NO. 2002-1274

United States of America
First Circuit Court of Appeals

UNITED STATES OF AMERICA,

Appellee,

v.

PERCIO REYNOSO

Defendant/Appellant

BRIEF OF APPELLANT

APPEAL FROM CONVICTION IN THE RHODE ISLAND DISTRICT COURT

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STATEMENT OF JURISDICTION

The First Circuit Court of Appeals has jurisdiction of this case pursuant to 28 U.S.C. § 1291.

The defendant was charged in the United States District Court for the District of Rhode Island with two indictments for federal criminal violations, i.e., that on or about March 29, 2001 Mr. Reynoso did 1) knowingly, intentionally and willfully combine, conspire, confederate and agree with a person or persons known to the Grand Jury to knowingly and intentionally distribute and possess with intent to distribute 500 grams or more of a mixture and substance containing a detectable amount of cocaine, a Schedule II Controlled Substance in violation of 21 U.S.C. § 841(a)(1) and 21 U.S.C. § 846; and 2) did knowingly and intentionally possess with intent to distribute 500 grams or more of a mixture and substance containing a detectable amount of cocaine, a Schedule II Controlled Substance in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B).

Judgment of guilty was entered on March 5, 2002 after a jury trial (*Mary M. Lisi*, J.). The defendant was sentenced to a term of imprisonment of 109 months and a term of supervised release of 5 years for each of the two counts, to run concurrently. As a special condition of supervised release, upon completion of his sentence of incarceration, the court ordered the defendant to be surrendered to the

I.N.S. for deportation proceedings. The court ordered that as a further special condition of supervised release that if Mr. Reynoso is ordered to be deported by the United States, he is to remain outside of the United States for the entire term of supervised release. The court also fined Mr. Reynoso $20,000 with interest, and imposed a special assessment of $100 per count for a total of $200.

A notice of appeal was timely filed on March 7, 2002.

STATEMENT OF ISSUES

1. Did the court violate Mr. Reynoso's rights to a speedy trial and to due process of law by dissolving the original jury and empaneling a new one after the Government filed a tardy superceding indictment?

2. Did the court err in allowing the expert testimony of a police agent, when she had no expertise in drug use and the only basis for her opinion testimony that the amount of drugs indicated an intent to distribute was the raw weight of drugs the police found?

3. Did the court err in not suppressing Mr. Reynoso's statement when he was not given or did not perceive any *Miranda* warning?

4. Was the court's imposition of an obstruction of justice sentence enhancement in error when it was based merely on the court's disbelief of Mr. Reynoso's denial of guilt?

5. Were the facts insufficient to find Mr. Reynoso had an intent to distribute the cocaine found in his car when the weight was not so great that they could not have been for personal use, and there was no other evidence of an intent to sell?

6. Were the facts insufficient to find Mr. Reynoso in possession of the drugs found in the backroom of the Cesana store when the only evidence of Mr. Reynoso's involvement was the testimony of the man video-taped with the drugs in his possession?

7. Did the court err in denying Mr. Reynoso a downward departure based on his status as a deportable alien?

STATEMENT OF FACTS AND STATEMENT OF THE CASE

Mr. Reynoso, a 29-year old Dominican barber, cocaine addict, and father of three, was thirsty for a soda to drink with his lunch. On March 29, 2001, at around one o'clock in the afternoon, he walked from his barbershop in Providence, Rhode Island, next-door to the Cesana health food store. As he was making his purchase, he was shocked by a dozen-member armed police squad bursting into the shop. *June 22 Suppression Trn.* at 129; *July 17 Suppression Trn.* at 7-8, 16; *Oct. 16 Trial Trn.* at 124; *Oct. 17 Trial Trn.* at 61-73, 79-80.

It turned out that the owner of the Cesana store, Benjamin Valera, had been dealing drugs out of his backroom office, and had been inadvertently captured on video-tape selling a kilogram of cocaine to a government agent. *June 22 Suppression Trn.* at 7-8. The raid squad arrested Mr. Valera, his employee, and Mr. Reynoso. When confronted, Mr. Valera told the police that the kilogram was Mr. Reynoso's, and that he, Mr. Valera, was merely selling it on consignment. *June 22 Suppression Trn.* at 11.

After the agents questioned Mr. Valera for an hour or so, they turned their attention to Mr. Reynoso. Mr. Reynoso has steadily maintained his ignorance of the kilogram on Benjamin Valera's desk, and of the drug-dealer ledger written in

Mr. Valera's hand agents found in the backroom office. *June 22 Suppression Trn.* at 75; *Oct. 17 Trial Trn.* at 3-80.

