UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA, Appellee,

- V -

BRANDON GREEN, PRO SE, Appellant.

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Nos. 21-1896 (L.), 21-1923 (Con.)

SUPPLEMENTAL ISSUES

I. Introduction

The Appellant, Brandon Green, pro se, would like to supplement his supplemental brief with some meritorious issues recently discovered by him, and which are not being raised by his appellate counsel. Specifically, these issues are:

1.) Whether his 235-month sentence for Count Four (the Narcotics Conspiracy) is in excess of the statutory ten (10) year minimum for a Section 841(b)(1)(A)(iii) offense, where (a) the jury wasn't instructed that drug quantity was an element of the offense that (b) must be proved beyond a reasonable doubt;
2.) Whether the District Court erred in giving Green a sentencing enhancement for his allegedly being an organizer or leader; whether the Government proved this (i.e., that Green was an Organizer or Leader); and, whether the evidence relied upon was legally sufficient;
3.) Whether the Section 924(c) statute covers more than one predicate attached to one 924(c) offense and should that conviction be vacated because the Government charged both a crime of violence and a drug trafficking offense, or two predicate offenses attached to one 924(c) count; and, whether the rule of lenity applies.

II. Discussion

1. Green's' 235-Month Sentence on Count Four, the Narcotics Conspiracy, is in Excess of the Statutory Ten (10) Year Minimum for a Section 841(b)(1)(A)(iii) Offense, Because the Jury Wasn't Instructed that Drug Quantity was an Element of the Offense that had to be Proven Beyond a Reasonable Doubt

A. A Brief Discussion

Green argues that the jury failed to find the require one kilogram or more heroin, five kilograms or more of cocaine, and 280 grams or more of cocaine base "beyond a reasonable doubt" and that these amounts were not submitted to the jury as "elements" of the offense of 21 U.S.C. Sec. 841(b)(1)(A)(iii), and 846. And this violated Green's sixth amendment right to have a jury determine every element of the offense beyond a reasonable doubt. This was also done in violation of United States v. Thomas, 274 F.3d ____ (2001) (which held that if the government or court imposes a sentence beyond the maximum of 841(a) offense, quantity is an element of the offense that must be submitted in the indictment and proved to the jury beyond a reasonable doubt.). Here, this didn't happen. And without this sentencing error Green's sentence could not have exceeded the mandatory minimum of 10 years or 15 years (one prior conviction). Moreover, because Count One (the RICO Conspiracy) was based on Count Four, the sentence on that count also would have been 10 or 15 years.

B. Relevant Facts

i. The Indictment

Count Four of the indictment charged Brandon Green, inter alios, with a conspiracy to possess with intent to distribute controlled substances in violation of 21 U.S.C. Sec. 841(a). The controlled substances involved in the offense were: (a) 280 grams and more of mixture and substances containing a detectable amount of cocaine base…in violation of section 841(b)(1)(A);(b) one kilogram and more of a mixture and substances containing a detectable amount of heroin,…841(b)(1)(A); and (c) five kilograms or more of a mixture and substances containing a detectable amount of cocaine; and (d) less than fifty kilograms of marijuana, in violation of . . . 841(b)(1)(d). (See Doc. 418).

ii. Government's Closing Arguments

As to Count Four the Government didn't argue that any of the drug quantities were an element of the offense that had to be proven beyond a reasonable doubt. Instead, the Government argued to the jury during closing that:
"Count Four…I have the elements of this count up on the slide. And again, you should follow judge Gardephe's instructions. I expect that he will tell that there are two elements to a narcotics conspiracy: first, whether there was an agreement or understanding between two or more people to violate the narcotics laws; and second for each defendant individually, did he intentionally and knowingly become a member of that conspiracy…" AUSA Ms. Nichols (Trial Tr. at. 3322, 3324). "You must then determine what the type and amount of drugs the defendant is personally responsible for. And you will see when you get the verdict form, you

will see there are places for you to indicate your finding about that, for each type of drug. And you will see that the defendants here are charged with cocaine, crack cocaine, heroin, and marijuana. And you will see the amounts are 280 grams or more…for heroin, it's one kilogram or more,…you will not be asked a question about the amount of marijuana…I expect that what he will tell you is that you don't have to determine exact quantities of controlled substances involved in the conspiracy; you just have to decide whether the conspiracy involved more than these amounts of drugs were reasonable foreseeable to each defendant within the scope of the criminal activity that he jointly undertook." id.

