.

POINT III

UNDER 21 U.S.C. § 848, DRUG QUANTITY IS AN ELEMENT OF AN AGGRAVATED CRIME AND THE JUDICIAL FINDING ON SUCH ELEMENT VIOLATED RICKY BLUE'S SIXTH AMENDMENT RIGHT TO A JURY TRIAL

Section 848 of Title 21 of the United States Code sets forth the crime of engaging in a "Continuing Criminal Enterprise" ("CCE"). Subsection (a), entitled "Penalties, Forfeitures," states that "any person who engages in a Continuing Criminal Enterprise shall be sentenced to a term of imprisonment which may not be less than twenty years and which may be up to life imprisonment. Subsection (a) does not set forth the elements of the crime. Rather, subsection (a) must be interpreted by reference to one or more other subsections of the statute to ascertain the elements of the crime.

Significantly, an examination of the structure of Section 848 reveals an intent by Congress to create three crimes with separate elements, each of varying degree of severity. The crimes are set forth in Subsections (b), (c) and (d), respectively. Each subsection is complete in describing the elements of each crime. As described below, the least severe crime is set forth in subsection (c), violation of which will lead to a sentence of twenty years to life. A more severe crime is set forth in subsection (b), violation of which will result in a mandatory minimum sentence of life imprisonment. Finally, the most severe crime is set forth in subsection (d), violation of which may result in the death penalty.

Subsection (c) of 21 U.S.C. § 848, entitled "Continuing Criminal Enterprise' defined," states:

For purposes of subsection (a) of this section, a person is engaged in a Continuing Criminal Enterprise if - -

(1) he violates any provision of this sub-chapter or sub-chapter II of this chapter the punishment for which is a felony, and

(2) such violation is a part of a continuing series of violations of this sub-chapter or sub-chapter II of this chapter - -

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.

21 U.S.C. § 848(c).

Significantly, subsection (c) follows subsection (b). Subsections (b)'s placement in between subsections (a) and (c) suggests that it is an aggravated crime with different elements, and not a sentencing factor. Specifically, subsection (b) states that "any person who engages in a Continuing Criminal Enterprise shall be imprisoned for life . . . , if - -

(1) such person is the principle administrator, organizer, or leader of the enterprise or is one of several such principle administrators, organizers or leaders; and

(2)(A) the violation referred to in subsection (c)(1) of this section involved at least 300 times the quantity of a substance described in subsection 841(b)(1)(B) of this title, or

(B) the enterprise, or any other enterprise in which the defendant was the principle or one of the several principle administrators, organizers, or leaders, received \$10 million dollars in gross receipts during any twelve-month period of its existence for the manufacture, importation, or distribution of a substance described in Section 841(b)(1)(B) of this title.

21 U.S.C. § 841(b).

Finally, subsection (e), entitled "Death Penalty," sets forth the most severe crime as follows:

(1) In addition to the other penalties set forth in this section - -

(A) any person engaging in or working in furtherance of a continuing criminal enterprise, or any person engaging in an offense punishable under section 841(b)(1)(A) of this title or section 960(b)(1) of this title who intentionally kills or counsels, commands, induces, procures, or causes the intentional killing of an individual and such killing results, shall be sentenced to any term of imprisonment, which shall not be less than 20 years, and which may be up to life imprisonment, or may be sentenced to death; and

(B) any person, during the commission of, in furtherance of, or while attempting to avoid apprehension, prosecution or service of a prison sentence for, a felony violation of this subchapter or subchapter II of this chapter who intentionally kills or counsels, commands, induces, procures, or causes the intentional killing of any Federal, State, or local law enforcement officer engaged in, or on account of, the performance of such officer's official duties and such killing results, shall be sentenced to any term of imprisonment, which shall not be less than 20 years, and which may be up to life imprisonment, or may be sentenced to death.

It is undisputed that in regard to Subsection (c) (the least severe crime), a jury must find each of the elements described therein beyond a reasonable doubt. *See, United States v. Ogando*, 968 F.2d 146 (2d Cir. 1992); *United States v. Simmons*, 923 F.2d 934 (2d Cir. 1991). In addition, it is well settled that a jury must find beyond a reasonable doubt the additional elements set forth in subsection (d) before a sentence of death may be imposed. *See, United States v. Walker*, 142 F.3d 103 (2d Cir. 1998) (defendants indicted in separate count for commission of murder while engaged in Continuing Criminal Enterprise in violation of 21 U.S.C. § 848(e)(1)(A). In *Walker*, this Court stated that the “jury had to find that four elements were present.”