The officers falsely told Mr. Reynoso that his fingerprints were on the kilogram. They told him to call his supplier, which he did, but which was fruitless. After agents saw him upset at seeing his wife and youngest son cross the street in front of the store, and after they discovered Mr. Reynoso had not perfected his immigration process, they warned him his children would be taken away, and threatened him with deportation. *July 17 Suppression Trn.* at 14; *Oct. 17 Trial Trn.* at 28.

Because he had not updated the license tags on his car, Mr. Reynoso initially lied to agents when asked if he had a vehicle in the area. *June 22 Suppression Trn.* at 104. The police of course discovered that the green Chrysler parked on the street belonged to Mr. Reynoso. *June 22 Suppression Trn.* at 87-88; *Oct. 16 Trial Trn.* at 7-8. Then frightened and thinking he was obliged, *July 17 Suppression Trn.* at 12, 36, Mr. Reynoso signed a consent to search his car, and the police found Mr. Reynoso's 110-gram stash of cocaine wrapped in a hat in the glove-box. Although at first reluctant, he was thus shamed into admitting to his family (and the police) his long-time cocaine habit. *Oct. 18 Trial Trn.* at 42.

A bevy of law enforcement officers maintain that Mr. Reynoso was given his *Miranda* rights, but due to the shock or confusion of the situation, he has no memory of it. *July 17 Suppression Trn.* at 19-20; *Oct. 17 Trial Trn.* at 40.

It took several hours to get a search warrant for the store, and during this time Mr. Valera repeatedly whispered messages to Mr. Reynoso through his employee that Mr. Reynoso should take responsibility for the cocaine. *Oct. 16 Trial Trn.* at 184.

At about 8:30 or 9:00 that evening, *June 22 Suppression Trn.* at 14, the agents brought Mr. Reynoso and Mr. Valera to DEA headquarters in Warwick Rhode Island. There, Mr. Reynoso was presented with two sheets of paper written by one of the agents, which Mr. Reynoso was instructed to sign. He indicated he did not want to sign it without consulting a lawyer. *July 17 Suppression Trn.* at 24. The agents then engineered a private meeting in a small room between Mr. Reynoso and Mr. Valera, who was by then cooperating with the Government to set up Mr. Reynoso.

Mr. Valera again urged Mr. Reynoso to claim the kilogram was his, and told Mr. Reynoso he could sign the document because Mr. Valera had money for a lawyer who would later be able to fix the situation. *July 17 Suppression Trn.* at 24-26. Thus (falsely) assured, Mr. Reynoso signed and initialed the un-read

document, which admits that he "delivered 1 kilogram of cocaine to Benjamin Valera."

After a jury trial (*Mary M. Lisi*, J.), Mr. Reynoso was convicted of possession with intent to distribute more than 500 grams of cocaine, and conspiracy to do the same. 21 U.S.C. §§ 846, 841(a)(1), & 841(b)(1)(B).

Mr. Reynoso's sentence was enhanced by two levels for obstruction of justice based on the court's belief that he lied in denying his guilt. He was sentenced to a term of imprisonment of 109 months and a term of supervised release of 5 years for each of the two counts, to run concurrently. The court imposed two special conditions of supervised release: first, upon completion of his sentence of incarceration, Mr. Reynoso is to be surrendered to the I.N.S. for deportation proceedings, and second, if Mr. Reynoso is deported, he is to remain outside of the United States for the entire term of supervised release. The court also imposed a special assessment of $100 per count for a total of $200.

This appeal followed.

SUMMARY OF ARGUMENT

Mr. Reynoso's jury was empaneled on his original indictment. The government then filed a superceding indictment, prompting the court to dissolve the jury and later empanel another. Mr. Reynoso argues that this procedure violated his right a speedy trial and also his right to due process of law.

Mr. Reynoso then notes that the trial court allowed the expert opinion testimony of a police agent regarding Mr. Reynoso's intent to sell. He points out that the agent has no experience or expertise in usage of drugs, and that finding the agent an expert based on nothing more than the raw weight of drugs was in error.

Third, Mr. Reynoso points out that although all the police insist that he was given his *Miranda* rights, because of the shock or surprise of the initial police raid, Mr. Reynoso has no memory of having perceived them. He thus argues that his statement should have been suppressed.

Mr. Reynoso next concedes that although the jury did not believe his testimony, as evidenced by its conviction of him, he merely denied his guilt. He thus argues that the court's imposition of an obstruction of justice sentence enhancement was in error.