iii. Jury Instructions

On Count Four the District Court instructed the jury as follows: "I have previously instructed you on the federal law of conspiracy and on the law concerning the distribution of controlled substances and the possession of controlled substances with the intent to distribute them. Those instrcutions apply here. If you find that the government has proven beyond a reasonable doubt that the defendant you are considering is guilty of the charged narcotics conspiracy, then you will be asked -- on the verdict form -- to indicate your findings as to the type and quantity of controlled substances involved in the defendant's offense. You will not be asked the precise quantitites of controlled substances invovled in the defendant's offense. Instead, you will be asked to state whether the defendant was personally involved with certain specified amounts of controlled subtances, or whether it was reasonable to him that the conspiracy of which he was a part involved -- over the duration of the conspiracy -- certain specified amounts of controlled substances. With respect to cocaine base, which is commonly known as "crack", the specified amounts are 280 grams or more, five kilograms or more, ... "You will not be asked to make a finding with respect to the quantity of marijuana involved in the charged conspiracy. Your finding as to the type and quantity of controlled substance must be unanimous…In making your determination about quantity you should include whatever quantity controlled substances was involved in any act or acts in which the particulat defendant you are considering personally and directly participated. If you find that a defendant personally or directly participated in a jointly undertaken drug transaction, he is responsible for the full quantity of drugs involved in that transaction." "With respect to any act or act in which the defendant you are considering was personally involved, you need not find that he knew what type fo drug was involved or that he knew the exact quantity of drug that wa involved, he need only know that the substance involved in the offense was drugs. In making your determination about drug quantity, you should include any quantity involved in the conspiracy so long as that quantity of drugs was wither known to the defendant or reasonably foreseeable to him and

within the scope of the conspiracy. "Reasonably foreseeable" means that the defendant could have reasonably anticipated the type and quantity of drugs invovled in the conspiracy." (id. at 3636-3637; also see, Jury Instructions, Pg. 52, "Special Interrogatory Cocerning Drug Type and Quantity").

The District Court went on to instruct the jury on the narcotics conspiracy offense as follows: "To prove that a defendant is guilty of conspiracy to distribute or possess with intent to distribute controlled substances, the government must prove beyond a reasonable doubt: First, that there was an agreement or understanding between two or more people to violate those provisions of the federal law that make it illegal to distribute controlled substances or to possess controlled substances with the intent to distribute them. And second that the defendant you are considering intentionally and knowingly became a member of that conspiracy; that is, he knowingly associaited himself with a conspiracy and participated in the conspiracy to distribute controlled substances or possess controlled substances with the intent to distribute them." (id.) The District Court further instructed the jury that: "You should be aware that the government is not required to prove the conspiracy invovled all four charged controlled substances. Proof that the alleged conspiracy involved any one of the charged controlled substances is sufficient. Similarly, the government need prove only that the objective of the conspiracy was either to distribute or posess witht the intent to distribute one or more controlled substances listed in the indictment."…. The quantity and purity of the drugs are not elements of the controlled substances act of racketeering . . .(id.).

iv. Jury Verdict Form

Regarding drug quantity and Green's conviction the Verdict Form doesn't instruct the jury that they must find the drug quantities beyond a reasonable doubt. Instead, there is only discussion as to amounts being "reasonably foreseeable" to him. (See Doc. 570 (Verdict Form) ("If you have found the defendant guilty of Count Four, did the defendant either have personal involvement with, or was it reasonable foreseeable to him that the conspiracy involved, the following amounts of controlled substances: 5 kilograms of more of cocaine; 280 grams or more of crack cocaine; 1 kilogram or more of heroin; and any quantity of marijuana").

v. Rule 35(a) Motion

Green raised these and similar sentencing issues in a Rule 35(a) motion he filed in the District Court. (See Doc. 1064).

C. Argument

Green argues that his sentence of 235 months is in excess of the 120 months (10 years) that's applicable to the offense of conviction because the jury wasn't instructed that the drug quantities were elements of the offense that must be proved beyond a reasonable doubt. Therefore, he argues that he should be resentenced under 21 U.S.C. Sec. 841(b)(1)(c).

1. Standard of Review

Green submits that because he raised this issue before the District Court at sentencing, and in his Rule 35(a) motion, that this Court should review for harmless error. See United States v. Cordoba-Murgas, 422 4.3d 65, 69 (2d Cir. 2005)("holding that "[i]n as much as the defendant raised the Apprendi claim before the district court at sentencing, the alleged error is preserved, and we review not for plain error but under the harmless error standard of review."). Otherwise, this issue should be reviewed under the plain error standard. See United States v. Silver, 203 F. Supp. 3d 370 (S.D.N.Y. Aug. 25, 2026).

2. Effect on Substantial Rights

Green states that this claim is a sentencing error only and should be reviewed as such. That is once it is determined that there was an error that affected his substantial rights, this Court should remand for resentencing. Green further argues that his substantial rights were affected because the court sentenced him to 235 months--nearly 5 years in excess of the 15-year statutory minimum for an 841(b)(1)(A) offense with one prior conviction.