It had to find that (1) Diaz was guilty of the narcotics conspiracy as charged in Count 4; (2) the drug conspiracy involved at least five kilograms of powder cocaine or fifty grams of crack cocaine, see 21 U.S.C. § 841(b)(1)(A); (3) while engaging in the drug conspiracy involving the specified quantity of drugs, Diaz either intentionally killed or counseled, demanded, induced, procured, or caused the intentional killing

of Michael Monsour; and (4) that the killing of Monsour actually resulted from Diaz' actions.

Based on the foregoing, it makes no sense that Congress would set forth two separate crimes in two subsections of 18 U.S.C. § 848 that must be submitted to a jury for determination beyond a reasonable doubt and yet intend the third subsection to describe only a sentencing factor that could be judicially found by a preponderance of the evidence/ Rather, the rules of statutory construction favor a consistent interpretation among the subsections. It is a well-settled rule of statutory construction that statutes may not be read in a manner that renders some of its language superfluous. *See, Babbitt v. Sweet Home Chapter of Cmty. for a Great Or*, 518 U.S. 687, 698 (1995); *Filler v. Hanvit Bank*, 378 F.3d 23 (2d Cir. 2004); *California Public Employees Retirement System v. World Com., Inc.*, 368 F.3d 86 (2d Cir. 2004); *Blumenthal v. United States Department of Interior*, 228 F.3d 82 (2d Cir. 2000) (a court is required to disfavor interpretations of statutes that render language superfluous); *United States v. Bernier*, 954 F.2d 818 (2d Cir. 1992) (courts must give effect to every word of a statute where possible); *Bell v. Reno*, 218 F.3d 86 (2d Cir. 2000) (a statute generally must not be construed so as to render a word or clause inoperative); *Apwu v. Potter*, 1148 F.3d 619 (2d Cir. 2003) (a basic tenant of statutory construction is that no sections should be interpreted so as to render any one section as inoperative, superfluous, void or insignificant); *United States v. Plaza Health Laboratories, Inc.*, 3 F.3d 6411 (2d Cir. 1993) (it is elemental that Congress does not add unnecessary words to statutes); *Auburn Housing Authority v. Martinez*, 277 3d 138 (2d Cir. 2002) (a court must interpret a statute so as to remain faithful to the words expressed by Congress in the whole statutory scheme, and a court is therefore not permitted to nullify unilaterally

statutory language).

Therefore, Ricky Blue could not be subject to the statutory minimum of life imprisonment under Subsection (b) unless the elements of said subsection had been determined by the jury beyond a reasonable doubt. They were not. The Indictment only charged, and the Government only proved to a jury, the elements of Subsection (c). Subsection (c) does not require a mandatory life sentence. The sentencing judge found the elements set forth in Subsection (B). Such finding violated Ricky Blue's rights under *Booker* and *Crosby*. The court below was incorrect when it determined that the statutory minimum barred re-sentencing.

The Foregoing Construction Of 21 U.S.C. § 848 Is Consistent With The Supreme Court's Construction of Similar Statutes

The Supreme Court recently held that similar statutes contain elements of a crime that must be proven to a jury and not sentencing factors. For example, in *Castillo v. United States*, 530 U.S. 120 (2000), the Supreme Court held that the section of a statute which increased the penalty for use or carrying of a "machinegun" stated an element of a separate, aggravated crime, and not a sentencing factor. Section 924(c)(1) of Title 18 of the United States Code stated, in pertinent part: "[w]hoever, during and in relation to any crime of violence . . . , uses or carries a firearm, shall in addition to the punishment provided for such crime . . . , be sentenced to imprisonment for five years, . . . and if the firearm is [, e.g.,] a machinegun, . . . to imprisonment for thirty years." The jury determined that the defendants had used or carried a firearm, but the jury was not asked to determine whether the firearm was a machinegun. Instead, the sentencing judge made such determination and imposed the mandatory thirty-year prison sentence.

In *Castillo*, the Supreme Court held that Section 924 (c)'s language, structure, context, history, and other factors led to the conclusion that the word "machinegun" was an element of a separate, aggravated crime. Among other things, the Supreme Court observed that the opening sentence of Section 924(c)(1) clearly established the elements of the basic federal offense of using or carrying a gun during a crime of violence. The Supreme Court also noted that Congress had placed such element and the word "machine gun" into a single sentence, not broken by dashes or separated into subsections. Therefore, the structure strongly suggested that the entire first sentence defined a crime. The Supreme Court also observed that it would not be difficult for a jury to determine whether a machinegun had been used or carried. Furthermore, the length and severity of the additional mandatory sentence for a "machinegun" weighed in favor of treating such offense-related words as referring to an element of a separate, aggravated crime.