Fifth and Sixth, Mr. Reynoso assembles the facts and suggests that the Government did not present sufficient evidence to convict him regarding either the

drugs in his car (which were for personal use) nor the drugs in the store (about which he knew nothing).

Finally, Mr. Reynoso argues that he should have been given a downward departure based on his status as a deportable alien.

ARGUMENT

I. Government's Post-Empanelment Filing of Superceding Indictment Denied Mr. Reynoso's Rights to Speedy Trial, and Due Process of Law

Mr. Reynoso was arrested and taken into custody on March 29, 2001. He was indicted by a federal grand jury on April 18, 2001 of one count of possession of cocaine with intent to distribute. On July 26, 2001 jury selection began and the jury was empaneled on August 1, 2001. On August 20, 2001, the day opening arguments were scheduled, the Government filed a new indictment against Mr. Reynoso, adding a count of conspiracy to possess cocaine with the intent to distribute.

The Government's alleged reason for the tardy filing was that it had conducted a "safety valve interview" with Mr. Valera on August 1, 2001, during which Mr. Valera indicated a willingness to cooperate with the Government in its case against Mr. Reynoso.

The court then dissolved the original jury, and on October 4, 2001 empaneled a new one to sit on the superceding indictment.

The effect of this was two-fold. First, filing a new indictment after the jury was empaneled violated Mr. Reynoso's right to a speedy trial. Second, it violated Mr. Reynoso's due process rights.

A. Dissolution and Empanelment of a New Jury Violated Mr. Reynoso's Right to a Speedy Trial

The federal Speedy Trial Act provides that:

> [T]rial of a defendant charged in an . . . indictment with the commission of an offense shall commence within seventy days from the filing date . . . of the . . . indictment, or from the date the defendant has appeared before a judicial officer . . . , whichever date last occurs.

18 U.S.C. § 3161(c)(1).

On July 26, 2001 jury selection began and the jury was empaneled on August 1, 2001. On August 20, 2001, the day opening arguments were supposed to begin, the Government showed up with the new indictment. The court then dissolved the existing jury only to empanel a new jury two months later.

This court has not long ago addressed this issue, writing, "[i]t is settled that trial generally 'commences' for Speedy Trial Act purposes on the day the jury is empaneled, even if not sworn." *United States v. Rodriguez*, 63 F.3d. 1159, 1164 (1st Cir. 1995) (see string citation to contained therein demonstrating proposition is settled).

Trial thus commenced on August 1, 2001. The court's dissolution of the existing jury and later impanelment of another put Mr. Reynoso's trial far beyond the time specified in the statute, thus violating his right to a speedy trial.

Accordingly, both the original and superceding indictments should have been dismissed with prejudice. 18 U.S.C. § 3162.

B. Dissolution and Emplanelment of a New Jury Violated Mr. Reynoso's Right to Due Process of Law

In *Gomez v. United States*, 490 U.S. 858 (1989), the Supreme Court was called upon to determine whether the statute authorizing the duties of federal magistrates extended to conducting *voir dire*. While the case was decided on statutory rather than constitutional grounds, the Court reviewed the application of due process law to when a trial begins and when therefore a defendant's important trial rights attach.

> Even though it is true that a criminal trial does not commence for purposes of the Double Jeopardy Clause until the jury is empaneled and sworn, *Serfass v. United States*, 420 U.S. 377, 388 (1975), other constitutional rights attach before that point, see, *e. g., Brewer v. Williams*, 430 U.S. 387, 398 (1977) (assistance of counsel). Thus in affirming *voir dire* as a critical stage of the criminal proceeding, during which the defendant has a constitutional right to be present, the Court wrote: "'[W]here the indictment is for a felony, the trial commences at least from the time when the work of empaneling the jury begins.'" *Lewis v. United States*, 146 U.S. 370, 374 (1892) (quoting *Hopt v. Utah*, 110 U.S. 574, 578 (1884)). See *Swain v. Alabama*, 380 U.S. 202, 219 (1965) (*voir dire* "a necessary part of trial by jury"); see also *Ricketts v. Adamson*, 483 U.S. 1, 3 (1987); *United States v. Powell*, 469 U.S. 57, 66 (1984). Jury selection is the primary means by which a court may enforce a defendant's right to be tried by a jury free from ethnic, racial, or political prejudice, *Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981); *Ham v. South Carolina*, 409 U.S. 524 (1973); *Dennis v. United States*, 339 U.S. 162 (1950), or predisposition about the defendant's culpability, *Irvin v.*

> *Dowd*, 366 U.S. 717 (1961). Indications that Congress likewise considers jury selection part of a felony trial may be gleaned, *inter alia*, from its passage in 1975 of the Speedy Trial Act, 18 U.S.C. §§ 3161 *et seq*. (1982 ed. and Supp. V), and its placement of rules pertaining to criminal petit juries in a chapter entitled "Trial." See Fed. Rules Crim. Proc. 23, 24; cf. *id.*, Rule 43(a) (requiring defendant's presence "at every stage of the trial including the impaneling of the jury").