3. Drug Quantity is an Element Under 21 U.S.C. Sec. 841

In Apprendi, the Supreme Court announced that "other than a fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proven beyond a reasonable doubt." 530 U.S. at 490. In Thomas, this Court applied Apprendi to the federal narcotics law, finding that "after Apprendi-drug type and quantity are elements of the offense under 21 U.S.C. Sec. 841 that must be charged in the indictment and submitted to the jury for its finding beyond a reasonable doubt" when they raised a potential penalty above the otherwise applicable statutory maximum. 274 F.3d at 673.

The Supreme Court extended this principle to mandatory minimums. Alleyne v. United States, 133 S.Ct. 2151, 2158 (2013) (holding that factual determinations that increase maximum or minimums other than a prior conviction must be found by a jury beyond a reasonable doubt or admitted by the defendant.). Because the quantity of drugs alleged in the indictment affects Green's minimum

sentence under 841, it must be submitted in the indictment found by a jury beyond a reasonable doubt. See Alleyne, 133 S.Ct. at 2155 ("Mandatory minimum sentences increase the penalty for a crime it follows, then that any fact that increases the mandatory minimum is an 'element' that must be submitted to a jury."). However, this didn't happen here.

Now, although the drug quantites were submitted in the indictment, they were not submitted to the jury as elements of the offense that needed to be proved beyond a reasonable doubt. (See, e.g., Government's Closing Arguments to jury, Trial Tr. at 3322 (where Government only stated two elements of a Narcotics Conspiracy, with no reference to quantites). However, in United States v. Thomas, 274 F.3d ____ (2001), the court held that under 21 U.S.C. Sec. 841 for an aggravated offnese, drug quantity was an "element" of the offense that must be submitted to the jury and proven beyond a reasonable doubt. id. at 673.

4. The District Court Erred in Failing to Instruct the Jury that Drug Quantity Was an Element of the Offense that Must be Proved Beyond a Reasonable Doubt

The reasonable doubt standard stems from the Fifth Amendment's due process clause and is interwoven with the Sixth Amendment's promise of a jury verdict. See Sullivan v. Louisiana, 508 U.S. 275, 278 (1993) ("It would not satisfy the sixth amendment to have a jury determine that the defendant is probably guilty, and then leave it up to the judge to determine . . . whether he is guilty beyond a reasonable doubt."). It is threrefore settled that in a criminal case, a vital part of a judge's responsibility is to provide the "reasonable doubt" charge to the jury. See Dunn v. Perin, 570 F.2d 21, 25 (1st Cir. 1978) (internal citations omitted). Indeed, whether a trial judge fails to instruct the jury that all the elements of the charged crime must be proven beyond a reasonable doubt, a finding of reversible plain error may be proper. See United States v. Hellman, 560 F.2d 1235, 1236 (5th Cir. 1977). Moreover, this, along with Apprendi, Alleyne, and Thomas, establish that the District Court was supposed to instruct Green's jury that it was required to find the drug quantities attributable to the defendant beyond a reasonable doubt. See United States v. Delgado, 744 F.3d 167, 168 (1st Cir. 2014)(Defendant who received a mandatory minimum sentence of 10 years where the jury found 5 kilograms or more of cocaine - the 10-year mandatory minimum sentence under Sec. 841(b)(1)(A) violated Alleyne because the jury was not instructed that the drug quantity was an element that the government must prove beyond a reasonable doubt. The court stated "his sentence cannnot stand in light of the Supreme Court decision in Alleyne."). Similarly, Green's sentence should also be vacated.

2. The District Court Shouldn't Have Enhanced Green's Sentence For His Allegedly Being An Organizer or Leader; Especially Because the Government Failed to Prove This

A. Relevant Facts

1. The Trial Evidence

Green submits that there was absolutely no relieable evidence introduced at his trial to show that he was any type of organizer or leader. In fact, the only "evidence" offerd by the Government at trial regarding this was the testimony of the Government's very unreliable and unbelievable cooperating witness(es) ("CW"). For instance, their CW, Michael Adams, testified that Green was the acting godfather when he was introduced to him by Latique Johnson (the undisputed godfather). However, this didn't make any sense because the only time there is an acting godfather is if the actual godfather is incarcerated. Furthermore, the only other evidence offered by the Government to support their claims that Green was an organizer or leader was more testimony from Adams, as well as some other CWs, who claimed that Green held various leadership positions. But they didn't have anything else to support this. It was just their unbelievable, contradictory, and often inconsistent testimonies. Moreover, because Green and his appellate Counsel already pointed out several issues with the testimony of the Government witnesses, and the problems with the proceedings in general, he will not restate all this here.

2. The PSR

The Pre-Sentence Investigation Report (or "PSR") states in Paragraph 68, "adjustment for role in the offense," that: "The defendant was an organizer or leader of a criminal activity that involves five or more participants..." Green, however, objected to the PSR in its entirety, and to any such enhancements; and he continues to do so, and to maintain that such claims are unfounded.