Similarly, in *Jones v. United States*, 526 U.S. 227 (1999), the Supreme Court held that provisions of a carjacking statute that established higher penalties when the offense resulted in serious bodily injury or death set forth additional elements of the offense, and not sentencing factors. In *Jones*, the Supreme Court analyzed 18 U.S.C. § 2119, which at the time provided that a person possessing a firearm who "takes a motor vehicle . . . from the person or presence of another by force and violence or by intimidation . . . shall - (1) be . . . imprisoned not more than fifteen years . . ., (2) if serious bodily injury . . . results, be . . . imprisoned not more than twenty-five years . . ., and (3) if death results, be . . . imprisoned for any number of years up to life. . . ." The Indictment did not refer to numbered sections of 18 U.S.C. § 2119. Nor did the Indictment charge the aggravating facts identified subparagraphs (2) or (3) of the statute. The jury instructions at trial defined

the offense only by reference to subparagraph (1) of Section 2119. At sentencing, the judge imposed a twenty-five-year sentence because a victim had suffered serious bodily injury.

The Supreme Court in *Jones* observed that subparagraphs (2) and (3) not only provided for steeply higher penalties, but also conditioned their application on further facts (injury or death), and that such facts seemed as important as the elements set forth in the principal paragraph (force, violence, or intimidation). As such, the structure of Section 2119 supported an inference of separate aggravated crimes containing additional elements. The Supreme Court also observed that categories of important facts, like degree of injury to victims, are traditionally treated as elements. Finally, the Supreme Court reasoned that an alternative construction of Section 2119 would raise a serious constitutional question under the Fifth Amendment's Due Process Clause and the Sixth Amendment's notice and jury trial guarantees. Given such doubt, the issue of statutory construction should therefore be resolved in favor of avoiding the question, under the rule that, "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [the Court's] duty is to avoid the latter." *Id.*

As in *Castillo* and *Jones*, the structure of 21 U.S.C. § 848 strongly supports an intent by Congress to set forth elements of separate, aggravated crimes. In particular, subsection (c) and subsection (e) unquestionably set forth elements of separate crimes that must be proven to a jury beyond a reasonable doubt. Subsection (b) also requires findings of highly significant facts, such as whether the defendant had possessed "at least 300 times the quantity of a substance described in Section 841(b)(1)(B)." Therefore, based on the reasoning set forth in *Castillo* and *Jones*, this Court should construe Section

848(b) to contain elements, and not sentencing factors.

The Continuing Criminal Enterprise Statute Is Different From Statutes That Arguably Set Forth Sentencing Factors

The statutory structure of 18 U.S.C. § 848 is different from statutes that arguably set forth “sentencing factors” rather than “elements” of particular crimes. For example, when enacting a sentencing enhancement based on recidivism, Congress increased the sentences that may be imposed for “dangerous drug offenders” under the former 21 U.S.C. § 849, Pub. L. 91-513, 84 Stat. 1266. Said statute stated that contested issues on prior convictions were to be resolved “after conviction but before pronouncement of sentence.” See former 21 U.S.C. § 851(b), Pub. L. 91-513, § 411, 84 Stat. 1269-70. Such contested issues were to be determined in a “hearing . . . before the court without a jury.” *Id.* In such instance, the disputed fact would be determined by a judge and not by a jury. See also, *Almandarez-Torres v. United States*, 523 U.S. 224 (1998).

Recently, this Court interpreted 21 U.S.C. § 841(b) to determine whether the drug quantities listed therein are elements or sentencing factors. See, *United States v. Gonzalez*, 420 F.3d 111 (2d Cir. 2005) (“drug quantity is an element that must always be pleaded and proved to a jury or admitted by a defendant to support conviction or sentence of an aggravated offense under § 841(b)(1)(A) or - (b)(1)(B)”). See also, *United States v. Estrada*, 428 F.3d 387 (2d Cir. 2005) (where the maximum sentence remains constant, and the mandatory minimum sentence increases based on a determination of prior felony drug convictions, there is no Sixth Amendment violation).