Gomez v. United States, 490 U.S. at 873

Even if the Government is not guilty of any prosecutorial vindictiveness as it contends, if the practice allowed here is condoned, there is nothing to prevent the Government from indicting a defendant on one charge, going through the process of jury selection, and then filing a superseding indictment in order to obtain a more favorable jury or for any other reason.

In any event, the Government's action and the court's response was a denial of Mr. Reynoso's due process rights. Accordingly, the superceding indictment should have been quashed and the initial indictment should be dismissed.

II. Court Erred in Allowing DEA Opinion Testimony That Drugs Were not for Personal Use

Mr. Reynoso's defense to the quantity of cocaine found in his car was that it was for personal use, and that he did not have any intent to sell it. He therefore testified regarding his embarrassing daily habit, that it had been a habit for several years, and that his dealer had left town for several weeks necessitating Mr. Reynoso's purchase of an adequate supply which he hid in his car to keep it from his family. *Oct. 17 Trial Trn.* at 14-15.

None of the equipment normally associated with selling drugs – scales, cutting agents, quantities of cash, packaging, etc. – were found in Mr. Reynoso's car, business, or home. *Oct. 15 Trial Trn.* at 192-95; *Oct. 16 Trial Trn.* at 21-22. To establish an intent to sell, the Government offered the testimony of DEA Agent Kathleen Kelleher. As a veteran drug warrior with lots of experience arresting sellers of cocaine, the court qualified Agent Kelleher as an expert. *Oct. 15 Trial Trn.* at 184. She then testified, over a defense objection, that in her opinion the 110 grams of cocaine found in Mr. Reynoso's car indicated an intent to sell. *Id.*

Agent Kelleher admitted that beyond sometimes posing as a user, *id.* at 182, she had no experience with the needs and habits of cocaine addicts. She claimed no education or expertise in the psychological, social, psychotic, physiological, or other effects of long-term cocaine use. She did not claim any knowledge or

expertise in any area of human knowledge regarding using cocaine. She did not claim to be acquainted with any habitual cocaine users, or to know anything about them individually or collectively. She did not claim any knowledge of the number of daily doses an addict might use, the amount of cocaine ingested per dose, the commonness or rarity of an addict buying in bulk for personal use, the ability of a cocaine addict to procure cocaine while his supplier is away, or any other matter concerning the personal use of cocaine. *Oct. 15 Trial Trn.* at 191.

In short, Agent Kelleher knows nothing about cocaine use. But as to a hammer all objects look like a nail, to Agent Kelleher's drug-selling expertise all large-ish quantities apparently look like an intent to distribute.

The court nonetheless allowed her to offer her opinion, *as an expert*, that the amount found was not for personal use. In its closing argument the Government highlighted Agent Kelleher's expert opinion, *Oct. 19 Trial Trn.* at 8, and in subsequent rulings the court relied on it as well. *Oct. 18 Trial Trn.* at 57.

In *United States v. Bergodere*, 40 F.3d 512 (1st Cir. 1994), there was packaging found with the drugs. The packaging not only indicated an intent to sell, but it supported the police-witness's qualification as an expert because the police officer had in his experience discovered drug packaging along with drugs when investigating drug sellers.

In *United States v. Valle*, 72 F.3d 210 (1st Cir. 1995), the detective offered his experience about the common attributes of cocaine addicts and contrasted the defendant's lack of them, to draw his conclusion that the drugs there were not for personal use. Moreover, in *Valle*, there was a weighing scale, and a large number of drug-filled straws with their ends burned shut, a common way, according to the detective/expert, to package drugs for sale. As in *Bergodere*, these items supported the detective's qualification as an expert because the jury cannot be assumed to know about drug packaging techniques.