3. The Sentencing Hearing

Following a lengthy trial, and even lengthier post-trial proceedings, Green was finally sentenced on July 22, 2021. Furthermore, when imposing his sentence the District Court applied a four-level enhancement, recommended by the Government and probation department, for Green's allegedly being an organizer or leader of a criminal activity that involves five or more persons. (See July 22, 2021,

Sent'g Hr'g Tr. at 38). However, Green objected to this. (See id. at 38-39). Nevertheless, the court overruled his objections, stating that "[h]is leadership role in the Blood Hound Brims was established through credible witness testimony, as explained on September 17, 2019, Opinion, Docket No. 743, at pages 7-8.". Green disagrees.

B. Insufficient Evidence to Support Giving Green an Enhanced Sentence for Being and Organizer or Leader

Now, Green submits that the Government witnesses who were used to attempt to establish his leadership roles were not credible. For example, Michael Adams testimony at trial was a bunch of lies; including his claims that Green held leadership positions in the Gang. For instance, even the District Court admitted that there wasn't any evidence showing that Green was involved in the Gang prior to 2010;[1] however, Adams claims to have met him in 2011, and that when he met him, he (Green) was the acting godfather, and that he was introduced to him by Johnson (the undisputed godfather). Green argues that it doesn't make any sense what Adams said for a few reasons: One, there is only an acting godfather when the godfather is incarcerated; and two, how is it that Green could have gone from having no position in the Gang to being at the top in less than one year. The thing is this, Adams is lying. Furthermore, as Green and his appellate counsel pointed out in their breifs, the other Government CWs' cannot be believed, either. The testimony from the Government's many CWs', which is what their case against Green was based primarily upon, was contradictory, inconsistent, and at times outright unbelievable. Furthermore, it wasn't corroborated by anything or anyone; at least nothing or no-one reliable. And the Government's contentions that Green was some type of organizer or leader are no exception to this. However, the District Court relied upon this when enhancing Green's sentence for his allegedly being an organizer or leader. (See July 22, 2021, Sent'g Hr'g Tr. at 38-40, 47, 53). Specifically, the District Court stated that: "Between 2011 and 2012, Mr. Green served as the acting godfather of the gang. At other times during his tenure in the Brims, Mr. Green held leadership positions in the Bronx subdivision of the gang[.]" (id. at 47 (internal citations omitted)). And this was based solely upon the testimony of the Government's CWs'. But it wasn't reliable. Green argues that the Government failed to prove by a preponderance of evidence that he was an

[1] An email exchange between the government and probation department shows that they applied a 4 point leadership enhancement without any supporting facts. This email, from AUSA Alison Nichols to the Probation Department on Thursday, June 13, 2019; 11:22am states, “Green joined BHB when he was in federal prison some time between 2006 to 2010. He eventually rose to the rank of the godfather for the feds, the highest rank for the branch of the gang in the federal prison system before his release in 2010. We don’t have an exact year.”

organizer or leader; and that the District Court erroneously relied upon unbelievable testimony of the Government's CWs' when deciding to enhance his sentence for this. Specifically, there wasn't any evidence that Green guided events or directed others; instead, it was primarily testimony about alleged drug transactions. And as Green previously stated and he and his appellate counsel pointed out, that testimony was extremely questionable and unreliable. See e.g., United States v. Caballero, 93 F.3d 209, 219-20 (S.D.N.Y. 2015)(Casetl, J.)(Concluding the Government had not proven by a preponderance of the evidence the defendant acted as a manager or supervisor by guiding events or directing others but rather identified potential methamphetamine purchasers); see also, United States v. Rosa, 11 F.3d 315 (2d Cir. 1993)(remanding because the district court made not factual finding on the issue of the defendant's leadership role).

3. More Than One Predicate Offense Should Not Have Been Attached to the 924(c) Offense

A. A Brief Discussion

Because of all the space used by Green thus far he will keep this issue to a minimum. Essentially, what Green is arguing here is that the Government should not have charged both a crime of violence and drug trafficking predicates to the Section 924(c) count Green was charged with. He argues that the way the statute is written, only more than one predicate should not be attached to this charge, and or that the rule of lenity should apply to this.

III. Conclusion

In the event that this Court does not vacate/remand his convictions for the issues presented by him and his appellate Counsel in their various briefs, or otherwise grant him relief for those issues, then he asks that this Court vacate his sentence, and remand his case for resentencing, absent a leadership role, and under the lowest possible sentencing range for a cocaine, heroin, and crack convictions, under 21 U.S.C. Sec. 841(b)(1)(C). Also, the Section 924(c) offense should be vacated because more than one predicate was attached to it.

EXECTUED On this 20th day of March 2023.

Respectfully Submitted,

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Brandon Green #56400-054 Appellant, Pro Se