Gonzalez and *Estrada* are distinguishable in that both dealt with 21 U.S.C. § 841 and not 21 U.S.C. § 848. *Gonzalez* and *Estrada* held that Section 841 contains the

elements of the crime in subsection (a) and the penalties for the crime in subsection (b). The Opinions hold that under such a statutory scheme, a defendant's Sixth Amendment rights to a jury trial are not violated unless the sentence imposed was for a drug quantity having a statutory maximum exceeding that authorized by the jury's verdict.

21 U.S.C. § 848 sets forth a different statutory scheme in which elements of the crime are set forth in different subsections that are to be read in the alternative. Based on such statutory scheme, the finding that the violation "involved at least 300 times the quantity of a substance described in subsection 841(b)(1)(B)" must be made by a jury beyond a reasonable doubt before the statute authorizes the imposition of a mandatory life sentence. (Also, subsection (b) requires a jury to find that the defendant was the "principal" administrator, organizer or leader.").

The foregoing construction of 21 U.S.C. § 848 is further compelled by the doctrine of constitutional avoidance. See, *Clark v. Martinez*, 543 U.S. 371 (2005) (where the language, structure and history of a statute are unclear and there is doubt about its meaning, the statute must be interpreted to accord with the Constitution, and not to violate it).

Although the Seventh Circuit in *Wilson v. United States*, 414 F.3d 829 (7th Cir. 2005) stated in dicta that a finding of drug quantity under 21 U.S.C. § 848 may be made by a sentencing judge, the court provided no reasoning for such conclusion. *Id.* at 831. In *Wilson* the court refused to expand the Certificate of Appealability to include a *Booker* claim, stating that the defendant's "life sentence is a statutory floor" and that "the Sixth Amendment permits judges to find facts to establish mandatory minimum sentences." Ricky Blue submits that such conclusion is in conflict with the clear intent of Congress in Section 848 which sets forth alternative crimes with separate elements..

POINT IV

ALTERNATIVELY, *HARRIS* IS IN DOUBT AND WILL BE OVERRULED

Ricky Blue recognizes that this Court may not overrule a decision of the Supreme Court of the United States. Nonetheless, to preserve his ability to challenge *Harris* on certiorari or at a later date, Ricky Blue herein challenges the validity of *Harris*.

In *Harris v. United States*, 536 U.S. 545 (2002), a four-member plurality (Kennedy, Rehnquist, O'Connor and Scalia), upheld judicial fact-finding that triggers a mandatory minimum sentence. The plurality was joined by Justice Bryer in a concurring opinion. In *Harris*, the defendant was convicted by a jury of carrying a firearm during and in relation to a drug-trafficking crime in violation of 18 U.S.C. § 924(c). At sentencing, the trial judge found that the defendant had “brandished” the firearm, thereby raising the applicable mandatory minimum sentence from five years to seven years. The plurality relied heavily on earlier case law holding that legislatures may freely designate facts as either elements or sentencing factors, absent an intent to evade constitutional protections. In regard to “brandishing” a firearm under Section 924(c), the plurality reasoned that said provision was a sentencing factor because (1) it was located in a subsection separate from the principal offense; (2) “brandishing” has not been traditionally treated as an element of the crime; and (3) the provision increased only a minimum sentence, and did so incrementally from five to seven years. *Id.* at 552-54.

The plurality in *Harris* held that the doctrine of constitutional avoidance was inapplicable because Congress presumably enacted the statute in reliance on *McMillan v.*

Pennsylvania, 477 U.S. 79 (1986), which holds that facts increasing the minimum sentence are not subject to Fifth and Sixth Amendment challenges. *Id.* at 555-56. Furthermore, the plurality held that *McMillan* is still viable despite *Apprendi*. *Id.* at 557-69.

The plurality in *Harris* observed that the maximum sentence under the statute of conviction was “well in excess of seven years,” and that the trial court had the power to exercise discretion in sentencing based on a variety of factors. *Id.* at 554-565,559. The plurality also stated that a legislature may dictate the precise weight that a sentencing judge must give to particular facts that establish the mandatory minimum sentence and that such fact-finding does not violate the Fifth and Sixth Amendment. *Id.* at 549, 558, 559, 567. The plurality reasoned:

Read together, *McMillan* and *Apprendi* mean that those facts setting the outer limits of a sentence, and of the judicial power to impose it, are elements of the crime for the purposes of the constitutional analysis.” *Id.* at 569. Within the range authorized by the jury’s verdict, however, the political system may channel judicial discretion - - and rely upon judicial expertise - - by requiring defendants to serve minimum terms after judges make certain factual findings.”

Id. at 567.