In Mr. Reynoso's case, however, the only fact supporting Agent Kelleher's qualification as an expert was the 110 grams of cocaine the police found in Mr. Reynoso's car. Because Agent Kelleher demonstrated no knowledge of the habits of a personal user, and there were no other circumstances lending themselves to expert description, there was no basis on which to qualify her as an expert. The court thus went beyond the allowable bounds of its discretion, and should not have allowed Agent Kelleher to offer her opinion.

The error was not harmless. Mr. Reynoso's did not deny at trial that the drugs in his car were his. Rather, he defended himself against the allegation that he had an intent to sell them on the grounds that they were for his own consumption. Because the court's error allowed the jury to hear Agent Kelleher's

opinion which cuts to the heart of Mr. Reynoso's defense, her supposedly expert opinion was highly prejudicial. Because present were none of the common instrumentalities of drug dealing, without her opinion, the only evidence that the drugs in the car were for distribution was their raw weight.

This court "may find an error harmless beyond a reasonable doubt only when the other evidence in the case, standing alone, provides overwhelming evidence of the defendant's guilt." *United States v. Trenkler*, 61 F.3d 45 (1st Cir. 1995). The police found 110 grams of cocaine in Mr. Reynoso's car, which had to feed his habit for six weeks at the rate of a few grams per day. The weight alone is not such overwhelming evidence of Mr. Reynoso's intent to distribute as to make harmless the error in allowing Agent Kelleher's opinion.

Scholarly opinion suggests that courts should be skeptical in allowing police to testify as experts regarding intent to sell.

> [A] law enforcement officer generally [should] not be permitted to give an opinion that a defendant possessed narcotics with intent to distribute. Such testimony is rife with potential for prejudice in that jurors may tend to defer their judgment to the expert's supposedly superior knowledge. Furthermore, such testimony is unlikely to be necessary for the jury to understand the evidence. An officer can simply explain to the jury the typical quantities and paraphernalia associated with drug users and contrast them with those associated with drug distributors. The jury will then be in as good a position as the officer to apply this background knowledge to the defendant and to determine whether the defendant intended to distribute. Indeed, to say that the jury is less qualified than the expert to make the correct

> conclusion raises the question of why the jury should be permitted to make the final decision at all.

Deon J. Nossel, *The Admissibility of Ultimate Issue Expert Testimony by Law Enforcement Officers in Criminal Trials*, 93 COLUM. L. REV. 231, 266 (1993); Mark Hansen, *Dr. Cop on the Stand*, 88 ABA J., May 2002 at 31 (suggesting that courts admit police expert too readily).

Accordingly, this Court should reverse Mr. Reynoso's conviction.

III. Mr. Reynoso's Statement Was Involuntarily Taken

Mr. Reynoso gave an incriminating statement. The Government contends that, despite the lack of a written form waiving his rights, Mr. Reynoso did so by answering questions after having been read a *Miranda* card which one of the officers kept in his wallet. Mr. Reynoso claims that, for whatever reason, he did not perceive any information regarding his rights.

Statements are inadmissible unless the Government is able to demonstrate that the police advised the defendant of his constitutional rights which exist throughout custodial interrogation, and further that the defendant, after proper advisement, knowingly, intelligently and voluntarily waived those rights. *Miranda v. Arizona*, 384 U.S. 436 (1966); *United States v. Palmer*, 203 F.3d 55, 60 (1st Cir. 2000).

The court must "indulge every reasonable presumption against waiver of fundamental constitutional rights." *Johnson v. Zerbst*, 304 U.S. 458 (1938). Thus, any ambiguity must be resolved in favor of the accused. Whenever a defendant decides to forego rights guaranteed by the Fifth Amendment, the alleged waiver must meet the strict standard of intentional relinquishment or abandonment of a known right. *United States v. Abbott*, 241 F.3d 29, 33-34 (1st Cir. 2001) (quoting *McCarthy v. United States*, 394 U.S. 459, 466 (1969)).

Mr. Reynoso, who does not speak or read English well, was not read his *Miranda* rights either in English or in Spanish, his native tongue. *July 17 Suppression Trn.* at 41. *See United States v. Garcia*, 897 F.2d 1413 (7th Cir. 1990) (defendant demonstrated proficiency in language in which he was read rights by properly translating a document). It should be noted that Mr. Reynoso was provided with a translator during all aspects of his trial.

At the scene, Mr. Reynoso was told his fingerprints were on the kilogram of cocaine found in the store, he was threatened with deportation, and he was warned his children would be referred to the State's child welfare agency. Moreover, Mr. Valera, with at least the passive assistance of the police, *June 22 Suppression Trn.* at 67, repeatedly told Mr. Reynoso that Mr. Valera would provide a lawyer and a that lawyer would later be able to fix the situation. *Oct. 15 Trial Trn.* at 61; *Oct. 17 Trial Trn.* at 19, 23.

When he was presented with a written statement, he refused to sign and requested an attorney. *Oct. 17 Trial Trn.* at 22. Although the Government witnesses deny that Mr. Reynoso requested a lawyer, Mr. Valera corroborates Mr. Reynoso's claim that he asked to talk to a lawyer. Mr. Valera testified that when the agents put the two co-defendants together for a conversation, Mr. Reynoso told

Mr. Valera that Mr. Reynoso was unwilling to sign the government-written statement before talking to a lawyer. *Oct. 15 Trial Trn.* at 61.

The agents not only denied Mr. Reynoso the opportunity to contact an attorney, they indicated to him that an attorney could not help him, again threatened him with deportation, and compelled him to sign a written statement out of fear and intimidation. Mr. Reynoso was therefore improperly coerced into involuntarily signing a written statement that he did not understand and that did not represent his depiction of events which occurred on March 29, 2001.

The armed squad that raided the Cesana health food store came equipped with a box of supplies, which included various paper forms generally necessary to conduct police raids. *June 22 Suppression Trn.* at 106. From the box the police were able to retrieve a consent-to-search form, which Mr. Reynoso signed regarding his car. Presumably the kit contained a standard waiver-of-rights form as well. *See e.g.*, *United States v. Palmer*, 203 F. 3d 55 (1st Cir. 2000) (defendant initialed and signed waiver of rights form). Yet despite seven hours of opportunity, and the involvement of a dozen federal and state law enforcement officers, the only hard evidence of waiver the Government could produce is a xerox copy of a *Miranda* card one of the officers kept in his wallet.

It is apparent from his testimony that Mr. Reynoso did not fully understand the legal implications of signing a statement. He did so only after the Government set up a meeting with Mr. Valera, and Mr. Valera urged Mr. Reynoso to sign on the grounds that there would later be an attorney to fix the situation.

These circumstances add up to an involuntary admission, and as such the statement should have been suppressed.

IV. Denying His Guilt Should Not Earn Mr. Reynoso a Two-Level Enhancement for Obstruction of Justice

The district court erred by enhancing Mr. Reynoso's sentence based upon its belief that Mr. Reynoso lied during the course of his suppression hearing and trial.

The guidelines provide a two-level increase if "the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution or sentencing" of the offense. U.S.S.G. § 3C1.1.

The Government bears the burden of proving the defendant had a "specific intent to obstruct justice, i.e., the defendant consciously acted with the purpose of obstructing justice." *United States v. Thomas*, 86 F.3d 263, 264 (1st Cir. 1996) (quotations and citations omitted). Statements made by the defendant must be evaluated in the light most favorable to him. *United States v. Tracy*, 36 F.3d 199, 204 (1st Cir. 1994), *cert. denied*, 115 S.Ct. 609 (1994).

If the testimony is the "result of confusion, mistake, or faulty memory," however, there can be no enhancement. *United States v. Dunnigan*, 507 U.S. 87, 95 (1993).

In imposing the enhancement, the court held that the defendant lied in denying he was got *Miranda* warnings, *2/25/02 Trn.* at 19, and in claiming the cocaine in his car was for personal use. *2/25/02 Trn.* at 20.

But because of the shock and confusion in the store after a raid involving a dozen armed officers, it is not unreasonable that Mr. Reynoso did not focus on what was being said to him and therefore did not fully comprehend it. There was no proof that Mr. Reynoso's disagreement with the Government regarding whether or not *Miranda* was given was not the result of Mr. Reynoso's confusion, mistake, or faulty memory. The same goes for the situation later in the Warwick DEA headquarters.

Mr. Reynoso testified that he was ashamed of his cocaine habit, but that the drugs in his car were for his own use. There were no items usually associated with selling drugs – scales, packaging, cutting agents, etc. – in Mr. Reynoso's car, home, or business. He testified that he had bought a quantity of 110 grams because his supplier would be out of town for six weeks. That equals two to three grams of cocaine per day, a reasonable daily dosage for a drug addict.

Moreover, the court contrasted Mr. Reynoso's testimony with the fact that he neglected to tell the Probation Officer from the Pre-trial Services Unit that he did not use cocaine. The statement to the Probation Officer was not under oath; the testimony was. (In addition, the statement to the pre-trial services officer was admitted for impeachment only, in accord with 18 USC 3153(c)(1). And Mr. Reynoso had a good reason to shade the truth to the Probation Officer – he was

ashamed of his habit, and fearful that admitting to drug use might effect his trial *and* his immigration status.