The dissent (Thomas, Stevens, Souter and Ginsberg) rejected the plurality’s interpretation of *Apprendi*, reasoning that when Congress sets the weight to be given a fact, such fact determines the “outer limits” of a sentence. As such, the fact must be pleaded and proved to a jury beyond a reasonable doubt.

Ricky Blue maintains that the Supreme Court will likely overrule its decision in *Harris*. Justice Breyer sided with the plurality to make the five-member majority despite his conclusion that he could not logically distinguish facts that would increase the minimum

from facts that would increase the maximum and that he disagreed “with the plurality’s opinion insofar as it finds such a distinction.” Nonetheless, Justice Breyer sided with the plurality because he had not “yet” accepted *Apprendi*. After *Harris*, Justice Breyer formulated the remedy in *Booker*. Justice Breyer used *Apprendi* as the basis for the *Booker* remedy. Therefore, logic should compel Justice Breyer to reverse his position if the issue in *Harris* is revisited.

Likewise, Justice Scalia will likely change the position that he took in *Harris* in that *Harris* is inconsistent with his positions in *Jones*, *Castillo* and *Apprendi*. Moreover, in *Blakely* and *Ring*, Justice Scalia spearheaded the Supreme Court’s rejection of the *McMillan* test for jury trial right which hinges on legislative labels. See, *Blakely v. Washington*, 542 U.S. 296 (2004); *Ring v. Arizona*, 536 U.S. 584 (2002). In *Blakely*, Justice Scalia declared that “facts essential to punishment” must be charged and proven to a jury beyond a reasonable doubt. Therefore, Justice Scalia’s position appears contradictory.

Ricky Blue contends that the holding in *Harris* defies logic and reason. It makes no sense that drug quantity may be an element when the statutory maximum increases but sentencing factor when the statutory maximum remains unchanged. Drug quantity is either an element or it is not. It does not depend on the fortuity of the manner in which the Government elects to charge a defendant on an indictment. In addition, the minimum sentence that may be imposed is usually the most critical consideration for any defendant. Facts that increase the statutory minimum sentence have an extremely significant effect on the nature and gravity of the crime charged. Therefore, facts that establish the

minimum should be elements that must be proved beyond a reasonable doubt to a jury. See Sentencing Post-Booker,” by Amy Baron-Evans, National Defender Sentencing Resource Counsel (Apl. 10, 2006), available at <http://www.fd.org>.

CONCLUSION

Based on the foregoing, Ricky Blue submits that his sentence should be remanded with instruction that the district court has the power to sentence Ricky Blue to a lesser sentence upon a consideration of the factors in 18 U.S.C. § 3553.

Respectfully submitted by:

BRUCE R. BRYAN, ESQ.
Attorney for Defendant-Appellant,
Ricky Blue,
333 East Onondaga Street
Syracuse, New York 13202
(315) 476-1800

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES OF AMERICA,

vs.

RICKY BLUE,

Defendant-Appellant,

Docket No.: 05-5189-cr(L)
05 - 5456 - c r
(conspiracy)
05 - 5533 - c r
(conspiracy)

CERTIFICATE OF COMPLIANCE

BRUCE R. BRYAN, ESQ., being duly sworn, deposes and says:

Pursuant to amended Federal Rule of Appellate Procedure 32, this Certificate of Compliance is furnished to set forth the number of words contained in the reply brief submitted by the Appellant, Ricky Blue. Based on information supplied by my typist, the brief of the Appellant, Ricky Blue, complies with amended Federal Rule of Appellate Procedure 32, in that it contains 9,539 words, exclusive of cover, table of contents, and table of citations. The foregoing is Arial type and based on my measurement contains ten and one-half characters per inch.

BRUCE R. BRYAN, ESQ.

Sworn to before me this
____ day of July, 2006.

Notary Public

ANTI-VIRUS CERTIFICATION FORM

See Second Circuit Local Rule 32J(a)J(1)(E)

CASE NAME: *United States v. Blue*

DOCKET NUMBER: 05-5189-cr(L); 05-5456-cr (conspiracy); 05-5533-cr (conspiracy)

I, Bruce R. Bryan, Esq., certify that I have scanned for viruses the PDF version of the

Appellant's Brief

Appellee's Brief

Reply Brief

Amicus Brief

that was submitted in this case as an email attachment to briefs@ca2.uscourts.gov and that no viruses were detected.

Please print the **name** and **version** of the anti-virus detector that you used

Symantec Anti-Virus

If you know, please print the **version of revision and/or the anti-virus signature files**.