A defendant cannot get an obstruction enhancement merely for "denial of guilt." U.S.S.G. § 3C1.1, *application note 1*. In offering a defense of personal use, Mr. Reynoso was merely denying his guilt to the distribution element, and cannot be liable for it. *United States v. Patel*, 32 F.3d 340, 345 (8th Cir. 1994) (obstruction enhancement cannot be applied "simply because [the defendant] testified and the jury disbelieved him"); *United States v. Phillips*, 210 F.3d 345 (5th Cir. 2000).

Because the facts must be taken in the light most favorable to him, the lack of distribution evidence forces a conclusion that for sentencing enhancement purposes, Mr. Reynoso might have been telling the truth. Accordingly, the court erred when it imposed the obstruction enhancement.

V. The Evidence Was Insufficient to Find that the Cocaine in Mr. Reynoso's Car Was For Sale

At trial, Mr. Reynoso suggested that the 110 grams of cocaine was for personal use, not for sale.

Government agents found the cocaine in a hat in the glove box of Mr. Reynoso's car after Mr. Reynoso allegedly gave them permission to search there. It was apparent that Mr. Reynoso was a drug user – his wife testified that although she did not know what type, Mr. Reynoso had come home under the influence of drugs, and that she had confronted him about it. *Oct. 17 Trial Trn.* at 99-101. The Government did not find any drug distribution equipment in Mr. Reynoso's car, home, or business.

Mr. Reynoso testified that he had 110 grams because his supplier was going out of town for six weeks and that he acquired enough to feed his habit for that period. *Oct. 17 Trial Trn.* at 14-15. It is a simple calculation that if a person uses just 2.6 grams per day, he'll use 110 grams in six weeks, making Mr. Reynoso's claim plausible.

The Government's only rebuttal was the supposedly "expert" opinion of Agent Kelleher that in her opinion, 110 grams is an amount she regards as for selling. *Oct. 15 Trial Trn.* at 184. But, as noted above, Agent Kelleher has no

experience or knowledge in the habits or needs of drug users generally, and no knowledge of Mr. Reynoso's drug ingestion regimen.

Accordingly, the Government did not provide sufficient evidence to convince a rational trier of facts beyond a reasonable doubt that he intended to sell the drugs which were in his car.

VI. The Evidence Was Insufficient to Link Mr. Reynoso to the Kilogram of Cocaine Found in the Cesana Health Food Store

The police secretly recorded a video of Mr. Valera holding a kilogram of cocaine in the back-room of his health food store. Mr. Reynoso was a daily customer in the Cesana store, and happened to be there buying a soda when the police raid occurred. *Oct. 16 Trial Trn.* at 180. Without his coerced statement made later in the day, the only evidence linking Mr. Reynoso to the kilo is Mr. Valera's claim that he was selling it on consignment for Mr. Reynoso. *Oct. 15 Trial Trn.* at 35, 51, 74.

Mr. Valera, moreover, had a giant motivation to place blame elsewhere. *Oct. 15 Trial Trn.* at 31, 91, 130. For his role in selling the kilo, he eventually got just 19 months in jail, *Feb. 25 Sentencing Trn.* at 18, even though he was caught on video selling cocaine to a government informant

For all their expertise in drug sales, no government agents testified that drug sales on consignment are a regular occurrence. The Government produced no forensic evidence. Mr. Reynoso's fingerprints were not found on the kilo, *Oct. 16 Trial Trn.* at 64, 97, and there is no audio or video tape with Mr. Reynoso discussing, possessing, or selling the kilo. *Oct. 17 Trial Trn.* at 104. The government had the Cesana store under surveillance for six months, *Oct. 16 Trial Trn.* at 53-54, but none of the watching agents had before noticed Mr. Reynoso, or

connected him with the drugs they knew were being sold there by Mr. Valera. *Id.*; *June 22 Suppression Trn.* at 19, 101. No drug sales equipment were found in Mr. Reynoso's home, car, or business. *Oct. 16 Trial Trn.* at 59, 118, 132.

The only unbiased witness, an employee of the health food store, testified that he knew Mr. Reynoso because he was a daily soda customer, but that he had never seen Mr. Reynoso carry any kilo-sized packages into the store. *Oct. 16 Trial Trn.* at 181.

Mr. Valera testified that his store legally sold substances commonly used to dilute cocaine, putting him in contact with drug users. *Oct. 15 Trial Trn.* at 35. When the police raided the store, Mr. Valera conveniently pointed to a random drug-addict customer who happened to be buying a soda, and found a way to place blame there. *June 22 Suppression Trn.* at 41.

Mr. Reynoso's statement was given in suspicious circumstances. *Oct. 17 Trial Trn.* at 47. Without more, conviction of Mr. Reynoso on Mr. Valera's word is insufficient to convince a rational trier of facts beyond a reasonable doubt that Mr. Reynoso had anything to do with the kilogram of cocaine photographed in Mr. Valera's store.

VII. Mr. Reynoso Should Have Received a Downward Departure Based on His Status as a Deportable Alien

Mr. Reynoso asked the court to grant a downward departure due to his status as a deportable alien. Deportable aliens are punished more severely than other offenders who receive an identical or similar base level classification because they are ineligible for programs while incarcerated such as a community treatment center, halfway house, and work release.

Sentencing courts may depart for mitigating factors of a kind or degree not adequately considered by the Sentencing Commission. *Koon v. United States*, 518 U. S. 81 (1996).

The guidelines list several factors that cannot be used as grounds upon which to base a departure, and lists other that are either "encouraged" or "discouraged." If an encouraged factor is present, the court may base a departure on that factor if the applicable guideline has not already taken it into account. If a particular factor is not mentioned in the Sentencing Guidelines, the court must decide whether the factor is sufficient to make the case atypical.

Although a departure based upon an unmentioned factor will be "highly infrequent." *Koon*, 518 U.S. at 96; *United States v. Dethlefs*, 123 F. 3d 39 (1st Cir. 1997), courts have recognized departures based on a defendant's status as a deportable alien. *See e.g., United States v. Farouil*, 124 F. 3d 838, 847 (7th Cir.

1997) ("[W]e have no reason to believe that the guidelines have accounted for a defendant's status as a deportable alien in setting the level for [the] offense. The district court is thus free to consider whether [the defendant's] status as a deportable alien has resulted in unusual or exceptional hardship in his conditions of confinement."); *United States v. Smith*, 27 F.3d 649, 655 (D.C. Cir. 1994) ("a downward departure may be appropriate where the defendant's status as a deportable alien is likely to cause a fortuitous increase in the severity of his sentence").

Although this Court had decided several relevant cases, none are on point. *See United States v. Clase-Espinal*, 115 F.3d 1054 (1st Cir. 1997), *cert. denied*, 522 U.S. 957 (defendant's stipulation of deportability not a lawful basis on which to depart downward in absence of a colorable defense of deportation); *United States v. Maldonado*, 242 F.3d 1 (1st Cir. 2001) (cost of incarcerating defendant who will ultimately be deported not basis for downward departure); *United States v. Vasquez*, 279 F.3d 77(1st Cir. 2002) (downward departure impermissible in illegal reentry cases as the only possible defendants to the charge are deportable aliens).

Due to his status as a INS detainee, for instance, he will be given a security level classification that is likely to be maximum or high-level custody. Mr. Reynoso will thus be ineligible for certain statutory benefits, such as spending the

last ten percent his sentence under conditions that will afford him a reasonable opportunity to adjust to and prepare for his re-entry into the community, and "halfway house" imprisonment if it is otherwise practical and appropriate.

Denial of such programs based solely on his deportable status without the consideration of downward departure results in a violation of the Mr. Reynoso's right to equal protection of the laws. U.S. CONST. amd. 14. Accordingly, he should have been given a downward departure.

CONCLUSION

In light of the foregoing, Percio Reynoso requests that this honorable court to reverse Mr. Reynoso's conviction, or at the least remand to the district court for re-sentencing.

Mr. Reynoso requests that his attorney be allowed to present oral argument.

Respectfully submitted,
Percio Reynoso,
By his Attorney,
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Dated: February 21, 2003

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I hereby certify that on February 21, 2003, two copies of the foregoing, as well as a computer disk containing the foregoing, formatted by WordPerfect 8, will be forwarded to Kenneth P. Madden, Esq., Assistant United States Attorney.

Dated: February 21, 2003

Joshua L. Gordon, Esq.

I hereby certify that this brief complies with the type-volume limitations contained in F.R.A.P. 32(a)(7)(B), that it was prepared using WordPerfect version 9, and that it contains no more than 6396 words, exclusive of those portions of the brief which are exempted.

Dated: February 21, 2003

Joshua L. Gordon, Esq.

ADDENDUM