(Your signature) _____

Date: July 12, 2006

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES OF AMERICA,

vs.

(conspiracy)
RICKY BLUE,

Defendant-Appellant.

Docket No.: 05-5189-cr(L)
05 - 5456 - c r
05 - 5533 - c r
(conspiracy)

STATE OF NEW YORK)
COUNTY OF ONONDAGA) ss.:

BRUCE R. BRYAN, ESQ., being duly sworn, deposes and says:

That on the _____ day of July, 2006, I served by first-class mail one copy of the
Appellant's brief on the following:

Douglas F. Gregory, Esq.
Assistant United States Attorney
United States Attorney's Office
Western District of New York
100 State Street
Rochester, NY 14614

BRUCE R. BRYAN, ESQ.

Sworn to before me this ____
day of July, 2006.

Notary Public

Bruce R. Bryan

Attorney at Law

*Member
New York and
Florida Bar*

*333 E. Onondaga Street
Syracuse, New York 13202
315-476-1800
Fax 315-474-0425*

July 12, 2006

Douglas F. Gregory
Assistant United States Attorney
United States Attorney's Office
Western District of New York
100 State Street
Rochester, NY 14164

RE: *United States v. Ricky Blue*
Docket No.: 05-5189-cr(L); 05-5456-cr ; 05-5533-cr

Dear Greg:

Enclosed please find for service two copies of the Appellant's brief in the above-referenced appeal.

Very truly yours,

Bruce R. Bryan

BRB:ars
Enclosure

Bruce R. Bryan

Attorney at Law

*Member
New York and
Florida Bar*

*333 E. Onondaga Street
Syracuse, New York 13202
315-476-1800
Fax 315-474-0425*

July 12, 2006

Clerk
United States Court of Appeals
Second Circuit
United States Courthouse
40 Centre Street, Room 1803
New York, NY 10007

RE: *United States v. Ricky Blue*
Docket No.: 05-5189-cr(L); 05-5456-cr; 05-5533-cr

Dear Clerk:

Enclosed please find for filing ten copies of the Appellant's brief in the above-referenced appeal, together with affidavit of service.

Very truly yours,

Bruce R. Bryan

BRB:ars
Enclosure

**05-5189-cr(L),
05-5456-cr (conspiracy), 05-5533-
cr (conspiracy)**

**UNITED STATES COURT OF APPEALS
SECOND CIRCUIT**

UNITED STATES OF AMERICA,

Appellee,

vs.

BRUCE BLUE, SOLOMON RENFROE, LEONARD SMITH,
JANEIRO H. TARVER, DEXTER CLAYTON, WILLIE BROCKINGTON,
TYRONE HOLTON, EILEEN MARQUEZ, ROSCOE SKINNER and
SHAWN WOODY,

Defendants,

TIMOTHY GIVENS, LEE BLUE, RICKY BLUE,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

**APPENDIX OF DEFENDANT-APPELLANT,
RICKY BLUE**

BRUCE R. BRYAN, ESQ.
Attorney for Defendant-Appellant,
Ricky Blue
Office and P.O. Address
333 East Onondaga Street
Syracuse, New York 13202
(315) 476-1800

TABLE OF CONTENTS

| | Page No. |
|---|----------|
| Index to the Record on Appeal | 1 |
| Indictment | 43 |
| Excerpts From Trial Transcript | 64 |
| Excerpts From Jury Instructions | 124 |
| Verdict | 131 |
| Sentencing Transcript, dated February 18, 2003 | 135 |
| Notice of Appeal, dated March 5, 2003 | 152 |
| Judgment of Conviction, entered March 4, 2003 | 154 |
| Notice of Entry, dated March 4, 2003 | 162 |
| Excerpts from Appellant's Brief (First Appeal) | 163 |
| Excerpts from Government's Brief (First Appeal) | 168 |
| Summary Order in <i>United States v. Blue</i> , 2005 WL 1317015 (2d Cir. 2005) | 171 |
| Government's Memorandum on Remand, dated July 22, 2005 | 173 |
| Defendant's Memorandum on Remand, dated August 31, 2005 | 181 |
| Order (Siragusa, J.), dated September 15, 2005 | 188 |
| Transcript of Post-Trial Proceeding (Remand for Re-sentencing Consideration, dated September 6, 2005 | 189 |
| Notice of Appeal, dated October 14, 2005 | 213 |
| Order (Siragusa, J.) Granting Extension to File Notice of Appeal | 214 |